THE INDIAN LAW REPORTS
(CUTTACK SERIES)

Containing Judgments of the High Court of Orissa.

Mode of Citation
2022 (II) I L R - CUT.

JUNE - 2022

Pages : 257 to 544

Edited By

MADHUMITA PANDA, ADVOCATE

LAW REPORTER
HIGH COURT OF ORISSA, CUTTACK.

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

Annual Subscription : ₹ 300/-

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NOMINAL INDEX

ACTS & RULES

Acts & No.

1996 -26	Arbitration And Conciliation Act, 1996
1908- 5	Code of Civil Procedure, 1908
1973- 02	Code of Criminal Procedure, 1973
1950	Constitution of India, 1950
1961-43	Income Tax Act, 1961
2016-2	Juvenile Justice (Care And Protection of Children) Act,2015
1957 -67	Mines And Minerals (Regulation And Developments)Act,1957
1960-16	Odisha Land Reforms Act, 1960
1952- 1	Orissa Estate Abolition Act, 1951
1947- 14	Orissa Sales Tax Act, 1947
1989 - 24	Railways Act, 1989
2002- 54	Securitisation And Reconstruction of Financial Assets And Enforcement of Security Interest Act, 2002

RULE:-1. Mineral Concession Rules, 1960

2. Odisha Civil Service (Pension Rule), 1992

TOPICAL INDEX

SUBJECT INDEX

CRIMINAL TRIAL – Offences under section 302 of IPC, 1860 – Conviction – Appeal – A case of circumstantial evidence where no direct eye-witness is there – Only circumstance brought against the appellant is relating to discovery of the alleged weapon of offence – But the alleged weapon of offence is not produced before the Court in course of trial and the seizure of the same at the instance of the accused leading to discovery is denied by both the independent witnesses – Effect of – Held, it becomes a weaker circumstance to be used against the accused – Appellant is not held guilty for murder and he is acquitted of the charge u/s 302 of IPC – Appeal allowed.

INCOME TAX ACT, 1961 – Section 32(1) (iia) – Additional depreciation – Whether the Tribunal was justified in not allowing the additional depreciation u/s 32(1)(iia) of the Act – Held, No – The components/ parts of a plant acquired prior to 31st march 2005 but fitted to the plant, thereafter would be eligible for additional depreciation under section 32(1)(iia) of the Act.

INTERPRETATION OF STATUTE – Circular – Whether beneficial or oppressive – Determination of – Held, when the circular/ notification takes away the accrued rights of a category of person the same cannot be described as a beneficial circular/notification – It can only be described as oppressive – Thus such a circular can only have prospective operation.

PUBLIC INTEREST LITIGATION – Writ Applications filed challenging the notification dt.11.08.2016 issued by the commissioner-Cum-Secretary, information and Public Relation Department, Govt. of Odisha under section 24 (4) of the RTI Act, 2005 – The said notification provides that nothing contained in the RTI Act shall apply to the General Administration (vigilance) Department of the Govt. of Odisha and its organisation – Whether such exemption would be sustainable under law? – Held, No. – The exemption would be contrary to the first proviso to section 24 (4) of the RTI Act and by that yardstick, would be unsustainable in law – The impugned notification seeks to take away what is provided under the RTI Act and therefore ultra vires the Act.

RAILWAYS ACT, 1989 – Section 124 – Liability of the railway to pay compensation – Whether a person who died being run over by a train is eligible to receive compensation – Held, Yes.

REGULARISATION – Finance department resolution dated 15th may 1997 – Discrimination in regularisation – Effect of – Held, not proper – When one set of people have been regularized as per the resolution Dt.15.05.1997 on completion 10 years of service, there is no occasion for regularizing the service of petitioner in a different batch who stands in a similar

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2022 (II) ILR - CUT- 257

Dr. S. MURALIDHAR, C.J.

CVREV NOS.179 & 274 OF 1995

ASHOKA INDUSTRIES LTD. …….. Petitioner

.V.

HARIBANDHU DAS & ORS. …….. Opp. Parties

CODE OF CIVIL PROCEDURE, 1908 – Section 115 – Revisional Power/ jurisdiction of the High Court – Maintainability questioned – Held, a revision petition would be maintainable against any order of a Sub-ordinate Court to the High Court, against which no appeal lies – In the present case, the order passed in the first appeal was in the nature of final order and accordingly a decree was drawn – It was not an Appealable order – Hence the bar provided U/s.115(1) and (2) does not attract – Accordingly revision petitions allowed. (Para-26 & 31)

Case Law Relied on and Referred to :-

1. (2003) 6 SCC 659 : Shiv Shakti Cooperative Housing Society, Nagpur Vs. Swaraj Developers.
2. (2002) 2 SCC 2 : Prem Bakshi Vs. Dharam Dev.
3. (2003) 6 SCC 675 : Surya Dev Rai Vs. Ram Chander Rai .
4. AIR 1961 SC 832 : Jagat Dhish Bhargava Vs. Jawahar Lal Bhargava .
5. AIR 1967 SC 1470: Phoolchand Vs. Gopal Lal.
6. AIR 1983 SC 786 : M/s. Ramnarain (P) Ltd. Vs. State Trading Corporation in India Ltd.
7. AIR 1968 Orissa 207 : Arjuna Charan Patnaik Vs. Purnanand Patnaik.

For Petitioner : Mr. Pitambar Acharya, Sr. Adv.
Mr. Samir Ku. Mishra

For Opp. Parties : Mr. B. Maharana, Mr. J. Katikia, Addl. Govt. Adv.

JUDGMENT Date of Judgment: 06.05.2022

Dr. S. MURALIDHAR, C.J.

1. These two civil revision petitions arise out similar set of facts involving the same parties and are accordingly being disposed of by this common judgment.

2. As far as CVREV No.179 of 1995 is concerned, the Petitioner challenges an order dated 1st August, 1995 whereby the learned Additional District Judge, Bhubaneswar (ADJ) recalled an earlier order passed by on 9th

December, 1994 admitting the Petitioner's Title Appeal No.58 of 1994 and rejecting the appeal as being "incomplete, defective and incompetent" in the absence of a copy of decree on the date, the same was presented and as the provision of Order XX Rule- 6A CPC is also not applicable on the date the appeal is admitted." In this revision petition, which was admitted on 14th August, 1995 status quo was directed to be maintained regarding the suit property. Subsequently, on 15th September, 1995 the proceedings in Execution Case No. 87 of 1995 in the Court of Civil Judge (Sr. Division), Bhubaneswar was stayed until further orders. By another order dated 18th September, 1995 the earlier status quo order was vacated in view of the stay of the execution proceedings. That interim order has continued ever since.

3. As far as Civil Revision Petition No.274 of 1995 is concerned,it challenges an order dated 4th August, 1995 passed by the learned ADJ dismissing the subsequent appeal being T.A. No.32 of 1995 filed by the Petitioner challenging the judgment and decree dated 16th November and 13th November, 1994 passed by the Civil Judge (Sr. Division), Bhubaneswar in O.S. No.223 of 1982-I dismissing T.A. No.32 of 1995 for non-filing of the judgment and decree. In the said civil revision No.274 of 1995 this Court passed an order dated 24th February, 1995 recording the submission of learned counsel for the Petitioner that he seeks to convert the petition to a writ petition. However, it appears that the said prayer was not allowed. On 6th July, 2017 a petition for substituting Opposite Party No.2 was allowed.

4. The background facts are that one Haribandhu Das filed Title Suit No.223 of 1982 in the Court of the Civil Judge (Sr. Division), Bhubaneswar under Order I Rule 8 of the CPC representing the Plaintiff No.2 seeking a declaration regarding “Permanent leasehold right over the land” and “for a decree of recovery of possession from Defendant Nos.1, 5 & 6.” The plaint was later amended to include a prayer for permanent injunction “restraining Defendants Nos.1, 5, 6, 18 and 19 from making any further construction and for a decree for mandatory injunction directing the Defendant Nos.1, 5, 6, 18 and 19 to demolish all construction on the suit land failing which the plaintiff may demolish all such construction/building etc. at the cost of Defendant Nos.1, 5, 6, 18 and 19 or in the alternative for a decree of mandatory injunction directing the Defendants to use, utilize the building constructed on the suit land as Gandhi Smruti Soudha to provide facilities for study of Gandhian culture and ideology and to provide hostel accommodation for

Adivasi, Harijan and other economic backward students, for costs and for any other relief or release to which the Plaintiff is entitled to under law."

5. The present Petitioner was the defendant No.1 in the said suit. It denied the allegations and claimed to be a bona fide purchaser of a value from its vendor under a sale deed (Ext.9) after due permission and claimed to be making payment of salami to the State of Odisha. According to the Petitioner, it had spent substantial sums from its own sources and through loan from the financial institutions to construct and operate the 'first-ever five star hotel in Odisha'.

6. The Orissa State Financial Corporation (OSFC) which had advanced loans to the Petitioner for the running of the said hotel, seized the hotel under Section 29 of the State Financial Corporation Act (SFC Act). According to the Petitioner, the stay initially granted was vacated by the trial Court. Although notice was issued in the said suit, the Plaintiff i.e. Respondent No.1 did not furnish the correct address of the present Petitioner (the defendant in the suit). The Petitioner was set ex parte in the suit which however proceeded against some other defendants who had no interest against the property in question. Since the written statement of the State Government was expunged by the Trial Court it also did not participate in the suit.

7. The Civil Judge (Senior Division), Bhubaneswar by judgment dated 17th November, 1994 decreed the above suit i.e. T.S.No.223 of 1982 on contest against the Defendant Nos.7, 11, 12, 13, 16, 17 and 18 (OSFC) and ex parte against other defendants.

8. The operative portion of the decree reads as under:

> "That the suit is decreed on contest against defendant Nos.7, 11, 12, 13, 16, 17 and 18 and exparte against other defendants, but in the circumstances without any cost. That the plaintiff's right, title and interest over the suit property is hereby declared and confirmed. That the Five Star Hotel standing on the suit property is held to be an accretion to the suit schedule land in favour of the plaintiffs and that the plaintiffs shall use the same "GANDHI SMARAK BHAWAN". That the defendants who are in possession of the suit schedule land and Hotel are directed to give vacant possession of the suit land and building to the plaintiffs within three months hence, failing which plaintiffs can take recourse to law to get back possession of the suit property according to law."

9. Learned counsel for the Petitioner stated to have applied for a certified copy of the operative portion of the aforementioned decree under Order XX Rule 6A of the CPC and this was duly granted.

10. Thereafter, on 25th November, 1994 the Petitioner filed Title Appeal No.58 of 1994 in the Court of the learned ADJ, Bhubaneswar. As of that date neither was any decree drawn up nor was that sealed and signed. Consequently, Title Appeal No.58 of 1994 was filed by the Petitioner only with a certified copy of the operative portion of the judgment of the Civil Judge (Sr. Division), Bhubaneswar which being decree satisfied the statutory requirement of under Order XX Rule 6A of the CPC.

11. On 28th November, 1994 the learned ADJ passed an order, the operative portion of which reads as under:

> "As decree has not yet been drawn up by the learned lower court, learned Advocate for the appellant has expressed his inability to file copy of the decree. But he has filed certified copy of the operative portion of the Judgment. A petition is filed on behalf of the appellant praying for stay of the operation of the Judgment passed by the Civil Judge (Sr. Division) Bhubaneswar on 16.11.1994 in O.S. No.223 of 1982 (I). When the learned lower Court has not yet drawn up the decree, the appellant is unable to file the copy of it and, according to order 41, Rule 1, C.P.C. every memorandum of appeal shall be accompanied by a copy of the decree. The appellant cannot be blamed because decree has not yet been drawn up by the learned lower court. The appellant is given time till 16.12.1994 for filing certified copy of the decree. In the interest of justice status quo be maintained till 16.12.1994."

12. The Petitioner states that thereafter on 28th November, 1994 the decree was drawn up and the trial Court on 30th November 1994 sealed and signed it. According to the Petitioner, despite the Petitioner's counsel applying for a certified copy on the same day i.e. 30th November, 1994 it was made available to the counsel only on 1st December, 1994.

13. On 9th December, 1994 the matter was heard and the Appellate Court passed the following order:

> "Record is put up today on the strength of an advance petition filed by the Advocate for the appellant who has prayed to admit the appeal as certified copy of the decree has already been filed before this Court and for stay of the operation of

> the Judgment till the disposal of the petition filed U/O. 39 rule 1 & 2 r/w 151 Cr.P.C. Heard, it is seen that the certified copy of the decree has already been filed. Admit, call for the L.C.R. Issue notice to the respondents fixing 31.1.95 for hearing.
>
> The petition filed U/O.39 rule 1 & 2 r/w 151 C.P.C. be registered as Misc. Case and put up today for further order.
>
> The operation of the judgment of the learned lower court is hereby stayed till 31.1.95."

14. According to the Petitioner, an application was filed by the Opposite Parties for rejecting the appeal memorandum without serving copy thereof to the Petitioner or its counsel. On the said application, the following order was passed by the learned 2nd ADJ, Bhubaneswar on 31st January,1995:

> "Order dtd. 31.1.95
>
> The Advocate for the appellant is presented and files two petitions, both for extension of the order of stay passed on 9.12.94 until further order since the stay was operative till today.
>
> The Respondent Nos.1 and 2 have entered appearance executing vakalatnama in favour of Sri Bijan Ray, Advocate and his associates and have filed a petition to reject the memorandum of appeal on the grounds stated therein and another petition praying to order that before hearing on their above petition no other matter be heard. Copies not served but attached to the petitions.
>
> The P.O. is on C.L. for today. L.C.R. has not been received. The Petitioners filed today be put up tomorrow i.e. 1.2.95 before the P.O. for consideration and further order. Copies of the petitions be served on the meantime.
>
> The Advocate for the appellant submits that the order of stay granted on the last date may be extended till the next date or else the appellant would be highly prejudiced. After going through the record, I feel that in the interest of justice the said order need be extended or else the purpose of the appeal would be frustrated.
>
> Hence, the order of stay granted on 9.12.94 stands extended till the date fixed i.e. 1.2.95."

15. On 1st February, 1995 the learned Appellate Court (the Court of the ADJ) passed orders on the application of Opposite Party Nos.1 and 2 regarding rejection of the Appeal to the following effect:

> "since the appeal has already been admitted, vide order No.4 dated 9.12.94, the memorandum of appeal cannot be rejected at this stage. The aforesaid petition for rejecting the appeal memorandum will be heard at the time of hearing of the appeal."

16. On 10th July, 1995 the restraint order passed by the Court was continued. On 25th July, 1995 the Appellate Court first took up the plea concerning maintainability and by the order dated 1st August, 1995 dismissed the appeal on the ground that it had not been filed with a copy of the decree it was not filed before expiry of the 15 days in terms of Order XX Rule 6 CPC. Challenging the above order dated 1st August, 1995 in the first mentioned civil revision i.e. CVREV No.179 of 1995 was filed.

17. One day prior to challenging the order dated 1st August 1995, the Petitioner filed Title Appeal No.32 of 1995 before the Court of the learned ADJ challenging the same judgment and decree dated 16th November, 1994 and 30th November, 1994 in O.S. No.223 of 1982-I. In the said appeal, the following order was passed:

> "Memorandum of Appeal presented today by Mr. H.K. Mohanty and other advocates for the appellant being aggrieved by the judgment and decree dated 16.11.94 and 30.11.94 respectively passed by the Civil Judge, (Sr. Divn.), Bhubaneswar in O.S. No.223/82-I. The appeal memo is presented at a later hour i.e. at 4.55 P.M. No time today, the appeal memo is being affixed with C. fee worth of Rs.1/- only. The advocate for the Appellant files a petition seeking one week time to file the balance court fee required for the memorandum of appeal. Another petition is also filed praying therein that the certified copy of the judgment and decree filed in T.A.58/94 of this court is to be tagged in this appeal.
>
> Put up on 4.8.95 with office note for further order."

18. However, on 4th August, 1995 learned Civil Judge (Senior Division), Bhubaneswar rejected the aforementioned T.A. No.32 of 1995 by the following order:

> "Office note is put up. No steps taken on behalf of the appellant. The appellant is absent on repeated calls. Nobody appears on behalf of the appellant at the time of call for filing on the memo of appeal which was filed yesterday in late hours at 4.55 P.M. seen the office note. It is further seen that the memorandum of appeal has not been accompanied by a copy of the decree appealed from and

> of the judgment on which it is founded according to order 41, R-I C.P.C. the memorandum of appeal shall be accompanied by a copy of the decree appealed from and of the judgment on which it is founded. When the memorandum of appeal filed yesterday before the court has not been accompanied by a copy of the decree appealed from and of the judgment on which it founded, such a memorandum of appeal cannot be accepted by appellate court. So the memo of appeal is rejected for the reasons stated above."

19. It is challenging the above order dated 4th August, 1995 the second revision i.e. CVREV No.274 of 1995 was filed.

20. It is stated that again out of an abundant caution, the Petitioner filed T.A. No.88 of 1995 challenging the same judgment dated and decree passed in T.S. No. 223 of 1982. In the said appeal, notice was issued on the question of limitation. The said appeal is stated to be pending before the District Judge, Khurda, wherein it has been renumbered as T.A. No.62/88 of 1987/1995. It is stated that on 21st February, 2005 the Petitioner filed an application for withdrawal of the said appeal. On 14th December, 1994 the Petitioner out of abundant caution filed Misc. Case No.775 of 1994 under Order IX Rule 13 of CPC in the Court of learned Senior Civil Judge, Bhubaneswar for setting aside the ex parte decree passed against the Petitioner in the said suit.

21. A preliminary objection has been raised on behalf of the contesting Respondents in these petitions to the maintainability of the revision petitions. It is submitted that under Section 115 of the CPC as amended, there is no power in the High Court to entertain the present revision petitions. It is further submitted that failure to furnish the certified copy of the decree, appealed against along with the memorandum of appeal was fatal to the appeals, and, therefore, the learned Civil Judge (Senior Division), Bhubaneswar was justified in rejecting the two appeals.

22. Mr. Pitambar Acharya, learned Senior Advocate for the Petitioner, submitted that the order which has been challenged in the appeal was in the nature of a final order and decree in the suit which was decided ex parte against the present Petitioner. Even otherwise, it was not an interlocutory order against which no revision petition would lie. He referred to the wording of Section 115 CPC as amended and submitted that a revision petition was maintainable against such a final order in the appeal. Reliance is placed on

the decisions in ***Shiv Shakti Cooperative Housing Society, Nagpur v. Swaraj Developers (2003) 6 SCC 659; Prem Bakshi v. Dharam Dev (2002) 2 SCC 2 and Surya Dev Rai v. Ram Chander Rai (2003) 6 SCC 675***.

23. On the other hand, Mr. B. Moharana, learned counsel appearing for Opposite Party No.2 i.e. the Indian National Congress (INC), relied upon the decisions of the Supreme Court in ***Jagat Dhish Bhargava v. Jawahar Lal Bhargava AIR 1961 SC 832 and Phoolchand v. Gopal Lal, AIR 1967 SC 1470.***

24. The above submissions have been considered. Section 115 of the CPC reads as under:

> "**115.Revision.-**
>
> (1) The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears-
>
> (a) to have exercised a jurisdiction not vested in it by law, or
>
> (b) to have failed to exercise a jurisdiction so vested, or
>
> (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit.
>
> (2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto.
>
> (3) A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court.
>
> *Explanation*--.In this section, the expression "any case which has been decided" includes any order made, or any order deciding an issue in the course of a suit or other proceeding.

25. A careful reading of Section 115 (1) CPC reveals that a revision petition would be maintainable against any order of a subordinate Court to the High Court, against which no appeal lies and if such subordinate Court has exercised a jurisdiction not vested in it or has failed to exercise a jurisdiction so vested or has otherwise acted illegally or with material irregularity. Section 115 (2) CPC states that the High Court shall not, "vary

or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto".

26. In the present case, the order passed in the first appeal was by the learned ADJ, first in the nature of the final order and accordingly a decree was also drawn up on that basis. It was not an appealable order. The bar to the High Court entertaining such revision petition as spelt out in Section 115 (1) and (2) CPC does not exist in the present case. It is seen that the orders dated 1st August 1995 and 4th August, 1995 finally decide the appeal by dismissing it on the ground that it was not accompanied by a certified copy of the decree. The Court is of the considered view that both these revision petitions are maintainable. Consequently, the preliminary objection to the maintainability of the revision petitions is negatived.

27. Turning now to the merits of the case, it is seen that a certified copy was applied for but was not made available by the time the limitation ended for filing the appeal. In Jagat Dhish Bhargava (supra), it was explained by the Supreme Court that in terms of Order XLI Rule 1 CPC although the filing of decree appears to be mandatory character, there was a distinction that could be drawn between the presentation of an appeal at the stage when a decree had been drawn and the appellant had not applied for it in time and one where the decree had, in fact, not been drawn up and an application has already been made by Appellant for a certified copy. It was explained as under:

> "14. Let us then consider the technical point raised by the appellant challenging the validity or the propriety of the order under appeal. The argument is that 0. 41, r. 1 is mandatory, and as soon as it is shown that an appeal has been filed with a memorandum of appeal accompanied only with a certified copy of the judgment the appeal must be dismissed as being incompetent, the relevant provisions of Order 41 with regard to the filing of the decree being of a mandatory character. It would be difficult to accede to the proposition thus advanced in a broad and general form. If at the time when the appeal is preferred a decree has already been drawn up by the trial Court and the appellant has not applied for it in time it would be a clear case where the appeal would be incompetent and a penalty of dismissal would be justified. The position would, however, be substantially different if at the time when the appeal is presented before the appellate Court a decree in fact had not been drawn up by the trial Court; in such a case if an application has been made by the appellant for, a certified copy of the decree, then all that can be said against the appeal preferred by him is that the appeal is premature since a decree has not been drawn up, and it is the decree against which an appeal lies. In such a case, if the office of the High Court examines the appeal carefully and discovery the defect the appeal may be returned to the appellant for presentation with the certified copy of

> the decree after it is obtained. In the case like the present, if the appeal has passed through the stage of admission through oversight of the office, then the only fair and rational course to adopt would be to adjourn the hearing of the appeal with a direction that the appellant should produce the certified copy of the decree as soon as it is supplied to him. In such a case it would be open to the High Court, and we apprehend it would be its duty, to direct the subordinate Court to draw up the decree forthwith without any delay. On the other hand, if a decree has been drawn up and an application for its certified copy has been made by the appellant after the decree was drawn up, the office of the appellate Court should return the appeal to the appellant as defective, and when the decree is filed by him the question of limitation may be examined on the merits. It is obvious that the complications in the present case have arisen as a result of two factors; the failure of the trial Court to draw up the decree as required by the Code, and the failure of the office in the High Court to notice the defect and to take appropriate action at the initial stage before the appeal was placed for admission under 0. 41, r. 11. It would thus be clear that no hard and fast 'rule of general applicability can be laid down for dealing with appeals defectively filed under 0. 41, r. 1. Appropriate orders will have to be passed having regard to the circumstances of each case, but the most important step to take in cases of defective presentation of appeals is that they should be carefully scrutinized at the initial stage soon after they are filed and the appellant required to remedy the defects. Therefore, in our opinion, the appellant is not justified in challenging the propriety or the validity of the order passed by the High Court because in the circumstances to which we have already adverted the said order is obviously fair and just. The High Court realised that it would be very unfair to penalise the party for the mistake committed by the trial Court and its own office, and so it has given time to the respondents to apply for a certified copy of the decree and then proceed with the appeal."

28. Again in ***Phoolchand v. Gopal Lal (supra)***, a preliminary objection was raised in the High Court to the maintainability of the appeal since it was not accompanied by the decree. The Supreme Court explained how one exceptional case was dealt with in ***Jagat Dhish Bhargava (supra)*** and that it was different from ***Phoolchand's*** case. It was observed as under:

> "5. ..... another exceptional case where in the absence of the copy of decree the appeal could be maintained. We have already indicated that the trial court did not frame a formal decree when it varied the shares and naturally Gopal Lal was not in a position to -file a copy of the decree when he presented the memorandum of appeal to the High Court. Even when time was granted by the High Court and Gopal Lal moved the trial court for framing a formal decree, the trial court refused to do so. In those circumstances it was impossible for Gopal Lal to file a copy of the formal decree. It is unfortunate that when the matter was brought to the know- ledge of the High Court it did not order the trial court to frame a formal decree; if it had done so, the appellant could have obtained a copy of the formal decree and filed it and the defect would have been cured. We do not think it was necessary for Gopal La] to

file a revision against the order of the trial court refusing to frame a formal decree, for Gopal Lal's appeal was pending in the High Court and the High Court should and could have directed the trial court in that appeal to frame a decree to enable Gopal Lal to file it and cure the defect. In such circumstances we fail to see what more Gopal Lal could have done in the matter of filing a copy of the decree. The fact that the trial court refused to frame a formal decree cannot in law deprive Gopal Lal of his right to appeal."

29. Further in ***M/s. Ramnarain (P) Ltd. v. State Trading Corporation in India Ltd. AIR 1983 SC 786***, it was explained as under:

"30. .....In an appropriate case any party which derives any advantage under a decree or order may, depending on the facts and circumstances of the case, disentitle himself to challenge the same and will be estopped from filing an appeal against the same, It is also to be borne in mind that no execution of decree passed in a suit on the original side is normally permitted unless a certified copy of the decree is on the record in the execution proceeding. A certified copy of the decree is not available so long as the decree is not drawn up and filed. The present appeal had been filed long before the decree had been drawn up and, therefore, there could be no question of execution of any decree at the time when the present appeal was filed. The question of the defendant appellant having obtained an advantage under the decree does not therefore, really arise. In the case of Bhau Ram v. Baijnath,(1) this Court observed at p. 362:

"It seems to us, however, that in the absence of some statutory provision or of a well-recognised principle of equity, no one can be deprived of his legal rights including a statutory right of appeal."

We have earlier held that no statutory provision deprives the defendant-appellant of his right to file the present appeal. We have carefully considered the facts and circumstances of this case and the facts of this case also do not attract any well-recognised principle of equity to deprive the appellant of his very valuable statutory right of appeal. The various passages from Halsbury relied on by Mr. Nariman which we have earlier quoted lend support to the view that the defendant-appellant in the instant case by reason of its conduct or otherwise is not estopped or has not become disentitled to file the appeal."

30. This Court in ***Arjuna Charan Patnaik v. Purnanand Patnaik AIR 1968 Orissa 207*** explained with reference to Article 123 of the Limitation Act, 1963 as under:

"3. Article 123 of the Limitation Act 1963 excluding the irrelevant portions runs thus:

"Description of application Period of Limitation Time from which period begins to run.

123. To set aside a decree passed ex parte Thirty days The date of the decree....."

The learned Munsif was of opinion that the date of the decree was 5-1-1965 when the decree was sealed and signed The application was filed within thirty days from this date The main question for consideration in this revision is as to the meaning of the expression "the date of the decree in Article 123 of the Limitation Act There is no definition in the Act as to what "the date of the decree" means Order 20. Rule 7 C P. C lays down that the decree shall bear date the day on which the judgment was prenounced and. when the Judge has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign he decree The date of the decree under this rule is 'the date of the judgment' and not 'the date of the signing of the decree' The C P C and Limitation Act are cognate statutes and in the absence of any express definition to the contrary. O 20, R. 7. C P C would govern the meaning of the date of the decree in Article 123 of the Limitation Act."

31. On the question of maintainability of the present revision petition, the decision in ***Prem Bakshi (supra)*** is instructive. There the Court has held as under:

"5. The proviso to sub-section (1) of Section 115 puts a restriction on the powers of the High Court inasmuch as the High Court shall not, under this section vary or reverse any order made or any order deciding a issue, in course of a suit or other proceedings except where (I) the order made would have finally dispose of the suit or other proceedings or, (ii) the said order would occasion a failure of justice or cause irreparable injury to the party against whom it is made. Under clause (a), the High Court would be justified in interfering with an order of a subordinate court if the said order finally disposes of the suit or other proceeding. By way of illustration we may say that if a trial court holds by an interlocutory order that it has no jurisdiction to proceed the case or that suit is barred by limitation, it would amount to finally deciding the case and such order would be revisable. The order in question by which the amendment was allowed could not be said to have finally disposed of the case and, therefore, it would not come under clause (a)."

32. The above decision found support in subsequent decision in ***Shiv Shakti Cooperative Housing Society, Nagpur v. Swaraj (supra)*** has held as under:

"32. A plain reading of Section 115 as it stands makes it clear that the stress is on the question whether the order in favour of the party applying for revision would have given finality to suit or other proceeding. If the answer is 'yes' then the revision is maintainable. But on the contrary, if the answer is 'no' then the revision is not

> maintainable. Therefore, if the impugned order is of interim in nature or does not finally decide the lis, the revision will not be maintainable. The legislative intent is crystal clear. Those orders, which are interim in nature, cannot be the subject matter of revision under Section 115. There is marked distinction in language of Section 97(3) of the Old Amendment Act and Section 32(2)(i) of the Amendment Act. While in the former, there was clear legislative intent to save applications admitted or pending before the amendment came into force. Such an intent is significantly absent in Section 32(2)(i). The amendment relates to procedures. No person has a vested right in a course of procedure. He has only the right of proceeding in the manner prescribed. If by a statutory change the mode of procedure is altered the parties are to proceed according to the altered mode, without exception, unless there is a different stipulation."

33. The decision in ***Surya Dev Rai v. Ram Chander Rai (2003) 6 SCC 675*** is also to the same effect.

34. For all of the aforementioned reasons, this Court allows the two revision petitions, sets aside the impugned orders passed by the learned Appellate Court. Since two appeals against the same judgment have been filed, it is sufficient that one alone is heard. Accordingly, T.A. No.58 of 1994 is restored to file of the learned ADJ, Bhubaneswar for being proceeded by on merit in accordance with law. It will be listed there for directions on 4th July, 2022. Till such time, the Appellate Court passes an order on the application for interim relief, status quo as ordered by this Court will continue.

35. The civil revisions are disposed of in the above terms. The LCR if requisitioned be returned forthwith. A certified copy of this order be sent immediately to the concerned Court of the ADJ, Bhubaneswar.

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2022 (II) ILR - CUT- 269

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

ITA NO. 133 OF 2012

NATIONAL ALUMINIUM COMPANY LTD., BHUBANESWAR ……..Appellant

.V.

THE COMMISSIONER OF INCOME TAX, BHUBANESWAR AND ANR. ……..Respondents

INCOME TAX ACT, 1961 – Section 32(1) (iia) – Additional depreciation – Whether the Tribunal was justified in not allowing the additional depreciation u/s 32(1)(iia) of the Act – Held, No – The components/ parts of a plant acquired prior to 31st march 2005 but fitted to the plant thereafter would be eligible for additional depreciation under section 32(1)(iia) of the Act. (Para-18)

Case Laws Relied on and Referred to :-

1. (2017) 393 ITR 441 (Guj) : Principal Commissioner of Income Tax Vs. IDMC Ltd.
2. I.T.A. No.20 of 2014 : M/s. Indian Metal and Ferro Alloys Ltd. Vs. Commissioner of Income Tax

For Appellant : Mr. A.U. Senapati

For Respondents: Mr. T.K. Satapathy, Senior Standing Counsel

ORDER Date of Order : 09.05.2022

Dr. S. MURALIDHAR, C.J.

1. This appeal by the Assessee-Appellant is directed against the order dated 29th June, 2012 passed by the Income Tax Appellate Tribunal, Cuttack Bench, Cuttack (ITAT) in ITA No.91/CTK/2010 for the assessment year (AY) 2006-07.

2. While admitting this appeal on 9th February, 2022 the following substantial questions of law were framed for consideration:

> "(i) Whether on the facts and in the circumstances of the case the learned ITAT was legally justified in dismissing the grounds of the appellant and upholding and affirming the decision of the Commissioner of Income Tax (Appeals) of the addition/disallowance of Rs.31,18,89,388/- u/s. 43B of the Act in respect of Electricity Duty deposited into designated bank Account as per direction of this Court ?
>
> (ii) Whether the components/parts of a plan which were acquired prior to 31st March, 2005 but all such components/parts fitted into the plant after 31.03.2005 and installed after 31.03.2005, the Tribunal was justified in law in not allowing the additional depreciation under Section 32(1)(iia) of the Act ?"

Question (i)

3. The background facts are that the Assessee (NALCO) is a public limited company engaged in the business of mining, manufacturing,

production, generation and dealing in Bauxite, Alumina, Aluminum and Power. It follows the mercantile system of accounting and its accounts are maintained on accrual system of accounting.

4. As part of its expansion project in the AY 2006-07 NALCO became eligible for "additional depreciation" under Section 32 (1) (iia) of the Income Tax Act ('Act'). For AY 2006-07 it claimed additional depreciation of Rs.30,77,31,263/- in respect of the cost of "New Plant or machinery" acquired and installed as part of the expansion project after 31st March, 2005.

5. NALCO has also its own captive power plant (CPP) at Angul, Odisha with an installed capacity of 840 MW. Electricity duty is payable by NALCO to the Government of Odisha on the electricity generated in its CPP under the Odisha Electricity Act, 1961. With effect from 10th October, 2001, the Government of Odisha issued a notification raising the electricity payable from 12 paisa per unit to 20 paisa per unit. Aggrieved by the additional levy of electricity duty, NALCO filed OJC No.2682 of 2002 in this Court. By an interim order dated 8th April, 2002 in Misc. Case No.2613 of 2002 in OJC No.2682 of 2002 this Court permitted NALCO to continue to pay electricity duty at 12 paisa per unit without prejudice to its rights and contentions. Further, NALCO was to deposit the differential of 8 paisa per unit in any Nationalized Bank in a fixed deposit. Accordingly, NALCO paid the differential 8 paisa per unit in a fixed deposit with the State Bank of India (SBI).

6. NALCO states that pursuant to the above interim order of the High Court it deposited a total sum of Rs.1,76,44,35,364/- from 10th October, 2001 to 31st March, 2006. Further, by orders dated 16th August, 2004 in Misc. Case No.5547 of 2002 and Misc. Case No.1232 of 2004 in OJC No.2682 of 2002, this Court directed NALCO to withdraw a sum of Rs.30 crores from the sum lying in Fixed Deposit with SBI and to deposit the said amount in the Treasury of the State Government by 3rd November, 2004. Three further similar orders were passed on 12th May 2005, 24th August, 2005 and 31st January, 2006 by which sums of Rs.50 crores, Rs.30 crores and Rs.20 crores respectively were released in favour of the State Government. As a result, a total sum of Rs.130 crores was transferred from the fixed deposits lying in the designated Bank account by NALCO to the State Government by 28th February, 2006.

7. For the returns filed for the AYs 2003-04 to 2006-07 NALCO claimed deduction under Section 43B of the Act towards electricity duty paid including the amounts deposited by it with SBI as per directions of this Court. Similar claims made by NALCO for the AYs 2003-04 and 2004-05 under Section 43B of the Act were allowed by the Assessing Officer (AO). For the AY 2006-07 the deductions claimed under Section 43B of the Act were to the tune of Rs.46,19,60,940/-. The AO disallowed the above amount by treating it as a deposit in a designated bank account and not as payment of electricity duty. In the assessment order date 29th December, 2008 the AO also disallowed the claim of additional depreciation of Rs.30,77,31,263/- under Section 32 (1)(iia) of the Act on the ground that the conditions stipulated therein had not been met.

8. The Commissioner of Income Tax (Appeals) [CIT (A)], by order dated 31st December 2009, dismissed NALCO's appeal by sustaining the addition under Section 43B of the Act to an extent of Rs.31,18,89,388/- and fully sustaining the disallowance of additional depreciation.

9. Thereafter the Assessee went before the ITAT in appeal which by the impugned order dated 29th June, 2012 was dismissed.

10. This Court has heard the submissions of Mr. A.U. Senapati, learned counsel for the Appellant and Mr. T.K. Satapathy, learned Senior Standing Counsel for the Respondents.

11. Mr. Satapathy, learned Senior Standing Counsel sought to place reliance on the order dated 4th March, 2022 of this Court in I.T.A. No.20 of 2014 (***M/s. Indian Metal and Ferro Alloys Ltd. v. Commissioner of Income Tax***) to urge that a similar question in that case as regards deduction under Section 43B of the Act was decided in favour of the Department and against the Assessee.

12. Countering the above submission, Mr. A.U. Senapati, learned counsel for the Appellant pointed out that the facts in Indian Metal and Ferro Alloys Ltd. (supra) are different inasmuch as in the said case this Court found that although the differential amount of electricity duty has been deposited in loan lien account, it was not actually paid to the Government but retained in that account. Mr. Senapati, learned counsel pointed out that in the present case, on

the other hand, the amount deposited in the SBI account was, under order of this Court, in fact released to the State Government.

13. On the issue of electricity duty, there is merit in the contention of Mr. A.U. Senapati that the facts of the present case are different from the case of ***Indian Metal and Ferro Alloys Ltd***. (supra). In that case the differential electricity duty paid in the loan lien account remained there and therefore, was inaccessible to the Government. In the present case, however, under the interim orders passed by this Court as much as nearly Rs.100 crores has been released to the State Government. In other words, the amount has not only been parted with by the Assessee but also has been received by the Government. Consequently, the deduction under Section 43B of the Act as claimed by the Assessee cannot be denied to it.

14. It requires to be mentioned here that against the order passed by this Court in OJC No.2682 of 2002 the State Government filed an SLP before the Supreme Court of India. In the said SLP (C) No.6386 of 2011 an order was passed by the Supreme Court on 23rd March, 2015 recoding a settlement between the parties, pursuant to which full payments have in fact been made by NALCO to the State Government. In that view of the matter, question No.(i) is answered in favour of the Assessee and against the Department by holding that the AO, the CIT(A) and the ITAT were not justified in sustaining the addition/disallowance of Rs.31,18,89,388/- under Section 43B of the Act in respect of electricity duty deposited in the SBI Bank account under the direction of this Court.

15. On this issue, the matter is remanded to the AO for a fresh computation keeping in view the amounts already released by the Petitioner to the State Government.

Question (ii)

16. As regards, the second issue concerning additional depreciation, reliance is placed by Mr. Senapati on the decision of Gujarat High Court in ***Principal Commissioner of Income Tax v. IDMC Ltd. (2017) 393 ITR 441 (Guj)***.

17. On this issue, the decision in ***PCIT v. IDMC Ltd.*** (supra) of the Gujarat High Court squarely applies. There it was held that machines that might have been acquired before 31st March, 2005 but installed after 31st March, 2005

would be eligible for grant of additional depreciation under Section 32(1)(iia) of the Act for the AY 2006-07. That decision of Gujarat High Court has been upheld by the Supreme Court by dismissal in Diary No.28648 of 2017 (Principal Commissioner of Income Tax v. M/s. IDMC Limited) on 13th October, 2017.

18. Accordingly, in the present case question No.(ii) is answered in favour of the Assessee and against the Department by holding that the component/parts of a plant acquired prior to 31st March, 2005 but fitted to the plant thereafter would be eligible for additional depreciation under Section 32(1)(iia) of the Act.

19. The appeal is allowed in the above terms, but in the circumstances, with no order as to costs.

20. An urgent certified copy of this order be issued as per rules.

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2022 (II) ILR - CUT- 274

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

W.P.(C) NOS.14286, 16718 AND 17950 OF 2016

SUBASH MOHAPATRA ……..Petitioner

.V.

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

(IN W.P.(C) NO.16718 OF 2016)
SUDHANSHU KUMAR NANDA ……..Petitioner

V

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

(IN W.P.(C) NO.17950 OF 2016)
PRADIP KUMAR PRADHAN ……Petitioner

V.

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

PUBLIC INTEREST LITIGATION – Writ Applications filed challenging the notification dt.11.08.2016 issued by the commissioner-Cum-Secretary, information and Public Relation Department, Govt. of Odisha

under section 24 (4) of the RTI Act, 2005 – The said notification provides that nothing contained in the RTI Act shall apply to the General Administration (vigilance) Department of the Govt. of Odisha and its organisation – Whether such exemption would be sustainable under law? – Held, No. – The exemption would be contrary to the first proviso to section 24 (4) of the RTI Act and by that yardstick, would be unsustainable in law – The impugned notification seeks to take away what is provided under the RTI Act and therefore ultra vires the Act.

(Para -35)

Case Laws Relied on and Referred to :-

1. AIR 1975 SC 865 : State of Uttar Pradesh Vs. Raj Narain
2. AIR 1982 SC 149 : S.P. Gupta Vs. President of India.
3. AIR 2002 SC 2112 : Union of India Vs. Association for Democratic Reforms
4. AIR 1992 SC 1782 : Commissioner of Income Tax, Bombay Vs. Gwalior Rayon Silk Manufacturing Company Ltd.
5. 2014 SCC Online P & H 104 : Hemant Goswami Vs. CBI
6. AIR 2011 Mad 275: S. Vijayalakshmi Vs. Union of India.
7. 2010 SCC OnLine CIC 6330 : B. Seetharamaiah Vs. Commissioner of Customs and Central Excise.
8. (2020) 4 SCC 702:Chief Information Commissioner Vs. High Court of Gujarat
9. (2013) 1 MLJ 348 : Superintendent of Police Vs. M. Kannappan .
10. AIR 1935 Nag 23 : Jagannath Rao Dani Vs. Emperor.
11. AIR 1933 Lah 498 : Emperor Vs. Dharam Vir.
12. (2013) 1 SCC 212 : Girish Ramchandra Deshpande Vs. Central Information Commissioner.
13. (2012) 13 SCC 61: Bihar Public Service Commission Vs. Sayad Hussain Abbas Rizvi.
14. (1969) 2 SCC 166 : Harkchand Ratanchand Banthia Vs. Union of India.
15. (1970) 2 SCC 780 : KA Abbas Vs. Union of India.
16. (1997) 4 SCC 306 : Dinesh Trivedi Vs. Union of India.
17. AIR 2017 Del 192 : CPIO, Intelligence Bureau Vs. Sanjiv Chaturvedi.
18. 2017 SCC OnLine Del 10475: CPIO CBI Vs. C.J. Karia.
19. 2012 SCC OnLine Ker 4133 : Joseph M. Puthussery Vs. State Information Commissioner.
20. (2011) 125 DRJ 508 : B.S. Mathur Vs. Public Information Officer.
21. 2012 SCC OnLine P&H 18520 : Bipan Modi Vs. State of Punjab .
22. 2015 SCC On Line Mani 129 : Md. Abid Hussain Vs. State of Manipur.
23. AIR 2011 P&H 168 : First Appellate Authority-cum-Additional Director General of Police Vs. Chief Information Commissioner, Haryana.
24. 2011 (8) SCALE 645 : Central Board of Secondary Education Vs. Aditya Bandopadhyah.

For Petitioners : Mr. S. P. Das, (In W.P.(C) Nos.14286 & 16718 of 2016), (In W.P.(C) No.17950 of 2016) None

For Opp. Parties : Mr. S. N. Das, ASC for the State,Mr. Srimanta Das Senior Standing Counsel Vigilance Department (Intervener)

JUDGMENT Date of Judgment : 20.06.2022

Dr. S. MURALIDHAR, C.J.

1. These three writ petitions, each filed by way of Public Interest Litigation (PIL), involve a challenge to the impugned notification dated 11th August 2016 issued by the Commissioner-cum-Secretary, Information and Public Relations Department,Government of Odisha under Section 24 (4) of the Right to Information Act, 2005 (RTI Act), and are accordingly being disposed of by this common judgment. The said notification provides that nothing contained in the RTI Act "shall apply to the General Administration (Vigilance) Department" of the Government of Odisha "and its organization".

Contentions of the Petitioners

2. The main ground of challenge in the aforesaid three writ petitions to the impugned notification is that it violates Article 19 (1) (a) of the Constitution of India which guarantees to all Indian citizens the fundamental right to information. It is submitted that under the RTI Act disclosure is the norm and refusal of information, the exception. Reliance in this regard is placed on the decisions in ***State of Uttar Pradesh v. Raj Narain AIR 1975 SC 865; S.P. Gupta v. President of India AIR 1982 SC 149 and Union of India v. Association for Democratic Reforms AIR 2002 SC 2112.***

3. Referring to Section 24 (4) of the RTI Act and, in particular, to the proviso thereto, it is submitted that the power of exemption granted to the State Government thereunder is not available even in the case of intelligence and security organizations where the allegations pertain to corruption and human rights violations. It is submitted that inasmuch as the impugned notification seeks to exempt the entire Vigilance Department in Odisha from the purview of the RTI Act, irrespective of the proviso to Section 24 (4) of the RTI Act, it is ultra vires Section 24 (4) of the RTI Act. In other words, it is contended that by the impugned notification the Government intends to keep away from disclosure to the public, instances of corruption and human right violations, notwithstanding the proviso to Section 24 (4) of the RTI Act. It is further submitted that the notification issued under Section 24 (4) of the

RTI Act or even the Rules made under Section 28 of the RTI Act cannot exceed the scope of the restriction under Section 24 of the RTI Act. It is submitted that the Rules and the notifications are meant to carry out the provisions of the RTI Act and not whittle down or take away what is guaranteed by the RTI Act. Reliance is placed on the decision in ***Commissioner of Income Tax, Bombay v. Gwalior Rayon Silk Manufacturing Company Ltd. AIR 1992 SC 1782***. It is further submitted that the impugned notification imposes a restriction not envisaged under Sections 8 and 9 of the RTI Act.

Contentions of the Opposite Parties

4. In reply to the writ petitions, the stand of the Opposite Parties (State) is that the activities of the Vigilance Department and its organizations are similar to that of the Central Bureau of Investigation (CBI) which is entrusted with the responsibility of administering anti-corruption laws. It is pointed out that the Government of India has exempted the CBI from the purview of the RTI Act since 2011. Likewise, the States of Tamil Nadu, Madhya Pradesh, Uttar Pradesh and Sikkim have issued notifications exempting their respective Vigilance Departments from the purview of the RTI Act. It is submitted that the Vigilance Department of the Government of Odisha and its organization are functioning as the premier anti-corruption agencies of the State and are entrusted with the responsibility of implementing an effective prevention, enforcement and prosecution mechanism thereby ensuring transparency and good governance for the benefit of the people. The essential tasks of the Vigilance Department are stated to be the collection of secret intelligence and making of secret discreet inquiries on the corrupt activities of public servants.

5. It has been further elaborated in the written submissions filed separately by the State on 2nd August, 2021 and again on 9th May, 2022 as well as the separate written notes of submissions of the State Vigilance Department on 9th May, 2022 that if the Vigilance Department were not to be exempted from the purview of the RTI Act then all kinds of information regarding the functioning of the Vigilance Department would become available to the public and that would be against the interests of the security and public interest. In particular, reference is made to the fact that under Section 8 (1) (h) of the RTI Act, information that is otherwise to be made available only under the orders of the Court like the information under

Section 91 read with Section 311 of Cr PC; or under Section 162 of the Indian Evidence Act read with Section 123 thereof, would become easily available to an applicant and this in turn might impede the progress of investigation or the prosecution of the case and delay the trial. Reliance in this regard is placed on the decision in ***Hemant Goswami v. CBI 2014 SCC Online P & H 104***. It is contended by the Opposite Parties that premature disclosure of the information, especially file notings, prior to a final decision being taken in disciplinary action has the potential to disrupt such proceedings.

6. The State Vigilance Department contends that revealing confidential information under the RTI Act to an individual, or an organization or even an aggrieved person at any stage would impede the entire process of an enquiry into corruption. It is submitted that Section 8 (1) (h) of the RTI Act does not adequately cover the confidential process which is undertaken in order to build up an enquiry against a corrupt person. It is submitted that the first proviso to Section 24 (4) of the RTI Act regarding allegations of corruption and human rights violation is in an entirely a different context and should not be misconstrued as information regarding corruption which is under investigation. Reliance is placed on the decision of the Madras High Court in ***S.Vijayalakshmi v. Union of India AIR 2011 Mad 275***.

7. It is further submitted that any interference with the procedure mentioned in the Cr PC and the Indian Evidence Act is exempted under Section 8 (1) (h) of the RTI Act. In this context, the order of the Chief Information Commissioner in ***B. Seetharamaiah v. Commissioner of Customs and Central Excise 2010 SCC OnLine CIC 6330*** is relied upon. Reliance is also placed on the decision in ***Chief Information Commissioner v. High Court of Gujarat (2020) 4 SCC 702***, where the Supreme Court had held that RTI Act cannot be invoked if there is already in place an effective legal regime for securing information and there is no lack of transparency. It is submitted that there is sufficient opportunity available to a party to a Vigilance case or a third party to obtain relevant information under Sections 91 and 311 of the Cr PC, Sections 162 and 165 of the Indian Evidence Act and Sections 4 (3), 5 and 22 of the Prevention of Corruption Act, 1988 (PC Act).

8. The Opposite Parties submit that both the Allahabad High Court in its order dated 25th October, 2010 in PIL No.63607 of 2010 (***Saleem Baig v.***

State of U.P.) and the Madras High Court in ***Superintendent of Police v. M. Kannappan (2013) 1 MLJ 348*** had upheld the constitutional validity of a similar notification under Section 24 (4) of the RTI Act keeping the Vigilance Department out of the purview of the RTI Act and held it not to be ultra vires the RTI Act. It is submitted that if the Vigilance Department is not exempted from the scope of the RTI Act, it would frustrate the intent of the legislature while inserting Section 8 (b) of the RTI Act. It is contended that even under Section 172 of the Cr PC, an accused does not have a right to seek to see the Case Diary whereas without the impugned notification such statements may become easily available under the RTI Act. Reliance is placed on the decisions in ***Jagannath Rao Dani v. Emperor AIR 1935 Nag 23 and Emperor v. Dharam Vir AIR 1933 Lah 498***.

9. The Opposite Parties submit that it was not the intent of the legislature to reveal the source of information given in confidence by an individual to the law enforcement agency and this includes the Vigilance Department. This information stands protected under Section 8 (g) of the RTI Act. Even under Section 7 of the PC Act, a person who gives information to the Vigilance Department about alleged illegal demand of gratification by a public servant can request that his name be kept anonymous.

10. Relying on the decision in ***Girish Ramchandra Deshpande v. Central Information Commissioner (2013) 1 SCC 212***, it is submitted by the Opposite Parties that protection from the probing eyes of outsiders needs to be provided to vigilance officers in performing their duties. It is submitted that the performance of an employee in an organisation is a matter between the employee and employer which would be governed under service rules falling under "personal information" under Section 8 (1) (j) of the RTI Act. It is submitted that the Government issued the impugned notification after receiving representations from the Vigilance Department that they were facing difficulties due to queries raised under the RTI Act. Relying on the decision in Bihar Public Service Commission v. Sayad Hussain Abbas Rizvi, (2012) 13 SCC 61 it is submitted that denial of information of the person whose document and information are with the Vigilance Department on the ground of protecting the person's fundamental right to privacy would be justified.

11. While it is not disputed by the Opposite Parties that the right of information is a fundamental right, it is submitted that it is also subject to

reasonable restrictions. Reliance is placed on the decision in ***Harkchand Ratanchand Banthia v. Union of India (1969) 2 SCC 166, KA Abbas v. Union of India (1970) 2 SCC 780, Dinesh Trivedi v. Union of India (1997) 4 SCC 306*** and the decision in ***Saleem Baig v. State of U.P.*** (supra) to contend that the right to information is subject to reasonable restrictions and the impugned notification is not ultra vires the RTI Act or for that matter the Constitution of India.

12. This Court has heard the submissions of Mr. S. P. Das and Mr. N. Nayak, learned counsel for the Petitioners; Mr. S. N. Das, learned Additional Standing Counsel for the State and Mr. Srimanta Das, learned Senior Standing Counsel for the Vigilance Department.

Analysis and reasons

13. Before proceeding to discuss the submissions made, the Court would like to reflect on the process that led to the enactment of the RTI Act. The precursor to the RTI Act was the Freedom of Information Act, 2002, which never became operational. It was later amended extensively and enacted as the RTI Act in 2005. The Statement of Objects and Reasons appended to the RTI Act explains the process thus:

> "In order to ensure greater and more effective access to information, the Government resolved that the Freedom of Information Act, 2002 enacted by the Parliament needs to be made more progressive, participatory and meaningful. The National Advisory Council deliberated on the issue and suggested certain important changes to be incorporated in the existing Act to ensure smoother and greater access to information. The Government examined the suggestions made by the National Advisory Council and others and decided to make a number of changes in the law.
>
> The important changes proposed to be incorporated, inter alia, include establishment of an appellate machinery with investigating powers to review decisions of the Public Information Officers; penal provisions for failure to provide information as per law; provisions to ensure maximum disclosure and minimum exemptions, consistent with the constitutional provisions, and effective mechanism for access to information and disclosure by authorities, etc. In view of significant changes proposed in the existing Act, the Government also decided to repeal the Freedom of Information Act, 2002. The proposed legislation will provide an effective framework for effectuating the right of information recognized under Article 19 of the Constitution of India."

14. Another key to understanding the main object and purpose behind the RTI Act, is its Preamble, which reads as under:

"An Act to provide for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority, the constitution of a Central Information Commission and State Information Commissions and for matters connected therewith or incidental thereto.

WHEREAS the Constitution of India has established democratic Republic;

AND WHEREAS democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed;

AND WHEREAS revelation of information in actual practice is likely to conflict with other public interests including efficient operations of the Governments, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information;

AND WHEREAS it is necessary to harmonise these conflicting interests while preserving the paramountcy of the democratic ideal;

NOW, THEREFORE, it is expedient to provide for furnishing certain information to citizens who desire to have it."

15. Thus, it is clear that one of the essential features of the RTI Act is transparency in public affairs and the need for the public to know how the government functions. Section 24 of the RTI Act, which is relevant to the present context, reads as under:

"***24. Act not to apply to certain organizations—***

(1) Nothing contained in this Act shall apply to the intelligence and security organisations specified in the Second Schedule, being organisations established by the Central Government or any information furnished by such organisations to that Government:

Provided that the information pertaining to the allegations of corruption and human rights violations shall not be excluded under this sub-section:

Provided further that in the case of information sought for is in respect of allegations of violation of human rights, the information shall only be provided after the approval of the Central Information Commission, and notwithstanding anything contained in Section 7, such information shall be provided within forty-five days from the date of the receipt of request.

(2) The Central Government may, by notification in the Official Gazette, amend the Schedule by including therein any other intelligence or security organisation

established by that Government or omitting therefrom any organisation already specified therein and on the publication of such notification, such organisation shall be deemed to be included in or, as the case may be,omitted from the Schedule.

(3) Every notification issued under sub-section (2) shall be laid before each House of Parliament.

(4) Nothing contained in this Act shall apply to such intelligence and security organisations, being organisations established by the State Government, as that Government may, from time to time, by notification in the Official Gazette, specify:

Provided that the information pertaining to the allegations of corruption and human rights violations shall not be excluded under this sub-section:

Provided further that in the case of information sought for is in respect of allegations of violation of human rights, the information shall only be provided after the approval of the State Information Commission and, notwithstanding anything contained in Section 7, such information shall be provided within forty-five days from the date of the receipt of request.

(5) Every notification issued under sub-section (4) shall be laid before the State Legislature."

16. What is immediately relevant as far as the present case is concerned, is Section 24 (4) of the RTI Act, which states that the State Government may by a Notification in the Official Gazette, specify "such intelligence and security organisations, being organisations established by the State Government" to which the RTI Act would not apply.

17. The first proviso is an important check on the above power of the State Government. It specifically states that information pertaining to the allegations of corruption and human rights violations shall not be excluded under sub-section (4) of section 24 of the RTI Act. There could be at least two broad sub categories here. One is cases generally concerning allegations of corruption and human rights violations which are under investigation by or have been investigated by the concerned 'intelligence and security organisations, being organisations established by the State Government'. The other sub-category is cases concerning allegations of corruption and human rights violations involving those working for or employed by the concerned 'intelligence and security organisations, being organisations established by the State Government'. The plain wording of the first proviso to Section 24 (4) of the RTI Act makes it clear that it applies to both the sub-categories noted hereinbefore.

18. Section 24 (1) of the RTI Act is more or less similarly worded as Section 24 (4) of the RTI Act, with one difference being that the former relates to 'intelligence and security organisations, being organisations established by the Central Government' whereas Section 24 (4) of the RTI Act pertains to those established by the State Government. The other difference is that the prohibition in the main part of Section 24 (1) on the applicability of the RTI Act is to the organisation specified in the said Second Schedule to the RTI Act "or any information furnished by such organisations to that Government". This additional phrase "or any information furnished by such organisations to that Government" is not to be found in Section 24 (4) of the RTI Act. However, the two provisos to both Section 24 (1) as well Section 24 (4) of the RTI Act are identically worded. In other words, in both instances, "information pertaining to the allegations of corruption and human rights violations shall not be excluded" from disclosure. Again, in both instances, where information that is sought is in respect of allegations of violations of human rights, the prior approval of the concerned Information Commission, Central or State, as the case may be, is required. Plainly the legislative intent is to provide information, and not to withhold it, particularly when it pertains to allegations of corruption and human rights violations.

19. The proviso to Section 24 (1) of the RTI Act has been interpreted by the Delhi High Court in ***CPIO, Intelligence Bureau v. Sanjiv Chaturvedi AIR 2017 Del 192***, where it was held as under:

> "29. The plain reading of the proviso shows that the exclusion is applicable with regard to any information. The term "any information" would include within its ambit all kinds of information. The proviso becomes applicable if the information pertains to allegations of corruption and human rights violation. The proviso is not qualified and conditional on the information being related to the exempt intelligence and security organizations. If the information sought, furnished by the exempt intelligence and security organizations, pertains to allegations of corruption and human rights violation, it would be exempt from the exclusion clause.
>
> 30. The proviso "Provided that the information pertaining to the allegations of corruption and human rights violations shall not be excluded under this sub-section" has to be read in the light of the preceding phrase "or any information furnished by such organisations to that Government".
>
> 31. When read together, the only conclusion that can be drawn is that, if the information sought pertains to allegation of corruption and human right violation, it would be exempt from the exclusion clause, irrespective of the fact that the

> information pertains to the exempt intelligence and security organizations or not or pertains to an Officer of the Intelligence Bureau or not."

20. This was reiterated subsequently by the same High Court in ***CPIO CBI v. C.J. Karia 2017 SCC OnLine Del 10475*** where the contention of the Petitioner that the CBI was named as an organization to the Second Schedule to the RTI Act by virtue of Section 24 (1) of the RTI Act and was, therefore, totally exempted from its purview, was not accepted by the Delhi High Court. It held as under:

> "8. It is apparent from the plain reading of the first proviso to Section 24 (1) of the Act that information pertaining to allegations of corruption and human rights violation are not excluded from the purview."

21. Thus, it is seen that what cannot be kept outside the purview of disclosure under the RTI Act as spelt out in the proviso to Section 24 (4) of the RTI Act is information pertaining to "allegations of corruption and human rights violations" in both sub-categories of cases as noted hereinbefore viz., cases generally concerning allegations of corruption and human rights violations which are under investigation by or have been investigated by the concerned intelligence and security organisations established by the State Government' or cases concerning allegations of corruption and human rights violations involving those working for or employed by the said organisations established by the State Government.

22. At this stage, it is necessary to refer to Section 8 of the RTI Act which reads as under:

> "***8. Exemption from disclosure of information***.-
>
> (1) Notwithstanding anything contained in this Act,there shall be no obligation to give any citizen,-
>
> (a) information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence;
>
> (b) information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court;
>
> (c) information, the disclosure of which would cause a breach of privilege of Parliament or the State Legislature;

(d) information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information;

(e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;

(f) information received in confidence from foreigngovernment;

(g) information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes;

(h) information which would impede the process of investigation or apprehension or prosecution of offenders;

(i) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers:

Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over:

Provided further that those matters which come under the exemptions specified in this section shall not be disclosed;

(j) information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information:

Provided that the information, which cannot be denied to the Parliament or a State Legislature shall not be denied to any person".

23. This Court is unable to accept the plea of the Opposite Parties that the information that stands protected from disclosure under Section 8 of the RTI Act will somehow straightway become available to an applicant in the absence of the impugned notification under Section 24 (4) of the RTI Act. One important factor to be noted is that Section 8 of the RTI Act opens with a non-obstante clause. The other factor is that the category of information that is highlighted in the first proviso to Section 24 (1) and Section 24 (4) of the

RTI Act viz., "information pertaining to the allegations of corruption and human rights violations" is not found mentioned as such in Section 8 of the RTI Act. In other words, what stands protected by Section 8 of the RTI Act would remain as such and additionally when such information pertains to allegations of corruption and human rights violations, the proviso to Section 24 (4) of the RTI Act would have to be considered as well. The exercise under Section 8 of the RTI Act would obviously be on a case-by-case basis. The object of the RTI Act, as spelt out in its Preamble, and the legislative intent and emphasis throughout that disclosure is the norm and withholding of information the exception, will have to be kept in view.

24. In this context, it must be noticed that the 2nd proviso under Section 24 (4) of the RTI Act provides a second layer of protection to a public servant, when it states that the information sought in respect of the allegations of violation of human rights shall be only be provided "after the approval of the State Information Commission". Therefore, it is not as if such information would be straightway made available to a person seeking such information. In processing the request by an applicant seeking information regarding violation of human rights or involving corruption, regard will be had to Section 8 of the RTI Act. That is the true purport of the non obstante clause at the beginning of Section 8 of the RTI Act. In effect, therefore, there is no conflict between Section 8 on the one hand and the proviso to Section 24 (4) of the RTI Act on the other.

25. This distinction was noticed by the Kerala High Court in ***Joseph M. Puthussery v. State Information Commissioner 2012 SCC OnLine Ker 4133*** where it was observed as under:

> "3. The Government has issued Ext.P6 and Ext.P7 notifications in tune with Section 24 (4) of the Right to Information Act, 2005. Several intelligence and security organisations including various wings of the Police Department have been exempted from the Act as per the notifications. The authorities are therefore well founded in not divulging the information sought for by the petitioner which are sensitive in nature. The information sought for do not pertain to allegations of corruption and human rights violation so as to fall within the purview of proviso to section 24(4) of the Act. Any report regarding the Goonda Police nexus cannot be divulged to the public as it is likely to be misused. The correctness of such report is yet to be established and the identity of the informants cannot be revealed lest it would act as a deterrent."

26. It is thus seen that on a case-by-case basis it should be possible for the PIO or for that matter the State Information Commission, while considering whether certain information is governed by Section 8 of the RTI Act and should therefore not be divulged straightway to also keep in view the first proviso to Section 24 (4) of the RTI Act. That is sufficient answer to the apprehension expressed by the Opposite Parties that but for the impugned notification, the information pertaining to investigation in criminal cases and other sensitive information concerning disciplinary inquiries will per force have to be disclosed to an applicant in terms of the proviso to Section 24 (4) of the RTI Act. Thus, as regards the process to be adopted in dealing with the applications under the proviso to Section 24 (4) of the RTI Act, inasmuch as Section 8 of the RTI Act opens with a non-obstante clause, if the information sought is covered thereunder it can be disclosed after satisfying the requirements of Section 8 of the RTI Act with regard being had to the true purport of the proviso Section 24 (4). In this context the following observations of the Delhi High Court in ***B.S. Mathur v. Public Information Officer (2011) 125 DRJ 508*** are relevant:

> "19. The question that arises for consideration has already been formulated in the Court's order dated 21st April 2011: Whether the disclosure of the information sought by the Petitioner to the extent not supplied to him yet would "impede the investigation" in terms of Section 8 (1) (h) RTI Act? The scheme of the RTI Act, its objects and reasons indicate that disclosure of information is the rule and non-disclosure the exception. A public authority which seeks to withhold information available with it has to show that the information sought is of the nature specified in Section 8 RTI Act. As regards Section 8 (1) (h) RTI Act, which is the only provision invoked by the Respondent to deny the Petitioner the information sought by him, it will have to be shown by the public authority that the information sought "would impede the process of investigation." The mere reproducing of the wording of the statute would not be sufficient when recourse is had to Section 8 (1) (h) RTI Act. The burden is on the public authority to show in what manner the disclosure of such information would 'impede' the investigation. Even if one went by the interpretation placed by this Court in W.P. (C) No.7930 of 2009 [Additional Commissioner of Police (Crime) v. CIC, decision dated 30th November 2009] that the word "impede" would "mean anything which would hamper and interfere with the procedure followed in the investigation and have the effect to hold back the progress of investigation", it has still to be demonstrated by the public authority that the information if disclosed would indeed "hamper" or "interfere" with the investigation, which in this case is the second enquiry."

27. The above decision is also an answer to the apprehension expressed by the Opposite Parties that if the RTI Act were to be made applicable to the

Vigilance Department then sensitive information pertaining to criminal investigation would become easily available to an applicant. Such requests will obviously be evaluated on a case-by-case basis, applying, where it is so warranted, Section 8 of the RTI Act. That, however, cannot be the justification for exempting the entire Vigilance Department from the purview of the RTI Act. Strangely, the argument of the Opposite Parties in support of the impugned notification misses the point that if the RTI Act is entirely excluded from application, then the shield of Section 8 of the RTI Act would also not be available.

28. Not each and every aspect of the functioning of the Vigilance Department would involve issues concerning security and the sanctity of investigation. There could be many an instance where the information concerning an organization would not be amenable to protection from disclosure. One such information could be that pertaining to recruitment in the organisation. In ***Bipan Modi v. State of Punjab 2012 SCC OnLine P&H 18520***, the Court negatived the plea that information pertaining to recruitment in the Police Department would be protected from disclosure. The Court held as under:

> "The object of granting exemption to police or allied departments vide the above reproduced notification is to protect the confidential, sensitive information pertaining to the intelligence or Security Organizations in accordance with Section 24 (4) of the Act. The notification dated 23.2.2006 (Annexure P-2) issued by the Government of Punjab has to be construed in the context of object sought to be achieved by Section 24(4) of the Act which in no certain terms further provides that "information pertaining to the allegations of corruption and Human Rights violations shall not be excluded under this sub-section". If there were selections based upon considerations other than merits, will it not amount to a kind of 'corruption' in the matter of public employment?"

29. Again, in ***Md. Abid Hussain v. State of Manipur 2015 SCC OnLine Mani 129***, the Manipur High Court had occasion to examine the scope and ambit of Section 24 (4) of the RTI Act. It was held as under:

> "[15] The legislature in their anxiety to keep certain organisations which are engaged in activities involving sensitive information, secrecy of the State, have sought to keep these organisations away from the purview of the Act by including such organisations in the Second Schedule of the Act as far as Central Organisations are concerned and in the official gazette in respect of State organisations. It does not, however, mean t hat all in formation relating to these organisations are

completely out of bound of the public. For example, even though the Central Bureau of Investigations is one of the organisations included in the Second Schedule to the Act,it does not mean that all information relating to it are out of bound of the public. If one looks at the website of the Central Bureau of Investigation which is in the public domain, there are so many information about the organisation which are already voluntarily made open to the public. This is for the simple reason that disclosure of these information does not in any way compromise with the integrity of the organisation or confidentiality of the sensitive nature of works undertaken by this organisation.The purpose of excluding all these organisations from the purview of the Act as provided under Section 24 is to merely protect and ensure the confidentiality of the sensitive works and activities undertaken by these organisations. *Therefore, if there are any information which do not impinge upon the confidentiality of the sensitive activities of the organisation and if such information is also relatable to the issues of corruption or violation of human rights, disclosure of such information cannot be withheld. Similarly, in respect of the police organisations in the State of Manipur if anybody seeks any information which does not touch upon any of the sensitive and confidential activities undertaken by the police department and if the said information also can be related to the issues of any allegation of corruption or violation of human rights, such information cannot be withheld*. We may further clarify this position by borrowing the concept of doctrine of "pith and substance". … Though this doctrine cannot be invoked to decide the issue raised in this petition, the principle behind it may be referred to while deciding the issue at hand. By doing so, this Court will hold that if any information relates to the core activity of the organisation because of which such an organisation has been excluded from the purview of the Act, any such information can be withheld except which relates to allegation of corruption and violation of human rights. Therefore, if there be any information which does not relate to the principal or the core function of the organisation which is sought to be protected by including in Section 24 of the Act, but if it can have some reference or relatable to corruption or violation of human rights, such an information cannot be withheld. It may be observed that the core function of the police organisation is to maintain law and order, security of the State and discharge such activities which are related to and ancillary to these functions. It that context, undertaking the exercise of a recruitment process is not part of the core function of the police department. It is some function which could be outsourced to any other agency like the Public Service Commission etc. and this activity does not form part of the core function of the Police Department which cannot be outsourced to any other agency. Of course, recruitment of intelligence officials may form part of the core function. But in the present case, such is not the case. The recruitment in issue is the general recruitment process of the personnel of the police department generally."

"[11] Thus, a reading of the aforesaid provisions of the Act would clearly show that what had been taken out from the purview of the Right to Information Act, 2005 by the main part of sub-Section 4 of Section 24 of the Act, has been brought back by the proviso as far as information pertaining to allegations of corruption and human rights violation are concerned. In other words, even if any intelligence or security organisations have been excluded from the purview of the Act on the basis of

notification issued in the official gazette by the State such exemption would not be applicable as regards information pertaining to allegations of corruptions and human rights violence. Hence, if the information sought for pertains to allegations of corruptions and human rights violence, even in respect of such intelligence and security organisations, the provisions of the Right to Information Act, 2005 will be applicable. In that context, the expression "information pertaining to allegations of corruption and human rights violence" needs to be understood properly for if any information is covered by the said expression, the authorities are under obligation to provide the information.

[12] This Court respectfully agrees with the reasoning and conclusion arrived at for holding that information in the nature sought for in the said case could not be withheld and ought to be disclosed. In the present case, the information sought for relates to the marks obtained by the successful candidates as well as the petitioner and it is the case of the petitioner that the information sought for before this Court is to dispel any doubt over corruption. Therefore, it can be said that the information sought for by the petitioner in the present case also pertains to the allegations of corruption. In this respect, it may be observed that the expression used in this provision is about "information pertaining to the allegations of corruption" and not "information pertaining to corruption". The earlier expression is of wider import. As per the earlier expression which has been used in the statute, the allegation need not be about a proven corruption or clearly shows existence of corruption. Allegation of corruption may or may not result in proving existence of corruption but there must be indication of the possibility of existence of corruption. However, it does not mean that anybody can seek information by making an allegation of corruption. There must be some proximity or nexus with the information sought and possibility of a corruption. In the present case, if it is found on the basis of the information sought by the petitioner that persons who do not otherwise qualify in terms marks obtained by the candidates have been included in the select list, obviously, the charge of corruption can certainly be validly raised. To that extent such information sought for by the petitioner can be said to be pertaining to allegations of corruption. It is not necessary that the information so furnished would prove an instance of corruption. It would be sufficient if the information so provided leads to a genuine complaint or allegation about the existence of corrupt practice.Therefore, this Court would hold that if the information sought for has a proximate link with the charge of corruption, such information would be covered by the expression "information pertaining to allegations of corruption". Similar position is with the case where there is allegation of human rights violation. The information sought for so provided per se may not establish corrupt practice or violation of human rights but it forms a valid and reasonable basis for making allegations of corrupt practice or violation of human rights, such information would come within the scope of the expression "information pertaining to allegations of corruption and human rights violation". This Court would hold that if any such information has the potential to raise a serious question of the existence of corruption or violation of human rights, it can be certainly considered to be "pertaining to allegations of corruption and human rights violation". In that event, such information cannot be withheld, if sought for.

> [13] One may look at this issue from another perspective. The exclusion of certain organisations under the main provisions of Sub-sections (1) and (4) of Section 24 is to ensure efficient functioning and operations of the Government, optimum use of limited fiscal resources, preservation of confidentiality of sensitive information and as such other public interest and to protect such other public interest as clearly mentioned in the Preamble to the Act. It is a well established principle that provisions of preamble could be invoked for a proper construction of the statute if the language used is too general. As already discussed above, the expression used in the proviso i.e., "information pertaining to allegations of corruption and human rights violence" is of too general and of wide amplitude which has not been defined in the Act or any cognate Act. However, giving a too wide interpretation may defeat the very purpose of ensuring preservation of the public interests as clearly mentioned in the Preamble. Therefore, a balanced and reasonable interpretation of the said expression can be done by referring to the Preamble as mentioned above. The Preamble is a key to open the mind of the Legislative and proves the board parameters of the enactment which impelled the lawmakers to craft such statutes."
>
> (emphasis supplied)

30. The above nuanced interpretation by the Manipur High Court of the scope of the proviso to Section 24 (4) of the RTI Act, with which this Court respectfully concurs, is not to be found in the earlier decisions of the Allahabad High Court in ***Saleem Baig v. State of U.P. (supra)*** or the Madras High Court in ***Superintendent of Police v. M. Kannappan (supra)*** which purportedly negatived the challenge to the constitutional validity of similar notifications under Section 24 (4) of the RTI Act.

31. Again, in ***First Appellate Authority-cum-Additional Director General of Police v. Chief Information Commissioner, Haryana AIR 2011 P&H 168***, the Punjab and Haryana High Court examined the scope of the expression "information pertaining to allegations of corruption and human rights violation" and in that context whether information in respect of employment in public post can be said to be "information pertaining to allegations of corruption and human rights violation". While directing disclosure of the information sought for to be provided, it was pointed out that public officers should be attentive, fair and impartial in the performance of their functions and not give undue preferential treatment to any group or individuals. The information sought was in respect of number of vacancies and whether the posts were filled up from amongst the eligible candidates. Disclosure of such information, according to the High Court, lead to transparent administration which would be antithesis of corruption.

32. Turning to the decision of the Madras High Court in S. Vijayalakshmi (supra) on which considerable reliance has been placed by the Opposite Parties, the issue there was concerning the interpretation of Section 24 (1) of the RTI Act granting full exemption to the CBI as an organisation from the applicability of the RTI Act. The High Court did not accept the plea that such an exemption under Section 24 (1) of the RTI Act could be termed as a blanket exemption. Terming as 'misconceived' the contention of the Petitioner there "that in view of the exemptions contemplated under Section 8(1) of the RTI Act there would be no necessity for a blanket exemption under Section 24(1) of the Act", the Madras High Court proceeded to explain as under:

> "22. Repeated reference has been made by stating that the exemption under section 24(1) is a blanket exemption or in other words a whole sale exemption. In the preceding paragraphs we have reproduced section 24 of the Act. In terms of subsection (1) of section 24, nothing contained in the RTI Act shall apply to the Intelligence and Security organisation specified in the second schedule being organisations established by the Central Government or any information furnished by such organisations to that Government. As noticed above, first proviso to section 24(1) of the Act states that information pertaining to the allegations of corruption and human right violation shall not be excluded under section 24 (1) of the Act. In terms of the second proviso, to sub section (1) of section 24, that in case of information sought for is in respect of allegations of violation of human right, the information shall only be provided after the approval of the Central Information Commission and notwithstanding anything contained in section 7 (which deals with the disposal of requests), and such information shall be provided within 45 days from the date of receipt of request. Therefore, it can hardly be stated to be case of a whole sale exemption or a blanket exemption. If an RTI applicant comes with a query alleging corruption in any of the Agencies or Organisations, listed out in the Second Schedule to the RTI Act, such information sought for is bound to be provided and the protection under section 24(1) cannot be availed of. Similar is the case relating to violation of human rights. Therefore, the safeguard is inbuilt in the Statute so as to ensure that even in respect of the Agencies or Organisations listed out in the Second Schedule are not totally excluded from the purview of the RTI Act."

33. Thus, the Madras High Court did not find a notification issued under Section 24 (1) of the RTI Act to be a 'blanket' exemption and gave importance to the first proviso thereto. It clarified that insofar as the information sought pertained to "allegations of corruption and human rights violations" its disclosure cannot be prevented under the shield of a notification under Section 24 (1) of the RTI Act. In doing so the Madras High

Court drew on the decision of the Supreme Court in ***Central Board of Secondary Education v. Aditya Bandopadhyah [2011] (8) SCALE 645*** where, it explained, it was held that the RTI Act "seeks to bring about a balance between two conflicting interests as harmony between them is essential for preserving democracy" and that Sections 3 and 4 seek to achieve the first objective i.e. to bring about transparency and accountability and sections 8, 9, 10 and 11 to achieve the second objective viz. to ensure that revelation of information does not conflict with other public interest which include preservation of confidentiality of sensitive information. Therefore, it was held that "Section 8 should not be considered to be fetter on the right to information, but as an equally important provision protecting other public interest essential for the fulfillment and preservation of democratic ideals." Later, another Bench of the Madras High Court in ***Superintendent of Police v. R Karthikeyan AIR 2012 Mad 84***, held likewise viz., a notification under Section 24 (4) of the RTI Act would not prevent disclosure of information "pertaining to allegations of corruption and human rights violations."

34. Indeed, information pertaining to allegations of corruption and human rights violations has been legislatively identified by the RTI Act as a species as deserving of a different treatment in terms of disclosure, which is what is highlighted by the first proviso to both Section 24 (1) as well as Section 24 (4) of the RTI Act. If Section 8 is read with Section 24 of the RTI Act, as it has to since no provision can be viewed as otiose, then it becomes apparent that even while dealing with requests for information falling in the domain of Section 8 of the RTI Act, if such information pertains to allegations of human rights violations or corruption, regard will have to be had to the first provisos to Section 24 (1) Section 24 (4) of the RTI Act.

35. The upshot of the above discussion is that this Court finds that the impugned notification in so far as it seeks to exempt the entire Vigilance Department of the Government from the view of the RTI Act would run counter to the 1st proviso to Section 24 (4) of the RTI Act. In other words, the notification insofar as it prevents disclosure of information concerning the General Administration (Vigilance) Department even when it pertains to allegations of corruption and human rights violations would be contrary to the first proviso to Section 24 (4) of the RTI act and, by that yardstick, would be unsustainable in law. If under the RTI Act disclosure is the norm, and non-disclosure the exception, then the impugned notification seeks to take away what is provided by the RTI Act and is therefore ultra vires the RTI Act.

36. In effect, therefore, by virtue of this decision of the Court, the General Administration (Vigilance) Department of the Government of Odisha cannot, notwithstanding the impugned notification dated 11th August 2016, refuse to divulge information pertaining to corruption and human rights violations, which information is expressly not protected from disclosure by virtue of the first proviso to Section 24 (4) of the RTI Act. Also, information that does not touch upon any of the sensitive and confidential activities undertaken by the Vigilance Department, cannot be withheld.

37. For all of the aforementioned reasons, this Court issues a declaratory writ to the effect that the impugned notification dated 11th August, 2016 issued by the Information and Public Relations Department, Government of Odisha under Section 24 (4) of the RTI Act, will not permit the Government to deny information pertaining to the Vigilance Department involving allegations of corruption and human rights violations, and other information that does not touch upon any of the sensitive and confidential activities undertaken by the Vigilance Department. A further clarificatory notification to the above effect be issued by the Government of Odisha within four weeks.

38. The writ petitions are disposed of in the above terms, but in the circumstances, with no order as to costs.

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2022 (II) ILR - CUT- 294

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

W.P.(C) NO.12026 OF 2010

M/s. MARUTI ESTATE INDIA (P) LTD. ……..Petitioner

.V.

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

ORISSA ESTATE ABOLITION ACT, 1951 – Section 38-B – Limitation – Exercise of revisional jurisdiction after lapse of 56 years – Effect of – Held, not proper – The revisional power conferred U/s 38-B of the OEA Act should be exercised in a reasonable manner which inheres the concept of exercise of power not arbitrarily and rather, absence of

limitation is an assurance to exercise the power with caution and circumspection to effectuate the purpose of the Act – The revisional jurisdiction after 56 years ought not have been exercised – In the impugned order no satisfactory explanation has been indicated by Opp. No.2 – The impugned order set-aside – Writ petition allowed.

(Para-8)

Case Laws Relied on and Referred to :-

1. (2003) 7 SCC 146 : State of Orissa Vs. Nityanand Satpathy & Ors.
2. 2009 (1) OLR SC 1100 : State of Orissa & Ors.Vs. Harapriya Bisoi.
3. AIR 2014 SC 1141: Chennai Metropolitan Water Supply and Sewerage Board & Ors. Vs. T.T. Murali Babu.
4. AIR 2015 SC 1021: Jt. Collector, Ranga Reddy Dist. & Anr. Vs. D. Narasingh Rao & Ors.
5. 1996 (II) OLR 262 : Nityanand Satpathy & Ors.Vs. Member, Board of Revenue & Ors.
6. 1993 (III) OLR 365: Labanyabati Devi & Ors.Vs. Member, Board of Revenue & Ors.
7. 2014(I) OLR 825 : Smt. Parbati Mohapatra & Anr. Vs. State of Orissa & Ors.

For Petitioner : Mr. N.P. Parija

For Opp. Parties : Mr.D.K. Mohanty, AGA

JUDGMENT Date of Judgment : 20.06.2022

R.K.PATTANAIK, J.

1. Instant writ petition under Article(s) 226 and 227 of the Constitution of India, 1950 is at the behest of the Petitioner questioning the correctness, legality and judicial propriety of the impugned order dated 17th August, 2009 (Annexure-6) passed in OEA Revision Case No.21 of 1998 by the Member, Board of Revenue (OP No.2) under Section 38-B of the Orissa Estates Abolition Act, 1951 (hereinafter referred to as 'OEA Act') on the grounds inter alia that the jurisdiction was exercised arbitrarily and with considerable delay and therefore, deserves to be set aside in order to do substantial justice.

2. By order under Annexure-6, jurisdiction under Section 38-B of the OEA Act, which according to the Petitioner, was exercised after 56 years despite the fact that in Nijdakhal Case No.480 of 1959-60, the schedule land was settled with the intermediary,who, thereafter, sold it to the vendees under RSD No.3534 dated 19th March, 1962, whereafter, there was an amicable partition held between the purchasers and even part of the mortgaged

property was disposed of by an auction in E.P. Case No.1683 of 1984-85 for clearing a loan with the Land Development Bank, Puri and in so far as Ac.10.2 decimals of land in the share of Annapurna Suar is concerned, the same was settled with the raiyats under Section 36A of the OLR Act, 1960 in OLR Case Nos.1221 of 1976 and 572 of 1997 and thereafter, the raiyats further sold it to Petitioner under Annexures-3,4&5, inasmuch as, the aforesaid facts were not duly taken cognizance of by OP No.2, who straightaway directed correction of ROR, which is not at all tenable in law.

3. Heard Mr. N.P. Parija, learned counsel for the Petitioner and Mr. D.K. Mohanty, learned AGA for the State.

4. Mr. Parija contends that OP No.2 arbitrarily unsettled the order of the OEA Collector in OEA Nijdakhal Case No.480 of 1959-60 notwithstanding the fact that the schedule land, after several transfers by sale, reached in the hands of the Petitioner through Annexure-3, 4 & 5. The decision of OP No.2 is that the status of the land was anabadi which could not have been settled with intermediaries, who, thereafter, inducted tenants but on its vesting, the same became the subject of the State. In response, Mr. Parija contends that the land was made abadi by the intermediaries and while being in their khas possession was settled in OEA Nijdakhal Case No.480 of 1959-60. It is further contended that OP No.2 could not have ignored the decisions of the OLR authorities, consolidation record of rights as well as the execution and sale of mortgaged property vide E.P. Case No.1683 of 1984-85 and that too exercising the jurisdiction with so much of delay and therefore, the impugned order under Annexure-6 is susceptible and thus, liable to be interfered with.

5. Per contra, Mr. Mohanty, learned AGA would submit that the schedule land was anabadi in status and remained with the State post vesting and therefore, could not have been settled with the intermediaries. While contending so, a decision of the Apex Court in ***State of Orissa v. Nityanand Satpathy and others (2003) 7 SCC 146*** is placed reliance on. One more decision in ***State of Orissa and others v. Harapriya Bisoi 2009 (1) OLR SC 1100*** is cited by Mr. Mohanty which is with reference to Section 5(i) of the OEA Act and further contended that since the claim of the Petitioner is not genuine, it cannot hold good even under a sale vide RSD No.902 dated 13th January,1994 and therefore, the impugned order (Annexure-6) is unassailable.

6. Admittedly, the settlement was made vide Nijdakhal Case No.480 of 1959-60. The circumstances under which the settlement was carried out were elaborately dealt with by OP No.2 in Annexure-6. It was noticed by OP No.2 that initially the intermediaries executed lease deeds but subsequently the settlement was stage managed in Nijdakhal Case No.480 of 1959-60; furthermore, the intermediaries were held not entitled to the settlement of anabadi land notwithstanding any claim to the effect that they had converted it to abadi by plantation or otherwise. Of course, in Nityanand Satpathy (supra), the Apex Court held that anabadi land is to vest in the State free from all encumbrances and the intermediary even though not physically dispossessed would be deemed to have gone out of possession entitling the State to take control of it and further held that the land not in khas possession of the intermediary cannot be settled under Section 7 of the OEA Act. In the instant case, according to the State, if the schedule land was converted to abadi, the intermediary should have moved the authority concerned for carrying out correction in the record of rights and if permitted, then, it would have been recorded in his favour either as nizjot or nijchas or nijdakhal. Admittedly, the record of rights remained as such with the status of the land anabadi, which obviously mean that the intermediary was not allowed to acquire any interest over the same. Indeed, the settlement of the year 1959-60 is under challenge after 56 years, which is one of the grounds challenging the decision of OP No.2. There is no denial to the fact that the lands suffered settlement under the OLR Act, 1960 and even a part thereof had been auctioned in E.P. Case No.1683 of 1984-85. Notwithstanding the fact that there has been a settlement in respect of anabadi land which has been challenged by the Petitioner for being made a party by the intermediaries and the fact that the joint claim petition exceeded the combined ceiling, the question is, whether, under the facts and circumstances narrated herein above, OP No.2 could have exercised jurisdiction under Section 38-B of the OEA Act?

7. Further the Court is to examine, if initiation of proceeding by OP No.2 stands vitiated on account of delay. In fact, there is no limitation prescribed for the exercise of revisional jurisdiction. It is settled law that the power which is to be exercised under Section 38-B of the OEA Act should be in a manner within a reasonable time and ought not to be arbitrary. In this regard, a decision of the Supreme Court in the case of ***Chennai Metropolitan Water Supply and Sewerage Board and others v. T.T. Murali Babu AIR 2014 SC 1141*** may be referred to,wherein, it has been held and observed that doctrine

of delay and laches should not be lightly brushed aside, inasmuch as, a writ court is required to examine the explanation offered and acceptability of the same. It has been further held therein that the Court should bear in mind that it is exercising an extra-ordinary and equitable jurisdiction; and as a constitutional Court, it has a duty to protect the rights of the citizens but at the same time to keep itself alive to the principle that when an aggrieved person without adequate reason approaches the Court at his own leisure or pleasure, the Court could be under legal obligation to scrutinize it. In ***Jt. Collector, Ranga Reddy Dist. and another v.D. Narasingh Rao and others AIR 2015 SC 1021***, the Supreme Court held that delayed exercise of revisional jurisdiction is frowned upon because if actions or transactions were to remain forever open to challenge, it would mean avoidable and endless uncertainty in human affairs which is not the policy of law; even when there is no period of limitation prescribed, for exercise of such powers, the intervening delay may have led to the creation of third party rights which cannot be trampled by a belated exercise of a discretionary power especially when no cogent explanation for the delay is in sight; Rule of law, it is said, must run closely with the rule of life; even in cases where the orders sought to be revised are fraudulent, the exercise of power must be within a reasonable period of discovery of fraud; simply describing an act or transaction to be fraudulent would not extend time for its correction to infinity; and finally concluded that, for otherwise, the exercise of revisional power would itself tantamount to a fraud upon the statute that vests such power in an authority.

8. The same view is expressed in ***Nityanand Satpathy and others v. Member, Board of Revenue and others 1996 (II) OLR 262***,wherein, it has been held that no time limit is fixed for a proceeding under Section 38-B of the OEA Act but power should be exercised in a reasonable manner which should depend on the facts of each particular case and similarly in ***Labanyabati Devi and other v. Member, Board of Revenue and others 1993 (III) OLR 365*** and ***Smt. Parbati Mohapatra and another v. State of Orissa and others 2014(I) OLR 825***. In fact, in ***T.T. Murali Babu*** (supra), the Apex Court observed that delay does bring in hazard and causes injuries to the litigants and may have impact on others' ripened rights and could unnecessary drag persons to litigation which, in acceptable realm of probability, may have been treated to have attained finality. As is understood, on a sincere reading of the above decisions, revisional power conferred under Section 38-B of the OEA Act should be exercised in a reasonable manner

which inheres the concept of exercise of power not arbitrarily and rather, absence of limitation is an assurance to exercise the power with caution and circumspection to effectuate the purpose of the Act. The aforesaid principle enunciated by the Supreme Court appears not to have been appreciated by O.P.No.2 in its proper perspective. There is no denial to the fact that the revisional jurisdiction has been exercised by OP No.2 after considerable delay since the settlement is of the year 1959-60. A question of fact regarding the status of land as anabadi alleged to have been settled with the intermediaries was raised before O.P.No.2 after such a long lapse of time. The intermediaries sold the schedule land in 1962 and as pleaded, the vendees have had a partition among themselves and thereafter, it changed hands and finally reached to the Petitioner,who purchased the same vide Annexure-3,4 & 5. Not only that, in respect of the land to the tune of Ac.10.2 dec., proceedings under Section 36A of the OLR Act, 1960 were initiated in OLR Case No.1221 of 1976 and OLR Case No.572 of 1997, where after, the raiyats sold and taking into account the above facts and that the property mortgaged with the Land Development Bank, Puri was subsequently auctioned to different persons in E.P. Case No.1683 of 1984-85, the Court is of the considered view that the revisional jurisdiction after about 56 years ought not to have been exercised by O.P.No.2. As a writ court, it is required to consider the explanation offered for exercising such a jurisdiction. This Court is exercising an equitable jurisdiction, so to say. As a constitutional Court, it has a duty and obligation to protect the rights of the litigants and to strike a balance to ensure that injustice does not result. In the impugned order (Annexure-6), no satisfactory explanation has been indicated by O.P.No.2 for exercising the jurisdiction under Section 38-B of the OEA Act except by alleging that there has been illegality committed by the authority concerned in settling the land vide Nijdakhal Case No.480 of 1959-60 in favour of the intermediaries and according to the Court, that by itself cannot be treated as a just ground to interfere with the settlement. Apart from the above, the interests and rights of the Petitioner which have ripened ever since the purchases made vide Annexure-3,4&5 having derived it from a settlement of the year 1959-60 should have been taken note of by O.P.No.2 while taking a decision in respect thereof. In absence of any such consideration by O.P.No.2, the inevitable conclusion of the Court is that the impugned order under Annexure-6 vis-à-vis the Petitioner cannot be sustained.

9. Accordingly, it is ordered.

10. In the result, the writ petition stands allowed. As a necessary corollary, the impugned order dated 17th August, 2009 (Annexure-6) passed in OEA Revision Case No.21 of 1998 by O.P.No.2 in exercise of jurisdiction under Section 38-B of the OEA Act is hereby set aside as against the Petitioner. Consequently, the order of status quo dated 3rd August, 2010 passed by this Court in M.C. No.11276 of 2010 is vacated.

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2022 (II) ILR - CUT- 300

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

STREV NO.109 OF 2008

M/s. RADHAKESHAV RICE MILL PVT.LTD. ……..Petitioner

.V.

STATE OF ODISHA ……..Opp. Party

ORISSA SALES TAX ACT, 1947 – Enhancement of the tax demand – Whether enhancement of turnover on absence of any materials to establish that the goods found short have been sold is justified? – Held, No – The shortage of stock simplicitor cannot alone be a ground for enhancement of turnover unless the department is able to show that it was sold.

In the present case there is no material brought to record from the side of the department to suggest that the shortage stock was sold by the petitioner & the tribunal was not right in directing the enhancement – The Petition allowed. (Para-10)

Case Laws Relied on and Referred to :-

1. 1983 54 STC 218 (Ori) : Mahabir Rice Mill Vs. State of Orissa.
2. O.J.C. No.286 of 1968 : Laxminarayan Sawalram Vs. State of Orissa .

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

For Opp. Party : Mr. Sunil Mishra, SC (CT & GST)

JUDGMENT Date of Judgment: 20.06.2022

R. K. PATTANAIK, J.

1. This is an application under Section 24(1) of the Orissa Sales Tax Act, 1947 (Repealed Act) (hereinafter referred to as 'the OST Act') read with

Section 104 of the Orissa Value Added Tax Act, 2004 filed by the Petitioner assailing the impugned order dated 11th April, 2007 (Annexure-3) passed in S.A. No.1051 of 2000-01 by the Orissa Sales Tax Tribunal, Cuttack (shortly as 'the Tribunal') for having enhanced the tax demand on the grounds inter alia that the same is beyond jurisdiction and not based on material facts on record and thus, liable to be set aside.

2. Taking into account the issues involved, the following questions of law are hereby taken up for consideration, namely,

> (a) Whether, in the facts and circumstances of the case, the order of the Tribunal enhancing the assessment without taking recourse to Rule 50(3) of the Orissa Sales Tax Rules, 1947 (in short 'the Rules') is sustainable in law?
>
> (b) Whether enhancement of turnover in absence of any materials to establish that the goods found short have been sold is justified in view of the ratio decided in the case of ***Mahabir Rice Mill v. State of Orissa reported in 1983 54 STC 218*** (Ori)?
>
> (c) Whether the determination of sales turnover by the Tribunal can be held to be based on lawful and valid nexus and sustainable in law?
>
> (d) Whether, in the facts and circumstances of the case, disposal of second appeal by the Tribunal without compliance of Rule 57 of the Rules for service of notice inviting cross-objection is justified in view of Section 23(3)(b) of the OST Act read with Rule 52 of the Rules?

3. In fact, in the present case, fraud case reports alleging purchase and sales suppression of paddy, rice and broken rice by the Petitioner were received, whereafter, proceeding under Section 12(4) of the OST Act for the period 1997-98 was initiated. As a result, the Sales Tax Officer, Sambalpur-I Circle, Sambalpur (in short 'the STO') recomputed the tax and directed the Petitioner to pay the balance amount of Rs.3,41,352/-. The said demand was challenged by the Petitioner before the Assistant Commissioner of Sales Tax, Sambalpur Range, Sambalpur (in short 'the ACST') which was partly allowed and the assessment was reduced by Rs.2,51,748/- with a direction to refund the excess payment, if any made. Against the aforesaid order of the ACST, appeal was carried to the Tribunal by the State which was allowed in part enhancing the assessment by Rs.2,46,937/-. So to say, the enhancement was upheld to the extent indicated and the Petitioner was directed to pay the balance tax under Annexure-3.

4. According to the Petitioner, the reports submitted by the Vigilance Unit, Sambalpur alleged shortage of 18.85 Quintals of paddy and 0.51 Quintals of rice which was explained away before the authorities for being on account of driage which is within the permissible limit and in respect of the other report on purchase suppression of 1899.15 Quintals of paddy and sales suppression of 4.88 Quintals of rice besides 01 Quintal of broken rice, the same was clarified by stating that the discrepancies have been due to improper stock taken on sampling basis by the inspecting officers and also on account of driage but then, the STO without accepting the above explanation, estimated suppression at Rs.9,00,204.75 and suppressed sales turnover at Rs.62,93,699.35 for the year 1997-98 by applying a multiplier of seven which resulted in extra tax demand of Rs.3,41,352/-. Such additional tax was directed to be paid by the Petitioner under the assessment order dated 4th September, 1998 (Annexure-1). The Petitioner preferred an appeal under Section 23 of the OST Act before the ACST, which, as earlier mentioned, was allowed partly and the assessed demand was reduced by Rs.2,51,748/-. In other words, the ACST accepted the stand of the Petitioner with regard to the allegation on purchase suppression. On the sales suppression, basing on detection of shortages or excess stock of paddy, rice, broken rice, the ACST held that it could not be established and hence, waived the enhancement and deleted the demand of Rs.2,51,748/- by an order dated 30th June, 2000 (Annexure-2). Against that order, the State filed appeal before the Tribunal which led to the passing of the impugned order i.e. Annexure-3.

5. Heard Mr. Jagabandhu Sahoo, learned Senior Advocate appearing for the Petitioner and Mr. Sunil Mishra, learned ASC.

6. Whether, such enhancement directed by the Tribunal under Annexure-3 is legally justified? The Petitioner's contention is that the inspecting officers adopted sampling method while taking the weighment of stock which is impermissible but it was not properly appreciated by the Tribunal as it has also not considered the specific objection regarding the weight of each bag taken at 75 Kg as the paddy kept in the bags ranged from 62-75 Kg, as earlier the Vigilance Wing had taken the stock @ 64 Kg per bag but it has been erroneously pegged at 75 Kg each bag at the time of inspection and subsequently stood accepted by the authority concerned. Mr. Sahoo contends that the allegation of excess stock giving rise to the claim of purchase suppression is not valid and lawful for which the impugned enhancement of turnover by the Tribunal is manifestly illegal and arbitrary. It is submitted

that the enhancement was directed by the Tribunal without due notice which is required as per Rule 50(3) of the Rules, and while claiming so, an order dated 12th March, 2008 of this Court in STREV No.245 of 2007 decided in ***M/s Utkal Sales Corporation v. State of Orissa*** and disposed on 12th March, 2008 is placed reliance. It is further contended that the appeal by the Tribunal was disposed of without complying Rule 57 of the Rules, whereby, notice is issued for filing of cross-objection. As regards, the sampling method which was adopted by the inspecting officers and later on approved by the Tribunal, Mr. Sahoo would contend that the stock discrepancy cannot be justified on such a ground and in that connection referred to thedecision of ***Mahabir Rice Mills*** supra. It is the submission of Mr. Sahoo that same view as above has been expressed by this Court in ***Yadurish Raj Jhunjhunwala v. SCT 67 STC 381 and Laxminarayan Sawalram v. State of Orissa*** (decided on 20th July, 1971 in O.J.C. No.286 of 1968). Mr. Mishra, learned ASC, on the other hand, submits that there is no error or illegality committed by the Tribunal in reaching at the conclusion under Annexure-3 and rightly the assessment was enhanced and additional tax was demanded, which is, therefore, calls for no interference.

7. One of the contentions of the Petitioner is that the Tribunal without issuing any notice under Rule 50(3) of the OST Rules enhanced the assessment, which is not permitted in law. The order of this Court in ***M/s Utkal Sales Corporation*** (supra) was referred to, while contending that a similar mistake has been committed by the Tribunal in the present case and therefore, the additional demand is unsustainable. On a bare reading of the impugned order under Annexure-3, it appears that the enhancement was directed not in compliance of Rule 50(3) of the Rules and therefore, in the considered view of the Court, the basic principle of natural justice and the relevant provision in the OST Rules have not been followed. In a similar situation, the enhanced assessment directed by the Tribunal was interfered with in the case of ***M/s Utkal Sales Corporation*** and the matter was remanded for a fresh consideration in accordance with law.

8. As to the other grounds raised by the Petitioner that notice was not issued in terms of Rule 57 of the OST Rules, it is contended that the same was not complied while disposing of the appeal and hence, the enhancement is not tenable in law in view Section 23(3)(b) of the OST Act read with Rule 52 of the OST Rules for the purpose of filing of cross-objection. In any case, the Petitioner could have filed a cross-appeal, had it been aggrieved by any

part of the order of the ACST. Nevertheless, the Tribunal had an obligation to issue a notice to the Petitioner for submission of cross-appeal as is required under Rule 57 of the OST Rules.

9. Furthermore, the STO declined to accept the explanation offered by the Petitioner towards the shortage in stock to the extent of 1899.15 Quintals of paddy which was based on sampling method on the ground that on the date of inspection, the dealer was present and admitted that each bag of paddy weighed 75 Kg. However, the ACST held that the shortage in stock of paddy, rice, broken rice is bound to occur in course of storage and handling and that apart, the inspection unit counted it on eye estimation by taking each bag of paddy at uniform rate of 75 Kg without weighment being done physically and while doing so, it should have been confronted to the Appellant with the observation that the Vigilance Wing previously had taken the stock sample @ 64 Kg per bag and hence, rejected the allegation of sales suppression. The above conclusion was overruled by the Tribunal but then, it allowed the enhancement by Rs.2,46,937/- and the assessment order of the STO was thereby reduced by Rs.4,811/-. Apart from the above contentions raised by Mr. Sahoo, another ground is taken which is to the effect that even if the unexplained shortage of stock is shown, the enhancement of taxable turnover cannot be sustained unless it is further proved that the stocks were sold by the assessee, which is the view expressed by this Court in ***Laxminarayan Sawalram*** (supra) and the same was reiterated in STREV No.2 of 2008 in the case of ***M/s Gupta Distributors, Cuttack v. State of Orissa*** decided on 22nd March, 2022. When there has been an observation by the ACST that the Vigilance Wing previously had taken the stock on sample weighment @ 64 Kg per bag, in the opinion of the Court, to rely upon the report of the inspecting officers tagging each bag @ 75 Kg and that too measured on eye-estimation would not be proper, which is also claimed not to have been confronted to the Petitioner. Such eye-estimation is not a proper method while taking measurement of bags of paddy without real weighment being done at the time of inspection, the fact which was rightly appreciated by the ACST. In fact, in such measurement, a risk is involved to have the proper assessment as to the weight of each bag of paddy. The aforesaid aspect was not duly taken cognizance of by the Tribunal, while enhancing the assessment.

10. That apart, mere stock deficiency by itself could not be sufficient unless it is specifically shown that the suppressed stock was, in fact, sold by

the assessee. In ***Mahabir Rice Mills*** as well as ***Laxminarayan Sawalram*** ibid, it has been categorically held and observed by this Court that shortage of stock simplicitor cannot alone be a ground for enhancement of turnover unless the Department is able to show that it was sold. In ***M/s Gupta Distributors*** case, this Court reiterated the said view, while interfering with the enhancement directed by the Tribunal,thereby, restoring the decision of the ACST. In the present case, there is no material brought on record from the side of the Department to suggest that the shortage stock was sold by the Petitioner. Therefore, in absence of any such evidence, it would not be just and proper to hold that there was deficiency in stock and so the suppression of sales by the Petitioner. Apart from that, the shortage in stock is based on mere eye-estimation of the inspecting officers, which as discussed earlier, may not be sufficient for the purpose of fixing liability against the Petitioner. In any case, since the shortage of stock, even if it is assumed, per se cannot be a ground for enhancement of turnover, since no material evidence is produced by the Department to further indicate that the same was sold by the Petitioner. Having said that, the Court reaches at a conclusion that the Tribunal was not right in interfering with the order of the ACST and directing enhancement.

11. Accordingly, for the discussions made herein above, the predominant issue with regard to the enhancement of turnover and decision thereon by the Tribunal cannot be sustained. In other words, the issues involved are answered in favour of the assessee and against the Department.

12. In the result, the revision petition stands allowed. As a necessary corollary, the impugned order under Annexure-3 passed in S.A. No.1051 of 2000-01 by the Tribunal is set aside and the order of the ACST in STA Case No.AA153 (SAI) of 1998-99 dated 7th September, 2000 is hereby restored. However, in the circumstances, there is no order as to costs.

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2022 (II) ILR - CUT- 306

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

W.P.(C) NO. 33441 OF 2021

DIPTI PRASAD DAS ……..Petitioner

.V.

CHIEF MANAGER AND AUTHORISED OFFICER, PUNJAB NATIONAL BANK, BHUBANESWAR ……..Opp. Party

(A) CONSTITUTION OF INDIA, 1950 – Article 226 and 227 – Whether a Writ of mandamus can be issued by the High Court in exercise of power under Article 226 of the Constitution of India directing a financial institution / bank to positively grant benefit of OTS to a borrower– Held, No – The grant of benefit under the OTS is always subject to the eligibility criteria mentioned under the OTS scheme having regard to the public interest involving the guidelines issued time to time.

(Para-13.1)

(B) CONSTITUTION OF INDIA, 1950 – Articles 226,227 – Pre-condition for invoking the equitable jurisdiction of a Writ Court – Held, it is the solemn duty of every litigant who approaches the court to disclose all material facts which even remotely may affect the controversy at issue.

(Para-9)

In the present case, we don't feel that the petitioner qualifies for invoking the extra-ordinary equitable writ jurisdiction of this court on the ground of concealment of material facts, which comprises of the previous litigation initiated by the petitioner regarding the same loan account – The Petition is dismissed.

Case Laws Relied on and Referred to :-

1. 2021 SCC Online Del 4256: Pushpa Builder Ltd. Vs. Vaish Cooperative Adarsh Bank Ltd.
2. Civil Appeal No(s).4970-4971 of 2009 : M/s. Sardar Associates & Ors. Vs. Punjab & Sind Bank & Ors .
3. 1994 (1) SCC 1 : S.P. Changalvaraya Naidu (dead) Vs Jagannath.
4. 2021 AIR SC 56 : Bijnor Urban Cooperative Bank Limited, Bijnor Vs. Meenal Agarwal.

For Petitioner : Mr. Alok Kumar Das and Mr. R.B. Mishra,.

For Opp. Party: Mr. Subrata Sadangi, Mr. Milan Kanungo, Sr. Adv. & Mr.Siba Narayan Biswal, for intervenor (Auction Purchaser)

JUDGMENT Date of Hearing: 26.04.2022: Date of Judgment: 28.06.2022

JASWANT SINGH, J.

The petitioner has preferred this writ petition to challenge the notice dated 07.10.2021 issued under Section 13(4) of the SARFAESI Act, 2002 (for short "the Act, 2002") whereby symbolic possession of the mortgaged property was undertaken, prayed for to keep the E-auction scheduled on 28.10.2021 in abeyance and to further direct the Opposite Party/Bank to consider the OTS proposal of the petitioner.

2. The brief facts of the case are that the petitioner, i.e., Mr. Dipti Prasad Das availed a Cash Credit limit loan of Rs.5 crores from the Opposite Party/Bank on 28.06.2013 by mortgaging his immovable property located at Plot No.166/2027, 166/2031/2205, 163/567/2030, 166/656/2029, Khata No.157/297/A at Mouza Bhagababatipur, Chandaka to secure the loan. Due to financial indiscipline, the loan account was classified as NPA on 10.02.2016. Further, a demand notice under Section 13(2) of the Act, 2002 was issued on 18.02.2016 recalling outstanding amount of Rs.5,60,48,436.80 as on 31.01.2016. It is the claim of the petitioner that a notice under Section 13(4) of the Act, 2002 was initially issued on 12.10.2017 taking symbolic possession of the mortgaged property. The petitioner had also sent an OTS proposal to the Opposite Party/Bank on 29.12.2018 which was approved and the petitioner was asked to deposit Rs.4,03,10,401/- (Four Crores Three Lakhs Ten Thousand Four Hundred One Rupees)to settle the loan account. The said OTS Scheme also provided that the settled amount must be paid within 90 days of conveying the approval of OTS to the borrower (petitioner). Further if the whole payment is not made within 90 days, the borrower (petitioner) was required to pay interest at the rate 9.25% on reducing balance basis from the date of conveying approval till the date of final payment. The petitioner was only able to deposit Rs.40,50,000/- (Forty Lakhs Fifty Thousand Rupees) within the stipulated time. It is the claim of the petitioner that further proceedings only began on 07.10.2021 whereby the Opposite Party/Bank again issued a notice under Section 13(4) of the Act, 2002 demanding an outstanding amount of Rs.9,27,73,120.50 as 30.09.2021 and also fixing the auction date on 28.10.2021 with a reserve price of Rs.2,95,00,000/-.

3. The petitioner also claims that the Opposite Party/Bank has come up with a new OTS Scheme namely "SASTRA CIR NO 31", dated 30.06.2021 and he is eligible under such Scheme.

4. During the course of hearing, the Opposite Party/Bank filed a detailed counter affidavit dated 15.11.2021 in reply to the writ petition filed by the petitioner. The said affidavit revealed certain startling facts. It provided that the petitioner has suppressed the fact of his approaching this Court vide writ petitions bearing W.P.(C) No.13569 of 2016, W.P.(C) No.14143 of 2016, W.P.(C) No.23310 of 2017 and W.P.(C) No.18622 of 2019 seeking a similar remedy with respect to the same property. Further, it is submitted vide the same affidavit dated 15.11.2021 that the petitioner has failed to comply with any of the orders or directions passed in the above writ petitions by this Hon'ble Court.

5. It is pertinent to refer to each of the writ petitions separately in order to decide the case.

(i) W.P.(C) No.14143 of 2016 and W.P.(C) No.13569 of 2016 were filed by the petitioner to challenge the earlier symbolic possession notice dated 26.07.2016 and the E-auction notice dated 09.08.2016 issued by the Opposite Party/Bank. The relevant order dated 22.06.2017 of this Court disposing of both the cases is produced below:

> "Learned counsel for opp.party-Bank submits that inspite of paper publication of e-auction notice, because of the pendency of the writ petition, no offer has been received by the Bank. Therefore, auction of the petitioner's mortgaged property could not be held on the date fixed. He also contends that no further action has yet been taken in the matter.
>
> Considering the submissions and in view of the fact that the auction could not be held due to lack of response, we dispose of the writ petitions directing that in case subsequent action for auction of the mortgaged property is taken by the Bank, the same shall be strictly in terms of the provisions of the SARFAESI Act and the Rules made thereunder. The Bank shall ensure that the reserve price of mortgaged property is fixed as per the existing market value.
>
> The writ applications are accordingly disposed of."

(ii) Thereafter, W.P.(C) No.23310 of 2017 was preferred by the petitioner challenging the subsequent E-auction Sale Notice dated 09.10.2017 with

respect to the same property. The order dated 15.11.2017 of this Court is reproduced below:

> "Learned counsel for the Bank on instruction submits that though the auction of the mortgaged property had been put to auction, but it did not yield any response and therefore the mortgaged property could not be sold.
>
> Learned counsel for the petitioner prays for withdrawal of this writ petition with liberty to approach the Bank for settlement of the loan account by sale of the hypothecated goods.
>
> Granting such liberty, the writ petition is disposed of as withdrawn."

(iii) Further, the W.P.(C) No.18622 of 2019 was preferred by the petitioner challenging the E-auction Sale Notice dated 19.09.2019. This Court vide interim order dated 04.10.2019 asked the petitioner to deposit Rs.50,00,000/- with the Opposite Party/Bank by 31.10.2019, and in failure to do so, allowed the Bank to take all consequential steps for realization of the outstanding dues. This Court also directed that the E Auction may continue but the same shall not be confirmed till next hearing.

It transpires that due to non-compliance of the interim order dated 04.10.2019, the petitioner failed to prove/show his bonafides and consequently this Court vide order dated 03.03.2021, dismissed the writ petition and vacated the interim order.

6. The Opposite Party/Bank vide the same affidavit dated 15.11.2021 also provided that the mortgaged property/secured asset was sold to the highest bidder for Rs.2.96 crores in the E Auction dated 28.10.2021. The auction purchaser has also deposited the entire amount in accordance with law and consequently the sale has been confirmed on 01.11.2021. Further, the relevant sale certificate has also been issued.

7. On the argument of the petitioner to consider the OTS Scheme 2021, the affidavit dated 15.11.2021 provided that in accordance with the said OTS Scheme, the petitioner should have approached the Bank by making a required initial deposit, however the petitioner submitted a vague OTS offer of Rs.272.30 lac vide letter dated 28.10.2021 without any token/upfront amount and consequently on consideration, the said proposal was discarded by the Bank.

8. The petitioner filed a rejoinder affidavit dated 30.11.2021 in response to the affidavit filed by the Opposite Party/Bank raising a sole argument that the property was auctioned on much lesser amount than the market value of the said mortgaged property. He also relied on two judgments in the case of ***Pushpa Builder Ltd. v. Vaish Cooperative Adarsh Bank Ltd., 2021 SCC Online Del 4256 and M/s. Sardar Associates & Ors. v. Punjab & Sind Bank & Ors in Civil Appeal No(s).4970-4971 of 2009***.

9. After analyzing the rival arguments and perusing the pleadings with the able assistance of the counsel for the parties, we find that the present writ petition is devoid of any merit and is liable to be dismissed.

10. First of all we would like to take up the question of concealment of the facts by the petitioner as pointed out by the Bank in their affidavit. The petitioners herein did not disclose about the previous litigations neither in their writ petition nor in the rejoinder affidavit. Having filed repeated petitions before this Court, we find that least what could be expected from a litigant is to disclose the previous litigations and the orders obtained from the Courts pertaining the issue involved. Thus, the first reason as to why the present petition cannot be entertained is that the petitioner concealed material facts regarding the filing of the previous petitions against the Opposite Party as noticed above. The intent apparently was to conceal the facts that previously the petitioner failed to prove its bona fide which is sine qua non while examining a claim of a borrower to settle its account under One Time Settlement. We do not appreciate such approach of the petitioner. It is the solemn duty of every litigant who approaches the Court to disclose all material facts which even remotely may affect the controversy at issue. This is one of the pre-condition for seeking to invoke the equitable jurisdiction of a writ Court under Article 226/227 of the Constitution of India.

10.1. Hon'ble Supreme Court ***in S.P. Changalvaraya Naidu (dead) V/s Jagannath 1994 (1) SCC 1*** held as under :-

> "7. The High Court, in our view, fell into patent error. The short question before the High Court was whether in the facts and circumstances of this case, Jagannath obtained the preliminary decree by playing fraud on the court. The High Court, however, went haywire and made observations which are wholly perverse. We do not agree with the High Court that "there is no legal duty cast upon the plaintiff to come to Court with a true case and prove it by true evidence". 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."

In view of the aforesaid judgment, we do not feel that the petitioner qualifies for invoking the extra-ordinary equitable writ jurisdiction of this Court on the ground of concealment of material facts, which comprises of the previous litigation initiated by the petitioner regarding the same loan account.

11. The Second reason for disentitling the petitioner to relief claimed is that petitioner previously has already been granted opportunity to settle the account but failed to do so. It has been noticed that offer of petitioner to settle the loan account was accepted by the Opposite Party Bank on 29.12.2018 for Rs. 4,03,10,401 but the petitioner could pay Rs. 40,50,000 only. The remaining amount since was not paid the settlement became inoperative. Even thereafter, the petitioner approached this Court by filing WP (C) No. 18622 of 2019 vide which E auction proposed to be conducted by the Bank vide sale notice dated 19.09.2019 was challenged. Vide order dated 04.10.2019 the petitioner was granted time to deposit Rs. 50 Lacs to avoid sale of the property at the hands of the bank. This amount admittedly was not deposited. Even now, when the property was put to sale the petitioner has approached this Court claiming similar relief of consideration of his case for settlement of the loan account under the Policy of the bank. We feel that since sufficient opportunity have already been granted to the petitioner to settle his account, no further directions can be issued to the bank compelling it to settle the account of the petitioner. This Court is conscious of the settled proposition of law that a borrower has a right of consideration and settlement of its loan account in terms of the One Time Settlement Policy of the Bank and no arbitrary or discriminatory action is permissible. However, the peculiar facts of this case disentitles the petitioner to claim such relief.

12. Thirdly, now since sale certificate has been issued and third party rights have been created we feel that prayer for settlement cannot now be considered at this belated stage,more-so when the bank has sold the property at a higher amount i.e. Rs.296 Lacs as compared to the offer of the petitioner

for Rs. 272.30 Lacs. The petitioner if at all has any grievance, the same can be redressed by availing remedies in terms of Section 17 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 by approaching DRT to challenge the sale proceedings. It is also not in dispute that the total outstanding amount as on 31.10.2021 is Rs.9,34,49,346.50 (Nine Crores Thirty Four Lacs Forty Nine Thousand Three Hundred Forty Six Rupees and Fifty Paise).

13. Fourthly, the bank has already considered the proposal of the petitioner and has rejected the same on two counts. Firstly, the proposal itself was not within the ambit of the OTS Scheme as it did not append any upfront amount which is the requirement of the policy. Secondly, according to the bank the value of the available security (Rs.1247.76 Lacs) is much more than the amount offered by the petitioner i.e. Rs.272.30 lac. In these circumstances, we are of the considered opinion that no such direction can be issued to the bank to settle the account where the bank can recover a better amount than what is being offered by the borrower. The bank is custodian of public funds. It is the duty of the bank to protect its right of recovery. If the bank considers that its has better prospects of recovery by putting the secured assets through the process of enforcement in accordance with law, we do not find such stand to be arbitrary or unreasonable.

13.1 Our aforesaid view finds support from a recent judgment of Hon'ble Supreme Court in ***Bijnor Urban Cooperative Bank Limited, Bijnor v. Meenal Agarwal 2021 AIR SC 56*** wherein it has been held as under :-

> "9. Even otherwise, as observed hereinabove, no borrower can, as a matter of right, pray for grant of benefit of One Time Settlement Scheme. In a given case, it may happen that a person would borrow a huge amount, for example Rs. 100 crores. After availing the loan, he may deliberately not pay any amount towards installments, though able to make the payment. He would wait for the OTS Scheme and then pray for grant of benefit under the OTS Scheme under which, always a lesser amount than the amount due and payable under the loan account will have to be paid. This, despite there being all possibility for recovery of the entire loan amount which can be realized by selling the mortgaged/secured properties. If it is held that the borrower can still, as a matter of right, pray for benefit under the OTS Scheme, in that case, it would be giving a premium to a dishonest borrower, who, despite the fact that he is able to make the payment and the fact that the bank is able to recover the entire loan amount even by selling the mortgaged/secured properties, either from the borrower and/or

guarantor. This is because under the OTS Scheme a debtor has to pay a lesser amount than the actual amount due and payable under the loan account. Such cannot be the intention of the bank while offering OTS Scheme and that cannot be purpose of the Scheme which may encourage such a dishonesty.

10. If a prayer is entertained on the part of the defaulting unit/person to compel or direct the financial corporation/bank to enter into a one-time settlement on the terms proposed by it/him, then every defaulting unit/person which/who is capable of paying its/his dues as per the terms of the agreement entered into by it/him would like to get one time settlement in its/his favour. Who would not like to get his liability reduced and pay lesser amount than the amount he/she is liable to pay under the loan account? In the present case, it is noted that the original writ petitioner and her husband are making the payments regularly in two other loan accounts and those accounts are regularized. Meaning thereby, they have the capacity to make the payment even with respect to the present loan account and despite the said fact, not a single amount/installment has been paid in the present loan account for which original petitioner is praying for the benefit under the OTS Scheme.

11. **The sum and substance of the aforesaid discussion would be that no writ of mandamus can be issued by the High Court in exercise of powers under Article 226 of the Constitution of India, directing a financial institution/bank to positively grant the benefit of OTS to a borrower. The grant of benefit under the OTS is always subject to the eligibility criteria mentioned under the OTS Scheme and the guidelines issued from time to time. If the bank/financial institution is of the opinion that the loanee has the capacity to make the payment and/or that the bank/financial institution is able to recover the entire loan amount even by auctioning the mortgaged property/secured property, either from the loanee and/or guarantor, the bank would be justified in refusing to grant the benefit under the OTS Scheme. Ultimately, such a decision should be left to the commercial wisdom of the bank whose amount is involved and it is always to be presumed that the financial institution/bank shall take a prudent decision whether to grant the benefit or not under the OTS Scheme, having regard to the public interest involved and having regard to the factors which are narrated hereinabove."**

[Emphasis supplied]

14. The argument of the petitioner that the sale has been conducted in violation of the mandatory procedure as provided for under Rule 8 and 9 of the Security Interest (Enforcement) Security Interest Rules, 2002 and at much lower price than the market value, we find involves leading of credible evidence and it's evaluation and for that the petitioner is at liberty to challenge the sale process before the DRT under Section 17 of the Act, 2002 as noticed above.

15. For the reasons stated above, we are not inclined to further entertain the present writ petition. The same is accordingly dismissed. The petitioner shall be at liberty to avail alternative remedies as may be available to him in accordance with law.

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2022 (II) ILR - CUT- 314

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

W.P.(C) NOS. 26500 & 27775 OF 2021

M/s. MAA KALIKA BHANDAR & ORS. ……..Petitioners
.V.
THE COLLECTOR AND DISTRICT MAGISTRATE, KHORDHA & ORS. ……..Opp. Parties

W.P.(C) NO.27775 OF 2021

M/S. DWARIKAMAYEE BHANDAR & ANR. ……..Petitioners
.V.
THE COLLECTOR AND DISTRICT MAGISTRATE, KHORDHA & ORS. ……..Opp. Parties

(A) CONSTITUTION OF INDIA, 1950 – Article 226 and 227 – Securitisation and Reconstruction Of Financial Asset and Enforcement Of Security Interest Act, 2002 – Section 14,17 – The District magistrate in exercise of its power under section 14 of the 2002 Act passed order – Whether Writ petition is maintainable when alternative statutory remedy is available under section 17 of the 2002 Act – Held, No. – The writ petitions are not maintainable as the petitioner have efficacious alternative statutory remedy under section 17 of the 2002 Act.
(Para-19-26)

(B) SECURITISATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT, 2002 – Section 14 – Whether the District magistrate is required to grant an opportunity of hearing, while examining application under section 14 of the 2002 Act? – Held, No. – Since District magistrate, does not perform any adjudicating function, no prejudice is suffered by the petitioner on account of not having been granted opportunity of hearing – The petitioner if aggrieved have remedy under section 17, before the DRT.
(Para-17)

Case Laws Relied on and Referred to :-

1. 2022 (1)OLR 521 : Bajaj Finance Ltd. Vs. M/s Ali Agency & Ors.
2. 2011 (2) SCC 782 : Kanhaiya Lalchand Sachdev Vs. State of Maharashtra.
3. 2010 (8) SCC 110 : United Bank of India Vs. Satyawati Tondon.
4. 2019 (20) SCC 47 : Authorised officer,Indian Bank Vs. D.Visalakshi & Anr.
5. 2014 (6) SCC1 : Harshad Govardhan Sondagar Vs. International Assets Reconstruction Company Ltd. & Ors.
6. 2021 SCC Online SC 334 : Radhakrishan Industries Vs. State of Himachal Pradesh.
7. 2015 (8) SCC 519 : M/s Dharampal Satypal Ltd. Vs. Deputy Commissioner of Central Excise, Gauhati Anr.
8. 2019(134) ALR 103 : Kumkum Tentiwal Vs. State of UP.
9. 2017 140 CLA 95 : United Bank of India Vs. State of West Bengal.
10. 2019 (20) SCC 47 : Authorised Officer, Indian Bank V/s V. Visalakshi
11. (2021) Vol.203 PLR 690 : Allahabad Bank Vs. District Magistrate, Ludhiana.
12. 2013 (9) SCC 620 : Standard Chartered Bank Vs. Noble Kumar.
13. 2020 (4) PLR 669 : Kamla Engg. And Steel Industries Vs. Punjab National Bank.
14. 2018 (15) SCC 99 : ITC Ltd Vs. Blue Coast Hotels Limited.
15. 2014 (51) RCR 438 : Punjab Chemicals Vs. District Magistrate-cum-Deputy Commissioner, Ludhiana.
16. 1981 PLR 335 : M/s Indo Swiss Time Limited Dundahera Vs. Umrao & Ors.

For Petitioner : Mr. S.P. Misra, Sr. Adv.
Mr. Soumya Mishra, (in both the writ petitions).

For Opp. Party : Mr. L. Samantaray, AGA (for O.P. No.1/D.M., Khordha)
Mr. Anjan Kumar Biswal (O.P. Nos.2,3 & 5/Bank)
(In both the writ petitions)
Mr. Pradipta Kumar Mohanty, Sr. Adv.
with Mr. Pranaya Mohanty
(for O.P. No.4/Auction Purchaser) (in W.P.(C) No.26500 of 2021)
Mr. Manoj Kumar Mohanty,
Mr. Tutu Pradhan, (for O.P. No.6/Auction Purchaser)
(In W.P.(C) No.27775 of 2021)

JUDGMENT Date of Hearing: 12.05.2022 :Date of Judgment:29.06.2022

JASWANT SINGH, J.

1. This common order shall dispose of both the aforementioned writ petitions as they involve similar facts and identical questions of law.

2. The Writ Petitions numbered W.P.(C) No.27775 of 2021 and W.P.(C) No.26500 of 2021 are taken up together as they involve a common question and prayer i.e. an opportunity must havebeen provided by the DM/Collector while taking possession of the mortgaged property under Section 14 of the SARFAESI Act,2002 (Hereinafter, "**Act, 2002**").

W.P.(C) No.26500 of 2021

3. The relevant facts of the Writ Petition numbered W.P.(C) No.26500 of 2021 is set out in brief hereunder. The Petitioner No.1 i.e. M/s. Maa Kalika Bhandar availed a cash credit loan of Rs. 22.50 crores from the Opposite Party No. 5/ Punjab National Bank on 25.06.2016. The said loan was availed by mortgaging an immovable property under the ownership of Petitioner No. 3 i.e. Jay Kumar Jajodia. Due to financial indiscipline, the said loan account was declared NPA on 31.01.2018. A demand notice under Section 13 (2) of the SARFAESI Act, 2002 was issued on 13.02.2018 recalling outstanding liability of Rs.22,14,25,096.45/-(Twenty Two Crores Fourteen Lacs Twenty Five Thousand Ninety Six Fourty Five Paise) and symbolic possession of the property was taken vide a notice dated 17.04.2018 under Section 13 (4) of the Act,2002. Further, the property was auctioned on 12.03.2019 wherein the Opposite Party No.4/Auction purchaser i.e. MGM Minerals Pvt. Ltd. was declared as the highest bidder and consequently, sale certificate has been issued in its favour owing to complete deposit of the whole bidding amount. Consequently, a challenge was laid to the said auction vide S.A No.41 of 2019 in the DRT by the petitioner, which has been admitted. Further, the 2nd Additional Civil Judge (Senior Division), Bhubaneswar and the Civil Judge (Senior Division), Bhubaneswar have passed an interim order to maintain status- quo over the disputed property. The dispute arose when the Opposite Party No. 1/ DM/Collector in Bank Misc. Case No.78 of 2018 passed an order dated 19.08.2021 on the application filed by the Opposite Party/Bank instructing the Police to help in acquiring the physical possession of the mortgaged property.

W.P.(C) No.27775 of 2021

4. The brief facts of W.P. (C) No.27775 of 2021 are that the petitioner No.1 i.e. M/s. Dwarikamayee Bhandar availed a Cash Credit Facility of Rs.470 lakhs from the Opposite Party No.5/Punjab National Bank

on 25.08.2015 which was further enhanced to Rs.950 lakhs on 10.09.2016 by mortgaging various immovable properties standing in the name of the Petitioner No.2 i.e. Pawan Kumar Jajodia. The petitioner No.2 stood as a guarantor. Moreover, the petitioner No.2 is also the partner in the petitioner No.1 i.e. M/s. Dwarikamayee Bhandar. Due to financial indiscipline, the said loan account was declared NPA on 31.01.2018. A demand notice under Section 13(2) of the Act, 2002 was issued to the petitioner on 03.02.2018 recalling outstanding liability of Rs.9,23,56,545.85/- (Nine Crores Twenty Three Lacs Fifty Six Thousands Five Hundred Fourty Five Eighty Five Paise). Further, the symbolic possession of the property was taken over on 17.04.2018. It is also pertinent to note that the auction with respect to two of the immovable properties has been successful and the auction purchasers have deposited the entire amount within the stipulated period. The Civil Judge (Senior Division), Bhubaneswar vide C.S. No.518 of 2019 passed an order dated 25.04.2019 to maintain status-quo over the disputed property. In the meantime, opposite party No.5/ Punjab National Bank approached opposite party No. 1 - DM by filing an application U/s 14 of the 2002, on 13.06.2018 vide Bank Misc. Case No.77 of 2018 seeking to take physical possession the property in possession. The bank, preferred W.P.(C) No.1404 of 2019 before this Court, seeking disposal of its application filed U/s 14 before the District Magistrate, on an early date. The said petition, was disposed off on 21.01.2019 by this Court directing District Magistrate to pass appropriate orders on the aforesaid application, after granting opportunity of hearing to the parties.

Arguments

5. It is the claim of the Petitioners in both the cases that no opportunity of personal hearing was afforded to them by the Opposite Party No.1/Collector-cum-District Magistrate, Khordha before passing order(s) dated 19.08.2021 under Section 14 of the Act, 2002 and thereby violating the principles of natural justice. It is further contended that the District Magistrate, Khordha failed to appreciate that the property in question could not be treated to be a secured asset, on account of the same having been attached by the Income Tax Department prior to the mortgage in favour of the bank on 28.06.2016, whereas, the said property had already been attached by the Income Tax department in proceedings initiated under Income Tax Act on 31.12.2015. Consequently, the mortgage transaction is void in terms of the Section 281 of the Income Tax Act, 1961.

6. Per Contra, Opposite Party /Punjab National Bank (PNB) in both the cases have contended that pursuant to the judgment of ***Bajaj Finance Ltd. v. M/s Ali Agency & others[1] W.P.(C).No.11425/2019***, decided on 10.01.2022, the Petitioners have an alternative remedy to approach the DRT under section 17 of the Act, 2002 and thereby this writ petitions are not maintainable.

7. Learned counsel for Opposite Party/ Punjab National Bank (PNB) raises a preliminary objection regarding maintainability on the ground that the impugned order(s) dated 19.08.2021 has been passed by the District Magistrate, Khordha in exercise of its powers under Section 14 of the Act, 2002 and the same amounts to an action under Section 13(4) and hence in view of the judgment of Hon'ble Supreme Court in ***Kanhaiya Lalchand Sachdev V/s State of Maharashtra[2]*** and ***United Bank of India Vs. Satyawati Tondon[3]*** the remedy available to the petitioners is to approach Debts Recovery Tribunal (DRT) under Section 17 of the Act, 2002 and hence present petition is not maintainable. He further places reliance on judgment of Hon'ble Supreme Court in the case of ***Authorised officer, Indian Bank Vs. D.Visalakshi and another[4]*** to contend that power to be exercised under Section 14 of the Act, 2002 by the District Magistrate, by its very nature is non-judicial and administrative in nature and consequently no opportunity of hearing is to be granted by the District Magistrate before passing of an order under Section 14.

8. In rebuttal, Ld. Counsel for the petitioner relies upon judgment of Hon'ble Supreme Court the ***Harshad Govardhan Sondagar Vs. International Assets Reconstruction Company Ltd. and others[5]*** (Para No.22 and 29), to contend that an order of the District Magistrate U/s 14 could be assailed by filing of writ petition under Article 226/227 of Constitution of India. He further places reliance on ***Radhakrishan Industries Vs. State of Himachal Pradesh[6]***, ***M/s Dharampal Satypal Ltd. Vs. Deputy Commissioner of Central Excise, Gauhati another[7]***, ***Kumkum Tentiwal Vs. State of UP[8]*** Writ (C) No.38578 of 2018 decided on 11.12.2018 by Allahabad High Court to contend that inspite of alternative remedy, writ petition is maintainable and principles of Natural Justice are required to be complied with even if there is no provision within the statute. He further places reliance upon ***United Bank of India Vs.***

1. 2022 (1)OLR 521, **2**. 2011 (2) SCC 782 , **3**. 2010 (8) SCC 110 , **4.** 2019 (20) SCC 47, **5**. 2014 (6) SCC1, 2021
6. SCC Online SC 334 , **7.** 2015 (8) SCC 519, **8**. 2017 140 CLA 95, **9**. 2019(134) ALR 103

State of West Bengal[9] decided by Calcutta High Court to contend that the secured creditor could not have applied under Section 14 to the District Magistrate for taking possession of an immovable property after execution and registration of a conveyance deed of the property sold by the bank under Rule 8 of Security Interest (Enforcement) Rules,2002.

Analysis

9. This court has heard the arguments advanced by both the sides and carefully perused the records. Keeping in view the preliminary objection raised by the opposite parties following preliminary issues would arise for consideration of this court.

> i. Whether the District Magistrate is required to grant an opportunity of hearing to the petitioners while examining application filed by the secured creditor under Section 14 ofthe Act, 2002.
>
> ii. Whether the present petition is maintainable in view of alternative statutory remedy available to the petitioner under Section 17 of the Act, 2002.

Issue No.1

10. Before proceeding further, it would be imperative to examine Section 14 and Section 17 of the Act, 2002 which reads as under:-

> **14. Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset.**
>
> - (1) Where the possession of any secured asset is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred by the secured creditor under the provisions of this Act, the secured creditor may, for the purpose of taking possession or control of any such secured asset, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or, as the case may be, the District Magistrate shall, on such request being made to him
>
> (a) take possession of such asset and documents relating thereto; and
>
> (b) forward such asset and documents to the secured creditor. [Provided that any application by the secured creditor shall be accompanied by an affidavit duly affirmed by the authorized officer of the secured creditor, declaring that-
>
> (i) the aggregate amount of financial assistance granted and the total claim of the Bank as on the date of filing the application;

(ii) the borrower has created security interest over various properties and that the Bank or Financial Institution is holding a valid and subsisting security interest over such properties and the claim of the Bank or Financial Institution is within the limitation period;

(iii) the borrower has created security interest over various properties giving the details of properties referred to in sub- clause (ii) above.

(iv) the borrower has committed default in repayment of the financial assistance granted aggregating the specified amount;

(v) consequent upon such default in repayment of the financial assistance the account of the borrower has been classified as a nonperforming asset;

(vi) affirming that the period of sixty days notice as required by the provisions of sub-section (2) of section 13, demanding payment of the defaulted financial assistance has been served on the borrower;

(vii) the objection or representation in reply to the notice received from the borrower has been considered by the secured creditor and reasons for non-acceptance of such objection or representation had been communicated to the borrower;

(viii) the borrower has not made any repayment of the financial assistance in spite of the above notice and the Authorised Officer is, therefore, entitled to take possession of the sec11red assets under the provisions of sub-section (4) of section 13 read with section 14 of the principal Act;

(ix) that the provisions of this Act and the rules made thereunder had been complied with:

Provided further that on receipt of the affidavit from the Authorised Officer, the District Magistrate or the Chief Metropolitan Magistrate, as the case may be, shall after satisfying the contents of the affidavit pass suitable orders for the purpose of taking possession of the secured assets [within a period of thirty days from the date of application]:-

[Provided also that if no order is passed by the Chief Metropolitan Magistrate or District Magistrate within the said period of thirty days for reasons beyond his control, he may, after recording reasons in writing for the same, pass the order within such further period but not exceeding in aggregate sixty days.]

Provided also that the requirement of filing affidavit stated in the first proviso shall not apply to proceeding pending before any District Magistrate or the Chief Metropolitan Magistrate, as the case may be, on the date of commencement of this Act.]

[(1A) The District Magistrate or the Chief Metropolitan Magistrate may authorize any officer subordinate to him,-

(i) to take possession of such assets and documents relating thereto; and

(ii) to forward such assets and documents to the secured creditor.]

(2) For the purpose of securing compliance with the provisions of sub-section (1), the Chief Metropolitan Magistrate or the District Magistrate may take or cause to be taken such steps and use, or cause to be used, such force, as may, in his opinion, be necessary.

(3) No act of the Chief Metropolitan Magistrate or the District Magistrate [any officer authorised by the Chief Metropolitan Magistrate or District Magistrate] done in pursuance of this section shall be called in question in any Court or before any authority.

17. [Application against measures to recover secured debts.]–

(1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, [may make an application along with such fee, as may be prescribed,] to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures had been taken:

[Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.]

[Explanation-For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under this sub-section.]

[(1A) An application under sub-section (1) shall be filed before the Debts Recovery Tribunal within the local limits of whose jurisdiction-

(a) the cause of action, wholly or in part, arises; (b) where the secured asset is located; or

(c) the branch or any other office of a bank or financial institution is maintaining an account in which debt claimed is outstanding for the time being.]

[(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.]

[(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management or restoration of possession, of the secured assets to the borrower or other aggrieved person, it may, by order,-

(a) declare the recourse to any one or more measures referred to in sub-section (4) of section 13 taken by the secured creditor as invalid; and

(b) restore the possession of secured assets or management of secured assets to the borrower or such other aggrieved person, who has made an application under sub-section (1), as the case may be; and

(c) pass such other direction as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13.]

(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under sub-section (4) of section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of section 13 to recover his secured debt.

[(4A) Where-

(i) any person, in an application under sub-section (1), claims any tenancy or leasehold rights upon the secured asset, the Debt Recovery Tribunal, after examining the facts of the case and evidence produced by the parties in relation to such claims shall, for the purposes of enforcement of security interest, have the jurisdiction to examine whether lease or tenancy,-

(a) has expired or stood determined; or

(b) is contrary to section 65A of the Transfer of Property Act,1882; or

(c) is contrary to terms of mortgage; or

(d) is created after the issuance of notice of default and demand by the Bank under sub-section (2) of section 13 of the Act; and

(ii) the Debt Recovery Tribunal is satisfied that tenancy right or leasehold rights claimed in secured asset falls under the sub- clause (a) or sub-clause (b) or sub-clause (c) or sub-clause (d) of clause (i), then notwithstanding anything to the contrary contained in any other law for the time being in force, the Debt Recovery Tribunal may pass such order as it deems fit in accordance with the provisions of this Act.]

> (5) Any application made under sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application:
>
> Provided that the Debts Recovery Tribunal may, from time to time, extend the said period for reasons to be recorded in writing, so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, shall not exceed four months from the date of making of such application made under sub-section (1).
>
> (6) If the application is not disposed of by the Debts Recovery Tribunal within the period of four months as specified in sub- section (5), any party to the application may make an application, in such form as may be prescribed, to the Appellate Tribunal for directing the Debts Recovery Tribunal for expeditious disposal of the application pending before the Debts Recovery Tribunal and the Appellate Tribunal may, on such application, make an order for expeditious disposal of the pending application by the Debts Recovery Tribunal.
>
> (7) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of the application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and the rules made thereunder.

A perusal of the aforesaid statutory provisions would reveal that if any person is aggrieved of any action taken by the secured creditor under Section 13(4), the remedy available to such person is to file an application before the DRT under Section 17. Still further, as per Section 34 of SARFAESI Act, 2002 the jurisdiction of the civil court is barred which clearly indicates the intention of the legislature is to avoid conferring of parallel jurisdiction to other courts/authorities. Reading of Section 14 nowhere permits conferring of any power of adjudication or entitlement to determine inter-se rights upon the District Magistrate while examining application under Section 14. Therefore, as far as statutory provisions are concerned, they clearly do not support the contention of the petitioner that the District Magistrate should have afforded an opportunity of hearing especially when neither any adjudicatory functions are to be performed nor any right inter-se the parties are to be determined by the District Magistrate. The only remedy available with the petitioners is to challenge the action of the bank by filing of an application before the DRT under section 17 of the Act, 2002.

11. The aforesaid issue, has been considered by the Hon'ble Supreme Court in the case of ***Authorised Officer, Indian Bank V/s V. Visalakshi***[10] where in it has been held as under:-

> "44. Be it noted that Section 14 of the 2002 Act is not a provision dealing with the jurisdiction of the Court as such. It is a remedial measure available to the secured creditor, who intends to take assistance of the authorised officer for taking possession of the secured asset in furtherance of enforcement of security furnished by the borrower. The authorised officer essentially exercises administrative or executive functions, to provide assistance to the secured creditor in terms of State's coercive power to effectuate the underlying legislative intent of speeding the recovery of the outstanding dues receivable by the secured creditor. At best, the exercise of power by the authorised officer may partake the colour of quasi-judicial function, which can be discharged even by the Executive Magistrate. **The authorised officer is not expected to adjudicate the contentious issues raised by the concerned parties but only verify the compliances referred to in the first proviso of Section 14; and being satisfied in that behalf, proceed to pass an order to facilitate taking over possession of the secured assets."**
>
> [Emphasis supplied]

A careful perusal of the entire judgment makes it apparent that the use of word "Authorised Officer" is actually a reference to either the District Magistrate or the Chief Metropolitan Magistrate within whose jurisdiction the Secured Asset is located and before whom the Secured Creditor/Bank makes an application under Section 14 of the Act, 2002 for seeking the assistance of the "State's coercive power" to obtain the actual physical possession of the Secured Asset. It is also laid down that the authority after receiving such request under Section 14 of the Act, 2002 is not expected to do any further scrutiny of the matter except to verify from the Secured Creditor whether a notice under Section 13(2) of the Act, 2002 has already been given or not and whether the Secured Asset is located within his jurisdiction or not, and after the amendment inserting the first proviso therein, the designated authority has to satisfy itself only with regard to the matters mentioned in Clauses (i) to (ix) as per the affidavit filed by the Secured Creditor. There is no adjudication of any kind at that stage.

12. Even a Division Bench of Punjab and Haryana High Court in the case of ***Allahabad Bank V/s District Magistrate, Ludhiana***[11] (in which one of us J. Jaswant Singh was a member) has in para 28 and 30 held as under :-

10. 2019 (20) SCC 47 , **11**. (2021) Vol.203 PLR 690

"28. It therefore becomes necessary to examine the scope of functions to be discharged by the District Magistrate under Section 14 of the Act, 2002. A bare perusal of the said provision reveals that it provides a lawful mechanism to take physical possession of the secured assets which is required to complete the process of transfer as noticed above. The District Magistrate is therefore obligated to provide requisite assistance to the secured creditor on such application having been filed by the secured creditor claiming physical possession of the secured asset subject to the secured creditor filing the 9-point affidavit as has been provided by the proviso inserted to Section 14 by the Act 1 of 2013 w.e.f. 15.01.2013. Section 14 further provides that the District Magistrate is required to record his satisfaction on such application and then proceed to pass suitable orders for taking possession of the secured asset. Such recording of satisfaction is only to be restricted with regard to the factual correctness of the affidavit filed by the secured creditor and cannot be stretched to include any quasi- judicial or an adjudicatory function. Hon'ble Supreme Court in ***Standard Chartered Bank v. Noble Kumar***[12] held as under :-

"26. An analysis of the 9 sub-clauses of the proviso which deal with the information that is required to be furnished in the affidavit filed by the secured creditor indicates in substance that (i) there was a loan transaction under which a borrower is liable to repay the loan amount with interest, (ii) there is a security interest created in a secured asset belonging to the borrower, (iii) that the borrower committed default in the repayment, (iv) that a notice contemplated under Section 13(2) was in fact issued, (v) in spite of such a notice, the borrower did not make the repayment, (vi) the objections of the borrower had in fact been considered and rejected, (vii) the reasons for such rejection had been communicated to the borrower etc.

27. **The satisfaction of the Magistrate contemplated under the second proviso to Section 14(1) necessarily requires the Magistrate to examine the factual correctness of the assertions made in such an affidavit but not the legal niceties of the transaction**. It is only after recording of his satisfaction the Magistrate can pass appropriate orders regarding taking of possession of the secured asset. "

[Emphasis supplied]

30…… It is also to be noticed that in case, a person who is aggrieved of such order, is not remediless as an order under Section 14, has been held to be an action under Section 13(4) of the Act, 2002 and any person aggrieved of the same, shall have a cause of action to challenge the same by filing an application under Section 17 of the Act, 2002. [refer to Para 20 of the judgment of Hon'ble Supreme Court in ***Kaniyalal Lalchand Sachdev v. State of Maharashtra***[13]]. Similarly, we find that in case if the secured creditor is aggrieved of any action of the District Magistrate or the manner and mode of its enforcement, not involving adjudication of rights of any other secured creditor, the remedy under writ jurisdiction would be available to such a secured creditor.

12. 2013 (9)SCC 620,

> This is because, Section 17 of the Act, 2002 can be invoked only in case, if the applicant is aggrieved of the action of the secured creditor, while in the instant case, the grievance of the secured creditor is against the non- implementation of its rights under Section 14 of the Act,2002." [Emphasis supplied]

13. Ld. Counsel for the Petitioners though have relied upon various judgments to contend that principles of natural justice are attracted even to the administrative proceedings including the one before District Magistrate. We have carefully examined the said judgments and are of the view that the same would not be applicable to present case. In **Radhakrishnan Industries**[14], Hon'ble Supreme Court had considered a situation where an order of provisional attachment passed by Joint Commissioner while exercising the powers of the Commissioner which was held to be ultra-vires of Section 83 of the Himachal Pradesh Goods and Service Tax Act, 2017 (hereinafter referred to as "Act, 2017"). It was further held that the Joint Commissioner was acting as a delegate of the powers of the Commissioner and consequently remedy of appeal against the order of Joint Commissioner would not be available under section 107(1) of the Act, 2017 and hence writ petition was held to be maintainable. However, in the instant case order passed by the District Magistrate is apparently neither beyond nor contrary to Section 14 of the Act, 2002 and hence appeal before DRT is available as held by Hon'ble Supreme Court in ***Kanaiyalal Lalchand Sachdev***[15] wherein it has been held as under:-

> **"20. We are in respectful agreement with the above enunciation of law on the point. It is manifest that an action under Section 14 of the Act constitutes an action taken after the stage of Section 13(4), and therefore, the same would fall within the ambit of Section 17(1) of the Act**. Thus, the Act itself contemplates an efficacious remedy for the borrower or any person affected by an action under Section 13(4) of the Act, by providing for an appeal before the DRT." [Emphasis supplied]

14. The next judgment relied upon by the petitioners is ***Dharampal Satyapal Ltd.V/sDeputy Commissioner of Central Excise, Gauhati***[16] wherein it was held that even administrative decisions of State authorities which results into civil consequences, would require of compliance of principles of natural justice. The said judgement would not be applicable because in the cited case, the Inquiring Authority was competent to determine rights inter-se the parties and hence hearing was held to be necessary. Whereas in the present District Magistrate is not empowered to adjudicate or determine any inter-se rights and hence question of opportunity of hearing or resultant prejudice does not arise. Further, the

said order is appealable before DRT and therefore it cannot be said that principles of natural justice have been violated or any prejudice has been caused to the petitioner on account of passing of the aforesaid order by the District Magistrate. Therefore, the said judgement would not apply to the present case.

15. The next judgement relied upon by the petitioners is ***United Bank of India***[17] by High Court of Calcutta wherein in para. 22 it has been held that a secured creditor cannot apply to the District Magistrate for seeking assistance to take physical possession under Section 14 after conducting sale in favor of auction purchaser. We do not agree with this view because in the subsequent judgement of Hon'ble Supreme Court in the case of ***ITC Ltd V/s Blue Coast Hotels Limited***[18] it has been held as under :-

> "50. In this case, the creditor did not have actual possession of the secured asset but only a constructive or symbolic possession. The transfer of the secured asset by the creditor therefore cannot be construed to be a complete transfer as contemplated by section 8 of the Transfer of Property Act. The creditor nevertheless had a right to take actual possession of the secured assets and must therefore be held to be a secured creditor even after the limited transfer to the auction purchaser under the agreement. **Thus, the entire interest in the property not having been passed on to the creditor in the first place, the creditor in turn could not pass on the entire interest to the auction purchaser and thus remained a secured creditor in the Act."** [Emphasis supplied]

It has thus been authoritatively held that secured creditor is entitled to maintain an application before the District Magistrate even after the sale, as the transfer by the secured creditor shall remain incomplete till complete transfer is effected in favour of the auction purchaser which includes transfer of possession as well. The judgment does not support the case of petitioners.

16. The next judgement relied upon by the counsel for the petitioner is **Kumkum Tentiwal vs State of U.P.**[19] by Allahabad High Court wherein it has been held that the District Magistrate is required to comply with principles of natural justice while examining application under Section 14 of the Act, 2002. We respectfully do not agree with the aforesaid view. Firstly, reliance placed in the aforesaid judgement upon the judgement of Hon'ble Supreme Court in the case of ***Harshad Govardhan Sondagar***[20] which pertained to petition filed by tenant contending that since he had not availed of any credit facility, he has not been served with any notice under Section 13

18. 2018(15) SCC 99 , **19.** 2019(134) ALR 103

and therefore, Supreme Court permitted the tenant to make submissions before the District Magistrate while examining application of the bank under Section 14. Further, unamended Section 17 which existed at that point of time did not provide for any specific remedy for the tenant to file an application under Section 17 before the DRT. However, subsequently Section 17 (4-A) was added by way of amendment w.e.f. 01/09/2016 and remedy of filing an application by a tenant before the DRT was specifically provided for. Secondly, Hon'ble Supreme Court in ***Authorised Officer Indian Bank*** (supra) has held that District Magistrate has no power of adjudication while entertaining an application under Section 14 of the Act, 2002.Therefore, the said judgement would not advance the case of the petitioners.

17. As regards the contention of the petitioners that in the earlier round of litigation i.e. **WP (C) No. 1404 of 2019** this Court while disposing of the petition vide order dated 21/01/2019 had directed the District Magistrate to pass an order after affording an opportunity of hearing to all the parties, it is to be noted that since District Magistrate, as noticed above, does not perform any adjudicatory function no prejudice is suffered by the petitioners on account of not having been granted opportunity of hearing before the District Magistrate. The petitioners if aggrieved, have remedy under section 17 before the DRT. Consequently, this argument is rejected

18. In view of above, the question of law is answered in negative and it is held that the petitioners were not entitled for opportunity of hearing before the District Magistrate before passing of the impugned order under Section 14 of the Act,2002. We hasten to add that before taking actual physical possession the duty officer would be bound to serve and affix notice of 15 days intimating the date when physical possession is scheduled to be taken as held by this Court in ***Bajaj Finance V/s Ali Agency***[21].

Issue No. 2

19. Ld. counsel for the respondent has raised a preliminary objection regarding the maintainability of the present petition which lays challenge the order passed by the District Magistrate under Section 14 and consequently there is an alternative statutory remedy available to the petitioner by filing of an application before the DRT under section 17 of the Act, 2002.

20. On the other hand, Ld. counsel for the petitioner has relied upon the judgement of Hon'ble Supreme Court in the case of ***Harshad Govardhan Sondagar***[22] to contend that writ petition is maintainable against the order passed by the District Magistrate under Section 14 of the Act, 2002.

21. As noticed above, Hon'ble Supreme Court in ***Kanaiyalal Lalchand Sachdev V/s State of Maharashtra***[23] has held that order passed by the District Magistrate under Section 14 would amount to an action under Section 13 (4) of the Act, 2002 and consequently can be challenged before the DRT under Section 17 of the Act, 2002.

22. As regards the judgement of Hon'ble Supreme Court in the case of ***Harshad Govardhan Sondagar***[24] is concerned, it has been held by the Hon'ble Supreme Court in para 29 as under :-

> "29. Sub-section (3) of section 14 of the SARFAESI Act provides that no act of the Chief Metropolitan Magistrate or the District Magistrate or any officer authorised by the Chief Metropolitan Magistrate or District Magistrate done in pursuance of Section 14 shall be called in question in any court or before any authority. The SARFAESI Act, therefore, attaches finality to the decision of the Chief Metropolitan Magistrate or the District Magistrate and this decision cannot be challenged before any court or any authority. But this Court has repeatedly held that statutory provisions attaching finality to the decision of an authority excluding the power of any other authority or Court to examine such a decision will not be a bar for the High Court or this Court to exercise jurisdiction vested by the Constitution because a statutory provision cannot take away a power vested by the Constitution. To quote, the observations of this Court in Columbia Sportswear Company v. Director of Income Tax, Bangalore [(2012) 11 SCC 224]:
>
> "17. Considering the settled position of law that the powers of this Court under Article 136 of the Constitution and the powers of the High Court under Articles 226 and 227 of the Constitution could not be affected by the provisions made in a statute by the Legislature making the decision of the tribunal final or conclusive, we hold that sub- section (1) of Section 245S of the Act, insofar as, it makes the advance ruling of the Authority binding on the applicant, in respect of the transaction and on the Commissioner and income-tax authorities subordinate to him, does not bar the jurisdiction of this Court under Article 136 of the Constitution or the jurisdiction of the High Court under Articles 226 and 227 of the Constitution to entertain a challenge to the advance ruling of the Authority."

> **In our view, therefore, the decision of the Chief Metropolitan Magistrate or the District Magistrate can be challenged before the High Court under Articles 226 and 227 of the Constitution by any aggrieved party and if such a challenge is made, the High Court can examine the decision of the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, in accordance with the settled principles of law."** [Emphasis supplied]

It is to be noticed that under un-amended Section 17 (as it then was) there was no specific remedy available for the tenant to challenge the action of secured creditor to take possession, before the DRT. The tenant not being a borrower was also not served with any prior notice under Section 13. In these circumstances, Supreme Court permitted tenant to raise submissions before the District Magistrate in proceedings under Section 14. However, subsequently after the aforesaid judgment, Section 17 (4-A) was added by virtue of amendment w.e.f. 01.09.2016 and remedy of filing application before DRT was specifically conferred upon the tenant. The judgment therefore cannot be applied post amendment of the statute to contend that hearing before the District Magistrate is called for, moreso when the said case pertained to a tenant as opposed to the present case, where none of the petitioners claim themselves to be tenants and are actually borrower/guarantor. Further, subsequently Hon'ble Supreme Court in ***Authorised Officer Indian Bank Vs. D. Visalakhi***[25] has held that District Magistrate has no power of adjudication. Therefore, the said judgment is also of no help the petitioners.

23. Still further, it is to be noticed that Hon'ble ***Supreme Court in Kanhaiya Lal Chand Sachdev***[26] has already held that an order passed by the District Magistrate is an order U/s 13(4) and consequently, appealable before DRT. The Judgment of ***Harshad Govardhan Sondagar***[27], has not taken into consideration the previous judgment of ***Kanhaiya Lal Chand Sachdev***[28]. The conflicting views of both these co-ordinate bench judgments were considered by a Division Bench of Punjab and Haryana High Court in ***Punjab Chemicals Vs. District Magistrate-cum-Deputy Commissioner, Ludhiana***[29] wherein in para 3,7 to 10 it was held as under:-

> "3. The petitioner has an alternative remedy of approaching the Debts Recovery Tribunal against the order passed by the District Magistrate in terms of Section 17(1) of the Act. In ***Kanaiyalal Lal Chand Sachdev v. State of Maharashtra, (2011) 2 SCC 782***, the Court held that against an action taken under Section 14, the remedy lies to move an application to the Tribunal. The Court observed:-

29. 2014 (5) RCR 438

"22. We are in respectful agreement with the above enunciation of law on the point. It is manifest that an action under Section 14 of the Act constitutes an action taken after the stage of Section 13(4), and therefore, the same would fall within the ambit of Section 17(1) of the Act. Thus, the Act itself contemplates an efficacious remedy for the borrower or any person affected by an action under Section 13(4) of the Act, by providing for an appeal before the DRT. 23. In our opinion, therefore, the High Court rightly dismissed the petition on the ground that an efficacious remedy was available to the appellants under Section 17 of the Act. It is well settled that ordinarily relief under Articles 226/227 of the Constitution of India is not available if an efficacious alternative remedy is available to any aggrieved person."

xxx xxx xx

7. The action under Section 14 by the District Magistrate is to give effect to the action of the Bank to take possession of the secured asset. The order of the District Magistrate is to aid the effort of the Bank to realise secured assets. It has no independent existence but an order analogous to execution proceedings. Therefore, in terms of the judgments referred to above, the order of District Magistrate would be appealable before the Debt Recovery Tribunal.

8. It may be noticed that recently the Hon'ble Supreme Court in ***Harshad Govardhan Sondagar v. International Assets Reconstruction***[30] has observed that the remedy under Section 17 of the Act, is not available to a lessee in the case of his dispossession by the secured creditor. The lessee has a liberty to challenge the order passed by the District Magistrate in accordance with power conferred under Article 226 of the Constitution before the High Court. However, the judgments in three quoted reports were not brought to the notice of the Court. The Court observed as:-

"32. When we read sub-section (1) of section 17 of the SRFAESI Act, we find that under the said sub-section "any person (including borrower)", aggrieved by any of the measures referred to in Sub-section (4) of Section 13 taken by the secured creditor or his authorised officer under the chapter, may apply to the Debts Recovery Tribunal having jurisdiction in the matter within 45 days from the date on which such measures had been taken. We agree with Mr Vikas Singh that the words "any person" are wide enough to include a lessee also. It is also possible to take a view that within 45 days from the date on which a possession notice is delivered or affixed or published under sub-rules (1) and (2) of Rule 8 of the Security Interest (Enforcement) Rules, 2002, a lessee may file an application before the Debts Recovery Tribunal having jurisdiction in the matter for restoration of possession in case he is dispossessed of the secured asset. But when we read sub-section (3) of section 17 of the SRFAESI Act, we find that the Debts Recovery Tribunal has

powers to restore possession of the secured asset to the borrower only and not to any person such as a lessee. Hence, even if the Debts Recovery Tribunal comes to the conclusion that any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor are not in accordance with the provisions of the Act, it cannot restore possession of the secured asset to the lessee. Where, therefore, the Debts Recovery Tribunal considers the application of the lessee and comes to the conclusion that the lease in favour of the lessee was made prior to the creation of mortgage or the lease though made after the creation of mortgage is in accordance with the requirements of Section 65A of the Transfer of Property Act and the lease was valid and binding on the mortgagee and the lease is yet to be determined, the Debts Recovery Tribunal will not have the power to restore possession of the secured asset to the lessee. In our considered opinion, therefore, there is no remedy available under section 17 of the SRFAESI Act to the lessee to protect his lawful possession under a valid lease."

9. Thus, there is apparent conflict between the Coordinate Benches of the Hon'ble Supreme Court. A Full Bench of this Court in ***M/s Indo Swiss Time Limited Dundahera v. Umrao and others***[31] has examined the issue as to which of the contradictory judgments passed by the coordinate Bench of the Superior Court, is to be followed. It was held that the High Court must follow the judgment which appears to it to lay down the law more elaborately and accurately. The Court held as under:-

"23. When judgments of the Superior Court are of co- equal Benches and therefore of matching authority then their weight inevitably must be considered by the rationale and the logic thereof and not by the mere fortuitous circumstances of the time and date on which they were rendered. It is manifest that when two directly conflicting judgments of the superior Courts and of equal authority are extent then both of them cannot be binding on the Courts below. Inevitably a choice though a difficult one, has to be made in such a situation. On principle it appears to me that the High Court must follow the judgment which appears to it to lay down the law more elaborately and accurately. The mere incidence of time whether the judgments of co-equal Benches of the Superior Court are earlier or later is a consideration which appears to me as hardly relevant."

10. **After hearing learned counsel for the petitioner, we find that the petitioner has an effective alternative remedy to approach the Debts Recovery Tribunal,under Section 17 of the Act, in terms of the judgments referred to above.**

11. In view of the contradictory judgments of the Coordinate Benches of the Hon'ble Supreme Court, we are more inclined to follow the earlier

> judgments of the Hon'ble Supreme Court, which provide a remedy to the borrower/lessee against an action of the District Magistrate under Section 14 of the Act. Such course provides a remedy to the lessee including the borrower, whereas in the absence of such course, the remedy would be to approach this Court, wherein it will not be appropriate to decide the questions of fact and/or mixed questions of law and facts. It would also lead to confusion amongst the borrowers and/or the lease as to which forum they should invoke. It would be in interest of justice that all actions of the secured creditors or of the District Magistrate are firstly challenged under Section 17 of the Act before the Tribunal." [Emphasis supplied]

24. As regards the contentions of the petitioner that property was already attached by the Income Tax Department, before the same was mortgaged we find that the said issue cannot be adjudicated in the present proceedings for the reason that firstly, it is a disputed question of fact as regard the date of mortgage and the date when the property was attached; as also whether such attachment actually lead to creation of a charge in terms of the section 100 of the Transfer of Property Act, 1882 or not as has been extensively dealt with by a Division Bench of Punjab and Haryana High Court in ***Kamla Engg. And Steel Industries V/s Punjab National Bank***[32](Para 22). Secondly, the argument that District Magistrate was required to adjudicate regarding the enforceability of the charge of mortgage by the secured creditor is untenable in view of the judgment of Hon'ble Supreme Court in ***Standard Chartered Bank V/s V. Noble Kumar***[33] wherein it has been held that the satisfaction of the Magistrate contemplated under the second proviso to Section 14(1) necessarily requires the Magistrate to examine the factual correctness of the assertions made in such an affidavit but not the legal niceties of the transaction. Therefore, District Magistrate could not have determined the issue of enforceability of charge of the bank nor could have considered the argument of the petitioner that the transaction was void in terms of Section 281 of the Income Tax Act, 1961.Thirdly, this issue cannot be adjudicated in absence of Income Tax Department, which is seen to be contesting party but not impleaded in the present petition. Consequently, for the aforesaid two reasons we refrain ourself from commenting on the merits of this issue and leave it open to the petitioner to raise the same before DRT under Section 17 of the Act, 2002.

25. It is true that that a rule of discretion by exercise of self- restraint is evolved by the court in exercise of the discretionary equitable writ jurisdiction (See ***Vetindia Pharmaceuticals Limited v. State of Uttar***

32. 2020 (4) PLR 669

Pradesh[34]) and in appropriate cases the Courts may intervene in exercise of its jurisdiction under Article 226 of the Constitution of India but keeping in view the disputed questions of facts and the inter-se rights of the parties which are yet to be examined as canvassed in the present petition, we do not deem it appropriate to invoke our equitable jurisdiction under Article 226 of the Constitution of India and leave the parties to avail alternative remedies available under the Statute.

26. Accordingly, Issue No. 2 is answered in negative and it is held that the present petition(s) is/are not maintainable as the petitioners have efficacious alternative statutory remedy under Section 17 of the Act, 2002.

CONCLUSION

27. In view of above, preliminary objection of the Opposite Parties/Punjab National Bank (PNB) is sustained and both writ petitions are accordingly dismissed being not maintainable. The petitioners in both the cases are relegated to avail the alternative statutory remedy under Section 17 of the Act, 2002 in accordance with law.

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2022 (II) ILR - CUT- 334

S. TALAPATRA, J & B.P. ROUTRAY, J.

CRIMINAL APPEAL NO. 316 OF 2020

DORA MOHAKUD .....Appellant

.V.

STATE OF ODISHA .....Respondent

CRIMINAL TRIAL – Offences under section 302 of IPC, 1860 – Conviction – Appeal – A case of circumstantial evidence where no direct eye-witness is there – Only circumstance brought against the appellant is relating to discovery of the alleged weapon of offence – But the alleged weapon of offence is not produced before the Court in course of trial and the seizure of the same at the instance of the accused leading to discovery is denied by both the independent witnesses – Effect of – Held, it becomes a weaker circumstance to be used against the accused – Appellant is not held guilty for murder and he is acquitted of the charge u/s 302 of IPC – Appeal allowed.

(Para-23)

Case Laws Relied on and Referred to :-

1. (2011) 2 SCC 532 : Kalyan Kumar Gogoi Vs. Ashutosh Agnihotri.
2. AIR 1984 SC 1622 : Sharad Birdhichand Sarda Vs. State of Maharashtra.

For Appellant : Mr. Arijeet Mishra

For Respodent : Mrs. Saswata Patnaik, Addl. Govt. Adv.

JUDGMENT Date of Judgment: 28.06.2022

B.P. ROUTRAY, J.

1. Present appeal is directed against the judgment of the learned Additional Sessions Judge, Karanjia convicting the Appellant for commission of offence under Section 302 of the Indian Penal Code (in short "I.P.C.") and sentencing him to life imprisonment along with fine of Rs.20,000/-.

2. The deceased-Shantilata Mohakud is the elder sister of the Appellant. Their house situated adjacently in the same village – Bandiraposhi. The deceased was aged about 60 years on the date of occurrence and the Appellant was around 46 years.

3. On 28.6.2018 during evening hour some quarrel ensued between the Appellant and the deceased regarding the death of a hen of the Appellant. As per the prosecution allegations, the Appellant killed the deceased by assaulting him by means of a spade (KODALA).

4. FIR in Jashipur P.S. Case No.70, dated 28.06.2018 was lodged by P.W.1, namely, Nandini Mohakud, the daughter-in-law of the deceased, who resides in another village which is about 4 kilometers away from the place of occurrence. She lodged the FIR stating that she got an information from one Sarat Chandra Mohanta that the deceased was killed by her brother-Dora Mohakud. When she reached at the spot found the deceased lying dead on the village road and on her query, she came to know from the villagers about the killing of the deceased by the Appellant by means of a spade.

5. P.W.22 – Reena Baxla, the Sub-Inspector of Police registered the FIR and took up investigation forthwith. The Appellant was arrested in the next morning at about 6.00 a.m. P.W. 22 held inquest over the dead body and sent the same for post mortem examination to Karanjia Sub-Divisional Hospital. Dr. Gouranga Charan Nayak (P.W.15) conducted the autopsy over the dead

body and found one cut injury of size 7 cm x 6 cm x 4 cm below the occipital region on the left side of the head. It was a deep seated injury and ante mortem in nature.

6. In course of investigation, P.W.22 examined many witnesses, visited the spot, seized the wearing apparels of the deceased as well as the Appellant.

7. The Appellant while in Police custody stated to have confessed before the Police regarding commission of murder of the deceased and gave recovery of the weapon of offences, i.e. the spade from his Bari (back-yard) land. Upon completion of investigation, the charge-sheet was submitted for the offence under Section 302, I.P.C.

8. The Appellant faced the prosecution taking the plea of complete innocence and false implication.

9. The prosecution examined as many as 22 witnesses in support of their case and further, exhibited 15 documents marked as Ext.1 to Ext.15. No material object was produced and marked by the prosecution in course of the trial.

10. On the other hand, no evidence was led from the side of the defense, either documentary or oral.

11. Learned trial court upon completion of trial convicted the Appellant with the finding that the alleged offence was committed by him and accordingly held him guilty for commission of the offence under Section 302, I.P.C.

12. It is strenuously argued by Mr. A. Mishra, learned counsel for the Appellant that absolutely no material is there against the Appellant to convict him for the alleged offence. But the learned trial court based on the statement of the I.O. with regard to the alleged confession made by the Appellant while in Police custody leading to discovery of the weapon of offence has convicted the Appellant.

13. Conversely, Mrs. Saswata Pattnaik, learned Additional Government Advocate submitted supporting the impugned judgment that to prove a fact discovered under Section 27 of the Indian Evidence Act does not require

corroboration from the independent witnesses and on the basis of such evidence, as relevant under Section 27 of the Indian Evidence Act, the conviction can be well founded.

14. First of all, the homicidal nature of death of the deceased is not disputed by the Appellant. Otherwise also it is established from the evidence of the autopsy Doctor (P.W.15) that the deceased died homicidal death. As per the opinion of P.W.15, the cause of death was due to homicidal type of injury with massive hemorrhagic shock as a result of the cut injury found below the occipital region of the left side head. Going through the evidence of P.W.15 and the inquest report prepared under Ext.2 as well as the post mortem report under Ext.9, it can safely be concluded that the deceased died with homicidal nature of death.

15. Admittedly no eye-witness is there who have stated to have been seen the occurrence. Among all such 22 witnesses examined by the prosecution, besides the I.O. (P.W.22) and the autopsy Doctor (P.W.15), the only relevant witness found is the informant, P.W.1. Amongst other witnesses, P.W.2, 4 & 7 have turned hostile; P.W.10, 16, 17, 18 & 21 have stated that they do not know anything about the occurrence; P.W.3 is the scribe of the FIR; P.W.5, 6, 8, 9, 14, 19 & 21 are the seizure witnesses; and P.Ws.12 & 13 who are two other daughters-in-law of the deceased are witnesses to the inquest only.

16. As per the contents of the FIR under Ext.1, the informant admittedly had not seen the occurrence, but came to know about the occurrence from one Sarat Chandra Mohanta. This Sarat Chandra Mohanta, P.W.2 has turned hostile as stated earlier. Going through the evidence of P.W.2, the admissible part of his evidence is to the effect that while returning to his village, he found the deceased lying on the road and then he informed the same to P.W.1 over telephone.

17. Now looking to the evidence of P.W.1, It is seen that upon getting information from P.W.2 when she reached at the spot, found the deceased lying dead on the road and she came to know from other villagers, that just prior to the death there was an altercation between the deceased and the Appellant and in course of such altercation, the Appellant killed the deceased. But this P.W.1 does not say the name of any such particular villager from whom she got the information about the altercation and killing of the deceased by the Appellant. So such evidence of P.W.1 with regard to the

alleged altercation and assault by the Appellant on the deceased is found to be in the nature of hearsay evidence and thus inadmissible in absence of disclosure of the source of information. Because, the person who actually has perceived it in his sense should make the statement and no one else since truth is diluted and diminished with each repetition. It is observed in the case of ***Kalyan Kumar Gogoi -vs- Ashutosh Agnihotri, (2011) 2 SCC 532*** that,

> "38. The reasons why hearsay evidence is not received as relevant evidence are:
>
> (a) the person giving such evidence does not feel any responsibility. The law requires all evidence to be given under personal responsibility i.e. every witness must give his testimony, under such circumstance, as expose him to all the penalties of falsehood. If the person giving hearsay evidence is concerned, he has a line of escape by saying "I do not know, but so and so told me"
>
> (b) truth is diluted and diminished with each repetition, and
>
> (c) if permitted, gives ample scope for playing fraud by saying "someone told me that….". It would be attaching importance to false rumour flying from one foul lip to another. Thus statements of witnesses based on information received from others is inadmissible."

18. As seen from the impugned judgment, the learned trial court has heavily relied on the evidence of the I.O. (P.W.22) regarding the confession made by the Appellant before her while in Police custody to give recovery of the weapon of offence, i.e. the spade allegedly concealed by him in his Bari land (back-yard land) beneath a bush. Said weapon was seized by preparing the seizure list under Ext.3. P.Ws.4 & 7 who are independent witnesses to such seizure of the weapon recovered at the instance of the Appellant have not supported such evidence of the I.O. They have categorically denied about any confession made by the Appellant before P.W.22 in their presence and they further denied about seizure of anything by Police in their presence. Learned trial court despite such denial by the independent witnesses has believed the statement of P.W.22 to establish the fact of leading to discovery of the weapon of offence at the instance of the Appellant and upon his information. This is seriously challenged by the Appellant before this Court.

19. In terms of Section 27 of the Indian Evidence Act so much of such information as relates distinctly to the fact discovered in consequence of the information received from the accused while in Police custody, is relevant.

As explained in the famous case of ***Pulukuri Kottaya (AIR 1947 PC 67)***, normally the Section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon or ornaments, said to be connected with the crime of which the informant is accused. The fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this and the information given must relate distinctly to this fact.

20. It is true that to prove the evidence of discovery of a fact under Section 27 of the Indian Evidence Act, independent corroboration to the evidence of the Police Officer is not the thumb rule. It cannot be expected that in every case such statement of the Police Officer should always be supported by independent witnesses. It is the experience of all courts that independent witnesses turn hostile for many reasons. To believe the evidence of the Police Officer in this regard, the facts of each case are to be appreciated accordingly.

Coming to the given facts of the instant case, the alleged weapon of offence is a spade (KODALA), which is commonly available to each villager as an useful tool for agricultural purpose. The place of recovery is allegedly the back-yard land of the Appellant. This means finding a spade on the back-yard land of any villager is not uncommon.

21. The next important factor is that the alleged weapon of offence was not produced before the trial court and no reason has been explained for non-production of the same. Though as per the prosecution case and the chemical examination report under Ext.15, said weapon (spade) was containing stain of blood of human origin, still grouping of such human blood-stain could not be ascertained. Again the blood group of the Appellant was also not ascertained. The prosecution has failed to determine the blood group of the Appellant though his sample blood was taken. The blood group of the deceased has been determined of 'A' grouping. However in absence of any definite opinion of grouping on the smear of blood found on the spade, the mere opinion regarding finding of blood stain of human origin will not suffice the purpose to connect the spade conclusively with the injuries found on the body of the deceased. Moreover, non-production of the alleged weapon of offence before the trial court also plays a great role to cast doubt on prosecution case.

22. As stated earlier this is a case of circumstantial evidence where no direct eye-witness is there. In such cases, the law is settled that every such circumstance sought to be used against the accused must be of conclusive in nature. The Hon'ble Supreme Court of India in the case of ***Sharad Birdhichand Sarda vs. State of Maharashtra, AIR 1984 SC 1622*** have elucidated five golden principles on appreciation of evidence in such cases, which are as follows:

> i) The circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must or should' and not 'may be' established;
>
> ii) 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;
>
> iii) The circumstances should be of a conclusive nature and tendency;
>
> iv) They should exclude every possible hypothesis except the one to be proved; and
>
> v) 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."

23. In the instant case, as it is seen from the discussions made in the earlier paragraphs, the only circumstance brought against the Appellant is relating to discovery of the alleged weapon of offence. It is true that according to P.W.15, the injury noticed on the dead body of the deceased could be possible by such weapon of offence. Nonetheless, it is also important on the part of the prosecution to satisfy the court by establishing a creditworthy connection regarding that weapon of offence and the accused. When the alleged weapon of offence is not produced before the court in course of trial and the seizure of the same at the instance of the accused leading to discovery is denied by both the independent witnesses, then it becomes a weaker circumstance to be used against the accused. Thus the learned trial court has committed error here because every circumstance must point towards the guilt of the accused unerringly. When there is no other circumstance brought against the Appellant to establish his guilt, the conviction recorded by the learned trial court based on this weaker circumstance is unsustainable. As such we are inclined to hold in favour of the Appellant that the prosecution has failed to prove the charge beyond all reasonable doubts.

24. Resultantly, the Appellant is not held guilty for murder of the deceased and he is acquitted of the charge under Section 302, I.P.C. He be set at liberty forthwith in case his detention is not required in any other case.

25. The appeal is allowed.

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2022 (II) ILR - CUT- 341

BISWAJIT MOHANTY, J & BIRAJA PRASANNA SATAPATHY,J.

W.P.(C) NO. 1138 OF 2013

GOSHIBANANDA NAIK ……..Petitioner

.V.

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

INTERPRETATION OF STATUTE – Circular – Whether beneficial or oppressive – Determination of – Held, when the circular/ notification takes away the accrued rights of a category of person the same cannot be described as a beneficial circular/notification – It can only be described as oppressive – Thus such a circular can only have prospective operation. (Para-5)

Case Law Relied on and Referred to :-

1. 2018(I) Supreme 94 : Director of Income Tax, Circle 26(1) New-Delhi Vs. S.R.M.B. Dairy Farming Private Limited.

For Petitioner : Mr. S.K.Joshi

For Opp. Parties : Mr.H.M.Dhal, Addl. Govt. Adv.

JUDGMENT Date of Hearing : 11.05.2022 : Date of Judgment: 24.06.2022

B. MOHANTY, J.

The petitioner has filed the present writ petition with a prayer to quash the Government of Odisha Revenue and Disaster Management Department Notification dated 20.10.2010 under Annexure-3 containing clarification on "Displaced/Affected families" with reference to Odisha Resettlement and Rehabilitation Policy, 2006, for short, "2006 Policy". He

has also made an alternative prayer that the above mentioned Notification under Annexure-3 should not be given retrospective effect and the opposite parties be directed to extend the benefits of the Odisha Resettlement and Rehabilitation Policy, 2006 to the project affected persons.

2. Mr.S.K.Joshi, learned counsel for the petitioner submitted that the father of the petitioner had purchased Ac.3.15 dec. from Ghasiram Domb on 10.3.2003 and Ac.4.09 dec. from one Sabe Harijan and others on 17.4.2003 through Registered Sale Deeds and the above noted lands were mutated in favour of the father of the petitioner vide orders dated 3.12.2003 and 2.1.2004 passed respectively in Mutation Case No. 1055 of 2003 and Mutation Case No. 1057 of 20223. More than 75% of such land was acquired by the Government for Ret Irrigation Project in the district of Kalahandi pursuant to initiation of land acquisition proceeding on publication of preliminary Notification under Section 4(1) of the Land Acquisition Act, 1894 on 19.1.2006 and compensation for such acquisition was paid to father of the petitioner. On 14.5.2006 the Government of Odisha brought into force "2006 Policy". On 4.6.2007 vide Annexure-1A, certain amendments were introduced to the "2006 Policy". By the selfsame amendment the definition of "affected family" was introduced to mean a family whose land is affected by construction of the project but is not displaced or required to be displaced. It also introduced beneficial provisions for such affected families under Clause 3. On 25.8.2010 vide Annexure-2, the Government of Odisha sanctioned rehabilitation assistance for payment to both displaced families as well as affected families. Thereafter though the benefits under the "2006 Policy" concerning the affected families were deposited however subsequently the authorities directed the bank not to disburse the same. The petitioner came to know that such withholding of the disbursement occurred on account of the clarification dated 20.10.2010 issued by the Government in Revenue and Disaster Management Department under Annexure-3 which made it clear that the persons or families who are not ordinarily residing in or near the project area for a period of at least three years prior to the date of Notification under Section 4(1) of the Land Acquisition Act, 1894, for short, "1894 Act" are not eligible for getting R & R benefits. On account of this though rehabilitation assistance was sanctioned under Annexures-2 and 4, the father of the petitioner did not get the R & R benefit under the "2006 Policy" read with amendments as introduced in 2007 under Annexure-1A. Since the father has died in the meantime, the petitioner has moved this Court by filing the present writ petition with the above noted prayers.

According to Mr.Joshi when the father of the petitioner purchased the case lands in 2003, there was no proposal for establishment of Ret Medium Irrigation Project at Kusumkhunti. Much after the purchase only in 2005 as would be clear from first paragraph of Annexure 1, the State Government proposed to construct the irrigation work known as Ret Irrigation Project. Therefore,it cannot be said that the father of the petitioner acted in an oblique or malafide manner in purchasing the land in question to avail the benefits under "2006 Policy" more particularly when on the dates of purchase in 2003 neither such a policy nor the later amendment to "2006 Policy" under Annexure-1A were in existence.

Secondly he contended that Annexure-3 only covers the cases where the persons purchased the land just before the land acquisition. In the present case the lands in question were not purchased just before the land acquisition process started in January, 2006 rather as indicated earlier the same were purchased much earlierduring March and April, 2003 i.e. much before the initiation of land acquisition proceedings.

Thirdly he submitted that Annexure-3 covers the case of purchase of small extent of land. Here the father of the petitioner has purchased more than seven acres of land in 2003 which cannot by any stretch of imagination be described as a small extent of land.

Lastly he submitted that as the benefits flowing from "2006 Policy" read with its amendment under Annexure-1A have been sought to be negatived by introducing further conditions under Annexure-3 that the affected family in order to get benefit has to reside in or near the project area for a period of at least three years prior to the date of Notification under Section 4(1) of 1894 Act, the Circular under Annexure-3 be declared illegal. But as the hearing progressed, he put stress mainly only on the alternative prayer made in this petition and submitted that the notification under Annexure-3 should not be given retrospective effect and should be confined to cases where purchase of the lands and Section 4(1) Notifications have been made after issuance of Annexuxre-3 and accordingly the benefits of R & R Assistance under "2006 Policy" with its later amendment under Annexure-1A be extended to his late father and consequently to him.

3. A counter affidavit filed on behalf of opposite party Nos. 1 to 4 wherein it is stated that Ret Irrigation Project was started vide Notification

No. 2448-Irr.Med(5)-39/2004(pt)/WR dated 22.1.2005 of Government in Water Resources Department, Odisha, Bhubaneswar. For the said purpose Notification under Section 4(1) of the "1894 Act" was issued on 19.1.2006. All the displaced persons and project affected persons were paid Resettlement and Rehabilitation Assistance in the year 2007 as per "2006 Policy". Though the father of the petitioner was paid land acquisition compensation for his land including trees however the Resettlement and Rehabilitation Assistance was not paid to him because he had purchased the lands within three years of the date of Notification under Section 4(1) of the "1894 Act" as per Government resolution under Annexure-3.

Mr.Dhal, learned Addl. Government Advocate reiterated the above noted stand of the opposite parties made in the counter affidavit and submitted that the case of the petitioner is without any merit and same should be dismissed.

4. Heard Mr.S.K.Joshi, learned counsel for the etitioner and Mr.H.M.Dhal, learned Addl. Government Advocate.

5. The undisputed facts of the case are that the father of the petitioner had purchased Ac.3.15 dec. of land from Ghasiram Domb by Registered Sale Deed No. 569 dated 10.3.2013 and Ac.4.09 dec. of land from Sabe Harijan and others vide Registered Sale Deed No. 921 dated 17.4.2003 as indicated in paragraph six of the counter affidavit. The opposite parties in counter affidavit at paragraph five have clearly admitted that the Ret Irrigation Project was started vide Notification dated 22.1.2005 of the Government of Odisha in Water Resources Department and the Notification under Section 4(1) of the 1894 Act was issued on 19.1.2006. The opposite parties also make it clear that "2006 Policy" is clearly attracted in respect of the above Irrigation Project and project affected persons/affected families have been paid Resettlement and Rehabilitation Assistance in the year 2007 as per the provisions of "2006 Policy". It is not disputed that the "2006 Policy" came into force from 14.5.2006 and the said policy was amended on 4th June, 2007 and was published in the Odisha Gazette on 6.6.2007 under Annexure-1A defining the "affected family" and providing rehabilitation package for such families. Accordingly all the displaced persons and project affected persons as averred in Paragraph 5 of the counter were paid R & R Assistance. Since the family of father of the petitioner clearly came under the definition of "affected families" as his land was acquired, he was clearly entitled to get the

R & R benefits under "2006 Policy" read with amendments under Annexure-1A. But on account of clarificatory Notification dated 20.10.2010 under Annexure-3 which reads as follows, he was deprived of such benefits.

" GOVERNMENT OF ODISHA
REVENUE AND DISASTER MANAGEMENT DEPARTMENT
No. R & R E H-56/10 42388/R &DM. date. 20.10.2010

From

Sri R.K.Sharma
Commissioner-cum-Secretary to Government

To

All RDOs/All Collectors.

Sub: Clarification on "Displaced/Affected families" with reference to Orissa R & R Policy, 2006.

Sir,

I am directed to say that it has been brought to the notice of the Government that there are instances of misuse of the provision of R & R Policy, 2006 by persons who anticipating acquisition of land for a development project in a particular area, purchase small extent of land and/or construct dwelling house thereon for availing benefits meant for displaced/affected families.

The intention of the R & R Policy is to provide benefits to people who are actually displaced by projects or whose livelihood is affected by such projects. Persons who are not ordinarily residing in or near the project area, but purchase land just before the land acquisition cannot be treated as affected or displaced families. In most such cases, the purpose of such transaction is to avail benefit from the resettlement and rehabilitation packages as per R & R Policy, 2006 often at the cost of the local original land owners who were actually residing in the project area for generations together.

Government after careful consideration have been pleased to clarify that the persons or families who were ordinarily not residing in or near the

project area are not eligible for and shall not be enumerated as displaced or affected families for the purpose of Resettlement and Rehabilitation benefits. Persons or families who are normally residing in or near the project areas for a period of at least 3(three) years prior to the date of section 4(1) notification (under Land Acquisition Act) above may be considered as ordinarily residing therein for the purpose of R & R benefits.

The above clarification may be brought to the notice of all concerned."

A perusal of the above noted clarification shows that the clarification as contained in the third paragraph of the above noted notification makes it clear that persons or families who were ordinarily not residing in or near the project area shall not be enumerated as displaced/affected families and accordingly they will not be eligible to get Resettlement and Rehabilitation benefits. It further clarifies that the persons or families who are normally residing in and near the project area for a period of at least three years prior to the date of Notification under Section 4(1) of "1894 Act" may be considered as ordinarily residing therein for the purpose of getting the Resettlement and Rehabilitation benefits. Thus, unless a person/ a family resides in or near the project area for a period of at least three years prior to the date of Notification issued under Section 4(1) of "1894 Act" he/the family will not be enumerated as a displaced/affected family and accordingly will not be eligible for Resettlement and Rehabilitation benefits.Thus the circular added a new dimension to the definition of "affected family" and "displaced family" requiring fulfillment of additional conditions to get the R & R benefits under "2006 Policy" and its amendment as introduced in 2007. As per the circular, this clarification was introduced as the Government found that many persons who are not ordinarily residing in or near the project area purchased small extent of land just before the land acquisition commenced for the purpose of availing benefits of Resettlement and Rehabilitation package under "2006 Policy" at the cost of original land owners who were actually residing in the project area for generation together. Though this clarificatory Notification was assailed by the learned counsel for the petitioner however as indicated earlier, as hearing progressed, he confined his attack to giving retrospective operation to Notification under Annexure-3 thereby depriving the father of the petitioner of his accrued benefits /dues under "2006 Policy" read with the amendment brought under such policy under Annexure-1A and consequent deprivation of the petitioner. It is not

disputed that the petitioner is laying his claim on the ground that his father was a project affected person or as one who belonged to a project affected family. The father of the petitioner would have got all the benefits as an affected family but for Annexure-3. It is admitted in the counter affidavit that the father of the petitioner was not paid the Resettlement and Rehabilitation Assistance as he had purchased the land within three years of the date of Notification under Section 4(1) of the "1894 Act". Thus entitlements of the late father of the petitioner as an "affected family" under Clause 8-III-Type C of "2006 Policy" have been nullified by virtue of the Notification under Annexure-3 by requiring additional conditions to be fulfilled to the effect that the affected families/persons should be residing in or near the project area for a period of at least three years prior to the date of Notification under Section 4(1) of the "1894 Act". Since the father of the petitioner purchased the land within three years naturally he could not be taken as residing for at least three years prior to Section 4(1) Notification in or near by project, thereby depriving father of the petitioner of the Resettlement and Rehabilitation Assistance. In this connection the submission of Mr.Joshi relating to deprivation of the accrued benefits/dues of the father of the petitioner to receive R & R benefits on account of retrospective operation of Annexure-3 assumes significance. Now the moot question is whether such right/rights flowing from beneficial provisions of "2006 Policy" and its later amendments under Annexure-1A can be taken away by a circular under Annexure-3 when process of acquisition was initiated much earlier ? It is well settled that a beneficial circular has to be applied retrospectively while an oppressive circular has to be applied prospectively. ***(See Director of Income Tax, Circle 26(1) New-Delhi Vrs. S.R.M.B. Dairy Farming Private Limited*** *reported in* ***2018(I) Supreme 94.*** Since the Circular/Notification under Annexure-3 takes away the accrued rights of a category of displaced families and affected families under amended "2006 Policy" in getting the R & R benefits, the same cannot be described as a beneficial circular/Notification. It can only be described as oppressive. Thus, such a circular can only have prospective operation. Even otherwise Annexure-3 does not clearly indicate that it will have any retrospective operation. In other words the circular under Annexure-3 can only apply to the purchases made and the Notifications made under Section 4(1) of "1894 Act" after 20.10.2010 and it cannot apply to purchases made and Notifications made under Section 4(1) of the "1894 Act" prior to 20.10.2010. It may be noted that merely holding that Annexure-3 will apply to Section 4(1) Notifications issued under "1894 Act" after issuance of Annexure-3 will not be enough as the same still will have retrospective

operation vis-a-vis purchases made before issuance of Annexure-3, where Section 4(1) Notification was issued immediately after issuance of Annexure-3. Therefore, the refusal of the authorities in not paying the R & R Assistance to the late father of the petitioner being a product of arbitrary exercise of power, cannot be legally sustained. Additionally also it may be noted here that when the lands to the tune more than Ac.7.00 dec. were purchased by father of the petitioner in 2003, there was no notification for construction of project. Such a notification came in 2005. Also at that point of time there was no existence of either "2006 Policy" or the amendments introduced under Annexure-1A. Therefore it cannot be alleged that lands were purchased only with an intention to get the R & R benefits under the above noted beneficial policies.

For all these reasons, it is made clear that the late father of the petitioner was entitled to all the benefits those are due to the affected families as his family clearly came within its definition of "affected family".Accordingly, this Court directs the opposite party Nos. 2 to 4 to pay all his dues relating to R & R Assistance under the "2006 Policy" as amended under Annexure-1A within a period of six months to his legal heirs. For the said purpose the petitioner is directed to produce a copy of the legal heir certificate of his late father before the authorities more particularly before opposite party No.4.

6. Accordingly the writ petition is disposed of.

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2022 (II) ILR - CUT-348

Dr. B.R. SARANGI, J & SANJAY KUMAR MISHRA, J.

W.P.(C) NO. 10527 OF 2011

M/s. TATA STEEL LTD. & ANR. ……..Petitioners

.V.

STATE OF ODISHA & ORS. ……Opp. Parties

(A) MINES AND MINERALS (REGULATION AND DEVELOPMENTS) ACT, 1957 – Section 9(1) – Demands raised in various letter referring to the judgment of the Apex Court – The said judgment has been distinguished by the Apex Court in another Judgment – Whether raised demand is sustainable? – Held, unsustainable in the eyes of law.

(Para-10)

(B) MINERAL CONCESSION RULES, 1960 – Rule 64 (B) and 64 (C) – Applicability – Held, the Rule 64 (b) and 64 (c) have come into force with effect from 25.09.2000 – Hence cannot be applied retrospectively, and the same has no application to the case of petitioner/Company.

Case Laws Relied on and Referred to :-

1. (1998) 6 SCC 476 : State of Orissa Vs. Steel Authority of India.
2. (2004) 6 SCC 281 : National Mineral Development Corporation Limited Vs. State of M.P.
3. (1998) 6 SCC 476 : State of Orissa Vs. Steel Authority of India Ltd.
4. (2004) 6 SCC 281 : National Mineral Development Corporation Ltd. Vs. State of M.P.
5. (1990) 1 SCC 12 : India Cement Ltd. Vs. State of Tamil Nadu.
6. AIR 1959 SC 582 : Western India Theatres Ltd. Vs. Cantonment Board, Poona Cantonment.
7. AIR 1990 SC 85 : India Cement Vs. State of Tamil Nadu.
8. (2015) 6 SCC 193 : Tata Steel Ltd. Vs. Union of India.

For Petitioners : M/s S.P. Sarangi, D.K. Das and P.K. Das.
For Opp. Parties: Mr. T. Pattnaik, Addl. Standing Counsel.

JUDGMENT Date of Hearing & Judgment: 22.06.2022

Dr. B.R.SARANGI, J.

The Petitioners, by way of this writ petition, seek to quash the letters dated 20.01.2004, 06.04.2004, 29.08.2008, 04.10.2008 and 15.04.2011 as at Annexures-1, 3, 7, 8 and 12 respectively issued by the Deputy Director Mines, Joda, Keonjhar, directing the Petitioner-Company to pay a sum of Rs.6,93,99,308/- towards loss of royalty and Rs.7,07,44,492/- as interest thereon due to beneficiations of high grade lump iron ore for the period from October, 1994 to September, 2000, and to issue direction to the Opposite Parties to grant "Mining Dues Clearance Certificate" in favour of the Petitioner Company without any further delay.

2. The factual matrix of the case, in brief, is that Petitioner No.1, being a Company registered under the Companies Act, 1956 and a manufacturer of iron and steel in the country, has set up an integrated steel plant at Jamshedpur. Petitioner No.2 is the Chief Resident Executive of Petitioner No.1 Company and is authorized to file the writ petition by virtue of the Board Resolution dated 07.04.2008 of Petitioner No.1-Company. As such, it is an old Mining Company in the country and owns mineral rights of various minerals like iron ore, chromite, limestone, dolomite, manganese, coal etc.

2.1 Petitioner-Company was granted the mining lease in the name of Joda East Iron and Manmore Manganese in the year 1925 by the then Maharaja of Keonjhar Estate over an area of 2.59 sq. mile for a period of 30 years from 01.07.1925 to 30.06.1955 vide Registered Deed No.9 of 1926 dated 28.04.1926. Two subsequent renewals for 30 years each were also granted by the Mining & Geology Department, Govt. of Orissa for the period from 01.07.1955 to 30.06.1985 vide Registered Lease Deed No.1487 dated 19.07.1965 and from 01.07.1985 to 30.06.2005 vide Registered Lease Deed No.23 dated 20.01.1998 respectively. During the 1st renewal period, Joda East Iron and Manmora Manganese were bifurcated and formed a separate lease for Manmora Manganese lease over 16.350 ha. As per the provision under Rule-24A (1) of Mineral Concession Rules, 1960, Petitioner-Company had applied for its 3rd renewal on 27.04.2004.

2.2 When the matter stood thus, Petitioner-Company set up a beneficiation plant of iron ore within its leasehold area of Joda East Iron Mines. The ore is extracted by open cast method of mining for which mining benches are prepared. Firstly, holes are drilled on the benches covering entire height of the bench at regular distance depending on ore types. After charging of the holes with explosives the portion of the bench is blasted. The blasted materials, which are known as Run of Mines (of grade from 58% Fe to 65% Fe), consist of boulders, fragments, fines and other extraneous material transported to the processing plant for crushing, screening and washing. Usable products of more than 0.15 mm are recovered as size and fines ore. The minus 0.15 mm fraction in the form of slime (mixed with washed water and impurities) are stored in the slime dam inside the leasehold area. The water is recovered and reused after settling of slime.

2.3 Petitioner-Company has been regularly submitting its return in Form-A and A-1 in respect of production, dispatch of iron from its Joda East Iron

Mines and also paying the royalty in due time as prescribed under the provisions of Mines and Minerals (Regulation and Development) Act, 1957 and Rules made thereunder.

2.4. The Deputy Director of Mines, Joda-Opposite Party No.3 wrote vide letter dated 20.01.2004 to the Petitioner-Company stating inter alia as follows:-

> *"From No.A-1 submitted by you are in a consolidated form pertaining to whole year, from there it is observed that some loss of iron ore has been shown while processing of High grade Lump Iron Ore produced from your mines and fed to the crusher in operation in the leasehold area. The total quantity of unprocessed run of mine ore consumed in the process of beneficiation for recovery of processed mineral will be taken into account fir the recovery of processed mineral will be taken into account for the purpose of assessment of royalty but not on the processed mineral (sized iron Ore and Fines) in accordance with Sect.9 of M.M.(DR) Act, 1957 at the rate specified in the IInd Schedule of the Act basing on the judgment of the Hon'ble Supreme Court of India, Dt.10.08.98 vide Civil Appeal No.3693 and 94 of 1998 (Arising out of SLP© No.16718/91 and 16665/92). Further, it is revealed that you have fed 1, 14, 41,817 Mts of Iron Ore (+ 65% Fe (Lump) and (-65% Fe) Iron Ore (Fines) recovered there from 69, 58,274 Mts of +65% Fe, (Lump) and (Fines) showing loss of 45, 13,543 Mts, for which you are liable to pay royalty in view of judicial pronouncement cited above."*

2.5 Relying upon the judgment of the apex Court in the case of ***State of Orissa v. Steel Authority of India, (1998) 6 SCC 476***, the aforesaid letter was issued by the Deputy Director of Mines, Joda-Opposite Party No.3. In response to the letter dated 20.01.2004 of the Deputy Director of Mines, Joda-Opposite Party No.3, Petitioner-Company gave reply to the same denying its liability to pay the royalty and further stated that the judgment dated 10.08.1998 of the apex Court in the case of ***Steel Authority of India*** (supra)has no application to the present case. In spite of such letter being issued, Deputy Director of Mines, Joda-Opposite Party No.3,wrote a letter on 06.04.2004 to the Petitioner-Company directing to pay a sum of Rs.1,55,06,518/- as loss of royalty due to beneficiation of high grade lump iron ore within the leasehold area. On 08.06.2004, Petitioner-Company wrote a letter to the Deputy Director of Mines stating that in view of the judgment of the apex Court in the case of ***National Mineral Development Corporation Limited v. State of M.P., (2004) 6 SCC 281***, it is not liable to pay the royalty either on the Run of Mine iron ore or on slime generated from beneficiation

of iron ore (i.e. loss due to beneficiation). Thereafter, the Deputy Director of Mines, Joda-Opposite Party No.3, wrote a letter on 05.08.2004 to the Director of Mines, Orissa-Opposite Party No.2, brining to its notice about the judgment dated 05.05.2004 of the apex Court in the case of National Mineral Development Corporation Limited (supra), wherein the apex Court held that the slimes are excluded from the charge of royalty and further requested to issue necessary instructions whether he will allow the Petitioner-Company to sell the slimes. On 30.08.2004, the Director of Mines, Orissa-Opposite Party No.2, wrote a letter to the Principal Secretary, Department of Steel stating that in view of the decision of the apex Court, the amount so demanded on TISCO is not payable and, as such, the same may be dropped. But the Deputy Director of Mines, Joda-Opposite Party No.3, without taking into consideration the judgment of the apex Court in National Mineral Development Corporation Limited (supra), issued letter on 29.08.2008 to the Petitioner-Company directing to pay a sum of Rs.6,80,54,191/- as loss of royalty and interest (Rs.3,47,63,581/-+Rs.3,32,90,610/-= Rs.6,80,54,191/-)in respect of Joda East Iron Mines for the period from 1994-95 to 2000-01 towards shortage of iron ore due to beneficiation. Further, the Deputy Director of Mines, Joda-Opposite Party No.3, also issued a letter on 04.10.2008 stating inter alia that as per the A.G. audit (revised) calculation, Petitioner-Company is liable to pay a sum of Rs.6,93,99,308/- towards loss of royalty and interest of Rs.7,07,44,492/- due to beneficiation of iron ore in respect Joda East Iron Mines for the period from 1994-95 to September, 2000. The Director of Mines- Opposite Party No.2, vide letter dated 31.03.2009, addressed to F.A.-cum-Joint Secretary to Government Department of Steel and Mines, Orissa, stated that the amount demanded on M/s TISCO Limited is not payable and, as such, the same may be dropped. On 18.08.2010 and 14.02.2011, Petitioner-Company applied for its "Mining Dues Clearance Certificate" to the Director of Mines, Orissa-Opposite Party No.2. The said applications are pending before the Director of Mines, Orissa-Opp. Party No.2, on the ground of non-payment of royalty and interest.Due tonon-issuance of "No Due Certificate" Petitioner-Company has been facing difficulties in renewing its lease, trading license and removal of ore etc. The Deputy Director of Mines,Joda-Opposite Party No.3,on 15.04.2011, issued a letter by giving reference of his earlier letters dated 29.08.2008 and 04.10.2008 and mentioned that "once again you are requested to pay a sum of Rs.6,93,99,308/- towards loss of royalty and interest of Rs.7,07,44,492/- due to beneficiation of iron ore in respect of Joda East Iron Mines for the period from 1994-95 to September,

2000, as pointed out by the A.G. Audit within 15 days, failing which action will be taken to recoverthe aforesaid dues through certificate proceeding. Hence this application.

3. Mr. S.P. Sarangi, learned counsel for the Petitioners emphatically contended that the letters issued on 20.01.2004, 06.04.2004, 29.08.2008, 04.10.2008 and 15.04.2011 by the Deputy Director of Mines, Joda, directing the Petitioner-Company to pay royalty and interest thereon due to beneficiation of high grade lump iron ore for the period from October, 1994 to September, 2000 are without jurisdiction, illegal, arbitrary, contrary to the law laid down by the apex Court and also violates Articles 14 and 19 (1) (g) of the Constitution of India. It is further contended that the demand of royalty levied by the Deputy Director Mines, Joda-Opposite Party No.3, is based on the A.G. Audit Report, which is based on the judgment of the apex Court in the case of ***Steel Authority of India Limited*** (supra) and, as such, the same was distinguished by the apex Court in the case of ***National Mineral Development Corporation Limited*** (supra). Thereby, the demand so raised cannot have any justification and the same has to be quashed. It is further contended that on the basis of the ratio decided in ***National Mineral Development Corporation Limited*** (supra), Opposite Party No.2-Director of Mines, on 30.08.2004 and 31.03.2009, has recommended to the State Government to drop the proceeding against the Petitioner-Company. In spite of such communication made, no action has been taken and arbitrarily demands have been raised, which cannot sustain in the eye of law and has to be quashed. Even though the Petitioner-Company applied for grant of "mining dues clearance certificate" by filing applications dated 18.08.2010 and 14.02.2011 for the purpose of renewal of its lease, trade license and removal of ore from mines,the same are still pending before the Opposite PartyNo.2-Director of Mines, on the ground of non-payment of royalty and interest thereon, even though the Petitioner-Company is not liable to pay the same. It is further contended that determination of royalty by the A.G. Audit has not been arrived at in accordance with the provisions of the Mines and Minerals (Development and Regulation) Act, 1957 and Mineral Concession Rules, 1960. Therefore, the same cannot be enforced and compelled by the Opposite Parties to pay the same, as the same is contrary to the judgment of the apex Court. Therefore, he seeks for quashing of the demand made by the authority vide letters dated 20.01.2004, 06.04.2004, 29.08.2008, 04.10.2008 and 15.04.2011under Annexures-1, 4, 8, 9 and 12, respectively.

To substantiate his contentions, he has placed reliance on the judgments of the apex Court in the cases of ***State of Orissa v. Steel Authority of India Ltd., (1998) 6 SCC 476; and National Mineral Development Corporation Ltd. v. State of M.P., (2004) 6 SCC 281***.

4. Mr. T. Pattnaik, learned Addl. Standing Counsel for the State-Opposite Parties contended that the Accountant General, Audit, vide Report on RAP-27 (Mining Review) dated 11.12.2003 and Report on RAP- 16 (Mining Review) has held that the referred demanded dues to be payable towards loss of royalty and interest accrued thereon till the date of demand and in accordance therewith the demand has been raised pursuant to letters, as mentioned above. As per the provisions contained in M.M. (D&R) Act, 1957 and Rules framed thereunder, the lessee has to maintain a correct and intelligible account of ore/mineral produced, consumed and dispatched daily and to submit a copy of such account as a monthly return in administrative Form-A and A-1. But the Petitioner- Company did not follow the Rules and submitted a consolidated Annual Return for three consecutive years stating that the ore fed to the Plant was high grade. After examining the Reports submitted by the Petitioner-Company, it is observed that loss of some ore has been shown while processing of high grade iron ore produced from the Petitioner-Company's mines and fed to the crusher in operation within the leasehold area. The total quantity of unprocessed run of mines ore is consumed in the process of beneficiating for recovery of the processed mineral. Thereby, the royalty is chargeable on the entire unprocessed run-off ores and not on the processed mineral alone as per the provisions contained in Section 9 of the M.M. (D&R) Act, 1957 at the rate specified in the Second Schedule to the Act, basing upon the judgment of the apex Court in the case of ***Steel Authority of India Limited*** (supra). Consequentially, the royalty payable on the fed quantity was assessed and the differential amount, after deducting the demanded/paid royalty over the finished product, was demanded. Thereby, no illegality or irregularity was committed by the Authority by making such demand pursuant to the letters, as mentioned above. It is further contended that the receipts of the mining revenue to the State Exchequer was reviewed by the A.G. Audit annually and after review, the Officers, who had conducted Audit, directed the Assessing Authorities to demand the short levied dues on the basis of their findings. In compliance of the observations of the Audit, the Assessing Authorities raised demand to the defaulters. Thereby, the demands have been raised by the Authorities to pay the royalty and interest thereon on run-off iron ores and slimes. As such, the

demand so made is well justified, which does not require any interference of this Court at this stage. Consequentially, he seeks for dismissal of the writ petition.

5. This Court heard Mr. S.P. Sarangi learned counsel for the Petitioners and Mr. T. Pattnaik, learned Addl. Standing Counsel for the State-Opposite Parties by hybrid mode. Pleadings having been exchanged between the parties, with the consent of learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

6. For just and proper adjudication of the case, relevant provisions of Mines and Minerals (Regulation and Development) Act, 1957 are extracted hereunder:-

> *"**Sec.2. Declaration as to expediency of Union Control.—**It is hereby declared that it is expedient in the public interest that the Union should take under its control the regulation of mines and the development of minerals to the extent hereinafter provided.*
>
> NOTES
>
> *(1) Section-2- The Court, inter alia, pointed out that the expression 'under the control of the Union' occurring in Entry 54 in the Union List and Entry 23 in the State List did not mean 'control of the Union Govt., because the Union consists of three limbs, namely, parliament, the Union Govt., and the Union Judiciary, and the control of the Union which is to be exercised under the said two entries is the one to be exercised by Parliament, namely, the legislative organ of the Union which is, therefore, rest in control of the Union. The Court further held that the Union had taken all the powers in respect of minor minerals to itself and had authorised the State Govt. to make rules for the regulation of leases and thus by the declaration made in Section 2 and the enactment of Section 15 the whole of the field relating to minor minerals came within the jurisdiction of Parliament and there was no scope left to the State Legislatures to make any enactment with respect thereto. (Bajinath Kedia vs. State of Bihar, AIR 1970 S.C.1436= (1970) 1 SCJ913) (Distg. In AIR 1982 SC 697 & AIR 1995 Ori. 65).*
>
> *(2) Section-2- The functions, powers and duties of Municipalities do not become an occupied field by reason of the declaration contained in Section 2.Though, therefore, on account of that declaration, the legislative field covered by Entry 23, List II (Seventh Schedule of the Constitution) may pass on the Parliament by virtue of Entry 54, List I, the competence of the State Government to enact laws for municipal administration will remain unaffected by that declaration. (Western Coalfields Ltd. vs. Spl. Area Development Authority, AIR 1982 SC 697 (707) = (1982) 1SCC.125).*

(3) Section-2 The various provisions contained in the central Act of 1957 also indicate that the Parliament while making the declaration in Section 2 has not taken under its control the field of taxation . Royalty is the payment made for the minerals extracted. It is not tax (LaxminarayanAgarwal vs. State of Orissa, AIR 1983 Ori. 210 (223) = (1983) 55 Cut. LT 364).

(4) Section-2 The declaration made under this section has resulted to bring the entire field of mines and minerals within the jurisdiction of the Central Govt., and as such,, the State Govt., had no authority to legislate on its own on matters relating to minor minerals. Thus, the State Govt. can choose to frame rules but it cannot enact laws on the subject. (Chandeswar Prasad vs. Sub- Divisional L.R. Officer, AIR 1986 Cal 1 (15) = (1985) 89 Cal. WN 414).

(5) Section-2 From the discussion made therein, it follows that in view of declaration under Section 2 of the Act, the State is devided of legislative powers to enact any law in respect of regulation of mines and minerals development, hence the State can claim to execute power touching any aspect of regulation of mines and minerals development. (Govt., of A.P. vs. Y S Vivekananda Reddy, AIR 1955 A.P. 1 (FB) = 1994 (3) Alt 179 (FB), 1994 (2) An. WR 300).

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Sec.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.

(2-A) 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 1[three years].

xxx *xxx* *xxx*

Entry-23

23. Iron Ore: *(i) Lumps*

(a) With 65 per cent Fe content or more: twenty seven rupees per tonne.

(b) With 62 per cent Fe content or more but less than 65 percent Fe: Sixteen rupees per tone

(c) With less than 62 per cent Fe content: Eleven rupees per Tone

(ii) Fines (including inter alia natural fines produced incidental to mining and sizing lumpy ore)

(a) With 65 per cent Fe content or more:Nineteen rupees per tone

(b) With 62 per cent Fe content or more but less than 65 percent Fe: Eleven rupees per tone

(c) With less than 62 per cent Fe content: Eight rupees per Tone

(iii) Concentrates prepared by beneficiation and /or concentration of low grade ore containing 40 per cent Fe or less: Four rupees per tonne"

Rules 64-B and 64-C of Mineral Concession Rules, 1960, being relevant for the purpose of the case are also extracted hereunder:-

"***64-B- Charging of Royalty in case of minerals subjected to processing:*** - (1) In case processing of run-of-mine minerals is carried out within the leased area, then, royalty shall be chargeable on the processed minerals removed from the leased area.

(2) In case run-of-mine mineral 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 mineral and not on the processed product.

NOTES

Re.64-B & C Royalty cannot be charged on 'slimes' of iron ore. Rules 64-B and 64-C suggest that dumped tailings or rejects (or in other words 'slimes') are to be treated as a separate head and charge of royalty therein is not to be made as a matter of course. Dumped tailings or rejects may be liable to payment of royalty if only they are sold or consumed, ***National Mineral Development Corporation Ltd. v. State of M.P., AIR 2004 SC 2456= 2004 (5) SCALE 345= 2004 AIR SCW 2939***

> ***64-C. Royalty on tailings or rejects****:- On removal of tailings or rejects from the leased area for dumping and not for sale or consumption, outside leased area such tailings or rejects shall not be liable for payment of royalty:*
>
> *Provided that in case so dumped tailings or rejects are used for sale or consumption on any later date after the date of such dumping, then, such tailings or rejects shall be liable for payment of royalty.*

Furthermore, Article 265 of the Constitution of India, having significance for deciding the lis between the parties, is quoted hereunder:-

> *"265. No tax shall be levied or collected except by authority of law."*

7. On perusal of the aforesaid provisions, it is made clear that in view of the declaration contained in Sections 2 and 9 of the MMDR Act, read with the Second Schedule, once the Parliament has declared that it is expedient in the public interest that the Union should take under its control the regulation and development of minerals to the extent provided in the MMDR Act, it becomes the exclusive subject for legislation by the Parliament alone. In view of Section 9(3) of the MMDR Act, it is the Central Government which has the jurisdiction to amend the Second Schedule to enhance or reduce the rate of royalty which shall be payable in respect of each mineral. The law prescribes both the Authority to levy the royalty, the subject of levy as well as the rate at which it is to be levied. As such, the legislation, on all the three aspects, is within the exclusive domain of the Parliament. The role of the State Government is limited to its implementation and collection of royalty for minerals extracted from within its territorial bounds. On perusal of Second Schedule to the MMDR Act it is thus evident that different subjectsand rates of royalty have been identified for different minerals in line with their characteristics. When the statute itself treats coal differently from iron ore, the Authority cannot and could not have gone beyond the provisions of law applicable to the present context. As it appears, demands have been raised pursuant to judgment of the apex Court in the case of ***Steel Authority of India Limited*** (supra), wherein Section 9 of the MMDR Act has been taken note of in Paragraph-11 of the said judgment which is extracted hereunder:-

> *"It is to be noted that the levy of royalty is in respect of minerals removed or consumed by the contractor from the leased area. We have seen earlier the process that the mineral was said to undergo before the same was removed from the leased area. Section 9(1) of the Act also contemplates the levy of royalty on the mineral*

> *consumed by the holder of a mining lease in the leased area. If that be so, the case of the appellants that such processing amounts to consumption and, therefore, the entire mineral is exigible to levy of royalty has to be accepted. We are unable to agree with the distinction made by the High Court and the conclusion that the royalty can be levied only on the quantity of mineral obtained after processing."*

8. So far as constitutionality of levy of cess on the royalty, the apex Court has referred to the judgment in the case of ***India Cement Ltd. v. State of Tamil Nadu, (1990) 1 SCC 12***, wherein also reference was made to the judgment of the apex Court in the case of ***Western India Theatres Ltd. v. Cantonment Board, Poona Cantonment, AIR 1959 SC 582***, and it was held that royalty is payable on a proportion of the minerals extracted. In view of the provisions contained in Section9, there is no iota of doubt that demand of royalty can be raised on mineral extracted subject to certain process to remove waste and foreign matter. But it was held that such processing amounts to consumption. Thereby, the Lessee-Manufacturer is liable to pay the royalty on the entire mineral extracted by him and not only on the net quantity of mineral obtained after processing. Consequentially, the apex Court held that the High Court was not right in quashing the demands which were rightly calculated and levied and set aside the judgment of the High Court and dismissed the writ petition filed by the Opposite Parties by allowing to operate the Petitioner by the State of Orissa.

9. It is made clear that in view of Section-9 read with Second Schedule, principles have been followed for levy of royalty. But Section-9 is not the beginning and end of the levy of royalty. Rather royalty has to be quantified for the purpose of levy and that cannot be done unless the provisions of the Second Schedule are taken into consideration. Therefore, reading of Section 9, which authorizes charging of royalty, cannot be complete unless what is specified in Schedule-II is also read as part and parcel of Section 9. For the purpose of levying any charge, not only the said charge to be authorized by law, it has also to be computed. The charging provision and the computation provision whether in one place, or not, have to be read together as constituting one integrated provision. In case of doubt or ambiguity, the computing provisions shall be so interpreted as to act in aid of the charging provision. Therefore, in ***National Mineral Development Corporation Ltd***. (supra), the apex Court held that royalty is not payable either on run iron ore or slimes generated from beneficiation from iron ore within the lease hold areas. Relevant paragraphs of the said judgments, such as, Paragraphs-22 to 26 and 28 to 36 read thus:-

"22. There can be no manner of doubt that the entire material extracted from the earth , so far as iron ore mines are concerned, has to be subjected to a process for the purpose of winning iron there from. The process results in (i) lumps, (ii) fines, and (iii) slimes. Section 9 of the Act obliges the holder of a mining lease to pay royalty in respect of any minerals removed or consumed from the leased area. If only it would have been the question of considering Section 9 and determining the impact thereof, maybe, it is the total quantity of mineral removed from the leased area or consumed in the beneficiation process which would have been liable for payment of royalty and that quantity may have included the quantity of slimes as well, as was held by this Court in State of Orissa v. Steel Authority of India Ltd.! But in case of iron ore the process of beneficiation involves introduction of catalytic agent leading to separation and generation of waste consisting of impurities which the scheme of the Act has left out from charging.

23. Section 9 is not the beginning and end of the levy of royalty. The royalty has to be quantified for purpose of levy and that cannot be done unless the provisions of the Second Schedule are taken into consideration. For the purpose of levying any charge, not only has the charge to be authorized by law, it has also to be computed. The charging provision and the computation provision may be found at one place or at two different places depending on the draftsman's art of drafting and methodology employed. In the latter case, the charging provision and the computation provision, though placed in two parts of the enactment, shall have to be read together as constituting one integrated provision. The charging provision and the computation provision do differ qualitatively. In case of conflict, the computation provision shall give way to the charging provision. In case of doubt or ambiguity the computing provision shall be so interpreted as to act in aid of charging provision. If the two can be read together homogeneously then both shall be given effect to, more so, When it is clear from the computation provision that it is meant to supplement the charging provision and is, on its own ,a substantive provision in the sense that but for the computation provision the charging provision alone would not work. The computing provision cannot be treated as mere surplus age or of no significance; what necessarily flows there shall also have to be given effect to.

24. Applying the above stated principle, it is clear that Section 9 neither prescribes the rate of royalty nor does it lay down how the royalty shall be computed. The rate of royalty and its computation methodology are to be found in the Second Schedule and therefore the reading of Section 9 which authorities charging of royalty cannot be complete unless what is specified in the Second Schedule is also read as part and parcel of Section 9.

25. A bare reading of Entry 23 reveals that Parliament has not chosen to compute royalty on iron ore by itself and quantifiable as run-of- mine(ROM). Parliament is conscious of the fact that iron ore shall have to be subjected to processing is conscious of the fact that iron ore shall have to be subjected to processing to processing where after it would yield (i) lumps, (ii)fines, (iii) concentrates, and (iv)

slimes – the last one to be found deposited in the tailing pond. Parliament has to be attributed with the knowledge that keeping in view the advancements in the field of science and technology as on the day, the smiles do not have any commercial value. While carrying out prospecting operations it is known what will be the strength of the iron ore (i.e. the percentage of ferrous content) available in a particular area. By reference to such strength or quality of iron ore, the rate of royalty could have been made available for calculation based on the quantity of the iron ore as run-of-mine and quantifiable on per tonne of iron ore, that is, tonnage of iron ore as such. Parliament has chosen not to do so. Entry 23, the manner in which it has been drafted, mandates the quantification of royalty to await or be postponed until the processing has been carried out and the lumps, fines and concentrates are prepared. Once the result of processing is available, the lumps, fines and the concentrates are subjected to levy of royalty at different rates applied by reference to the quantity of each of the three items earned as a result of processing. The slimes have been left out of consideration vy Entry 23 for the purpose of quantification and levy.

26. The High Court is, therefore, not right in forming an opinion that the slimes are part of fines and hence liable to be included in clause

(ii) of Entry 23 for the purpose of charging the royalty. In the mining circles, fines and slimes both have different meanings. Both the terms are well understood as two different objects. Slimes cannot be included in "fines".

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28. It is clear that in iron ore production the run- of-mine (ROM) is in a very crude form. A lot of waste material called "impurities" accompanies the iron ore. The ore has to be upgraded.Upgrading the ores is called " beneficiation". That saves the cost of transportation. Different processes have been developed by science and technology and accepted and adopted in different iron ore projects for the purpose of beneficiation. In the processes, a stage is reached which yields concentrates. They are treated in the concentrate plant by resort to physical, chemical and/or electrical methods. The valuable constituents are retained and what is discarded as "tailings" or "slimes" is something of no commercial value, being just impurities consisting of unusable materials. Concentrates is not necessarily a stage reached in all the processes. Concentrates consist of enriched ore segregated from waste in concentration plant. It is a substance of intensified strength having been purified by removal of valueless mud, slurry, impurities and waste. Wet processing (at a stage after fines have already been won) separates extremely fine particles, grains or fragments of ore which are too poor to be treated any further and have to be flown for being consigned to tail ponds as waste separated from concentrates. From concentrates iron can yet be won. Concentrates differ from slimes which are to be found as such not in concentration plant but only in tail pond. What

reaches tailings dam or pond is slurry. Solid particles are deposited and clean water overflows. This processing is done to prevent pollution and to protect environment. There are ferrous contents in the slurry but that is a total waste. Inasmuch as, and undisputedly, by any process or technique known to science and technology till this date, winning of ferrous contents from out of the slurry is commercially unviable. The slimes are accepted by the mother earth once again to be dissolved in its womb.29. Parliament knowing it full well that the iron ore shall have to undergo a process leading to emergence of lumps, . fines, concentrates and slimes chose to make provision for quantification of royalty only by reference to the quantity of lumps, fines and concentrates. It left slimes out of consideration. Nothing prevented Parliament from either providing for the quantity of iron ore as such as the basis for quantification of royalty. It chose to make provision for the quantification being awaited until the emergence of lumps, fines and concentrates. Having done so Parliament has not said: "fines including slimes". Though "slimes"are not "fines" Parliament could have assigned an artificial or extended meaning to "fines" for the purpose of levy of royalty which it has chosen not to do. It is clearly suggestive of its intention not to take into consideration "slimes' for quantifying the amount of royalty. This deliberate omission of Parliament cannot be made good by interpretative process so as to charge royalty on slimes by reading Section 9 of the Act divorced from the provisions of the Second Schedule. Even if slimes were to be held liable to charge of royalty, the question would still have remained, at what rate and on what quantity, which questions cannot be answered by Section 9.

30. Maybe, at some point of time in future when science and technology have succeeded in evolving a process rendering the slimes a useful and valuable goods on account of availability of any process making it commercially viable to retrieve iron therefrom, Parliament may make appropriate amendment in Entry 23 by including therein "slimes" and prescribing the rate at which royalty shall be charged thereon.

31. Mr Mukul Rohatgi, the learned Additional Solicitor General assisted by Mr P.S. Narasimha, learned counsel for the appellant, has brought to our notice a very significant amendment made in the Mineral Concession Rules, 1960. The Mineral Concession Rules, 1960 (hereinafter referred to as the Rules for short) have been framed by the Central Government in exercise of the powers conferred by Section 13 of the Mines and Minerals (Regulation and Development) Act, 1957. Rules 64-B and 64-C have been introduced therein by GSR No.743(E) dated 25-9-2000 which read as under:

"64-B. charging of royalty in case of minerals subjected to processing - (1) In case processing of run-of-mine mineral 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 mineral 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 mineral and not on the processed product.

64-C. Royalty on tailings or rejects — On removal of tailings or rejects from the leased area for dumping and not for sale or consumption outside leased area, such tailings or rejects shall not be liable for payment of royalty:

Provided that in case so dumped tailings or rejects are used for sale or consumption on any later date after the date of such dumping, then, such tailings or rejects shall be liable for payment of royalty".

32. Though the objects and reasons which prompted the abovesaid amendment are not known to us (none placed for consideration by any of the parties), in all probability the same seems to have been prompted by the pronouncement of this Court in State of Orissa v. Steel Authority of India Ltd. Be that as it may, the above said Rules also suggest the intention of the Government that dumped tailings or rejects (or in other words "slimes") are to be treated as a separate head and charge of royalty thereon is not to be made as a matter of course. Dumped tailings or rejects may be liable to payment of royalty if only they are sold or consumed. Rules 64-B and 64-C are general in nature, applicable to all types of minerals. There are several other entries in the Second Schedule where a mineral is liable to royalty on tonnage basis no sooner extracted and as run-of-mine (ROM). Such entries do not further classify the mineral by reference to its constituents. The case of iron ore is different. So far as the iron ore is concerned, the provisions of Section 9 of the Act read with Entry 23 of the Second Schedule and the above said rules homogeneously construed do not subject the run-of-mine (ROM) to payment of royalty. The Second Schedule does not prescribe any rate of royalty on the iron ore as run-of-mine and the levy of royalty has to be postponed until the processing has been done and the quantity of lumps, fines and concentrates (none of which will include slimes) has been found out on the availability of which data alone the royalty is capable of being quantified. Under the Second Schedule, the slimes which have come into existence shall have to be excluded from the charge of royalty.

33. S/Shri S.K. Agnihotri and Prakash Shrivastava, the learned counsel for the States of Madhya Pradesh and Chhattisgarh submitted that Rules 64- B and 64-C have come to be framed on 25-9-2000 and cannot be applied retrospectively. We agree. There is no question of giving the above said amendment in the rules a retrospective operation. These rules only clarify the position as it already existed and are intended to remove the doubts. We have pressed the said two

rules into service only for the purpose of reinforcing the conclusion which we have already arrived at dehors the said amendment in the rules.

34. The case of State of Orissa v. Steel Authority of India Ltd.1 which was relied on by the High Court and by the learned counsel for the respondents before us is distinguishable. There the question arose as to the charge of royalty on dolomite and limestone dealt with by Entries 15 and 26 respectively of the Second Schedule. Both these minerals were utilised as raw material by the mining lessees on the leased area itself. The mining lessee claimed that dolomite and limestone having been extracted from the mine underwent processing wherein a part of the mineral was wasted and the wastage remained on the leased area and not removed there from. The contention of the lessee was that royalty could not be demanded on that portion of the wastage which was not removed from the mining area. This contention was repelled by this Court by reference to Section 9(1) of the Act which speaks of payment of royalty in respect of any mineral removed or consumed by the lessee. The Court held that though the impurities part of dolomite and limestone were not removed from the leased area but that would not make any difference as the run-of-mine was itself consumed in the processing on the leased area.

35. Entry 15 levies royalty on tonnage basis on thedolomite itself so also Entry 26 levies royalty on limestone itself as run-ofmine though two different rates are prescribed depending on the grade or percentage of silica content in the limestone. The scheme of those two entries is different from the scheme of Entry 23 dealing with iron ore. As no rate of royalty has been prescribed in the Second Schedule to be charged on slimes and also no rate of royalty has been prescribed on iron ore as run-of-mine, royalty cannot be charged on the wastage.

36. Our answers to the questions framed in the earlier part of this judgment are:

(i) "Slime" or "slimes" is a term well understood in mining industry and trade. It is different from "fines" and "concentrates" — the term as used in the Second Schedule Entry 23 of this Act.

(ii) "Slime" or "slimes" cannot be included in "fines" or "concentrates" for the purpose of charging royalty under Section 9(1) read with Entry 23 of the Second Schedule of the Act."

10. In Paragraph-34, as mentioned above, the apex Court has taken note of the judgment in the case of Steel Authority of India Limited (supra) and, as such, the apex Court has distinguished that judgment taking into consideration the question arose as to the charge of royalty on dolomite and

limestone dealt with the Entries 15 and 26 respectively of the Second Schedule. Both these mineral were utilized as raw material by the mining lessee on the lease area itself. The mining lessee claimed that dolomite and limestone having been extracted from the mine underwent processing wherein a part of the mineral was wasted and the wastage remained on the leased area and not removed therefrom. The contention of the lessee was that royalty could not be demanded on that portion of the wastage, which was not removed from the mining area. The said contention was repelled by the apex Court, referring to Section 9(1) of the Act, which speaks of payment of royalty in respect of any mineral removed or consumed by the lessee. Thereby, the said judgment has been distinguished by the apex Court in ***National Mineral Development Corporation Limited*** (supra) and also specifically held that "slime" or "slimes" cannot be included in "fines" or "concentrates" for the purpose of charging royalty under Section 9(1) read with Entry 23 of the Second Schedule of the Act. Thereby, the demands raised in various letters, as mentioned above, referring to the judgment of the apex Court in the case of ***Steel Authority of India Limited*** (supra), is unsustainable in the eye of law, in view of the law laid down in ***National Mineral Development Corporation Limited*** (supra).

11. Furthermore, the reference made to Rules- 64B and 64-C of Mineral Concessions Rules, 1960, which was framed on 25.09.2000, cannot be applied retrospectively. These Rules only clarify the position as it already existed and are intended to remove the doubts. The two Rules have been pressed into service only for the purpose of reinforcing the conclusion which has already been arrived at de hors the said amendment in the Rules. Taking into consideration the judgment of the apex Court in the case of ***National Mineral Development Corporation Limited*** (supra), recommendation was made by the Director of Mines to the State Government for dropping of the demand and in turn, the State has not taken any decision thereon. It is made clear that Rules 64-B and 64-C of the Mineral Concessions Rules provide that in case of processing of run-off mine is carried out within the leased area, then royalty shall be chargeable on the processed mineral removed from the leased area. Thus, not only did Entry 23 expressly state that royalty is chargeable on iron ore from on the components resulting from the beneficiation process, the new provision also puts the Petitioner-Company in the same basket. As such, the said Rules have come into force w.e.f. 25.09.2000 and, therefore, the same has no application to the case of the Petitioner-Company. Apart from the same, the Accountant General is not the

final or decision making Authority in respect of the manner of levy of royalty on minerals extracted in terms of Section 9 of the MMDR Act. As such, the Audit Report prepared by the Accountant General cannot be the basis of a demand. The office of Accountant General is a part of the Indian Audit & Accounts Department under the Comptroller and Auditor General of India (C&AG). The C&AG is a Constitutional Authority appointed by the President of India to perform such duties and exercise such powers in relation to the accounts of the Union and of the States and of any other Authority or Body, as may be prescribed by or under any law made by the Parliament. It includes performing Audit of revenue and expenditure of major revenue earning Departments of the Government in the mining areas as well. Therefore, the recommendations of the Accountant General have just been forwarded to the Petitioner-Company without an attempt being made to determine whether the demand is in fact made out in law. As such, the Report of the Accountant General only contained recommendations and the same is not binding force.

12. The Petitioner-Company has a legitimate expectation of being treated fairly by the Opposite Parties which is a Public Authority and obligated to do so. Such a legitimate expectation is an expectation of a benefit/relief that ordinarily flows from established practice. The term "established practice" refers to a regular, consistent predictable and certain conduct, process or activity of the decision making authority. Therefore, the demands which were raised having not been done in consonance with the provisions of law, vide various letters as mentioned above, cannot sustain in the eye of law.

13. If it is to be considered from other angle that royalty paid under Section 9 of the MMDR Act is essentially a tax, as held by the apex Court in the case of ***India Cement v. State of Tamil Nadu, AIR 1990 SC 85***, Article 265 of the Constitution of India provides that no tax shall be levied or collected except by authority of law. Any demand for collection of royalty can be made only in consonance with the MMDR Act and not otherwise. The law of precedent is clear that a decision passed in the context to which it relates and is binding in similar facts and circumstances and not as a blanket rule. Since the Second Schedule to the MMDR Act must be read as a part and parcel of Section 9, the interpretation given in the decision cannot apply to the computation of every mineral. As such, the reliance placed on the decision of the apex Court in the case of ***Steel Authority of India Limited*** (supra) cannot apply to the present fact and circumstances.

14. In ***Tata Steel Ltd. v. Union of India, (2015) 6 SCC 193***, the apex Court in Paragraphs-59 and 60 observed as under:-

> *"59. Iron ore (with which NMDC [National Mineral Development Corpn. Ltd. v. State of M.P., (2004) 6 SCC 281] is concerned) falls in the same generic category for levy of royalty as dolomite, limestone and coal, namely, on a tonnage basis but there is a crucial difference between iron ore and coal (as also between dolomite, l imestone and iron ore). In the case of iron ore, beneficiation is necessary before it can be utilised. It has been observed in NMDC that:*
>
> *"28. ... in iron ore production the run-of- mine (ROM is in a very crude form. A lot of waste material called 'impurities' accompanies the iron ore. The ore has to be upgraded. Upgrading the ores is called `beneficiation'. That saves the cost of transportation. Different processes have been developed by science and technology and accepted and adopted in different iron ore projects for the purpose of beneficiation."*
>
> *It is for this reason, inter alia, that the levy of royalty on iron ore is postponed, as held in NMDC, to a post- beneficiation stage.*
>
> *60. In the case of coal, beneficiation is not necessary since ROM coal can be used as it is straight from the pit-head. In the case of iron ore, as noticed in NMDC, waste material is removed from the extracted iron ore and through the beneficiation process the ore is upgraded. The removal of waste material obviously reduces the weight of the iron ore and that is why it saves the cost of transportation as observed in NMDC. However, in the case of coal apart from the fact that beneficiation is not necessary, if the leaseholder does in fact beneficiate the coal, the weight of the beneficiated coal is more than ROM coal as has been noted above. This would, therefore, increase the cost of transportation which is based on the weight of the coal. Under the circumstances, removal of beneficiated coal as against ROM coal might work to the disadvantage of the leaseholder. For this reason, no similarity can be found between coal and iron ore or between coal and dolomite and lime stone (apart from the fact that SAIL [State of Orissa v. SAIL,(1998) 6 SCC 476]did not deal with removal from the leased area but consumption within the leased area)".*

15. In view of the aforesaid facts and circumstances, there is no iota of doubt that the decision relied upon by the Opposite Parties on which impugned demands have been raised, is not applicable to the Petitioner-Company. As such, the reliance placed on the decision of the apex Court in the case of ***Steel Authority of India Limited*** (supra), cannot have any

retrospective operation so as to raise the demand by the authority, as impugned in this writ petition.

16. Considering the case from all angles, this Court is of the considered view that the demands raised by the Authority vide letters dated 20.01.2004, 06.04.2004, 29.08.2008, 04.10.2008 and 15.04.2011 as at Annexures-1, 3, 7, 8 and 12, respectively, issued by the Deputy Director of Mines, Joda, Keonjhar, directing to pay a sum of Rs.6,93,99,308/- towards loss of royalty and Rs.7,07,44,492/- as interest thereon due to beneficiations of high grade lump iron ore for the period from October, 1994 to September, 2000, cannot sustain in the eye of law and the same are liable to be quashed and are hereby quashed. Consequentially, this Court directs the Opposite Parties to issue "Mining Dues Clearance Certificate"in favour of the Petitioner-Company without causing any further delay.

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

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2022 (II) ILR - CUT- 368

Dr. B. R. SARANGI, J & SANJAY KUMAR MISHRA, J.

W.P(C) NO. 10891 OF 2016

STATE OF ODISHA & ANR. .....Petitioners

.V.

NIRMAL CHARAN TRIPATHY & ORS. .....Opp. Parties

SERVICE LAW – Regularization – Appointment/engagement had been made de-hors the Rule – Claim for regularization – Effect of – Held, when the engagement de-hors the rule is illegal, even if the person has been appointed by following a process of selection, i.e. in consonance with the guidelines issued by the government, but not in conformity with the relevant rules – The absorption by relaxing or amending the rules does not arise. (Para-14)

Case Laws Relied on and Referred to :-

1. 1979 (4) SCC 507 : B.N. Nagarajan Vs. State of Karnataka.
2. AIR 2006 SC 1806 : Secretary State of Karnataka Vs. Umadevi.
3. 2011 SCC (L & S) 2587 : State of Karnakata Vs. M.L. Keshari.

For Petitioners : Mr. A.K. Mishra, AGA

For Opp. Parties : M/s. S.B. Jena, S. Behera & S.P. Jena

JUDGMENT Date of Judgment: 24.06.2022

Dr. B.R.SARANGI, J.

The Petitioner-State and its functionary, who were Opposite Parties No.1 & 3 before the Tribunal, have filed this writ petition seeking to quash the common order dated 29.09.2015 passed in O.A. No.3759(C) of 2012 and batch, by which the Odisha Administrative Tribunal, Cuttack Bench, Cuttack has directed the Petitioners to reconsider the grievance of Opposite Party No.1 for his absorption as Rural Labour Inspector by amending/relaxing the Odisha Assistant Labour Officers and Rural Labour Inspectors Service (Method of Recruitment and Conditions of Service) Rules, 2001 (in short "Rules, 2001").

2. The factual matrix of the case, in brief, is that elimination of child labour is the prime consideration of the Government of India, Ministry of Labour, which has been viewed with not only as the concept of whole nation but also with the global concern. As the population increases at an alarming rate, as more and more children are born year after year, and as more and more children enter the world of work at their school going age (5-14), this becomes a matter of grave anxiety and concern to the policy formulators and the framers of law at the national level. The Government, as a matter of principle, takes steps for release of these children from hazardous work and for their rehabilitation- physical, emotional & economic through education with a project approach. Accordingly, National Policy on child labour was formulated in August, 1987 and the National Child Labour Projects were conceptualized and launched around the same time. These initiatives, which were rather on a small scale in the beginning, were subsequently reinforced and strengthened by the announcement made by the former Prime Minister on 15.08.1994 for the total liberation of all children (5-14), who are employed in hazardous work and for their physical and emotional rehabilitation through a composite package called National Child Labour Projects, which are to be administered by the District Child Labour Project Society registered as such under the Societies Registration Act, 1860. This was carried out due to judgment dated 10.12.1996 passed by the apex Court in Civil Writ Petition No.465 of 1986 (***M.C. Mehta v. State of Tamil Nadu & Others***). Thereby, it has created a new urgency and seriousness of concern in regard to elimination of child

labour by the Central Government, State Governments, NGOs and all others, who are concerned about this social malady.

2.1 With a view to fulfilling the constitutional mandate, a major programme was launched on 15th August, 1994 for withdrawing children working in hazardous occupations and rehabilitating them through special schools. As a follow up, a series of steps has been taken by the Government. Consequentially, a High Powered Body, the National Authority for the Elimination of Child Labour (NAECL) was constituted on 26th September, 1994 under the Chairmanship of Labour Minister with a view to formulating policies and programmes for elimination of child labour, monitor the progress of implementation of programmes, projects and Schemes for elimination of child labour and to coordinate the implementation of child labour related projects of the various sister Ministries of the Government of India (to ensure convergence of services for the benefit of the families of child labour). To give effect to this announcement, 64 area based projects were sanctioned (in addition to 12 continuing projects) under the existing Scheme of NCLP. Accordingly, the Government of India, Ministry of Labour issued a letter dated 15.07.1995 floating a Scheme called "National Child Labour Project", which was placed before the Workshop scheduled to be held on 13th & 14th September, 1995 to finalize the district projects for eliminating the child labour in hazardous occupations.

2.2 In view of such Scheme, a survey was conducted, which revealed that about seven lakhs child labourers were engaged in different types of occupations in the State, which resulted in their deprivation of education and being subjected to distress conditions. Basing on the above survey, the State of Odisha submitted 16 projects before the workshop, which was held on 13th & 14th September, 1995. All the projects were approved by the Government of India. Since the Collectors are to play the major roles in implementation of those projects, the State Government issued certain guidelines to the Collectors for successful implementation of the projects. Amongst other things, it was provided that for smooth management of the projects, there shall be two Field Officers, one Accountant-cum-Clerk, one Stenographer, one Driver and Peon. They were directed to be appointed by the Project Directors with the approval of the Chairman for the purpose of enforcement of laws relating to child labour and improvement in the economic condition of the parents.

Further, it owes responsibility for implementation of the programme by creating public awareness against child labour system. To give effect to such Scheme, the Labour Commissioner, Orissa issued a circular on 17.11.1995 prescribing guidelines for recruitment of staff for the NCLP. Pursuant to such guidelines, the concerned Project Directors placed requisition to the concerned Employment Exchanges, but as the concerned Employment Exchanges were not able to sponsor the names having the required qualification, the requisition was placed before the University Employment Exchanges and on names being sponsored by the concerned Employment Exchanges, the committee conducted the test and interview and made a recommendation to the Project Directors, who, with the approval of the Chairman of Project Society, issued orders of appointments to the candidates recommended. Opposite Party No.1 is one of such candidates, who has been engaged as Field Officer and has been discharging the duty till date, even his performance and efficiency are being reviewed by the Chairman of the Project Society. Initially, he was paid consolidated pay of Rs.2500/-, which was later on revised to Rs.4000/- per month w.e.f. April, 2001, which was again revised to Rs.8000/- per month w.e.f. April 2011 and, as such, revision of pay has also been granted to Opposite Party No.1.

2.3. While he was so continuing, he became overaged/age barred for entry into Government service. The qualification prescribed for the post of Rural Labour Inspector is akin to the qualification prescribed for engagement of Field Officer. Opposite Party No.1 was hopeful that his case will be considered, but even though he along with some others applied for the said posts, none of them were allowed to participate in the process of selection, nor steps were taken to absorb them as Rural Labour Inspectors. Consequentially, he filed representation before the authority. Having come to know that 30 posts of Rural Labour Inspectors are lying vacant and the same are to be filled up by following due procedure, as prescribed under Rules, 2001, and those posts are to be filled up in both by way of direct recruitment (50%) and by promotion (50%) from amongst the staff of the Labour Directorate, as Opposite Party No.1 had possessed prescribed qualification, he made representation on 03.12.2011 to the Government of India in Ministry of Labour and Employment, the Chief Secretary, Odisha as well as Labour Commissioner, Odisha ventilating his grievances for absorption, but no action was taken. Therefore, Opposite Party No.1, along with others, approached this Court by filing W.P. (C) No.15829

of 2011 seeking direction to appoint/absorb him as Rural Labour Inspector/Assistant Labour Officer. The said writ petition was disposed of, vide order dated 26.09.2011, directing the Petitioners to consider the representation and take a decision within a period of two months. In compliance thereof, the grievance of Opposite Party No.1 was rejected on the ground that there is no provision under the Rules, 2001 for direct absorption of Field Officers working under the NCLP in the post of Rural Labour Inspectors/Assistant Labour Officers, vide letter dated 04.02.2012.

2.4. Assailing the said order dated 04.02.2012, Opposite Party No.1 approached the Tribunal by filing O.A. No.3759(C) of 2012 and the Tribunal, vide order dated 29.09.2015, disposed of the said O.A. stating, inter alia that as Opposite Party No.1 and other similarly situated persons have been conferred with the statutory assignment, they are eligible to be absorbed as Rural Labour Inspectors by relaxing or amending the relevant Recruitment Rules and accordingly directed the Petitioners to reconsider the grievance of Opposite Party No.1 along with others for absorption as Rural Labour Inspectors by amending/relaxing the Rules, 2001 within a period of four months from the date of receipt of the copy of the order. Aggrieved by the said order, the Petitioners have filed this writ petition.

3. Mr. A.K. Mishra, learned Additional Government Advocate, appearing for the Petitioners vehemently contended that the direction given by the Tribunal is contrary to the provisions of law, more particularly Rules, 2001. More so, Opposite Party No.1 has been appointed as Field Officer under the NCLP and, as such, he is not a regular employee under the State Level Directorate and also not fulfilling the eligibility criteria prescribed under Rule-3 of the Rules,2001. As such, the direction given by the Tribunal by resorting to relaxation power contained in Rule-13 of the Rules, 2001 is not legally tenable, as the same is to be exercised on circumstance only when the State Government considers it necessary to do so for public interest. Apart from the same, it is contended that Rule-13 of Rules, 2001 is applicable to the employees, who are already in State Directorate but not to an outsider like that of Opposite Party No.1, who has been engaged under the Project. As such, relaxation power cannot be exercised in a whimsical manner. It is further contended that on the one hand the Tribunal observed that it is not competent to issue direction to the State Government either to amend Rules or relax the Rules, and on the other hand directs to relax or amend the Rules and reconsider the

grievance of Opposite Party No.1, which is absolutely misconceived one and contrary to the provisions of law. It is further contended that the Tribunal has failed to appreciate the fact that NCLP, which is a society, is still continuing, under which Opposite Party No.1 has been engaged and continuing in service. Thereby, application of Rules, 2001, by invoking the relaxation power under Rule-13 cannot and could not arise in favour of Opposite Party No.1. More so, Rule-3 of Rules, 2001 specifies with regard to method of recruitment. Therefore, the persons, who have been appointed under Rules, 2001 having requisite qualification under Rule-3, in their case relaxation power under Rule-13 of Rules, 2001 may apply, but not in respect of the persons, who have appointed under the Scheme floated by the Central Government. It is further contended that admittedly pursuant to the Scheme floated by the Ministry of Labour, the State Government has fixed guidelines for such engagement, pursuant to which Opposite Party No.1 has been engaged as Field Officer. Therefore, he cannot be absorbed under Rules, 2001 against permanent vacancy without following due procedure. Thereby, vide order dated 29.09.2015, the direction so issued by the Tribunal in O.A. No.3759(C) of 2012 is arbitrary, unreasonable and contrary to the provisions of law, which has to be quashed.

4. Mr. S.B. Jena, learned Counsel appearing for Opposite Party No.1, fairly admitted that Opposite Party No.1 has been appointed under the Scheme and has been discharging his duty, but contended that he is continuing from 1995 and in the meantime he has completed more than 25 years. In the event of closure of the Scheme, he will be placed out of employment and, as such, he is discharging the duty and responsibility akin to the post of Assistant Labour Officer. Therefore, he should be absorbed as per Rules, 2001. Consequentially, the direction given by the Tribunal to reconsider the case of Opposite Party No.1 by amending/relaxing Rules, 2001, does not suffer from any illegality or irregularity. It is further contended that Opposite Party No.1, on being duly sponsored by the University Employment Exchange, having been appointed by following due procedure of selection conducted by duly constituted selection committee in accordance with guidelines issued by the Government, should not be denied regular absorption under Rules, 2001. It is further contended that the Opposite Party No.1 and similarly circumstanced persons were being paid consolidated pay of Rs.2500/- per month, which was later on revised to 4000/- per month w.e.f. April,2001 and again revised to Rs.8000/- per month w.e.f. April 2011 and Rs. 12,000/- only w.e.f.

01.01.2016, and it is difficult for them to manage their families with such paltry sum of money, when they are discharging the statutory responsibility, pursuant to the notifications issued by the Government of Orissa in Labour and Employment Department during March 1996 to June 1996, one under Section 17 of the Child Labour (Prohibition and Regulation) Act 1986 (16.03.1996) the other one under Section 6(1) of the Beedi and Cigar Workers (Condition of Employment) Act, 1966 (on 21.06.1996), another under Section 9)(1) of the Equal Remuneration Act, 1976 (27.06.1996) and the last one Section 19 (1) of the Minimum Wages Act, 1948 (27.06.1996) in appointing the Project Directors and Field Officers as Inspectors under the above Acts having jurisdiction in their respective NCLP districts. Therefore, Opposite Party No.1 should be absorbed on regular basis by relaxing/amending the Rules, 2001 and extended with all consequential benefits as due and admissible to him. Thereby, contended that the Tribunal has not committed any error apparent on the face of the records so as to cause interference of this Court. In support of his contentions, he has relied upon the judgments of the apex Court in ***B.N. Nagarajan v State of Karnataka, 1979 (4) SCC 507; Secretary State of Karnataka v. Umadevi, AIR 2006 SC 1806 and State of Karnakata v. M.L. Keshari, 2011 SCC (L & S) 2587.***

5. Mr. M.K. Pati, learned Central Government Counsel, appearing for Opposite Party No.2, contended that the Government of India framed a Policy to eliminate the child labour from the country. Accordingly, the Ministry of Labour and Employment has been implementing the central Sector Plan Scheme i.e. National Child Labour Project Scheme since 1987. The target group for the Scheme is (i) all the children workers belong to the age of 14 years in the identified target area, (ii) adolescent workers belong to the age of 18 years in the target area engaged in hazardous occupations/processes and (iii) families of child workers in the identified target area. The entire project is implemented through a registered society. The project societies are required to conduct survey to identify children working in any occupations and process and to take necessary steps to bring those children into mainstream. It is also contended that to achieve the goal, volunteers are to be engaged for the project society office and they will be paid only a consolidated amount of honorarium for their services. It is further contended that the volunteers are not engaged by the Ministry of Labour and Employment, but by the District Project Society or the implementing agency. As such, there is no provision in the NCLP Scheme for

regularization of the services of volunteers and others engaged in the society as their services are voluntary in nature and in no case be considered as permanent. The part-time volunteers are paid honorarium. The main criteria for selection of volunteers, is their commitment to the cause of community services. Therefore, the claim of Opposite Party No.1 to regularize his services cannot have any justification.

6. This Court heard Mr. A.K. Mishra, learned Additional Government Advocate appearing for the Petitioners; Mr. S.B. Jena, learned Counsel appearing for Opposite Party No.1; and Mr. M.K. Pati, learned Central Government Counsel appearing for Opposite Party No.2 through hybrid mode and perused documents. Pleadings have been exchanged between the parties and with the consent of learned counsel for the parties, the matter is being disposed of finally at the stage of admission.

7. For just and proper adjudication of the case, relevant provisions enshrined in the Constitution of India are quoted below:

> ***"Article-24:*** *Which deals with "Prohibition of employment of children in factories etc" provides that no child below the age fourteen years shall be employed in work in any factory or mine or engaged in any other hazardous employment.Article-39 provides that the state shall, in particular, direct its policy towards securing:*
>
> *Xxx xxx xxx*
>
> *(e) that the health and strength of workers, mean and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength.*
>
> *(f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.*
>
> *Article-45 provides that the State shall endeavor to provide, within a period of ten years from the commencement of this constitution, for free and compulsory education for all children until they complete the age of fourteen years."*

8. To give effect to the aforesaid constitutional mandate, a major programme was launched on 15.08.1994 for withdrawing children working in hazardous occupations and rehabilitating them through Special Schools

and the same was carried out because of the judgment of the apex Court in M.C. Mehta (supra). Accordingly, the Ministry of Labour & Employment, Government of India issued guidelines on 15.07.1995 for the Scheme called "National Child Labour Project (NCLP) and to give effect to such guidelines, the Government of Odisha in Labour & Employment Department issued guidelines on 09.10.1995, wherein Clause-2.1 states with regard to constitution of project society and its registration.

9. There is no iota of doubt that Opposite Party No.1 has been engaged as Field Officer under the NCLP Scheme floated by the Government of India and the guidelines issued by the State Government. He is continuing in the said post and at times he has to discharge certain statutory responsibilities and he was imparted training and after completion, he has discharged various statutory functions under the Act and Rules applicable to him. As he has been continuing since 1995 till date, he along with others made representation for their absorption against 50% quota meant for promotion from amongst the staff of the Labour Directorate as per the Rules, 2001. As he has possessed requisite qualification and has been appointed following due procedure of recruitment, he approached the Development Commissioner, Orissa for absorption against the post of Rural Labour Inspector by amending the Rules, 2001. The same having not been considered, he along with others approached this Court by filing W.P.(C) No.15829 of 2011, which was disposed of vide order dated 26.09.2011 directing the Petitioners to consider the representation and take a decision thereon within a period of two months from the date of communication of the order. In compliance thereof, the Authority rejected the representation, against which Opposite Party No.1 filed O.A. No. 3759 (C) of 2012 before the Tribunal. The Tribunal, vide order dated 29.09.2015, though took note of the fact that there is no provision in the Rules, 2001 for direct absorption of Opposite Party No.1 in the post of Field Officer or Rural Assistant Labour Officer, but directed the Petitioners to consider the grievance of Opposite Party No.1 for absorption as Rural Assistant Labour Inspector by amending/relaxing the Rules, 2001.

10. In exercise of powers conferred by the proviso to Article 309 of the Constitution of India, the Governor of Odisha is pleased to make the Rules to regulate the Method of Recruitment and Conditions of Service of persons appointed to the posts of Assistant Labour Officers and Rural Labour Inspectors called "Odisha Assistant Labour Officers' and Rural Labour

Inspectors' Service (Method of Recruitment and Conditions of Service) Rules, 2001. Part II of the said Rules deals with recruitment. Rule-3 thereof prescribes method of recruitment, which reads as follows:-

> *"3. Method or recruitment – Recruitment to the post of Assistant Labour Officer and Rural Labour Inspector shall be made by the following methods, namely:*
>
> *(a) By direct recruitment to the post of Assistant Labour Officer and Rural Labour Inspector to the extent of 50 per cent through competitive examination by the Odisha Staff Selection Commission;*
>
> *(b) By promotion to the extent of 50per cent of vacancies arising every year in the rank of Assistant Labour Officer from among the Rural Labour Inspectors who have put in atleast 5 years service in the said post on the 1st day of January of the year in which Selection Board meets, having the qualification of Degree in Bachelor of Arts /Science/ Commerce from a recognized University and Degree/Diploma from a recognized Institution in-*
>
> *I. Industrial Relations and Personnel Management; or*
>
> *II. Personnel Management and Industrial Relations; or*
>
> *III. Labour Welfare /Labour Law; or*
>
> *IV. Management in Business Administration (with specialization in H.R.D.), or*
>
> *V. Human Resource Management; and*
>
> *(c) by promotion to the extent of 50% of the vaccines arising every year in the rank of Rural Labour Inspector from among the suitable employees of Group 'C' Service working under the Directorate of Labour Commissioner, Odisha having a minimum in Bachelor of Arts or science or Commerce from a recognised University.*
>
> ***NOTE**-While filling up the promotional vacancy in the rank of Rural Labour Inspector preference shall be given to those having Degree or Diploma from a recognised University in-*
>
> *(i) Labour Welfare/ Labour Law; or*
>
> *(ii) Personnel Management and IndustrialRelation; or*
>
> *(ii) Industrial Relations and Personnel Management; or*

(iv) HumanResources Management; or (v)Management in Business Administration (with specialization in H.R.D.)"

Rule-4 deals with direct recruitment wherein power has been vested with the Commission to conduct the competitive examination ordinarily once in a year for direct recruitment and in the month of October of each year, the Labour Commissioner, Odisha, with prior approval of the Government shall determine the number of vacancies to be filled up by direct recruitment in the coming year and intimate the same to the Commission and on receipt of the intimation, the Commission shall take steps for direct recruitment. Rules-5 & 6 prescribe eligibility criteria for the post of Assistant Labour Officer and Rural Labour Inspector respectively. Rule-7 deals with selection of candidates by the Commission by taking reservation under Rule-8, whereas Rule-9 deals with constitution of selection board. Part-III deals with Probation and Confirmation under Rules-10 & 11 respectively. Part-IV states Seniority and Increment whereas Part-V deals with Relaxation and Interpretation under Rules-13 and 14 respectively. Rule-13 reads as follows:-

"13. Relaxation- The Government may if considered necessary or expedient so to do in the public interest, by order, reasons to be recorded in writing relax any of the provisions of these rules in respect of any class or category of employees."

11. In view of rules framed under Article 309 of the Constitution of India, which is statutory one, the procedure has been envisaged with regard to recruitment/appointment of the Rural Labour Inspector and the Assistant Labour Officer. Even though Opposite Party No.1 has been engaged as Field Officer under the project, he cannot directly be absorbed under Rules,2001. Even taking into consideration his long service, no right has been accrued in his favour to get absorption under Rules, 2001. As such, the Scheme is very clear that he cannot be considered for regular appointment and absorption under the State authorities as per the Rules by invoking relaxation clause envisaged under Rule-13. Relaxation means, rigors of a particular rule slackened in its application to a given case. Therefore, claim of Opposite Party No.1 for absorption under Rules, 2001 is absolutely misconceived one and, as such, the same cannot be sustained in the eye of law,even though he has performed certain statutory duties under different acts, as mentioned above.

12. It is nobody's case that Opposite Party No.1 has been appointed under Rules, 2001. It is admitted case of all the parties that he has been appointed under NCLP Scheme floated by the Government of India, Ministry of Labour, pursuant to guidelines issued by the State Government.

13. The judgments of the apex Court in ***Uma Devi and M.L. Keshari*** (supra), reference to which has been made by the Tribunal in the impugned judgment, have no application to the present case. Meaning thereby, the appointment to the post of Rural Labour Inspector/Assistant Labour Officer is governed under Rules, 2001. As has been discussed above in regard to the Rules, 2001, it is made clear that specific qualification and procedure have been prescribed under the Rules, 2001 for such appointment. May it be the Opposite Party No.1 claims to have discharged certain statutory duty and responsibility, that ipso facto cannot accrue any right on him for regularization/absorption in service under Rules, 2001. As a consequence thereof, direction given by the Tribunal to the Petitioners to take steps for absorption of Opposite Party No.1 by amending/relaxing the Rules, 2001, cannot have any justification. Therefore, the Tribunal has committed gross error apparent on the face of the record by issuing such direction without taking into consideration the implication of Rules, 2001 vis-à-vis the appointment of Opposite Party No.1.

14. More so, since Opposite Party No.1 has been appointed under the Scheme, no right has been accrued in his favour for his absorption as Rural Labour Inspector/Assistant Labour Officer, as his recruitment has not been made in terms of Rules, 2001, as has been held by the apex Court in a catena of judgments that appointment/engagement de hors the rules is illegal even if Opposite Party No.1 has been appointed by following a process of selection, i.e., in consonance with the guidelines issued by the Government, but not in conformity with the Rules. Therefore, question of invoking Rule-13 of the Rules, 2001 does not arise in case of Opposite Party No.1. As a consequence thereof, the direction given by the Tribunal for absorption of Opposite Party No.1 as Rural Labour Inspector/ Assistant Labour Officer by relaxing or amending the Rules, 2001 does not arise.

15. In the above view of the matter, the common order dated 29.09.2015 passed by the Odisha Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No.3759(C) of 2012 and batch, namely, O.A. No.2691(C) of 2013 to

O.A. No.2702(C) of 2013 cannot sustain in the eye of law. Therefore, the same is liable to be quashed and is hereby quashed.

16. The writ petition is accordingly allowed. However, there shall be no order as to costs.

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2022 (II) ILR - CUT- 380

ARINDAM SINHA, J.

W.P.(C) NO. 9594 OF 2017

SHRIYA CHHANCHAN .....Petitioner

.V.

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

COMPENSATION – Failure of Sterilization Operation – Effect of – Held, as per family planning indemnity scheme issued in October, 2013 by family planning division Ministry of Health and Family Welfare Govt. of India, the petitioner is entitled to compensation. (Para-7)

For Petitioner : Mr. Arjuna Ch. Behera
For Opp. Parties : Mr. Sailaja Nanda Das, ASC

ORDER Date of Order: 24.06.2022

ARINDAM SINHA, J.

1. Mr. Behera, learned advocate appears on behalf of petitioner and submits, his client underwent sterilization procedure conducted by the State. In spite thereof, she conceived and delivered a child. She is in involved financial condition, unable to meet expenses of the child and hence has claimed compensation. The sterilization procedure was undertaken by petitioner on 2nd January, 2014.

2. On earlier date of hearing Mr. Behera had relied on Standards for Female and Male Sterilization Services issued in October, 2006 by Research Studies and Standards Division, Ministry of Health and Family Welfare,

Government of India. Under Standards for Female sterilization there is sub-heading 1.4.2 on Clinical Assessment and Screening of Clients, to be made prior to the operation. Clause-b under the sub-heading has entry-v, which says as under.

> *"Menstrual history: Date of last menstrual period and current pregnancy status."*

He submits, this procedure must have been followed before the operation. Having done that State cannot turn around and say that the child was born on a full term delivery, to allege that his client was pregnant at the time sterilization operation was done. He relies on manual for family planning indemnity scheme issued in October, 2013 by Family Planning Division, Ministry of Health and Family Welfare, Government of India, in which available benefit include and provide for limit of Rs.30,000/- cover on failure of sterilization.

3. Mr. Das, learned advocate, Additional Standing Counsel appears on behalf of State. He submits, clinical assessment and screening of petitioner revealed that she had her last menstrual cycle on 22nd December, 2013. The sterilization operation was conducted, as aforesaid, on 2nd January, 2014. On query from Court he submits, there is no record regarding current pregnancy status as on date of sterilization operation.

4. Mr. Das submits, petitioner did not follow up after the sterilization operation. She had given undertaken that if she missed her menstrual cycle immediately after the operation, she was to report to the clinic and, in the circumstances, obtain Medical Termination of Pregnancy (MTP). Not having done so, petitioner now cannot allege failure of the procedure nor claim compensation. Mr. Behera in reply refers to paragraphs 4 in the petition, in which, inter alia, following has been stated.

> *"That is submitted that after the sterilization the petitioner felt herself uneasy and went to the hospital opp. Party the No.5 in where the said opp. Party No.5 examined the petitioner and suggested to take rest for some days. Though the petitioner disclosed before him regarding stoppage of her regular menstruation cycle....."*

On behalf of State counter has been filed. Paragraph 6 from the counter is reproduced below.

" 6. That the averments made in Para-4 of the writ petition are not correct. As ascertain from O.P. No.5 this deponent humbly submits that the allegations made by petitioner in this para are all false and fabricated."

5. There appears to have been omission by the State in obtaining current pregnancy status before conducting sterilization operation on petitioner. Furthermore, paragraph 6 in the counter is not a specific denial on averments made by petitioner in paragraph 4 of the petition. The counter has been affirmed as an affidavit by Chief District Medical Officer. The vague denial in paragraph 6 on behalf of the doctor is insufficient basis to disbelieve petitioner's averments in paragraph 4.

6. State not having itself followed the procedure to the letter cannot turn around and say that petitioner had omitted to act as per undertaking given by her, to report that she missed menstrual cycle after the operation. As aforesaid analysis of pleadings in paragraphs 4 and 6, respectively of the petition and counter, do not support this contention of State.

7. It appears, the sterilization operation resulted in failure to prevent the pregancy. Petitioner is entitled to compensation at par with limit of aforesaid indemnity of Rs.30,000/-.Petitioner will also get cost of Rs.20,000/- The compensation and cost are to be paid within three week of communication. Court expects, the money will be spent by petitioner for benefit of the child.

8. The writ petition is disposed of.

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2022 (II) ILR - CUT- 382

ARINDAM SINHA, J.

W.P.(C)NO.18866 OF 2013

PRATIMA @ P. NAYAK & ANR. .....Petitioners

.V.

G.M. EAST COAST RAILWAY & ANR. .....Opp. Parties

RAILWAYS ACT, 1989 – Section 124 – Liability of the railway to pay compensation – Whether a person who died being run over by a train is eligible to receive compensation – Held, Yes. (Para-7)

Case Law Relied on and Referred to :-
1. AIR 2012 Orissa 38 : Shyam Nayak Vs. General Manager, East Coast Railway.

For Petitioners : Mr. J.K. Mohapatra
For Opp. Parties : Mr. Gyanalok Mohanty

ORDER Date of Order: 22.06.2022

ARINDAM SINHA, J.

1. Mr. Mohapatra, learned advocate appears on behalf of petitioners, who are the widow and son of a person deceased, having been run over by a train. He relies on judgment of a Division Bench of this Court in **Shyam Nayak Vs. General Manager, East Coast Railway** reported in **AIR 2012 Orissa 38**. He submits, in the reported case a person while crossing the railway line dividing the village, was run over by a train coming at high speed without blowing horn at the unmanned level crossing. The incident happened at midnight. In this case the deceased, according to Mr. Mohapatra, was crossing the railway line at the same unmanned level crossing, was dashed by the train, which approached without blowing horn and dragged the deceased 300 meters. On query from Court regarding post- mortem he draws attention to paragraphs 3 and 7 of the petition to submit, the victim was going for marketing and crossed railway line at Boinda level crossing. It was around 10.00 a.m., when train no.18105 approached without blowing horn and ran over him. As a result, the victim was dragged a distance of 300 meters and died at the spot. Post-mortem could not be done since the local people cremated the body due to the police concerned not taking appropriate steps. He submits, there be interference since the Railway Claims Tribunal is empowered to only deal with claims of passengers and the victim was not a passenger.

2. Mr. Mohanty learned advocate appears on behalf of Union of India (railways) and submits, **Shyam Nayak** (supra) is distinguishable on facts inasmuch as therein the accident happened at midnight, but in this case the victim was run over in broad day light at 10.00 a.m. in the morning. The victim was careless. He also relies on **Shyam Nayak** (supra), paragraph 6 to

submit, the level crossing involved in this case is of 'C' class and does not qualify for manning of Train Vehicle Unit (TVU). All prescribed safety measures are provided such as indication boards, speed breakers, caution boards and signage in three languages. Also provided are whistle boards to give advance indication to drivers for blowing horn. He submits, there was no negligence on the part of railways. The accident occurred due to carelessness of the victim.

3. Documents annexed to the petition show that on 22nd January, 2013 the Station Master, Jarapada had informed Officer-in-Charge of Jarapada Police Station that a male aged about 55 years was run over and died by train no.18105 express and lying at kilometer 130/5-6 between Jarapada and Boinda, as reported by two guards of the train. Pursuant to the information received the police station drew up a First Information Report (FIR). The report says it was drawn up at 12.00 p.m., i.e., within two hours of the accident. In spite thereof, there was omission to conduct post-mortem of the deceased. There is no document disclosed in the petition regarding averment that the villagers cremated the body due to inaction on the part of the police. State has not been made party though aforesaid allegation against the police was made.

4. There is also nothing on record to substantiate the averments that the accident took place at the level crossing (Boinda) and the victim was dragged 300 meters. At 10.00 a.m. in the morning, it appears, there was no witness at the level crossing. This goes to show that the level crossing is of the category stated by the railways in their counter as mentioned in **Shyam Nayak** (supra). Otherwise, the accident can also be presumed to have taken place at kilometer 130/5-6 between Jarapada and Boinda.

5. On analysis of facts available on the documents and particulars of the level crossing at Boinda available from Shyam Nayak (supra), this Court can only conclude that the evidence is insufficient to fix the railways with charge of negligence. Section 124 in Railways Act, 1989 provides for extent of liability of the railway administration to pay compensation to such extent as may be prescribed and to that extent only for loss suffered by the death of a passenger, dying as a result of the accident and for personal injury and loss, destruction, damage or deterioration of goods owned by the passenger and accompanying him in the compartment or on the train, sustained as a result of

the accident. The deceased not being a passenger is not covered by the extent of liability provided by the section.

6. Court has relied upon description of the level crossing from **Shyam Nayak** (supra) because nothing has been disclosed regarding notification of requirement(s) made by the Central Government in respect of any or all the clauses under section 18. In the circumstances, this Court is confronted with a person having lost his life on being run over by a train, the claim of compensation consequent thereto made by the widow and son by the writ petition presented on 14th August, 2013, and contention of the railway that there was no negligence on its part. On query from Court Mr. Mohanty submits, compensation under section 124 as prescribed and prevailing in year 2013 was Rs.4,00,000/- per death.

7. In view of the language in section 124 that the railways have liability to pay compensation notwithstanding anything contained in any other law, but it relating to a passenger and the fact that the deceased lost his life by being run over, this Court feels fit to direct compensation to be paid at the earlier prescribed sum of Rs.4,00,000/- to petitioners and not the higher present prescribed amount of compensation, as there must, in the circumstances, be presumption of carelessness by the victim. Compliance must be within four weeks of communication.

8. The writ petition is disposed of.

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2022 (II) ILR - CUT- 385

ARINDAM SINHA, J.

W.P.(C) NO. 33298 OF 2021

THE BM, SBI GENERAL INSURANCE CO. LTD. & ANR. .....Petitioners

.V.

MONALISA DASH & ANR. .....Opp. Parties

COMPENSATION – Deceased suffered heart attack when riding the motor cycle as he was struck by lightning – Whether such death covered the personal accident scheme? – Held, Yes. (Para-4)

For Petitioners : Mr. Somnath Roy
For Opp. Parties : Mr. P.K. Mishra

ORDER Date of Order: 30.06.2022

ARINDAM SINHA, J.

1. Mr. Roy, learned advocate appears on behalf of petitioners (insurance company). He submits, impugned is award dated 18th August, 2021 passed by the Permanent Lok Adalat. He submits, under a personal accident cover, claim was made on the insured having died while riding motorcycle. He submits, death was ascertained to be by cardiac arrest. It was not motor accident, which caused the death. In the circumstances, the personal accident cover did not provide for the cause of death.

2. Mr. Mishra, learned advocate appears on behalf of opposite party-beneficiary. He submits, the deceased suffered heart attack when running motor cycle because he was struck by lightening. It was, therefore, an accident.

3. On query from Court Mr. Roy refers to the postmortem report. Cause of death has been given as cardiac arrest due to lightening, sufficient to cause death in ordinary course of nature. Petitioner's contention is that the cover was in respect of motor accident. By the personal accident cover, petitioner undertook to pay compensation as per prescribed scale for bodily injury/death sustained by the owner- driver of the vehicle in direct connection with the vehicle insured whilst mounting into/dismounting from or travelling in the insured vehicle as to co-driver, caused by violent accidental external and visible means, which independent of any other cause shall within six calendar months of such injury result in death.

4. There is no dispute that the deceased was struck by lightning when riding motorcycle, which resulted in death. Court is convinced death was caused by violent accidental external and visible means of lightening striking the individual riding a motorcycle for it to be seen as an accident. Lightening

is an external phenomenon and visible causing, in this case, the rider being struck thereby and consequently his death by heart attack.

5. It appears the PLA adjudicated upon failure to achieve settlement. In the circumstances Court does not find reason to interfere. Mr. Roy submits, there ought not to have been direction for payment of interest. However, Court is not inclined to interfere with the direction except in reducing the rate to 6% per annum on the period directed by the award.

6. The Registry is directed to forthwith disburse the money deposited by petitioners to opposite party no.1 along with interest, if any accrued, on it having been kept deposited in an interest bearing account. Petitioners are directed to pay the balance within three weeks of communication along with interest at 6% per annum simple, the period commencing as directed in the award, calculated up to the date of deposit of 50% in the Registry and thereafter at that rate on the balance 50%, till date of payment.

7. In event all or any of above directions are not complied with by petitioners, the writ petition will be deemed to have been dismissed and opposite party no.1 will thereupon become entitled to seek execution of award of the Permanent Lok Adalat including its directions on interest, as a decree of Court, in accordance with law.

8. The writ petition is disposed of.

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2022 (II) ILR - CUT- 387

D.DASH, J.

R.S.A. NO. 212 OF 2005

SRIMATI NAGI REDDY KUMARI ……..Appellant

.V.

SMT. SATYABATI PATRO & ANR. ……Respondents

CODE OF CIVIL PROCEDURE,1908 – Section 100 – Suit for specific performance of contract filed by plaintiff/appellant – Whether the lower

Appellate Court is wrong in placing the burden on the Appellant, when the case of the appellant and finding about payment of consideration in-part under exhibt-1 became final and conclusive – Held, No.
(Para-10)

For Appellant : M/s. S.S. Rao, B.K. Mohanty,N.C. Nayak & A.P. Rath
For Respondents : M/s.P.K. Nayak-1, B.K. Mohanty & M.K. Das,
M/s. M.K. Das, Sidhartha Mishra & B. Ku. Behera.

JUDGMENT Date of Hearing 17.05.2022 : Date of Judgment: 20.06.2022

D.DASH, J.

The Appellant, by filing this Appeal under Section-100 of the Code of Civil Procedure (hereinafter called as 'the Code') has assailed the judgment and decree passed by the learned Adhoc Additional District Judge (FTC), Berhampur in RFA No.25/2004 (71/2003 G.D.C.).

By the same, the Appeal filed by the present Respondent No.1(Defendant No.2) under section 96 of the Code challenging the judgment and decree passed by the learned Civil Judge (Sr. Division), Berhampur in Title Suit No.191 of 1996 has been allowed and thereby the suit for specific performance of contract filed by the Appellant (Plaintiff), which has been decreed by directing the Respondents (Defendants) to execute and register the sale deed in respect of the suit land in favour of the Appellant (Plaintiff) on receipt of balance consideration have been set aside. So by the impugned judgment and decree passed by the First Appellate Court, the Appellant-Plaintiff has been non-suited.

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

3. Plaintiffs case is that Defendant No.1 was the owner in possession of the suit land. On 29.10.1996 she had a contract for sale of the suit land with standing trees with the Defendant No.1. It was agreed between them that the Defendant No.1 would sale the suit land for a consideration of Rs.70,000/- and execute the registered sale deed within three weeks on receiving the balance consideration or else would pay a sum of Rs.50,000/- to the Plaintiff as damages. It is stated that on 29.10.1996 the Defendant No.1 accepted a sum of Rs.5001/- towards advance consideration from the Plaintiff in

presence of the witnesses and granted the money receipt acknowledging the payment of the said amount by the Plaintiff and receipt of the same by him. It is further stated that Defendant No.1 had in his custody, the registered sale deed in respect of the suit land by which he had acquired title over the suit land and he had handed over a photocopy of that sale deed to the Plaintiff. It is said that he then had delivered the possession of the suit land to the Plaintiff. On 13.11.1996 when the Defendant No.1 did not show any such inclination to come forward to register the sale deed; the Plaintiff issued notice. Despite the waiting, the Defendant No.1 did not come to register the sale deed. On 27.11.1996 the Plaintiff could know that the Defendant No.1 was going to execute the sale deed in respect of the suit land in favour of the Defendant No.2 who being fully aware of the contract of sale that the Defendant No.1 had agreed to sale the suit land to the Plaintiff is coming forward to purchase the land. The Plaintiff No.1 then filed the suit.

4. The Defendant No.1 denying the plaint averments asserted to have never entered into any contract with the Plaintiff for sale of the suit land for a consideration of Rs.70,000/- He also denied to have granted any receipt in favour of the Plaintiff in token of acceptance of Rs.5001/- as part of the agreed consideration. It is his case that he being the true owner of the suit land has sold the same to the Defendant No.2 and the possession of the said land has been delivered to her; who is in possession of the same.

At this stage, it may be stated that the Defendant No.1 finally disregarding the contract for sale that he had made with the Plaintiff executed the sale deed in respect of the suit land in favour of the Defendant No.2 which he stated in the written statement. So, the Defendant No.2 was brought within the purview of the suit by way of amendment of the plaint.

5. The Trial Court on above rival pleadings having framed seven issues, on examination of evidence and their evaluation has answered Issue Nos.1 to 3 being rightly taken together for decision in holding that the Defendant No.1 had agreed to sale the suit land to the Plaintiff for a consideration of Rs.70,000/- and had received the advance consideration. Having said so, the other issue concerning Defendant No.2 has been answered in holding that she was not a bona fide purchaser for value without notice of the agreement. With such findings the suit stood decreed with necessary directions as afore-stated.

The purchaser of the suit land from the Defendant No.1, i.e., Defendant No.2 then carried the Appeal. The said Appeal has been allowed. The First Appellate Court on examination of evidence and their evaluation at its level has held that the Plaintiff has failed to prove her case that there was a valid and enforceable contract between the Defendant No.1 and herself on 29.10.1996 for sale of the suit land by the Defendant No.1 for a consideration of Rs.70,000/- and as such the First Appellate Court has held the Plaintiff as to be not entitled to the reliefs so granted by the Trial Court. Hence this Second Appeal is at the instance of the Plaintiff.

6. Mr. S.S. Rao, learned Counsel for the Appellant (Plaintiff) submitted that when the Trial Court on a vivid discussion of evidence and their detail examination from every possible angle had rendered the finding on the factual setting of the case in favour of the Plaintiff that the Defendant No.1 had entered upon a contract with her to sale the suit land for agreed consideration of Rs.70,000/- and although the Plaintiff was ready and willing to perform her part of the contract it is for the failure of the Defendant No.1 that the Plaintiff suffered; the same have been unreasonably set aside by the First Appellate Court without any justifiable reasons and rather on a slipshod examination of the evidence. He further submitted that in the alternative when Ext.1 has been duly proved and the Defendant No.1 in his evidence has clearly stated to have written the same in his own hand and signed it, the First Appellate Court ought to have at least directed the Defendant No.1 to refund the said amount with interest pendetilite and future to the Plaintiff when the suit is well within the time and that by not doing the same as permissible under the provision of Order-7 Rule-7 of the Code; the ultimate decision has doubly enriched the Defendant No.1 who has been unlawfully enriched thereby.

7. Mr. P.K. Nayak, learned Counsel for the Respondent No.1 submitted all in favour of the findings recorded by the First Appellate Court. He submitted that keeping in view the settled principles of law, when the First Appellate Court having made detail examination of oral evidence let in by the Plaintiff in support of the said oral contract for sale and simultaneously, looking at the contents of Ext.1 has rightly held that the Plaintiff has failed to prove that there was no valid and enforceable contract between the Defendant No.1 and the Plaintiff on 29.10.1996 to sell the said land for a consideration of Rs.70,000/-, the same is not liable to be interfered with. He further

submitted that when the First Appellate Court has discarded this Ext.1 to be taken not of in support of the case of the oral contract for sale as pleaded in holding that there was no such payment of money towards advance consideration; the question of directing the Defendant No.1 to make the payment of the amount said to have been paid by the Plaintiff under Ext.1 does not arise.

8. In addressing the rival submission of the learned counsel for the parties, the following substantial questions of law are required to be answered in this Appeal:-

> "(a) Whether at the instance of subsequent purchaser having knowledge of previous agreement, the decree for specific performance of the contract between the appellant and respondent no.2 can be set aside?
>
> (b) Whether the lower appellate court is wrong in reversing the judgment and decree of the trial court directing specific performance of contract, when the Ext.1 the receipt of advance consideration is established and supply of Ext.2 to appellant was proved and finding to that effect are not reversed?
>
> (c) Whether the lower appellate court is wrong in placing the burden on the appellant when the case of the appellant and finding about payment of consideration in part under Ext.1 became final and conclusive?
>
> (d) Whether even disbelieving the case of the Appellant (Plaintiff) that she in her favour had no agreement for sale of the land in question with Respondent No.2 (Defendant No.1); on the basis of the evidence on record and in view of admission of D.W.1 that he had written the same and as such bound by its contents, the First Appellate Court ought to have passed a decree for recovery of the amount as stand under Ext.1 to have been received by D.W.1 from the Appellant (Plaintiff) with interest pendetilite and future by passing a simple money decree?"

9. Keeping in view the submissions made, I have carefully read the judgments passed by the courts below.

10. The case of the Plaintiff is that there was an oral contract between the Defendant No.1 and herself for sale of the suit land. In order to establish the same, the evidence has been let in by examining P.W.2 to 4. The documents in support of the same are Exts.1, the receipt and Ext.2 the photocopy of the

sale deed by which the Defendant No.1 had purchased the suit land which is said to have been given by the Defendant No.1 to the Plaintiff.

The Plaintiff herself has been examined as P.W.1. She has first of all stated that an agreement was written at her house and it was written in Oriya. P.W.2 has stated that the agreement for sale was executed on a letter pad of Defendant no.1 and other witnesses, i.e., P.Ws.3 and 4 have stated that the written agreement was prepared by Defendant No.1 for the purpose. However, this solely this Ext.1 is projected as the trump card for the Plaintiff. It reveals that it is an acknowledgement said to have been made by the Defendant No.1 as regards receipt of Rs.5001/- towards advance for sale of his land at Kanisi. Nothing being indicated as to the sale of any specific land, much less to say that it was concerning the suit land. The same is extracted in verbatim.

"Receive Rs.500/- (Rupees five hundred only) as advance to sale of my land at Kanisi.

Sd/-

Sd/- witness Defendant No.1

Sd/- witness."

The above contents of Ext.1 which has come from the custody of the Plaintiff, who has proved the same which has come from no doubt reveals that the Defendant No.1 has received a sum of Rs.5001/- but it does not contain the detail particulars of the land for sale for which the amount had been so received, the area etc. The Defendant No.1, however, in his evidence has admitted that the contents of Ext.1 are in his own handwriting and he has signed on the same. The other document Ext.2 is the photo copy of the sale deed by which the Defendant No.1 had purchased the said land. The Plaintiff's evidence that she remained in possession of the property in question from that time onwards has been disbelieved by the First Appellate Court assigning very good reasons more particularly taking into account the evidence of the P.W.2 who is none other than the husband of the Plaintiff who has stated that the Defendant No.2, the purchaser is in possession of the suit land since the date of her purchase which goes to show that it had been so delivered by the Defendant No.1 as the Plaintiff does not state that she has been forcibly disposed either by the Defendant No.1 or Defendant No.2. This document Ext.1 is even not remotely relatable to say that it came into being pursuant to the contract for sale of the suit land to the Plaintiff and that the

Defendant No.1 had received the said sum as advance consideration when even the total agreed consideration for the said transaction does not find mention and so also no further details as to when the sale deed would come to be executed etc.

The very case of the Plaintiff that in the event of failure, the Defendant No.1 had agreed to pay Rs.50,000/- as damage itself negates her claim that under the contract of sale, the Defendant No.1 had undertaken the definite obligation to execute the sale deed. This on this ground alone, even by saying that there was an agreement for sale, the same cannot be said to be absolute as the plaintiff having foreseen certain events to happen in future had secured the advance money and make good the loss. Therefore, the view taken by the First Appellate Court that the Plaintiff has not proved her case as to be entitled to a decree for specific performance of sale of suit land is not liable to be interfered with.

In view of all these aforesaid, the substantial questions of law as at (a) to (c) stand answered against the case/claim of the Plaintiff.

11. Now coming to the last substantial question of law, when it is found that the Defendant No.1 has not denied that he had not received the sum of Rs.5001/- from the Plaintiff and he has admitted to have written the receipt of Ext.1, in my considered view the Plaintiff ought to have been granted with the relief of recovery of the said sum from the Defendant No.1 with interest pendetilite and future by taking it as a transaction of simple advancement of money by the Plaintiff to the Defendant No.1. The answer to the said substantial question of law is thus recorded in favour of the Plaintiff holding that she is entitled to get a sum of Rs.5001/- (Rupees five thousand one) with pendetilite and future interest at a reasonable rate from the Defendant No.1, which relief is permissible to be granted by the court with the aid of the provision of Order-7 Rule-7 of the Code.

12. In the result, the Appeal stands allowed in part by passing a decree of realization of a sum of Rs.5001/- from the Defendant No.1 with pendetilite and future interest @ 10% per annum. The Defendant No.1 is hereby directed to pay the said amount within a period of three months hence and in the event of failure on the part of the Defendant No.1, the Plaintiff would be at liberty to recover the same by levying Execution Proceeding in the court of law. No order as to cost.

2022 (II) ILR - CUT- 394

BISWANATH RATH , J.

W.P.(C) NO. 6511 OF 2022

RANJAN KUMAR SAHU ……..Petitioner

.V.

SUB-COLLECTOR, ATHAMALLIK, ANGUL & ANR. ……..Opp. Parties

PROBATE OF THE WILL – Exemption of certain district – Law is well settled that probate of the will is not necessary in the undivided district of Dhenkanal – As the district Angul is carved out of Dhenkanal district, there is no need of probate of such document.

Case Law Relied on and Referred to :-

1. 2009 (II) CLR 155 : Aparna Sahu & Ors. Vs. Raghunath Biswal & Ors.

For Petitioner : Mr. S.Ku. Patra

For Opp. Parties: Mr. U.K. Sahoo

ORDER Date of Order: 29.06.2022

BISWANATH RATH , J.

1. On consent of both the parties this matter is taken up for final disposal.

2. This writ petition involves the following prayer:-

> "It prayed therefore that this Honb'le Court may graciously be pleased to pass an order issue Rule NISI calling upon Opp.Parties to show cause and if they fail to show cause or so insufficient cause then issue appropriate writ, order, direction to quash the order dt.27.10.21 (Annexure-3) and 6.11.21 (Annexure-4) and direction may given to the Op.Parties to mutated the above schedule land in favour of the petitioner.
>
> And pass any other order which will deem fit and proper in the ends of justice."

3. Challenge in the writ petition is made to the orders at Annexures-3 & 4 herein.

4. Challenging the order of the original authority vide Annexure-3 involving the Mutation Case No.617 of 2021 and further also the order of dismissal of the appeal at the instance of the Petitioner vide Annexure-4, Mr. Patra, learned counsel for the Petitioner taking this Court to

the pleadings in the writ petition as well as the case of the Petitioner before the Forums below contended that for the property involved belongs to Athamallik in the Angul district, there is no need of probate in the involvement of deed involving such property. Taking this Court to a reported judgment of this Court in the case of ***Aparna Sahu and Others Versus Raghunath Biswal and Others*** as reported in 2009 (II) CLR 155 and a further judgment of this Court in W.P.(C) No.10400 of 2021 decided on 22.04.2021 both if there is requirement of probate involving Angul district, learned counsel for the Petitioner claims that the original authority as well as the appellate authority have failed in appreciating the position of law in this situation through both the above judgments and accordingly learned counsel for the Petitioner claimed that in this situation both the orders require to be interfered with and set aside.

5. In his opposition learned State Counsel, however, taking this Court to the ground of rejection in the orders at Annexures-3 & 4 attempted to substantiate the case of the public authority. There is no denial to the settled position of law dealing with Wills in the District of Angul through both the aforesaid judgments requiring no probate.

6. Considering the rival contentions of the parties and on perusal of the judgment in 2009(II)CLR 155 more particularly the direction in paragraph no.15 therein, this Court finds, the Single Bench of this Court taking up similar issue particularly involving the property under Athamallik Sub-Division in the District of Angul has come to observe as follows:

> "15. Only on other ground which needs to be dealt with is with regard to the submission of Mr. Mukherjee that P.W.3 did not identify the testator before the Sub- Registrar. This submission also appears to be factually not correct. P.W.3 in his examination-in-chief has stated :
>
> "Ext. 1 is the said will. This is my signature in the front page of the will marked Ext. 1/f. This is signature on the last page of the will marked Ext.1/g. Then the deed of will was presented. Sub- Registration Officer. I was present before the Registration Officer at the time of registration. I also give my signature."
>
> Mr. Mukherjee, relied upon the following statement made by the said witness in cross-examination, in support of his argument that P.W.3 had not identified the will.
>
> "Before the Registration Officer, I did not identify Jahar Biswal to the Registration Officer. X x x"

> The words "to the Registration Officer" are very significant. The deed itself reveals that P.W.3 has signed as identifier. He also admitted about such fact. He was present in the Sub-Registration Officer in course of registration. The question of identifying Jahar personally to the Sub-Registrar does not arise. A cumulative reading of the entire evidence clearly establishes the fact that not only there was valid attestation but also there was no defect in the registrarion of the will executed by Jahar in favour of the plaintiff. That apart, all these are questions of fact, which have been dealt with by the Courts below in extensor."

7. This issue has again visited this Court in W.P.(C) No.10400 of 2021 and this Court while disposing of the above writ petition on 22.04.2021, has directed in paragraph no.11 therein as follows:-

> "11. Law is well-settled that probate of the Will is not necessary in the undivided district of Dhenkanal. Thus, the restriction imposed at para-6 of the aforesaid circular with regard to probate the Will may not be applicable to the case at hand save and except other conditions of the circular dated 07.05.2018, in respect of which this Court does not express any opinion."

8. This Court in deciding the W.P.(C) No.10400 of 2021, even has taken some other decisions as indicated in paragraph no.7. In the above scenario and for the position of law on the issue of no need for registration and/or probate of Will involving property in the district of Angul, this Court finds, the position of law has been settled through the above judgment deciding no need of probate of such document particularly in respect of Angul District a District carved out of Dhenkanal District, which is already exempted from getting into such registration and/or probate of Will. For the settled position of law and since the orders at Annexures-3 & 4 have been passed in no consideration of settled position of law, this Court while setting aside both the orders at Annexures-3 & 4, remits the matter to the Tahasildar, Kishorenagar to dispose of the mutation case allowing in favour of the Petitioner keeping in view the settled position of law and giving direction for necessary correction in the Record of Rights.

9. The entire exercise shall be completed within a period of six weeks from the date of communication of an authenticated copy of this order by the Petitioner.

10. The Petitioner is directed to appear before the Tahasildar, Kishorenagar along with a certified copy of this order on 11.07.2022.

11. The writ petition stands disposed of with the above direction

2022 (II) ILR - CUT- 397

BISWANATH RATH , J.

WPC(OAC) NO.1110 OF 2014

SAUDA NAIK .....Petitioner

.V.

STATE OF ODISHA .....Opp. Party

REGULARISATION – Finance department resolution dated 15th may 1997 – Discrimination in regularisation – Effect of – Held, not proper – When one set of people have been regularized as per the resolution Dt.15.05.1997 on completion 10 years of service, there is no occasion for regularizing the service of petitioner in a different batch who stands in a similar footing – This Court directs the Opp. party to treat the petitioner to be a regular employee form 07.01.2003 and release all consequential benefits accordingly. (Para-8)

For Petitioner : Mr. A.K. Panda

For Opp. Party : Mr. S. Ghose,ASC

ORDER Date of Order: 29.06.2022

BISWANATH RATH, J.

1. This application involves the following relief:-

"7. **Relief(s) sought for :-**

In view of the facts and circumstances of the case, the applicant most fervently prays that this Hon'ble Tribunal may be graciously be pleased :

(a) To direct the respondents to regularize the services of the applicant retrospectively w.e.f. 1995 as has been extended to similarly situated employees/counter parts (applicants of T.A. No.56(C)/93).

(b) To count the service of the applicant from the year 1995 so that the applicant will be eligible for pension after his retirement.

(c) To pay the arrear dues /service benefits to the applicant from 1995 till 2008.

(d) To pass any other order / orders as would be deemed fit and proper."

2. Factual background involved herein is, for the disposal of the T.A. No.56(C)/1993 on 23.11.1995 the State Authorities moved Hon'ble Apex Court in SLP No.5683 of 1996, which finally got dismissed. There is no dispute that the principle decided in T.A. No.56(C)/1993 has been confirmed by the Hon'ble apex Court. It has been brought to the notice of this Court through a communication of the Government of Orissa in Revenue and Disaster Management Department dated 10.10.2008 that through this letter the name of the Petitioner find place at Sl. No.39 and there is already a direction by the competent authority to regularize all these persons including the Petitioner against the existing vacancies in the Office of the Survey & Map Publication, Odisha, Cuttack except rejecting the case of one Karna Bewa for the reason indicated therein. It is next taking this Court to the development taken place in the meantime, learned counsel for the Petitioner submitted that for the services of the Petitioner being regularized on 12.11.2008, the Petitioner filed O.A. for antedating his date of regularization keeping in view the settled position of law. Bringing to the notice of this Court the document at page 24 of the brief, learned counsel for the Petitioner contended that in the same batch there has been regularization of certain persons w.e.f. 19.06.1999 and 2.07.1999 and thus Petitioner submitted that there is discrimination in the case of the Petitioner.

In the circumstance learned counsel for the Petitioner contended that when a set of people have been regularized in 1999, there was no occasion for regularizing the services of the Petitionerin a different batch, who stands in similar footing. It is thus contended that there was no room with the competent authority to discriminate the Petitioner by regularizing him from 12.11.2008. Learned counsel for the Petitioner further taking this Court to the circular being the foundation in regularizing the persons named at page 24 of the brief and the resolution of the Finance Department dated 15th May, 1997 contended that for the clear provision therein the case of the Petitioner should have been considered to have been regularized upon completion of 10 years from the date of his joining at least since 7.01.2003 and in no circumstance from 12.1.2008.

3. It is, in the above background of the matter, learned counsel for the Petitioner claimed for allowing this application and giving suitable direction to the competent authority for preponing the date of regularization of the services of the Petitioner at least from 07.01.2003.

4. Mr. Ghose, learned State Counsel in his attempt to support the case of the State Authorities relying on the direction at Annexure-9 (series) being passed on the direction of the Tribunal in T.A. No.56(C)/1993 contended that for the regularization of the Petitioner having been taken place following the direction of the Tribunal in disposal of the aforesaid T.A., there appears, there is no illegality in regularizing the services of the Petitioner from 12.11.2008. There is, however, no dispute to the claim of the Petitioner that the order of the Tribunal in T.A. No.56(C)/1993 has been confirmed by the Hon'ble apex Court in disposal of the SLP No.5683 of 1996 and also involving similar O.A. in SLP No.19310 of 1996. There is also no dispute to the existence of the Finance Department Resolution dated 15th May, 1997 benefitting the Petitioner herein.

5. Considering the rival contentions of the parties, this Court finds, the prayer involved herein was also the prayer made by a different group of people involving T.A. No.56(C)/1993. This T.A. was disposed of with the following direction:-

> "6. Taking all these decisions into consideration, I direct respondents that a scheme will be prepared within six months from the date of receipt of a copy of this order to absorb the existing casual skilled and highly-skilled employees and by phases all will be absorbed within three years, so that they will retire as regular employees to get the benefit of their service. Till they continue as casual employees, they shall be paid the minimum in the scale applicable to such posts in similar organization. This shall be worked out within three months from the date of receipt of a copy of this order and the payments shall be made immediately thereafter. Once the principle is decided, no joint application will be entertained and individual employee aggrieved has to approach the Tribunal for redressal his grievance under Section 19 of the Act.
>
> 7. A question arose whether direction can be given to give relief to casual employees who neither hold a civil post nor is a member of civil service. Their claim is for regularization in posts which comes within recruitment and Tribunal has jurisdiction in that respect to give direction to a civil post or civil service. Ancillarily, it can give direction for lesser relief till they are absorbed in regular posts.
>
> 8. In case no scheme is declared within six months as directed and the applicants are not paid emoluments which will be equal to the minimum in the scale of pay to which they are entitled within three months as directed, individual applicants are given liberty to approach the Tribunal under Section 19 of the Act so that each grievance can be examined independently depending upon facts and circumstances of his case. No joint Application shall be permitted.

> 9. On the facts and circumstances of this case, I have exercised power under Section 5(6) of the Act to hear the application by a Bench of one Member for early disposal to mitigate grievance of the applicants.
>
> 10. With this direction the Transferred Application is disposed of. There shall be no order as to costs."

6. There is no dispute at Bar that this order was challenged by the State Authorities in the Hon'ble apex Court through SLP No.5683 of 1996 and the same was dismissed affirming the order of the Tribunal. Further after finality of the issue involving T.A. No.56(C)/1993 even through the Hon'ble apex Court, the competent authority in further consideration of the matter issued a communication to the Additional Secretary to Government, Revenue & Disaster Management with clear direction to the competent authority to consider the case of the persons involved in T.A. No.56(C)/1993 for their regularization from their completing 10 years of service. This Court takes into account the provision in the Government vide Finance Department Resolution No.22764-WFI-24/97-F dated 15th May, 1997 and the relevant provision in the said resolution dated 15th May, 1997 reads as follows:

> "1. Separate Gradation/Seniority list shall be prepared by the Appointing Authority for each category of workers determining the length of engagement of a particular person. The workers should have worked under the administrative control of the Department concerned directly for a minimum period of 10 years. The engagement of 240 days in a year shall be construed as a complete year of engagement for this purpose.
>
> 2. The workers should have been engaged prior to12.4.1993 i.e. prior to promulagation of ban on engagement of N.M.R/D.L.R./Job Contract Workers etc. vide Finance Department Circular No.17813- WP-II-180/92-F. dated 12th April 1993.
>
> 3. They should have the minimum educational / Technical qualification prescribed for the post against which they would be absorbed."

7. Reading through the direction of the competent authority vide Annexure-4 to treat the persons in the manner involving direction in T.A. No.56(C)/1993, together with the Finance Department Resolution dated 15th May, 1997, this Court finds, there remains no doubt that the persons engaged as NMR/DLR/Job contract workers engaged prior to 12.04.1993 ought to be regularized on their completion of 10 years of service. This Court, therefore, records, the action of the State Authorities here

remains both contrary to the position of Law indicated herein and their own circular.

8. It is, in the circumstance, this Court finds, there was no option with the State Authorities than to regularize all such persons appointed prior to 12.04.1993 involving the above category of employment on their completion of 10 years from the date of their engagement.

9. Now coming to the case at hand, this Court finds, there is no dispute that the Petitioner was engaged as a Sweeper as DLR on7.01.1993. For the observation of this Court and for the support of the communication of the Government vide Annexure-4 reading together with the resolution of the Finance Department dated 15th May, 1997 and decision through above T.A., this Court finds, there is no requirement of further consideration of the case of the Petitioner, as the Petitioner's case is squarely covered by the direction of the Tribunal and for the communication of the resolution indicated hereinabove, this Court also takes into account the development involving four similarly situated persons as appearing at page 24 of the brief who have all been regularized from 19.06.1999 & 2.07.1999 respectively on their completing 10 years of service. In the process, while interfering in the order at Annexure-9 (series) so far it relates to the Petitioner, this Court directs the Opposite Party No.1 to treat the Petitioner to be a regular employee from 7.01.2003 and release all consequential benefits in favour of the Petitioner accordingly.

10. The above direction be worked out within a period of one & half months from the date of communication of an authenticated copy of this order by the Petitioner.

11. The O.A. succeeds to the extent indicated hereinabove. There is, however, no order as to the costs.

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2022 (II) ILR - CUT- 402

S.K. SAHOO, J.

CRLA NO. 695 OF 2016

SUDARSAN SAHANI ……Appellant

.V.

STATE OF ODISHA (VIG.) …….Respondent

CRLA NO. 687 OF 2016
PRASANTA KUMAR PATRA ……Appellant

.V.

STATE OF ODISHA (VIG.) ……Respondent

CRLA No. 694 of 2016
SAROJ KUMAR MISRA ……Appellant

.V.

STATE OF ODISHA (VIG.) …….Respondent

GCRLA No. 25 of 2019
STATE OF ODISHA (VIG.) ……Appellant

.V.

1. SAROJ KUMAR MISHRA
2. SUDARSAN SAHANI
3. PRASANTA KU. PATRA
4. ABAKASH PADHY ……Respondents

(A) CRIMINAL TRIAL – Offences under sections 420, 468, 201 and section 120-B of the Indian Penal Code r/w Section 13(2) 13(1),(d) of P.C Act, 1988 – Though the learned trial Court acquitted the appellants/accused persons from the charges under sections 420, 468, 120-B and 201 of the penal code but found the appellants guilty under section 13(2), 13(1)(d) of 1988 Act, without assigning any reason – Whether such observation of the trial court is sustainable under law ? – Held, No – This reflects non-application of mind to the ingredients required to sustain such charges.

(B) CODE OF CRIMINAL PROCEDURE, 1973 – Section 378 – Appeal against acquittal – Scope of interference by the Appellate Court – Held, the Appellate Court should be slow to interfere with the decision of the Trial Court – If the grounds of acquittal cannot be entirely and effectively dislodged or demolished and unless there has been flagrant miscarriage of justice by pronouncing the order of acquittal then the finding of the acquittal should not be disturbed.

Case Laws Relied on and Referred to :-

1. AIR 2008 SC 2991 : Yogesh @ Sachin Jagdish Joshi Vs. State of Maharashtra.
2. (1980) 2 SCC 465 : Shivnarayan Laxminarayan Joshi Vs. State of Maharastra.
3.2013 (3) SCALE 565 : Yakub Abdul Razaq Menon Vs. State of Maharashtra
4. AIR 2005 SC 128 : K. Hasim Vs. State of Tamil Nadu).
5. (2002) 5 SCC 234 : Devender Pal Singh Vs. State National Capital Territory of Delhi.
6. (2008) 39 OCR (SC) 188 : Inder Mohan Goswami Vs. State of Uttaranchal.
7. (2011) 49 OCR (SC) 924 : Joseph Salvaraj A. Vs. State of Gujarat .
8. (2009) 43 OCR (SC) 680 : Devendra Vs. State of U.P.
9. A.I.R. 2001 S.C. 1226 : Alpic Finance Ltd. Vs. P. Sadasivan.
10. A.I.R. 1983 SC 308 : Babu Vs. State of Uttar Pradesh.
11. (2018) 5 SCC 790 : Bannareddy Vs. State of Karnataka.
12. (2008) 10 SCC 450 : Ghurey Lal Vs. State of Uttar Pradesh

CRLA NO. 695 OF 2016 & CRLA NO. 694 OF 2016

For Appellant :Mr. Asok Mohanty,Sr.Adv.

For Respondent : Mr. Srimanta Das ,Sr. Standing Counsel (Vig.).

CRLA NO. 687 OF 2016

For Appellant : Mr. Pradipta Kumar Mohanty,Sr.Adv.

For Respondent : Mr. Srimanta Das ,Sr. Standing Counsel (Vig.).

GCRLA No. 25 of 2019

For Appellant : Mr. P.K. Pani Standing Counsel (Vig.)

For Respondents : Mr. Pradipta Kumar Mohanty,Sr. Adv.

JUDGMENT Date of Hearing: 25.03.2022: Date of Judgment: 18.04.2022

S.K. SAHOO, J.

Since all the appeals arise out of one case, with the consent of the learned counsel for the parties, those were heard analogously and disposed of by this common judgment.

The appellant Sudarsan Sahani in CRLA No. 695 of 2016, appellant Prasanta Kumar Patra in CRLA No. 687 of 2016, appellant Saroj Kumar Misra in CRLA No. 694 of 2016 and respondent no.4 Abakash Padhy in GCRLA No. 25 of 2019 faced trial in the Court of learned Special Judge (Vigilance), Phulbani in G.R. Case No.08 of 2013(v) (T.R. No. 08 of 2013)/G.R. Case No.30 of 2005(v) BAM (T.R. No. 39 of 2009) for the offences punishable under section 13(2) read with section 13(1)(d) of the Prevention of Corruption Act, 1988 (hereafter '1988 Act') along with

offences punishable under sections 420, 468, 201 and section 120-B of the Indian Penal Code on the accusation of misappropriating government money to the tune of Rs.1,50,000/- (rupees one lakh fifty thousand) in connivance with each other by corrupt or illegal means or by otherwise abusing their position showing false execution of pothole repair work, committing forgery of certain documents/records such as, pothole repair estimate and causing disappearance of evidence, such as MB No.1311 to screen themselves from legal punishment.

The learned trial Court vide impugned judgment and order dated 13.12.2016 though acquitted the respondent no.4 Abakash Padhy of GCRLA No. 25 of 2019 of all the charges so also the appellants Sudarsan Sahani, Prasanta Kumar Patra and Saroj Kumar Misra in the three criminal appeals of the charges under sections 420, 468, 201 and section 120-B of the Indian Penal Code, but found the appellants guilty of the offence under section 13(2) read with section 13(1)(d) of 1988 Act and sentenced each of the appellants to undergo rigorous imprisonment for two years each and to pay a fine of Rs.2,000/- (rupees two thousand) each, in default, to undergo further R.I. for one month each.

The appellants have challenged the impugned judgment and order dated 13.12.2016 passed by the learned trial Court by filing the aforesaid three criminal appeals whereas the State of Odisha has filed GCRLA No. 25 of 2019 challenging order of acquittal of the appellants of the charges under sections 420, 468, 201 and 120-B of the Indian Penal Code so also of the respondent no.4 Abakash Padhy of all the charges

2. The prosecution case, as per the First information report (Ext.28) lodged by P.K. Dwivedy (P.W.12), Inspector of Police, Vigilance, Berhampur, in short, is that pursuant to receipt of reliable information of misappropriation of government money to the tune of Rs.1,50,000/- (rupees one lakh fifty thousand) by showing false execution of pothole repair work in N.H. 217 from 147 K.M. to 171 K.M. in September 2004, an enquiry was taken up, in course of which it was ascertained that during the period from 2002 to 2004, the appellant Sudarsan Sahani was the S.D.O. of N.H. Sub-division, Balliguda, appellant Saroj Kumar Misra was the Executive Engineer, N.H. Division, Berhampur and appellant Prasanta Kumar Patra was the Junior Engineer of N.H. Section, Balliguda. During the said period, an estimate was made relating to the periodical renewal of N.H. 217 and the

same was sanctioned and agreement was executed on 19.02.2004 with contractor Sri Arun Kumar Choudhury relating to PR Coat of N.H. 217 from 148 K.M. to 154 K.M. for an amount of Rs.36,98,199/- with the date of commencement and completion from 19.02.2004 to 18.06.2004 and further extension of time was given upto 30.01.2005. The enquiry further revealed that while the said agreement was subsisting, another agreement was executed for the same portion of work with co-accused Abakash Padhy (respondent no.4 of GCRLA No. 25 of 2019) overlapping the earlier agreement with an estimate of Rs.4,64,881/- with the date of commencement and completion from 10.09.2004 to 09.03.2005. After execution of agreement with co-accused Abakash Padhy, the appellant Prasanta Kumar Patra made necessary entries relating to pothole repair work in the measurement book and an amount of Rs.1,50,000/- was paid to co-accused Abakash Padhy on 14.10.2004. It further came to light that pothole repair works from 147 K.M. to 171 K.M. was not actually executed and false bills were prepared and payment of Rs.1,50,000/- was shown. The Superintending Engineer, N.H. Circle (South), Bhubaneswar conducted an inspection and came to the conclusion that the agreement drawn by the Executive Engineer, N.H. Division, Berhampur was unauthorized as PR agreement over the same patch was already in force and it was further found that inflated rates were given in the sanction and estimate agreement with an intention to give undue financial benefit to the agency executing pothole repair work and that the measurement books were not produced before him for his scrutiny and it was reported to be missing. Considering the inspection report, the payment of Rs.1,50,000/- made to the contractor Abakash Padhy was treated as unauthorized, unwanted and loss to the Government.

Consequent to the enquiry, P.W.12 P.K. Dwivedy, Inspector of Police, Vigilance, Berhampur drew up the plain paper F.I.R. against the three appellants so also respondent no.4 Abakash Padhy and submitted the same to Superintendent of Police, Vigilance, Berhampur Division, Berhampur for registration of the case and accordingly, Berhampur Vigilance P.S. Case No. 30 dated 28.12.2005 was registered section 13(2) read with section 13(1)(d) of 1988 Act along with offences punishable under sections 420, 201 and section 120-B of the Indian Penal Code.

During investigation, P.W.12 examined the witnesses, seized relevant documents, obtained sanction for prosecution in respect of the public servants and on completion of investigation, since prima facie case was found against

all the three appellants and the respondent no. 4 of GCRLA, charge sheet was placed under section 13(2) read with section 13(1)(d) of 1988 Act along with offences punishable under sections 420, 468, 201 and section 120-B of the Indian Penal Code.

3. The defence plea of the appellants who are the public servants is that the PR agreement with contractor Arun Kumar Choudhury was a conditional one which was not completed till the departure of Executive Engineer and the said contractor Arun Kumar Choudhury had also not applied for extension of time for which the 1st contract came into end on 31.08.2004 and was not in force when the 2nd contract with the respondent Abakash Padhy was executed. It is further pleaded by the appellants that the Executive Engineer executed the 2nd agreement for repair of potholes from 148 K.M. to 171 K.M. which includes the work of 6 K.M. of the 1st agreement and that MB No.1311 was submitted by the appellant Prasanta Kumar Patra relating to the work executed by respondent Abakash Padhy and the same was submitted by J.E. S. Acharya to the Divisional Office. The defence plea of respondent Abakash Padhy is that he had rightly executed the work as per agreement and has been falsely implicated. The payment of running bill of Rs.1.50 lakh was made with bonafide and final bill having not been paid, there was no loss to the Government. The 1st contractor Arun Kumar Choudhury started the work on the verbal instruction on the day of joining of P.W.9 without extension and it is only on 24.03.2005 that post-facto extension was granted after the final bill was paid.

4. In order to prove its case, the prosecution examined twelve witnesses.

P.W.1 Kamala Padhi and P.W.2 Jabaharlal Patra were working as the Senior Clerk and Junior Clerk respectively attached to the office of Executive Engineer, N.H. Division, Berhampur in whose presence some documents were seized by the Vigilance police on production by one Rama Chandra Sethi as per seizure list vide Ext.1.

P.W.3 Surya Narayan Padhy was working as Junior Clerk in the office of Executive Engineer, N.H. Division, Berhampur in whose presence some documents were seized by the Vigilance as per the seizure lists vide Exts. 2, 3 and 4.

P.W.4 Rankanidhi Padhy was working as Junior Clerk in the office of Executive Engineer, N.H. Division, Berhampur and is a witness to the seizure as per the seizure list vide Ext. 3.

P.W.5 Rama Chandra Sethy was working as an Assistant Engineer in the office of Executive Engineer, N.H. Division, Berhampur. He stated that on the direction of the Executive Engineer, he produced certain documents before the Investigating Officer which were seized as per the seizure lists vide Ext. 1 and 2. He was declared hostile by the prosecution.

P.W.6 Mahesh Ch. Panda was the Junior Clerk in the office of the N.H. Division, Berhampur and he is a witness to the seizure of documents as per seizure list vide Ext.2.

P.W.7 Muralikrushna Pattnaik was the Junior Clerk in the office of the N.H. Division, Berhampur and he is a witness to the seizure of documents like MB movement register (Ext.5), correspondence file (Ext.6) as per seizure list Ext.3. He also stated about the seizure of MB issue register (Ext.7) as per seizure list Ext.4.

P.W.8 Sarada Prasad Das was the Asst. Engineer attached to the Vigilance Directorate, Odisha, Cuttack, who was directed by the Superintending Engineer, Vigilance Direcotrate to submit a report on scrutiny of certain records relating to the work providing PR coat to N.H. 217 at 13 patches under N.H. Division, Berhampur for the year 2003-04 and he submitted the report as per Ext.8 which was forwarded to the I.O. of the case.

P.W.9 Pradip Ku. Sutar was the Executive Engineer of N.H. Division, Berhampur. He stated that though the agreement in respect of the work in question was executed during the tenure of his predecessor, but the work started after his joining. He proved the tender documents and bills for the work of the two contractors i.e., Arun Kumar Choudhury and respondent no.4 Abakash Padhi and also proved the measurement book in respect of the work executed by the 1st contractor Arun Kumar Choudhury. He further stated that M.B. No.1311 containing measurement for the 1st running bill passed for respondent no.4 for Rs.1,50,000/- was not available in the office.

P.W.10 Anil Kumar Choudhury executed the work in question being the power of attorney holder of his brother Arun Kumar Choudhury as the agreement for the work between the Executive Engineer and his brother. He stated that after execution of the agreement, the work was executed jointly by him and his brother Arun Kumar Chaudhury and he was supervising the entire work, which was for an estimated cost of Rs.36,98,199/-. He further stated that though as per agreement, the date of commencement of the work was 19.02.2004 and date of completion was 18.06.2004 but it was extended from time to time and completed in January 2005. He proved the documents like running bills, final bill and signatures of his brother Arun Kumar Choudhury on the measurement books.

P.W.11 Bharat Ch. Pradhan was in additional charge of the Superintending Engineer, National Highway, Berhampur and he had inspected the work in question and submitted a consolidated report as per Ext.27.

P.W.12 Prasanta Kumar Dwivedy was the Inspector of Police, Vigilance, Berhampur, who submitted the written report to the Superintendent of Police, Vigilance, Berhampur, which was treated as F.I.R. as per Ext.28. He is also the Investigating Officer of the case.

The prosecution exhibited thirty six documents. Exts.1 to 4 are the seizure lists, Ext.5 is the MB movement register, Ext.6 is the correspondence file, Ext.7 is the MB issue register, Ext.8 is the report of P.W.8, Ext.9 is the forwarding letter, Ext.10 is the F-2 agreement, Ext.11 is the 1st running bill, Ext.12 is the relevant entry in MB 1427, Ext.13 is the 2nd running bill, Ext.14 is the relevant page nos.1 to 9 of MB 1446, Ext.15 is the final bill, Ext.16 is the relevant page nos. 5 to 11 of MB 1427, Ext.17 is the Schedule of Quantities approved by Superintending Engineer, N.H. Circle (South), Bhubaneswar, Ext.18 is the comparative statement, Ext.19 is the tender schedule, Ext.20 is the estimate, Ext.21 is the F-2 agreement, Ext.22 is the tender submitted by respondent no.4 Abakash Padhy, Ext.23 is the tender submitted by Debaraj Pradhan, Ext.24 is the 1st running bill, Ext.25 is the MB Book No.1447, Ext.26 is the MB Book No.1346, Ext.27 is the inspection note of the Superintending Engineer, Ext.28 is the F.I.R., Ext.29 is letter no. 154, Ext.30 is the relevant entry No.263, Ext.31 is the letter no. 279, Ext.32 is letter No.1474, Exts.33, 34 and 35 are the sanction orders for prosecution of

the three appellants, Ext.36 is letter no. 2453 dated 05.08.2015 of the Executive Engineer, N.H. Division, Berhampur.

The defence has examined four witnesses in its support.

D.W.1 Sarat Chandra Rout was the Assistant Engineer, N.H. Division office, Berhampur, who was also holding the additional work of Public Information Officer of the concerned office and while working as such, he had furnished some documents/letters, which were marked as Exts.G, I, J, M and Q.

D.W.2 Sanatan Mohanty was working as Asst. Engineer, Estimate, N.H. Office, Berhampur and he produced the letters vide Ext.CC, Ext.T, Ext.U, Ext.V, Ext.W, Ext.H/1, Ext.X, Ext.Y, Ext.Z, Ext.AA and Ext.BB.

D.W.3 Basudev Sasmal was working as Asst. Engineer, R & B Division, Jeypore and he produced the documents vide Ext.O & Ext.S.

D.W.4 Saroj Kumar Misra is the appellant in CRLA No.694 of 2016 and he produced certain documents which are marked as Ext.K and Ext.L.

The defence exhibited twenty nine documents. Ext.A is letter no. 843 dated 16.02.2005, Ext.B is letter No. 37 dated 16.02.2005, Ext.C is letter No.711 dated 11.02.2005, Ext.D is letter no. 581 dated 04.02.2005, Ext.E is letter no. 21 dated 31.01.2005, Ext.F is letter No. 246 dated 17.01.2005, Ext.F is letter no. 246 dated 17.01.2005, Ext.G is letter no. 5277 dated 29.10.2004, Ext.H is letter no. 56 dated 24.04.2005, Ext.I is letter No. 38(cib) WE dated 31.10.2004, Ext.J is letter No.11342 dated 19.02.2004, Ext.K is letter no. 2816 dated 17.08.2004, Ext.L is letter dated 22.05.2003, Ext.M is memo no. 2682 dated 29.05.2004, Ext.N is letter No.1165(WE) dated 24.03.2005, Ext.O is payment details of 141F-2/03-04 of respondent no.4 Arun Kumar Choudhury, Ext.P is the rain fall data obtained from BDO, Daringbadi, Ext.Q is the letter no. 4775 dated 22.09.2004, Ext.R is the charge papers showing details of inspection, Ext.S is memo no. 2584-88 dated 20.04.2005, Ext.T is D.O. letter no. 16990 dated 23.12.2003, Ext.U is the inspection report of R.K. Rao (CEMH), Ext.V is the tour diary of P.K. Sutar (EENH), Ext.W is the letter no. 2500 dated 23.04.2005, Ext.X is the hand receipts of Abakash Padhy, Ext.Y is the forwarding letter of PIO dated 07.05.2015, Ext.Z is the office order of the Executive Engineer, NH Division,

Berhampur, Ext.AA is the FDR assessment report, Ext.BB is the bar chart of FDR and Ext.CC is the letter no. 63 dated 07.05.2015.

5. The learned trial Court in its impugned judgment has been pleased to hold that the appellants were the public servants at the relevant point of time within the meaning of public servant as defined under section 2 of 1988 Act. It was further held that the respondent no.4 had executed the patch work on the N.H. way and at the time of entering into the contract with the respondent no.4, the earlier contract was not in force, as such, no illegality has been done. It was further held that by the time Arun Kumar Choudhury, the contractor commenced the disputed work on 01.12.2004 till its completion on 30.01.2005, there was no extension of time and extension of time was sought for by P.W.9 only on 21.03.2005 which was sanctioned by the Superintending Engineer on 24.03.2005. It was further held that till 22.09.2004, the earlier contract with the 1st Contractor Arun Kumar Choudhury was not rescinded and was very much in force in view of Clause-2 (b)(l) of the conditions of contract. The appellant Saroj Kumar Misra entered into an agreement with the respondent no.4 on 10.09.2004 for the self-same work with commencement and completion date as 10.09.2004 and 09.03.2005 and as such the subsequent contract was illegal. It was further held that in view of the contradictory evidence adduced by the prosecution witnesses, it can affirmatively be concluded that the trial run of the machineries by the 1st contractor Arun Kumar Choudhury was doubtful. It was further held that the prosecution has not substantiated the essential ingredients of sections 420 and 468 of the Indian Penal Code.

The learned trial Court further held that on careful scrutiny of the materials on record, there appears nothing to the fact that the appellants conspired with the respondent no.4 to grab the government funds allotted for construction of potholes and therefore, the prosecution has failed to bring home the charge under section 120-B of the Indian Penal Code against the accused persons.

The learned trial Court further held that the disappearance of MB No.1311 against the appellants was not founded and accordingly, the prosecution has failed to substantiate the charge under section 201 of the Indian Penal Code against them. It was further held that the respondent no.4 is not guilty under any of the offences charged and accordingly, he was acquitted of all the charges.

However, the learned trial Court held that the prosecution has successfully established the charge under section 13(2) read with section 13(1)(d) of the 1988 Act against the appellants and accordingly found them guilty.

6. Mr. Asok Mohanty, learned Senior Advocate appearing for the appellants Sudarsan Sahani and Saroj Kumar Misra argued that the finding of the learned trial Court that the 2nd agreement which was executed by the appellant Saroj Kumar Misra with the respondent no.4 Abhisekh Padhi while the 1st agreement was in force is illegal, is contrary to the evidence on record and suffers from non-application of mind. It is further submitted that the 2nd agreement was a valid one for the following reasons:

> (i) Both the agreements were for different work and therefore, did not overlap at all. Moreover, the nature and scope of work in the two agreements operate in two different spheres. The 1st agreement was for periodical renewal and the 2nd agreement was for pothole repairs;
>
> (ii) The 1st agreement was for periodical renewal from 148 K.M. to 154 K.M. and the 2nd agreement was for pothole repair from 147 K.M. to 171 K.M. The value of the 1st agreement was Rs.36,98,199/- for six kilometers, whereas the 2nd agreement value was for Rs.4,70,170/- for 24 Kms.;
>
> (iii) At the time of execution of 2nd agreement dated 10.09.2004, the 1st agreement/contract was not in force;
>
> (iv) In the 1st agreement, it is clearly mentioned that time was the essence of contract, which would be evident from a bare reading of clause 2(a) of the agreement (Ext.10) and since time was the essence of contract, the 1st contractor Arun Kumar Choudhury was obliged to finish the work within time or during the period of extension granted as per procedure laid down in the O.P.W.D. Code. The 1st contractor signed the agreement (Ext.10) on 19.02.2004 wherein the date of completion of the work was mentioned as 18.06.2004. On account of the Code of Conduct for General Election, extension was granted from 01.05.2004 to 31.08.2004, but before or after 31.08.2004, no extension was sought for or granted by the prescribed authority. Therefore, there was no agreement in force as on 10.09.2004 when the disputed agreement under Ext.21 was executed between the appellant Saroj Kumar Misra, the Executive Engineer and the respondent no.4 Abakash Padhi. Reliance was placed on two letters i.e. Ext.Q and Ext.G.

Mr. Asok Mohanty, learned Senior Advocate further argued that the learned trial Court rightly acquitted all the appellants including the respondent no.4 of the charges under sections 420, 468, 120-B and 201 of the

Indian Penal Code but most peculiarly without assigning any reason whatsoever, convicted the appellants under section 13(2) read with section 13(1)(d) of 1988 Act. Such an order of conviction is perverse and suffers from non-application of mind and therefore, cannot be sustained in the eye of law.

Mr. Pradipta Kumar Mohanty, learned Senior Advocate appearing for the appellant Prasant Kumar Patra in CRLA No.687 of 2016 so also for all the respondents in GCRLA No.25 of 2019 not only adopted the argument advanced by Mr. Asok Mohanty, Senior Advocate but added that the impugned judgment and order of acquittal of respondent no.4 of all the charges and the appellants of some of the charges passed by the learned trial cannot be said to be perverse, palpably wrong, manifestly erroneous or demonstrably unsustainable and since this Court while dealing with an appeal against acquittal ought to be cautious because the presumption of innocence in favour of the accused is not certainly weakened by the fact that he has been acquitted at the trial, therefore, there is no compelling reasons to interfere with the same in the GCRLA.

Mr. Srimanta Das, learned Senior Standing Counsel for the Vigilance Department on the other hand contended that the appellant Saroj Kumar Misra being the Executive Engineer executed the agreement vide Ext.10 with the 1st contractor Arun Kumar Choudhury with date of commencement as 19.02.2004 and date of completion as 18.06.2004 and extension of time was granted upto 30.01.2005 which was sanctioned by Superintendent Engineer, N.H. Circle vide letter dated 24.03.2005. However, the said appellant executed the fresh agreement vide Ext.21 within the extended period of the 1st contractor with the respondent no.4 Abakash Padhi, i.e. the 2nd contractor on 10.09.2004 for repair of potholes from 147 K.M. to 171 K.M. for the year 2004-05 with date of commencement 10.09.2004 with the stipulated date of completion as 09.03.2005 thereby overlapping the existing agreement vide Ext.10 and the learned trial Court has rightly given the finding that the 2nd agreement was entered into between the appellant Saroj Kumar Misra and the respondent no.4 Abakash Padhy while the 1st agreement was not rescinded and was very much in force. He further argued that P.W.9 has stated that although he joined as Executive Engineer on 08.10.2004, but he was not given charge of the office by his predecessor (appellant Saroj Kumar Misra) and that during that period, the office of the Executive Engineer was kept under lock and key by the said appellant and that he (P.W.9) took charge

from the appellant on 01.12.2004 which was after nearly two months and during the said period, he (P.W.9) made an inspection of the site in question and found that no work appeared to have been done there. It is argued that P.W.9 was deliberately kept out of the office in order to cover up the irregularities committed by the appellants with regard to so-called work of the respondent no.4 which was in fact non-existent but the payment of bill was made thereon. He further emphasized that the respondent no.4 in his accused statement has clearly stated that he had no knowledge regarding entrustment of work to him in pursuance to the 2nd tender call notice for the year 2004-05, which substantiates that the accused persons prepared false bills and vouchers to misappropriate Government money making the respondent no.4 as a dummy contractor only on paper. While concluding his argument, Mr. Das contended that the respondent no.4 should have to execute the work entrusted utilizing machines as per specification in the tender, but he claimed the amount for such work, which he had allegedly executed manually and there is no iota of doubt that had the work been done manually, the expenses would have been more and the respondent no.4 could not have claimed the lesser amount as if it was executed through machines and this is another factor, which improbablises the execution of any work by the respondent no.4 under the 2nd contract and rather it strengthens the prosecution case that fabricated documents were created by the accused persons to claim charges for pothole repair works, which was in fact not been done and whatever work has been done, that was done only by the 1st contractor Arun Kumar Choudhury, who was paid for the work and therefore, the learned trial Court has rightly convicted the appellants under section 13(2) read with section 13(1)(d) of 1988 Act.

Mr. P.K. Pani, learned Standing Counsel (Vigilance) appearing in the Government Appeal contended that not only the acquittal of respondent no.4 of all the charges, but also the appellants of the charges under sections 420, 468, 201 and section 120-B of the Indian Penal Code is faulty and it should be set aside and all the appellants and respondent no.4 should be held guilty for all the offences they were charged. According to Mr. Pani, pursuant to the F-2 agreement executed with the 1st contractor Arun Kumar Choudhury, the work was carried out and completed within the extended time as allowed by the Department and after due measurement, the final bill was passed and payment was made thereon. During the continuance of the work under the 1st agreement which was in force, another agreement was illegally entered into with the respondent no.4 for a small part of the work covered under the 1st

agreement and not only that, the bill for the work under 2nd agreement for an amount of Rs.1,50,000/- was also released in favour of the respondent no.4 within four days of the agreement. He further argued that the pothole repair works as per the 2nd agreement was also covered under the original agreement, which was not permissible, inasmuch as in case of exigencies for any small additional work within the original work in progress, the same has to be executed by the original contractor as per clause 10 of the F2 agreement of the 1st contractor as well as clause 3.5.31 of O.P.W.D. Code. Mr. Pani further submitted that that is the reason why the purported work under the 2nd tender was stopped because of irregularity and no work appeared to have been done in the site under the 2nd tender. He emphasized about the conspiracy between the accused persons in preparing false paper work like tender and agreement by showing simultaneous execution of sham work with the original work and for such purpose, a dummy contractor like respondent no.4 was set up. The measurement book for the work done under the 2nd agreement, which was M.B. No. 1311 was found missing. According to Mr. Pani, since the learned trial Court has ignored the material evidence brought on record by the prosecution to substantiate various charges against the accused persons, the view taken for acquittal is clearly unsustainable and therefore, it should be set aside.

7. The first and core point for determination is whether the 1st agreement executed with the contractor Arun Kumar Choudhury was in force when the 2nd agreement was executed with the respondent no.4 Abakash Padhy.

The second point for determination is whether there was at all any necessity for entering into the 2nd agreement for execution of pothole repair work and whether the respondent no.4 executed any work at all or false bill was claimed.

The third point for determination is whether there was any criminal conspiracy between the accused persons and undue official favour was shown to the respondent no.4 for making payment of Rs.1,50,000/- (rupees one lakh fifty thousand) to him by showing false execution of pothole repair work.

The fourth point for determination is whether there was any forgery in respect of documents/records like pothole repair estimate of Rs.4,91,800/-, agreement entered into with the respondent no.4 and M.B. No. 1311 and

whether there was any dishonest cheating to the Government by showing undue official favour to the respondent no.4.

The fifth and last point for determination is whether the accused persons have caused disappearance of M.B. No.1311 with an intention to screen themselves from legal punishment.

First Point:

Whether the 1st agreement was in force when the 2nd agreement was executed:

8. Ext.10 is the F2 agreement executed between 1st contractor Arun Kumar Choudhury and the appellant Saroj Kumar Misra as Executive Engineer, N.H. Division, Berhampur on 19.02.2004 for the work "Periodical renewal work of N.H. 217 from KM 148/0 to 158/0". This document was proved by P.W.9, the Executive Engineer, N.H. Division, Berhampur. The stipulated date for commencement and completion of the work as per Ext.10 were 19.02.2004 and 18.06.2004.

Clause 2(a) of Ext.10 reads as follows:-

> "The time allowed for carrying out the work as entered in the tender shall be strictly observed by the contractor and shall be reckoned from the date on which the written order to commence work is given to the contractor. The work shall throughout the stipulated period of the contract be carried on with all due diligence (time being deemed to be of the essence of the contract on the part of the contractor) and the contractor shall pay as compensation an amount equal to ½% on the amount of the estimated cost if the whole work as shown by the tender for every day that the work remains uncommenced or unfinished after the proper dates (the work should not be considered finished until such date as the Executive Engineer shall certify as the date on which the work is finished after necessary rectification of defects as pointed out by the Executive Engineer, or his authorized Agents, are fully complied with by the contractor to the Executive Engineer's satisfaction) And further to ensure good progress during execution of the work, the contractor shall be bound in all cases in which the time allowed for any work exceeds one month, to complete one-fourth of the whole of the work before one fourth of the whole time allowed under the contract has elapsed, one half of the work, before one half of such time has elapsed and three-forth of the work before three-fourth of such time has elapsed. In the events of contractor failing to comply with the condition, he shall be liable to pay as compensation an amount equal to one third percent on the said estimated cost of the whole work for every day that the due quantity of work remains incomplete

provided always that the entire amount of compensation to be paid under the provisions of this clause shall not exceed 10% on the estimated cost of the work as shown in the tender."

Clause 4 of Ext.10 which provides for extension of time is quoted below:-

"If the contractor shall desire on extension of the time for completion of the work, on the ground of his having been unavoidably hindrances in its execution or any other ground, he shall apply in writing to the Executive Engineer within 30 days of the date of the hindrance on account of which he desires such extension as aforesaid and the Executive Engineer shall, if in his opinion (which shall be final) reasonable be shown therefore, authorize such extension of time, if any, as may in his opinion, be necessary or proper. The Executive Engineer shall at the same time inform the contractor whether he claims compensation for delay."

Para 3.5.30 of the O.P.W.D. Code, Vol.I provides for extension of time, which reads as follows:-

"3.5.30. Application for extension of time for the completion of a work on the grounds of unavoidable hindrance or any other grounds shall be submitted by the contractor within 30 days of such hindrance and the Divisional Officer shall authorize or recommend such extension of time as deemed necessary or proper within fifteen days of the receipt of such an application. In cases where the sanction of the higher authority to the grant of extension of time is necessary, the Divisional Officer should send his recommendation as expeditiously as possible. The higher authority should communicate his decision within sixty days from the date of receipt on recommendation in his office. If the orders of the competent authority are not received in time, the Divisional Officer may grant extension of time under intimation to the concerned authorities so that the contract might remain in force, but while communicating this extension of time, he must inform the contractor that extension is granted without prejudice to Government's right to levy compensation under relevant clause of the contracts.

Notes:- (I) The power to grant extension of time vests with the authority who accepted the tender but the period of extension that can be granted by such an authority is limited to the period equivalent to the time originally stipulated in the agreement for completion of the work. Beyond this, approval of next higher authority should be obtained before extension of time is granted.

(II) The application for extension of time and sanction thereto should be made in the prescribed form."

Mr. Asok Mohanty, learned Senior Advocate placed reliance on Ext.Q, which is the letter no.4775 dated 22.09.2004 addressed to the 1st

contractor Arun Kumar Choudhury by the appellant Saroj Kumar Misra in his official capacity. In the said letter, it is mentioned as follows:-

> "You have not executed any work till now. You have also not applied for grant of extension of time as per clause of F2 agreement in prescribed form."

Mr. Ashok Mohanty, learned Senior Advocate further placed reliance on Ext.G i.e. the letter no.5777 dated 29.10.2004 addressed to Superintending Engineer, N.H. Circle (South) by the appellant Saroj Kumar Misra which was a submission of rescission proposal of the 1st agreement i.e. the work assigned to the contractor Arun Kumar Choudhury. In the said letter, it is mentioned that the work that was awarded to Shri Arun Kumar Choudhury was with the date of commencement and stipulated date of completion was 19.02.2004 (shifted to 01.05.2004) and 18.06.2004 (shifted to 31.08.2004) respectively, but the contractor had neither executed any work during the period of contract nor has he applied to grant of extension of time in proper format as required under clause 4 of the F2 agreement. It is further mentioned therein that the said contractor as per letter dated 22.09.2004 (Ext.Q) was asked to file show cause within seven days as to why his contract should not be rescinded. It is further mentioned therein that the contractor had not started the work till 19.10.2004 and his revised work programme was already returned in original and that the delay in starting the work was therefore appeared to be intentional.

From these two letters i.e. Ext.Q and Ext.G, it becomes prima facie evident that the 1st contractor Arun Kumar Choudhury had not applied for extension of time either prior 31.08.2004 or after that particularly till the 2nd contract with respondent no.4 vide Ext.21 was executed on 10.09.2004.

During course of hearing on 10.02.2022, Mr. Asok Mohanty placed the letter dated 21.03.2005 written by P.W.9, the Executive Engineer to the Superintending Engineer, N.H. Circle (South), Bhubaneswar which is a part and parcel of Ext.N proved by the defence through D.W.3 wherein it was mentioned that subsequently on consideration of representation of the 1st contractor, the date of commencement and stipulated dated of completion were shifted to 01.06.2004 and 30.09.2004 respectively and below the letter in the enclosure portion, copy of the representation of the 1st contractor Arun Kumar Choudhury has been mentioned. It was argued that no such representation was in existence and no such order has been passed on any

such representation of the 1st contractor as was mentioned in the letter dated 21.03.2005 regarding shifting of date of commencement and date of completion of work to 01.06.2004 and 30.09.2004 respectively. To meet the contention of Mr. Asok Mohanty, learned Senior Advocate, time was sought for by Mr. Srimanta Das, learned Senior Standing Counsel of Vigilance Department to obtain instruction as to whether any such representation of the 1st contractor and any such order regarding shifting of the date of commencement and the date of completion of the work is available or not.

On 24.02.2022, Mr. Srimanta Das, learned Senior Standing Counsel for the Vigilance Department filed an application under section 391 of Cr.P.C. for marking certain documents as additional evidence and the application was registered as I.A. No.254 of 2022.

An affidavit was filed by the holding Investigating Officer on 10.03.2022 in which it was clearly mentioned that the two documents i.e. the representation of the 1st contractor Arun Kumar Choudhury for extension of time for completion of work or the order passed on such representation regarding shifting of the date of commencement or date of completion of work were not available either in the office of Executive Engineer, N.H. Division, Berhampur or in the office of Chief Construction Engineer, N.H. Circle, Berhampur.

The application filed by the learned Senior Standing Counsel for the Vigilance Department under section 391 Cr.P.C. was heard and rejected as per order dated 10.03.2022.

Thus, neither before the learned trial Court nor before this Court, the prosecution was able to produce any representation of the 1st contractor nor any order passed on such representation shifting the date of commencement and date of completion of the work to 01.06.2004 and 30.09.2004 respectively. P.W.9 admits that there is a provision under O.P.W.D. Code giving scope to the executant to apply for extension of time one month prior to the proposed date of completion if the extension is required due to unavoidable hindrance. However, P.W.9 stated that he could not say if the extension was prayed within the time stipulated unless he referred to the record. He further stated that he could not say if Arun Kumar Choudhury had applied for extension of time one month prior to the end day of the stipulated time. P.W.9 further stated that he could not say whether the Technical team

had inspected the work entrusted to the 1st contractor Arun Kumar Choudhury and reported on 29.07.2004 that the contractor had no equipments in order to execute the proposed work which was submitted to the Superintending Engineer, N.H. South Circle, Berhampur who in turn intimated the Executive Engineer, N.H. Division, Berhampur vide letter dated 17.08.2004. P.W.9 further stated that he could not say whether the Executive Engineer had called on Arun Kumar Choudhury to submit his show cause within seven days and whether the Executive Engineer vide letter dated 29.10.2004 intimated Superintending Engineer about the closure proposal of the work of Arun Kumar Choudhury. P.W.9 further stated that when a contractor fails to execute the work under the conditions stipulated in the agreement and for his default, he is served with a show cause notice, he cannot be directed to take up the said work afresh after the time stipulation of the agreement.

In view of such state of affairs, the submission of Mr. Asok Mohanty, learned Senior Advocate has got substantial force that the prosecution has failed to produce any document regarding submission of any application by the 1st contractor for extension of time to complete the work or any order passed thereon and thus it would be deemed that after 31.08.2004, there was no extension to the work in question under 1st agreement Ext.10.

The above aspect is further strengthened on perusal of the check list which is a part and parcel of Ext.N that goes to show at column no.4 that the application for extension of time was submitted on 10.03.2005 after the work is said to have been completed on 30.01.2005. This check list was signed by P.W.9 wherein the date of submission of application for extension of time by the 1st contractor Arun Kumar Choudhury has been mentioned as 10.03.2005.

P.W.9 has clearly stated in his evidence that he joined as Executive Engineer, N.H. Division, Berhampur on 08.10.2004 and took charge from his predecessor (appellant Saroj Kumar Misra) on 01.12.2004 and that the agreement Ext.10 was executed during the tenure of his predecessor but the work started after his joining and in the cross-examination, he has clarified that the 1st contractor Arun Kumar Choudhury started execution of work on 01.12.2004 on which date he took charge of the office from his predecessor. The learned trial Court has also observed (para-16 of the impugned judgment) that by the time the 1st contractor Arun Kumar Choudhury

commenced the disputed work on 01.12.2004 till its completion on 30.01.2005, there was no extension of time and extension of time was sought for by P.W.9 only on 21.03.2005 and the same was sanctioned by the Superintending Engineer on 24.03.2005. This finding of the learned trial Court is quite justified in the facts and circumstances of the case.

Mr. Asok Mohanty, learned Senior Advocate contended that 'contract remains in force' after the earlier stipulated date only when the application for extension of time for the completion of a work is submitted by the contractor within the period stipulated indicating the grounds of unavoidable hindrance or any other grounds in the work in question. The same also finds place in clause 4 of the conditions of the contract in Ext.10. According to him, as per Para 3.5.30 of O.P.W.D. Code, Vol.I, the term 'contract remains in force' and 'rescission of contract' as per clause 2(b)(i) of the conditions of the contract as per Ext.10 are two different things. To rescind the contract, the rescission notice in writing is to be given to the contractor under the hand of Executive Engineer which would be the conclusive evidence and the security deposit of the contractor shall stand forfeited and will be absolutely at the disposal of the Government. The finding of the learned trial Court in para-17 of the impugned judgment that in view of the notice dated 22.09.2004 vide Ext.Q issued to the 1st contractor, till that date the earlier contract was very much in force, is not correct. I agree with the submission made by the learned Senior Advocate Mr. Asok Mohanty that 'contract to remain in force' as per the provisions of the O.P.W.D. Code and 'rescission of contract' which includes forfeiture of the security deposit of the contractor are quite different and distinguishable and the learned trial Court erred in holding these two aspects to be one and the same.

Security for the due fulfillment of a contract is invariably taken in view of clause 3.5.19 of the O.P.W.D. Code. The security may be taken in shape of N.S.C./Post Office Savings Bank Account/ Post Office Time Deposit Account/ Kissan Vikash Patra only towards E.M.D./initial security deposit/ any other security deposit from the contractor or supplier. In Ext.10, as per tender call notice 1/2003-2004 issued by the Office of the Superintending Engineer, N.H. Circle (South), Bhubaneswar under the heading of eligibility criteria as per clause 8, it is mentioned that the contractor shall be required to give a trial run of the equipments for establishing their capacity to achieve the laid down specification and tolerances to the satisfaction of the Engineering-

in-charge within fifteen days from signing of agreement failing which the securities of the contractor shall be forfeited. Basing on the inspection of Drum Mix Plant made by the Technical Committee on 28.07.2007 as per Ext.K, it was found to be not to the satisfaction of the Executive Engineer which is mentioned under the heading of general remarks. The learned trial Court also came to conclusion in the impugned judgment that the trial run of machinery by the 1st contractor Arun Kumar Choudhury as per clause 8 of Ext.10 is doubtful. However, the learned trial Court gave an erroneous finding that failing to give a trial run of the equipments for establishing the capacity by the contractor will only result in forfeiture of his 'security deposit' and not 'rescission of contract'. Once there would be forfeiture of security for not giving the trial run of the equipments, it would result in a situation of tender being submitted without security and agreement will also be without security and as such the agreement will lapse in view of clause 3.5.19.

In view of the foregoing discussions and the relevant provision of Para 3.5.30 of O.P.W.D. Code, Vol.I and clause 4 of the conditions of contract (Ext.10), since there was no application for extension of time submitted by the 1st contractor either prior to 31.08.2004 or after that, it is to be held that the contract as per 1st agreement executed with the contractor Arun Kumar Choudhury was not in force when the 2nd agreement was executed on 10.09.2004 vide Ext.21 with the respondent no.4 Abakash Padhi for potholes repair works. Thus, the first point is answered accordingly.

Second Point:
Whether there was any necessity for entering into the 2nd agreement and whether the respondent no.4 executed any work at all or claimed false bill:

9. From a bare reading of the two F2 agreements i.e. Ext.10 and Ext.21, it is apparent that the agreements were for different work and operate in two different spheres. The 1st agreement (Ext.10) with Arun Kumar Choudhury was for periodical renewal from 148 K.M. to 154 K.M. and the 2nd agreement (Ext.21) with the respondent no.4 Abakash Padhy was for pothole repair from 147 K.M. to 171 K.M. The value of the 1st agreement was Rs.36,98,199/- for six kilometers, whereas the 2nd agreement value was for Rs.4,70,170/- for 24 Kms. Thus, the nature and scope of work in two agreements

are different. There is no dispute that the period of execution of the pothole repair work under Ext.21 would have been well within the time period of earlier agreement Ext.10 had the 1st contractor applied for extension of time and an order would have been passed in granting extension. It is also not in dispute that in case of exigencies for any small additional work within the original work in progress, the same has to be executed by the original contractor as per clause 10 of the F2 agreement of the 1st contractor as well as Para 3.5.31 of O.P.W.D. Code, but when the 1st contractor Arun Kumar Choudhury has not at all progressed with his work as per F2 agreement Ext.10 executed on 19.02.2004 and started execution of work only on 01.12.2004 as stated by P.W.9 and on account of rainy season, the potholes repair which was in the nature of flood damage repair work had to be undertaken immediately for maintaining the safety of road for movement, no fault can be found with entering into the contract vide Ext.21 with the respondent no.4 Abakash Padhy on the ground that those two work overlap each other. Had the 1st contractor Arun Kumar Choudhury started the periodical renewal work in time, there might not have been any necessity for entering into contract with the 2nd contractor respondent no.4 Abakash Padhy for pothole repair work. P.W.9 admits in his cross-examination that repairing of potholes on N.H. is a routine work for maintenance. He further stated that the Executive Engineer is competent to take steps for repair of the potholes in an emergency situation by entering into new agreement with a contractor following the official procedure. He further stated that if the potholes on the road required to be repaired are small in size, the work can be executed manually. In my humble view, there were every necessity for entering into the 2nd agreement (Ext.21) as the 1st contractor had not progressed with his assigned work.

There are materials on record that the respondent no.4 executed the port hole repair work assigned to him under agreement Ext.21 and submitted the first running bill which was passed for Rs.1,50,000/-. Ext.C is the letter dated 11.02.2005 issued by P.W.9 to the Assistant Engineer, N.H. Sub-Division, Balliguda which clearly states that the final bill regarding execution of work under F2 Agreement No.1 of 2004-05 (Ext.21) has not been submitted. P.W.9 further mentioned in the letter that it would be construed that no further work had been executed against the above contract other than the items against which the bills were earlier submitted. Thus, P.W.9 himself indicates in the letter under Ext.C that the respondent no.4 had executed the work as per Ext.21 for which running bill was submitted. According to P.W.9, running

bills are prepared taking into consideration the progress of a particular work and that the payment on running bill is made during the execution of the work and it has nothing to do with the completion of the work. P.W.9 further submits that the first running bill (Ext.24) for the second work was prepared for Rs.2,53,418/- and passed on 14.09.2004 for Rs.1,50,000/- and in M.B. No.1311 at page No.89, the measurement for this work was recorded.

P.W.9 has stated that the Superintending Engineer (P.W.11) had inspected the works along with him on 05.05.2005 and submitted the inspection note Ext.27 which was received by him (P.W.9) on 31.05.2005. P.W.11 referring to his inspection note Ext.27 has stated that the pothole repair work from KM 147/0 to 171/0 of NH 217 was taken up and during his inspection, some patch work was found executed on the National Highway towards the repair. He (P.W.11) further stated that in his inspection report marked as Ext.27, he has observed that the potholes between KM 147/0 to 171/0 excluding the area between 148/0 to 154/0 were found repaired manually using over sized chips for surface dressing. In the cross-examination, P.W.11 has stated that if those 6 Kms. are excluded from 24 Kms., the pothole repair work was undertaken for 18 Kms. only. He further stated that a pothole can be repaired without using WBM and by surface dressing only if the nature of the pothole is small and due to wear and tear of the BT. He further stated that the record reveals that the pothole repair from 147/0 Km. to 171/0 Km. on NH 217 was a flood damage repair. He further stated that for repairing pothole, machineries are required depending upon the size of damage and it can also be repaired manually. He has further stated that the part bill paid to contractor Abakash Padhi (respondent no.4) for the pothole repair was calculated on the basis of repair through machine though the work was actually executed manually. P.W.9 also admits that in the status report communicated to Asst. Engineer on 17.02.2005, he had instructed him to stop the work by respondent no.4 as on that day. As per Ext.A the respondent no.4 was intimated about the closure of contract. From this, it is apparent that the respondent no.4 continued with the work in respect of 154 Km. to 171 Km. till 17.02.2005. In view of the evidence available on record, I am of the humble view that after execution of the agreement under Ext.21, the respondent no.4 executed the pothole repair work and submitted the first running bill which was passed for Rs.1,50,000/- (one lakh fifty thousand) and it cannot be said that he raised any false bill merely because the pothole repaired work was done manually even though he could have utilized machine as per specification in the tender but since it was the running bill, it

cannot be said that no pothole work had been done by the respondent no.4 and that he was a dummy contractor only on paper and that it was a sham work and that the accused persons prepared false bills and vouchers to misappropriate the Government money. Thus, the second point is answered accordingly.

Third Point:
Whether there was any criminal conspiracy between the accused persons and undue official favour was shown to respondent no.4:

10. It has already been held while discussing the 1st point and 2nd point that the contract as per 1st agreement (Ext.N) executed with the contractor Arun Kumar Choudhury was not in force when the 2nd agreement (Ext.21) was executed with the respondent no.4 Abakash Padhi for pothole repair work and that the nature and scope of work in the two agreements (Ext.10 and Ext.21) are different and there was every necessity for entering into the 2nd agreement (Ext.21) as the 1st contractor had not progressed with his work and that there are materials on record that the respondent no.4 executed the pothole repair work and submitted his first running bill (Ext.24) which was passed for Rs.1,50,000/-.

The basic ingredients of the offence of 'criminal conspiracy' as defined under section 120-A I.P.C. are

(i) An agreement between two or more persons;

(ii) The agreement must relate to doing or causing to be done either (a) an illegal act; or (b) an act which is not illegal in itself but is done by illegal means.

The meeting of minds of two or more persons for doing or causing to be done an illegal act or an act by illegal means is the sine qua non of criminal conspiracy. The offence can be proved largely from the inferences drawn from the acts or illegal omission committed by the conspirators in pursuance of a common design in as much as the conspiracy is always hatched in secrecy and it is impossible to adduce direct evidence of the common intention of the conspirators. The entire agreement is to be viewed as a whole and it has to be ascertained as to what in fact the conspirators intended to do or the object they wanted to achieve. The essence of criminal conspiracy is the unlawful combination and ordinarily the offence is complete when the combination is framed. Encouragement and support

which co-conspirators give to one another rendering enterprises possible which, if left to individual effort, would have been impossible, furnish the ground for visiting conspirators and abettors with condign punishment. (**Ref:- AIR 2008 SC 2991, Yogesh @ Sachin Jagdish Joshi –v- State of Maharashtra; (1980) 2 SCC 465, Shivnarayan Laxminarayan Joshi –v- State of Maharastra, 2013 (3) SCALE 565, Yakub Abdul Razaq Menon – v- State of Maharashtra; AIR 2005 SC 128, K. Hasim –v- State of Tamil Nadu**).

Section 120-B of the Indian Penal Code prescribes punishment for criminal conspiracy which is defined under section 120-A of the Indian Penal Code.

In case of **Devender Pal Singh -Vrs.- State National Capital Territory of Delhi reported in (2002) 5 Supreme Court Cases 234**, it is held that the element of a criminal conspiracy consists of (a) an object to be accomplished, (b) a plan or scheme embodying means to accomplish that object, (c) an agreement or understanding between two or more of the accused persons whereby they become definitely committed to co-operate for the accomplishment of the object by the means embodied in the agreement, or by any effectual means, (d) in the jurisdiction where the statute required an overt act. The essence of a criminal conspiracy is the unlawful combination and ordinarily the offence is complete when the combination is framed. From this, it necessarily follows that unless the statute so requires, no overt act need be done in furtherance of the conspiracy, and that the object of the combination need not be accomplished, in order to constitute an indictable offence. Law making conspiracy a crime is designed to curb immoderate power to do mischief which is gained by a combination of the means. The encouragement and support which co-conspirators give to one another rendering enterprise possible which, if left to individual effort, would have been impossible, furnish the ground for visiting conspirators and abettors with condign punishment. The conspiracy is held to be continued and renewed as to all its members wherever and whenever any member of the conspiracy acts in furtherance of the common design. For an offence punishable under section 120-B of the Indian Penal Code, the prosecution need not necessarily prove that the perpetrators expressly agree to do or cause to be done illegal act; the agreement may be proved by necessary implication. Offence of criminal conspiracy has its foundation in an agreement to commit an offence. A conspiracy consists not merely in the intention of two or more,

but in the agreement of two or more to do an unlawful act by unlawful means.

Since in the factual scenario, the execution of 2nd agreement with the respondent no.4 cannot be said to be an illegal act but was a sheer necessity in the situation of flood damage and there is absence of any material that there was any agreement between the accused persons for doing the pothole repair work by illegal means or for doing an unlawful act by unlawful means rather the respondent no.4 has executed the pothole repair work entrusted to him in a lawful manner and got a sum of Rs.1,50,000/- towards the first running bill and there is no material also on record that there was any inflated cost or any loss to the Government and specifically in view of the evidence of P.W.11 that the part bill paid to respondent no.4 was calculated on the basis of repair through machine though the work was actually executed manually, I am of the humble view that the learned trial Court has rightly held that the prosecution has failed to bring home the charge under section 120-B of the Indian Penal Code against the accused persons. Thus, the third point is answered accordingly.

Fourth Point:
Whether there was any forgery in respect of documents/records or there was any dishonest cheating to the Government by showing undue official favour to the respondent no.4:

11. The essential ingredients of the offence of "cheating" are that (i) deception of a person either by making a false or misleading representation or by dishonest concealment or by any other act or omission; (ii) fraudulent or dishonest inducement of that person to either deliver any property or to consent to the retention thereof by any person or to intentionally induce that person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived; and (iii) such act or omission causing or is likely to cause damage or harm to that person in body, mind, reputation or property. To constitute an offence under section 420 of the Indian Penal Code, there should not only be cheating, but as a consequence of such cheating, the accused should have dishonestly induced the person deceived (i) to deliver any property to any person, or (ii) to make, alter or destroy wholly or in part a valuable security (or anything signed or sealed and which is capable of being converted into a valuable security). (Ref:- ***Md. Ibrahim – Vrs.- State of Bihar reported in (2009) 8 Supreme Court Cases 751***)

In case of **Inder Mohan Goswami -Vrs.- State of Uttaranchal** reported in (2008) 39 Orissa Criminal Reports (SC) 188, it is held that to hold a person guilty of 'cheating', it is necessary to show that he had a fraudulent or dishonest intention at the time of making the promise. From his mere failure to subsequently keep a promise, one cannot presume that he all along had a culpable intention to break the promise from the beginning.

In case of **Joseph Salvaraj A. -Vrs.- State of Gujarat reported in (2011) 49 Orissa Criminal Reports (SC) 924**, it is held that under section 420 of the Indian Penal Code, it is inbuilt that there has to be a dishonest intention from the very beginning, which is sine qua non to hold the accused guilty for commission of the said offence.

In case of **Devendra -Vrs.- State of U.P. reported in (2009) 43 Orissa Criminal Reports (SC) 680**, it is held that a misrepresentation from the very beginning is a sine qua non for constitution of an offence of cheating, although in some cases, an intention to cheat may develop at a later stage of formation of the contract.

In case of **Alpic Finance Ltd. -Vrs.- P. Sadasivan reported in A.I.R. 2001 S.C. 1226**, it is held as follows:-

> "10. The facts in the present case have to be appreciated in the light of the various decisions of this Court. When somebody suffers injury to his person, property or reputation, he may have remedies both under civil and criminal law.
>
> The injury alleged may form basis of civil claim and may also constitute the ingredients of some crime punishable under criminal law. When there is dispute between the parties arising out of a transaction involving passing of valuable properties between them, the aggrieved person may have right to sue for damages or compensation and at the same time, law permits the victim to proceed against the wrongdoer for having committed an offence of criminal breach of trust or cheating. Here the main offence alleged by the appellant is that respondents committed the offence under Section 420 I.P.C. and the case of the appellant is that respondents have cheated him and thereby dishonestly induced him to deliver property. To deceive is to induce a man to believe that a thing is true which is false and which the person practicing the deceit knows or believes to be false. It must also be shown that there existed a fraudulent and dishonest intention at the time of commission of the offence. There is no allegation that the respondents made any willful misrepresentation. Even according to the appellant, parties entered into a valid lease agreement and the grievance of the appellant is that the respondents failed to discharge their contractual obligations. In the complaint, there is no allegation that

there was fraud or dishonest inducement on the part of the respondents and thereby the respondents parted with the property. It is trite law and common sense that an honest man entering into a contract is deemed to represent that he has the present intention of carrying it out but if, having accepted the pecuniary advantage involved in the transaction, he fails to pay his debt, he does not necessarily evade the debt by deception.

11. Moreover, the appellant has no case that the respondents obtained the article by any fraudulent inducement or by willful misrepresentation. We are told that respondents, though committed default in paying some installments, have paid substantial amount towards the consideration.

12. Having regard to the facts and circumstances, it is difficult to discern an element of deception in the whole transaction, whereas it is palpably evident that the appellant had an oblique motive of causing harassment to the respondents by seizing the entire articles through magisterial proceedings. We are of the view that the learned judge was perfectly justified in quashing the proceedings and we are disinclined to interfere in such matters."

In case of ***Hridaya Ranjan Pd. Verma -Vrs.- State of Bihar reported in A.I.R. 2000 S.C. 2341, it is held as follows:-***

"13. Cheating is defined in Section 415 of the Code as, "Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

Explanation - A dishonest concealment of facts is a deception within the meaning of this section.

The section requires - (1) Deception of any person.

(2) (a) Fraudulently or dishonestly inducing that person
(i) to deliver any property to any person; or

(ii) to consent that any person shall retain any property; or

(b) intentionally inducing that person to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body mind, reputation or property.

14. On a reading of the section, it is manifest that in the definition there are set forth two separate classes of acts which the person deceived may be induced to do. In the

> first place he may be induced fraudulently or dishonestly to deliver any property to any person. The second class of acts set forth in the section is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases the inducing must be fraudulent or dishonest. In the second class of acts, the inducing must be intentional but not fraudulent or dishonest.
>
> 15. In determining the question, it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time to inducement which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. Therefore it is the intention which is the gist of the offence. To hold a person guilty of cheating, it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise.
>
> 16. From his mere failure to keep up promise subsequently such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed."

The basic ingredients of the offence under section 467 of the Indian Penal Code are that (i) the document in question is forged; (ii) the accused forged it and (iii) the document is one of the kinds enumerated in the said section. Section 468 of the Indian Penal Code applies to those cases where forgery has been committed for the purpose of cheating. If it is proved that the purpose of the offender in committing the 'forgery' is to obtain property dishonestly or if the guilty purpose comes within the definition of 'cheating' as defined under section 415 of the Indian Penal Code, then his act would be punishable under section 468 of the Indian Penal Code. For both these offences, the very first thing which is required to be proved is that a 'forgery' as defined under sections 463 and 464 of the Indian Penal Code have been committed.

There is absolutely no material that any fraud has been perpetuated in making the document Ext.21. There is no dispute that final bill in respect of the work executed by respondent no.4 had not been prepared and the amount paid to him to the tune of Rs.1,50,000/- (rupees one lakh fifty thousand) was in the nature of first running bill. The evidence on record as already discussed clearly indicates that the pothole repair work was done manually but the bill of respondent no.4 has been calculated on the basis of repair through machine and thus the payment of the running bill cannot be said to be with an inflated

rate or it cannot be said that there was any wrongful loss to the Government in making such payment. The prosecution had not adduced any satisfactory evidence that any of the documents like agreement entered into with the respondent no.4 or M.B. No.1311 or the pothole repair estimate are false documents and that the accused persons prepared such documents for the purpose of cheating and therefore, the learned trial Court is quite justified in holding that the prosecution has not substantiated the essential ingredients of offences under sections 420 and 468 of the Indian Penal Code. Thus, the fourth point is answered accordingly.

Fifth Point:
Whether the accused persons have caused disappearance of M.B. No.1311 with an intention to screen themselves from legal punishment:

12. In order to attract the ingredients of the offence under section 201 of the Indian Penal Code, the prosecution is required to prove the following aspects:-

(i) The accused had knowledge or reason to believe that an offence has been committed;

(ii) The accused caused disappearance of the evidence which is related to such offence;

(iii) Such disappearance has been done with the intention of screening himself or any other offender from legal punishment which is co-related to such offence;

(iv) After having knowledge or reason to believe regarding commission of offence, the accused intentionally gave any false information relating to such offence and thereby caused disappearance of evidence.

The Investigating Officer (P.W.12) has stated that during investigation, J.E. Sasikanta Acharya disclosed before him to have received and handed over M.B. No.1311 to the Head Clerk Prakash Chandra Panda but had not received a receipt for the same from Shri Panda. Neither the prosecution has examined J.E. Sasikanta Acharya nor Prakash Chandra Panda.

P.W.9 has stated that a letter was written to Assistant Engineer to ascertain about the M.B. No.1311 and in his letter dated 03.04.2006, the

Assistant Engineer intimated that the M.B. was submitted along with the bill in the Office of the Executive Engineer's Head Clerk in-charge Shri P.C. Panda on 15.03.2005. He further stated that after receipt of the reply from the Assistant Engineer, a letter was issued to the Head Clerk in-charge Shri P.C. Panda. He further stated that M.B. No.1311 was in his office on 03.02.2005 and on that day, he was the Executive Engineer of N.H. Division, Berhampur and the M.B. movement registers remain under the custody of the dealing assistant. He further stated that a departmental proceeding was initiated against the Junior Engineer S.K. Acharya for the untraced M.B. and the bills and that J.E. S.K. Acharya was awarded with a punishment in that D.P.

In view of such materials, it cannot be said that merely because M.B. No.1311 was not found, the accused persons caused its disappearance. The finding of the learned trial Court that disappearance of M.B. No.1311 against the accused persons is not found and the prosecution has failed to substantiate the charge under section 201 of the Indian Penal Code against the accused persons is quite justified and I also agree with the same. Thus, the fifth point is answered accordingly.

13. Coming to the charge under section 13(2) read with section 13(1)(d) of the 1988 Act for which the three appellants were found guilty by the learned trial Court after acquitting all the accused persons of the charges under sections 420, 468, 120-B and 201 of the Indian Penal Code without assigning any reason whatsoever is quite surprising, reflects non-application of mind to the ingredients required to substantiate such charge.

The charge was framed under section 13(2) read with section 13(1)(d) of the 1988 Act on the ground that that all the three appellants-public servants in connivance with each other and also with the respondent no.4 Abakash Padhi by corrupt and illegal means or by otherwise abusing their position as such public servant obtained for themselves pecuniary advantages to the extent of amount of Rs.1,50,000/- (rupees one lakh fifty thousand) by showing undue official favour to the respondent no.4 by showing false execution of pothole repair work.

Since I have already found that there has been execution of pothole repair work by the respondent no.4 for which he was paid Rs.1,50,000/- (rupees one lakh fifty thousand) towards his first running bill, the question of showing of undue official favour to anybody does not arise. Therefore, the

conviction of the appellants under section 13(2) read with section 13(1)(d) of the 1988 Act is not sustainable in the eye of law and hereby set aside.

14. Coming to the appeal against acquittal filed by the State of Odisha, law is well settled as held in case of **Babu -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 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 -Vrs.- State of Karnataka 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."

Thus in a case of appeal against acquittal, although the powers of the High Court to reassess the evidence and reach its own conclusions are as extensive as in an appeal against an order of conviction, yet, as a rule of prudence, proper weight should be given to the views of the Trial Judge as to the credibility of the witnesses, the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at the trial, the right of an accused to the benefit of any doubt and the slowness of an appellate Court in disturbing a finding of fact arrived at by a Trial Judge who had the advantage of seeing the witnesses. Where two reasonable views are possible or two reasonable conclusions can be drawn on the evidence on record, the appellate Court, as a matter of judicial caution should not interfere with the conclusion arrived at by the learned trial Court unless the conclusions are not possible. Even if the appellate Court can review the trial Court's conclusion both on facts as well as law, but if the grounds of acquittal cannot be entirely and effectively dislodged or demolished and unless there has been flagrant miscarriage of justice by pronouncing the order of acquittal substantially and compelling reasons are there to interfere with the conclusions arrived at by the trial Court, the findings of acquittal should not be disturbed.

Keeping the ratio laid down by the Hon'ble Supreme Court and the settled position of law, on the basis of careful analysis of evidence on record as made above, I am of the humble view that the view taken for the acquittal of the respondent no.4 of all the charges so also the appellants of the charges under sections 420, 468, 201 and 120-B of the Indian Penal Code is reasonable and plausible and I find no compelling reason to interfere with the conclusions arrived at by the learned trial Court so far as the order of acquittal is concerned.

15. In view of the foregoing discussions, all the three criminal appeals i.e. CRLA No.695 of 2016 filed by appellant Sudarsan Sahani, CRLA No.687 of 2016 filed by appellant Prasanta Kumar Patra and CRLA No.694 of 2016 filed by appellant Saroj Kumar Misra are allowed. The impugned judgment and order of conviction of the three appellants under section 13(2) read with section 13(1)(d) of the 1988 Act and the sentence passed thereunder is hereby

set aside and they are acquitted of such charge. The appellants are on bail by virtue of the orders of this Court. They are discharged from liability of their bail bonds. The personal bonds and the surety bonds stand cancelled.

GCRLA No.25 of 2019 filed by the State of Odisha also stands dismissed. The respondent no.4 Abakash Padhy who is on bail by virtue of the order dated 02.08.2019 is discharged from the liability of the bail bonds. The personal bond and the surety bonds stand cancelled.

The trial Court records with a copy of this judgment be sent down to the concerned Court forthwith for information.

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2022 (II) ILR - CUT- 434

K.R. MOHAPATRA, J.

OJC NO.1921 OF 1999

RADHAKANTA MATH .....Petitioner

.V.

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

ODISHA LAND REFORMS ACT, 1960 – Section 38 – Exemption from ceiling – Requirements of – Held, to attract exemption "as religious or charitable trust of public nature" a declaration is required to be made under section 57-A, of the Act. (Para-22)

Case Laws Relied on and Referred to :-

1. AIR 1967 SC 256 : Mahant Shri Srinivas Ramanuj Das Vs. Surjanarayan Das & Anr
2. 2004 (I) OLR 72 : Madhu Sudan Panda and after him Mukta Devi & Ors. Vs. the Commissioner of Hindu Religious Endowments, Orissa & Ors.

For Petitioner : Mr. Dayananda Mohapatra.

For Opp. Parties: Mr. A. R. Dash, Addl. Govt. Adv.
Miss. Pratyusha Naidu, (For Commissioner of Endowments)

JUDGMENT Date of Judgment: 07.06.2022

K.R. MOHAPATRA, J.

1. This matter is taken up through Hybrid mode.

2. Radhakanta Math, a Public Religious Institution, represented through Sri Parsuram Das, has filed this writ petition assailing the legality and propriety of order dated 9th September, 1998 (Annexure-7) passed by Additional District Magistrate, Puri in OLR Revision Case No.1 of 1997 initiated under Section 59 of the Odisha Land Reforms Act, 1960 (hereinafter referred to as, 'OLR Act').

3. The genesis of the present writ petition emanates from the order passed on 19th January, 1996 (Annexure-5) by the Revenue Officer-cum-Tahasildar, Puri (Opposite Party No.2) in Ceiling Case No.1/243 of 1986 in which the land under Khata No.21 of mouza- Sipasurubuli in the district of Puri (hereinafter referred to as 'the case land') was declared as ceiling surplus.

4. The case of the Petitioner-Math before the Revenue Officer was that the Math is a trust estate and is a 'Privileged Raiyat' as defined under Section 2(24) (e) of the OLR Act. In the Ceiling proceeding, the Revenue Officer held the property in question to be the personal property of Mahanta and is amenable to Ceiling proceeding. Accordingly, he passed the order under Annexure-5.

5. The Petitioner-Math being aggrieved, preferred OLR Appeal No.12 of 1996 under Section 58 of the OLR Act. The Sub-Collector, Puri-Opposite Party No.3 in his order dated 11th August, 1997 under Annexure-6 dismissed the appeal and thereby confirmed the order passed by the Revenue Officer in the Ceiling proceeding. Against the said order, the Petitioner- Math preferred OLR Revision No.1 of 1997 before the ADM, Puri through its Manager being appointed by the Commissioner of Endowments. Some of the villagers claiming themselves to be Raiyats of the land in question made complaint before Collector, Puri, which was referred to learned Member, Board of Revenue, Odisha, Cuttack under Section 59 (2) of the OLR and OLR Revision No.8 of 1997 was initiated. However, the ADM heard the ORL RC Case No.1 of 1997 on its own merit and passed the impugned order dated 9th September, 1998 under Annexure-7 dismissing the Revision and thereby confirming the orders passed under Annexures-5 and 6. Assailing the same, the present writ petition has been filed.

6. In course of hearing, the State Government by filing IA No.26 of 2021 raised an issue with regard to maintainability of the writ petition stating

that since notification under Section 3(1) of the Odisha Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 (hereinafter referred to as 'the Consolidation Act') has been published and consolidation operation has started in the village, the OLR proceeding stands abated and accordingly the writ petition is not maintainable. This Court, vide its order dated 4th February, 2022, held that upon initiation of consolidation operation, the Ceiling proceeding under the OLR Act does not abate. Hence, this writ petition was heard on merit.

7. Mr. Mohapatra, learned counsel for the Petitioner strenuously argued that the Petitioner-Math is a trust estate and is deemed to be a '*Privileged Raiyat'* as defined under Section 2(24) (e) of the OLR Act. As such, the land in question held by the Petitioner Math is exempted from ceiling, as provided under Section 38 of the OLR Act. He submitted that the Petitioner- Math is one of the Public Religious Institutions of Baisnab cult. Consequent upon vesting of the estate under Section 3(A) of the Odisha Estate Abolition Act, 1951 (hereinafter referred to as 'OEA Act'), the Petitioner-Math through its Manager, namely, Sri Udayanath Das filed a petition under Section 13(D)(1) of the OEA Act to exempt its property from vesting. Accordingly, a Tribunal was constituted under Section 13(C) of the OEA Act and declared a part of the estate of the Petitioner-Math as trust estate. It is his submission that Chapter-II-A was introduced to the OEA Act, vide Amendment Act 5 of 1963, which came into force on 11th April, 1963. The said Chapter was repealed vide Orissa Act 33 of 1970 with effect from 21st December, 1970. Sub-clause (e) of Section 13-A of the said Chapter defined *'Trust Estate' as 'an estate the whole of the net income whereof under any trust or other legal obligation has been dedicated exclusively to charitable or religious purposes of a public nature without any resolution of pecuniary benefit to any individual.'* Section 13-D of the said Chapter stipulated that upon issuance of a notification under Section 13-A of the OEA Act, the trustee in respect of a trust estate shall make an application claiming the estate as a trust estate. Cumulative reading of the aforesaid provisions of the OEA Act would reveal that in order to get a declaration as Trust Estate, the trust must own an estate whose net income is dedicated exclusively for charitable or religious purposes of public nature without any provision of benefit to any individual.

8. When the matter stood thus, by amendment of OLR Act,1960, Chapter-IV came into force which introduced Ceiling proceeding.

Consequently, the Legislature also introduced a provision in Section 2(24) to the OLR Act, which defined 'Privileged Raiyat'. Similarly, the Act introduced Section 57-A into the OLR Act for constitution of a Tribunal for declaration of a trust to be religious or charitable one of public nature. Once the Tribunal held the institution to be a trust, it shall be a 'Privileged Raiyat', as defined under Section 2(24)(e) of the OLR Act. Resultantly, said trust will be exempted from Ceiling proceeding as provided under Section 38 of the said Act (OLR Act).

9. Mr. Mohapatra made an endeavour to bring a distinction between Section 2 (24)(c), (d) and (e) of the OLR Act. It was his submission that Clause-'(c)' of Section 2 (24) refers to the trust, which has been declared as 'Privileged Raiyat' prior to commencement of OLR Amendment Act, 1973, whereas Clause-'(d)' of the said Section refers to a trust or other institution whose estate has been declared as a trust estate by a competent authority under the OEA Act. In such a situation, the said trust estate will be a *'Privileged Raiyat'* as defined under Section 2(24) of the OLR Act. However, Clause '(e)' refers to'other trust', which is of religious and charitable character of public nature and is unconnected with its 'estate', which finds place in Clause '(d)'. Section 2 (24) (e) read with Section 57-A Sub-sections (1) and (3) of the OLR Act provide that the 'other trust' is essentially a trust of religious and charitable character and is to be declared as such so as to bring it within the meaning of *'Privileged Raiyat'* under Section 2(24) of the OLR Act. Once such a declaration is made, the immovable properties of the trust will be exempted from Ceiling proceeding in view of the provisions under Section 38 of the OLR Act.

10. Mr. Mohapatra, learned counsel for the Petitioner referring to the orders under Annexures-1 and 2 to the writ petition, i.e., the order of the Tribunal constituted under the provisions of repealed Chapter-II-A of the OEA Act, submits that declaration made therein clothes the Petitioner-Math with the benefit of exemption under Section 38 of the OLR Act being a trust estate having complied with the requirement of Section 13-A of the OEA Act. Learned counsel for the Petitioner also placed reliance on Annexure-3, i.e., the petition filed under Section 57-A of the OLR Act to declare the institution to be a religious or charitable trust of public nature. The property of the Petitioner-Math as described at paragraph-7 of the said petition refers to Sabik Khata and Plot numbers of the case land. Considering the said

application, the Tribunal, vide its order dated 2nd April, 1977 (Annexure-4) passed the following order:-

> *"This is a case under Section 57 A of the OLR Act for having a declaration in favour of the public endowment known as Radhakanta Math of Balisahi, Puri to the effect it is a privileged raiyat in respect of the properties described in detailed in the petition filed by its Mahant-cum-Trustee Gaurgobind Das Goswamy as detailed under Section 2 (24)(e) of the said Act. The authorized agent of the Mahant who has examined on behalf of the petitioner, proved that the Math is a public religious endowment and that a declaration to that effect under the revised Section 13-D of the OEA Act. He proved relevant order copy of Tribunal as Ext.1; and supports the statement. As defined under Section 2(24) of the OLR Act, a privileged raiyat means any trust, other Institution whose estate has been declared to be a trust estate by a competent authority under OEA Act, 11 of 1952 and the Math as is apparent, had taken such a declaration.*
>
> *This case accordingly has no merit. Another declaration would be redundant. Proceeding therefore is dropped and rejected as not maintainable."*

The said proceeding was dropped being not maintainable, as the Petitioner-Math has already been declared as a trust estate by competent authority under the OEA Act. In the light of the aforesaid order, Mr. Mohapatra, learned counsel submits that the Petitioner-Math complied with requirement of Section 2(24) (e) of the OLR Act. As such, he is protected under Section 38 of the OLR Act. This material question of law was never taken into consideration by the authorities under the OLR Act, while adjudicating the matter.

11. The 2nd limb of submission of Mr. Mohapatra was that during Hal settlement operation, ROR was published on 8th February, 1977 relating to Khata No.21 in the name of the then Mahanta of Petitioner-Math. However, law is well-settled that the ROR prepared under the Odisha Survey and Settlement Act,1958 (hereinafter referred to as 'OSS Act') neither creates nor extinguishes right of a tenant. On the other hand, learned counsel for the Petitioner referred to an affidavit dated 15th March, 2020, and a memo filed on 14th September, 2021 enclosing therein the order passed in OJC No.574 of 1978 in order to buttress his contention that the income of the scheduled property was all along being utilized for the purpose of the Petitioner-Math. The then Mahanta had never challenged such enjoyment of the property in question by the Petitioner-Math either in common law forum or under section

41 of the Odisha Hindu Religious Endowments Act, 1951 (hereinafter referred to as 'Endowments Act'), which clearly reveals that right of the Mahanta, if any, over the case land has already been blended with Math. In addition to the above, the petition under Annexure-3 itself discloses that the Mahanta of the Math himself filed an application to acknowledge the property in question to be the property of the Petitioner-Math, which is a religious and charitable institution. Further, the Mahanta of the Math being a Nihangi (ascetic and celibate), any property purchased in his name and used for the purpose of the trust should be construed to have been purchased from out of the earnings of the Petitioner-Math. In support of his submission, Mr. Mohapatra, learned counsel for the Petitioner placed reliance on a decision of the Constitution Bench of the Hon'ble Supreme Court reported in AIR 1967 SC 256 (***Mahant Shri Srinivas Ramanuj Das v. Surjanarayan Das and another***), wherein it is held as under:-

> *"29. .....The documents relied upon for the appellant relate to acquisition of properties by purchase or gift and are in the name of the Mahant of the Math. Such documents being in the name of the Mahant alone, do not necessarily lead to the conclusion that the properties were acquired or received in donation by the Mahant in his personal capacity for his personal use and possession. An inference that they were acquired by the Mahant for the Math is equally possible and in fact is to be preferred to what appears on the face of the documents. The onus of proof being on the appellant, it was possible for him to establish his case from the documents available to him. But he has chosen not to place at the disposal of the Court all the relevant documents. It is significant to note that not a single document has been produced by the plaintiff which specifically mentioned the purchase or the gift to be by or to the Math itself. It is difficult to believe that the Math acquired no property during the long period of its existence. The Mahant as the head of the institution acts for the Math and is its real representative. All the dealings for and on behalf of the Math must be conducted by the Mahant and it should be no wonder if the Mahant acting for the Math acts ostensibly in his own name. Though the documents relating to purchase of properties have been produced, no evidence was led to show that they were purchased from the personal assets of the Mahant. Presumably if there was such evidence, it would have been produced. The only possible inference which can be drawn is that they were purchased from the assets of the Math....."*
>
> *30. Reference may be made to Sitaram Days Banasi v. H.R.E. Board Madras(1) and to Raghbir Lala v. Mohammad Said(1). In the former case, Varadachariar, J. said:-*

"From the few sale deeds filed in the case, it no doubt appears that some of those properties were purchased in the name of the prior Mahant; but it being admitted that he was an ascetic and celibate and the head of the institution, the probabilities are that they were purchased with the funds of the institution." and in the latter it was said:- "No doubt if a question arises whether particular property acquired by a given individual was acquired on his own behalf or on behalf of some other person or institution with whom or with which he was connected the circumstance that the individual so acquiring property was a professed ascetic may have importance."

Mr. Mohapatra further relied upon the case law in the case of ***Madhu Sudan Panda and after him Mukta Devi and others Vs. the Commissioner of Hindu Religious Endowments, Orissa and others***, reported in 2004 (I) OLR 72, wherein this Court held as under:-

"9. Defendant Nos. 1 and 2, i.e the Commissioner and the Secretary to the Commissioner respectively, have categorically in their written statement stated that after due enquiry the Commissioner gave a finding that the suit properties were the trust properties belonging to the institutions and the Mahants had no right to alienate the said properties without prior permission. There is also nothing in the evidence on record to indicate that the successive Mahants ever had personal income of their own out of which they could acquire the properties including the disputed properties in their personal capacity. That too, if properties were ostensibly purchased by the Mahants cannot be said to have been acquired in their personal capacity. In the case of Mahant Shri Srinivas Ramanuj Das v. Surjanarayan Das, AIR 1967 SC 256, the Apex Court held that:

"The gift being to the Math, though ostensibly in the name of the Mahant, the Mahant held the properties as a trustee for the indeterminate class of beneficiaries, viz., sishyas, anusishyas and visitors. This stamps the Math with the public character".

So, it is clear that in the present case even if the onus was on the plaintiff to prove that the property in dispute does not belong to Math or Trust, but to Mahant personally, the plaintiff has not discharged the same."

11.1 Mr. Mohapatra, learned counsel for the Petitioner, therefore, submitted that from the above it is clearly established that.-

(i) Radhakanta Math is a public religious endowment;

(ii) It is a religious trust of public nature;

(iii) It has declaration of the Tribunal under Section 57-A of the OLR Act read with Section 13-D of the OEA Act so as to be treated as 'Privileged Raiyat' as defined under Section 2 (24) (e) of the OLR Act;

(iv) Thus, its properties are exempted from Ceiling as provided under Section 38 of the OLR Act;

(v) The case land being religious endowment is under the administrative control of the Commissioner of Endowments;

(vi) Any contention that when the property in question belongs to Mahanta is incorrect in view of the law laid down by Hon'ble Supreme Court in the case of ***Mahant Shri Srinivas Ramanuj Das (supra)*** and documents referred to by the Petitioner in affidavit filed on 15th March, 2020, Annexure-8 to the writ petition together with the memo filed on 14th September, 2021 enclosing the order of this Court in OJC No.574 of 1978.

11.2. In view of the above, he prayed for setting aside the order under Annexure-7 by which the order passed under Annexures-5 and 6 have been confirmed.

12. Mr. Dash, learned Additional Government Advocate refuted the submission made by learned counsel for the Petitioner. He contended that the Petitioner primarily relied upon the orders passed under Annexures-1 and 2 by the Tribunal under Section 13-A (Chapter-II–A) of the OEA Act in Misc. Case No.1813 of 1965. The said declaration has no relevance for adjudication of the case. In support of his submission, he relied upon Section 13-A(e) as well as Section 13-D of Chapter-II-A (since repealed) of the OEA Act, which are quoted below.

*" **Section 13-A (e)***

'Trust estate' means an estate the whole of the net income whereof under any trust or other legal obligation has been dedicated exclusively to charitable or religious purposes of a public nature without any reservation of pecuniary benefit to any individual.

Section 13-D

(1) The trustee in respect of a trust estate shall upon the issue of a notification under Section 3-A make an application in the prescribed form and manner to the Tribunal within three months from the date of such notification claiming that the estate is a trust estate.

(2) If the Collector of the district on his own information or on receipt of any information from the Endowment Commissioner or the Board of Wakfs or from any source whatsoever, is of the view that there are circumstances to indicate that any estate is a trust estate he may make a reference within the aforesaid period to the Tribunal for determination whether the Estate is a trust estate or not."

By order under Annexure-2, the entire property under Sabik Khata No.55 measuring an area Ac.32.81 decimal and Khata No.56 measuring an area Ac.0.27 decimal (in total Ac.33.08 decimal) were absolutely dedicated for the seva puja of Radhakanta Dev, which is a public deity. Accordingly, learned Tribunal Judge, vide order dated 20th December, 1966, declared those properties to be the trust estate. On the other hand, the property referred to under Annexure-3, i.e., the application made under Section 57-A of the OLR Act, does not relate to those properties. The properties referred to under Annexure-3 are Sabik Khata No.70 of Sipasurubuli mouza and Khata No.15 of Sundarpur mouza. The property under Annexure-3 is no way related to that under Annexure-2. Said properties were never declared as trust estate by the competent authority. Further, the properties under Annexures-5, 6 and 7 do not relate to the properties either under Annexure-2 or Annexure-3. As such, the order under Annexure-2 is of no assistance to the Petitioner-Math.

13. Further, the contention of learned counsel for the Petitioner that the Petitioner-Math being a religious institution is a 'Privileged Raiyat' and the properties belonging to the Petitioner-Math being utilized as such, are exempted from ceiling proceeding under Section 38 of the OLR Act, has no legal basis. It is more so, because of the language and tenor of Section 2(24)(e) of the OLR Act. A property on being declared as 'trust estate' either under the OEA Act or under the OLR Act, can only be exempted from ceiling proceeding, which is not so in the instant case. The ROR (Annexure-A to the counter affidavit filed by the Opposite Parties) is prepared by the settlement authority in the year 1977. It is prepared in the name of a private person and not in the name of the Petitioner-Math. The entry in the ROR under Annexure-A has a presumptive value of correctness under Section 13(1) of the OSS Act unless it is proved to the contrary.

14. It is contended by learned counsel for the Petitioner that since the usufructs from the properties in question under Annexure- A have been utilized for the benefit of the religious institution, the same can be exempted

from the provisions of the OLR Act, is contrary to law. The definition of *'Privileged Raiyat'* does not cover such a situation or contingency. As such, the orders under Annexures-5, 6 and 7 are based on sound legal proposition.

14.1 Further, the authorities under the OLR Act have no jurisdiction to treat the property to be a religious endowment unless it is so declared by a competent authority. Section 41(1)(d) of the Endowments Act clearly provides that the Assistant Commissioner of Endowments is competent to take decision with regard to the nature of the property. No declaration having been made in that regard, the OLR authorities have to respect the ROR under Annexure-A on its face value and proceed with the matter. During adjudication of the ceiling proceeding, the Petitioner has never established that the property in question belongs to the deity by producing orders/declaration by the competent authorities. In view of the above, Mr. Dash, learned AGA prayed for dismissal of the writ petition and also prayed to vacate the interim order dated 3rd August, 2012 staying further proceeding initiated under the Consolidation Act.

15. Miss Naidu, learned counsel for the Commissioner of Endowments was served with notice under Section 69(1) of the Endowments Act to participate in the hearing of the writ petition. On instruction, she submitted that the property in question does not belong to the Petitioner-Math. It is the personal property of the recorded tenant and cannot be said to be a religious endowment. She on instructions also clarified that no such declaration has been made by Assistant Commissioner of Endowments. She, however, submitted that since the matter relates to legality and propriety of the orders under Annexures-5, 6, and 7, she has no say on the merit of such orders.

16. As discussed above, this Court, vide order dated 4th February, 2022 held that the question of abatement of ceiling proceeding under the OLR Act does not arise upon publication of notification under Section 3(1) of the Consolidation Act. Thus, this Court proceeded with hearing of the writ petition on merit.

17. Heard learned counsel for the parties. Perused the materials on record as well as the case laws cited by learned counsel for the parties.

18. Before delving into merits of the rival contentions of learned counsel for the parties, this Court feels it proper to discuss the relevant provisions of law for just adjudication of the case. Section 2(24) of the OLR Act defines the meaning of 'Privileged Raiya', which reads as under;

> ***"Privileged raiyat** means-*
>
> *(a)..... ....*
>
> *(b)..... ....*
>
> *(c) any trust or other institution declared under this Act to have been a privileged raiyat prior to the commencement of the Orissa Land Reforms (Amendment) Act,1973;*
>
> *(d) any trust or other institution whose estate has been declared to be a trust estate by a competent authority under the Orissa Estate Abolition Act,1951 (Act 11 of 1952);*
>
> *(e) any other trust which is declared to be a religious or charitable trust of public natureby the Tribunal constituted under Section 57-A;*
>
> *(f)..... ...."*

On a conspectus of the aforesaid provisions, it is clear that any trust or other institution declared to be a trust estate or religious or charitable trust of public nature by a competent authority under the provisions of OEA Act or under Section 57-A of the OLR Act, shall be treated to be a *'Privileged Raiyat'*. Section 57-A(3) of the OLR Act provides that any trustee or trustees desiring to get any trust declared to be a religious or charitable trust of a public nature under Sub-clause (e) of Clause (24) of Section 2 may make an application to the Tribunal in the prescribed manner. Proviso to said sub-section (3) makes it clear that no application under this sub-section shall be maintainable, if-

> (a) it relates to a trust which has been created and established after the 26th day of September, 1970; or
>
> (b) it is filed after the date of expiry of a period of six months from the date of commencement of the Orissa Land Reforms (Second Amendment) Act, 1976;

It is further provided that nothing in Clause (a), as stated above, shall affect any declaration made prior to the date of commencement of Orissa Land Reforms (Second Amendment) Act, 1976. Mr. Mohapatra, learned

counsel for the Petitioner submitted that there has already been a declaration under Section 13-D of the OEA Act that the Petitioner-Math is a trust estate, vide order dated 10th December, 1966, Annexures-1 and 2 to the writ petition in Misc. Case Nos.1814 and 1813 of 1965 respectively. In the said orders under Annexures-1 and 2, Khata No.39, measuring an area Ac.10.00 decimal of mouza Astaranga, Kakatpur (in Misc. Case No.1814 of 1965) and entire Khata No.55 to an extent of Ac.32.81 decimal and Khata No.56 to an extent of Ac.0.27 decimal (in total Ac.33.08 decimal) of mouza Kantapariyera, Kakatpur in the district of Puri (in Misc. Case No.1813 of 1965) have been declared to be the trust estate of Petitioner-Math.

19. 'Trust estate' has been defined under Section 2(oo) of the OEA Act, which reads as follows:

> "***Section 2 (oo)***
>
> *'trust estate' means an estate the whole of the net income whereof under any trust or other legal obligation has been dedicated exclusively to charitable or religious purposes of a public nature without any reservation of pecuniary benefit to any individual."*

Under Chapter-II-A of the OEA Act (since repealed), Section 13-A (e) defined 'trust estate' in the same terms and manner as defined under Section 2(oo) of the OEA Act. Section 13-D of said Chapter-II-A provided that upon issuance of a notification under Section 3-A of the OEA Act, the trustee in respect of a 'trust estate' may make an application in the prescribed form and manner to the Tribunal within three months from the date of such notification claiming that the estate is a trust estate.

20. Thus, in order to get a declaration either as a *'trust estate'* or a *'Privileged Raiyat'*, a trust has to make an application in the prescribed manner to the competent authority in that regard. In the instant case, Khata No.39 of Mouza- Astaranga and Khata Nos. 55 and 56 of mouza-Kantapariyera under Kakatpur Police Station have been declared as 'trust estate' under Section 13-D of the OEA Act. Further, it appears that the Petitioner-Math had made an application under Section 57-A of the OLR Act by the Tribunal in Misc. Case No.287 of 1976 to declare Khata No.70 of Mouza Sipasurubuli and Khata No.15 of mouza Sandhapur under Puri Sadar Police Station to be declared as a religious and charitable trust of public

nature. The said application was dismissed by learned Tribunal Judge vide order dated 2nd April, 1977 (Annexure-4) holding that it has no merit as the Petitioner- Math has already been declared as *'trust estate'* under the OEA Act. As such, another declaration would be redundant. Properties involved under Annexure-3 are not the properties under Annexures-1 and 2. It further appears that the Court refused to grant prayer made under Section 57-A of the OLR Act. On perusal of the record, it appears that ceiling proceeding was in respect of Hal Khata No.21 of mouza Sipasurubuli to an extent of Ac.515.03 decimal. The properties of Petitioner-Math, which has been declared as '*trust estate*' under Section 13-D of the OEA Act in Misc. Case Nos.1813 and 1814 of 1965 do not belong to mouza Sipasurubuli. Thus, properties under Annexures-1 and 2 are no way connected to the ceiling proceeding. Further, it is apparent from Annexure-4 that the properties under Annexure-A in respect of which ceiling proceedings have been initiated has not been declared as 'trust estate' under Section 57-A of the OLR Act.

21. A *'trust estate'* is declared in respect of property and in the instant case there is no material on record to come to a conclusion that the properties under Annexure-A has been declared as 'trust estate'. Further, the Petitioner-Math has never been declared as a religious or charitable trust of public nature under Section 57-A of the OLR Act.

22. An argument has been advanced by Mr. Mohapatra, learned counsel for the Petitioner that the Mahanta of the Math belonged to Nihangi cult. Thus, relying upon the decision of ***Mahant Shri Srinivas Ramanuj D***as (supra), he made an endeavour to pursue this Court that even if the properties have been recorded in the name of the Mahanta, but in fact the same belongs to the institution. He also relied upon the case of ***Madhu Sudan Panda*** (supra) in which this Court held that a gift to the Math though ostensibly in the name of the Mahanta, he held the property as a trustee for the Math. Even if the submission of learned counsel for the Petitioner to be correct, but still the property in question requires a declaration to be a 'religious or charitable trust of public nature' under Section 57- A of the OLR Act to attract exemption under Section 38 of the said Act. Such a declaration was neither sought for nor granted in the case at hand. Only by making a submission to the effect that the property in question is being used for the benefit of the Petitioner-Math will not be sufficient to attract Section 38 of the OLR Act. Order dated 19th May, 1978 passed in OJC No.574 of 1978 has no relevance for determination of the issue in the instant case. The

said order was passed on an application for extension of time to make deposit of Rs.1.00 lakh as directed vide order dated 5th May, 1978 by which said writ petition was disposed of. The said deposit was directed to be made towards auction price of cashew nut plantation for the relevant year. Few other documents were also relied upon by learned counsel for the Petitioner to establish that the case land belongs to the Petitioner-Math, but in view of discussions made above, such contentions are not acceptable.

23. In view of the discussions made above, this Court is of the considered opinion that the authorities under the OLR Act have committed no error in passing the orders under Annexures-5, 6 and 7. As such, the writ petition being devoid of any merit stands dismissed, but in the facts and circumstances of the case, there shall be no order as to costs.

24. In view of dismissal of the writ petition, interim order dated 3rd August, 2012 stands vacated.

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2022 (II) ILR - CUT- 447

K.R. MOHAPATRA, J.

ARBP (ICA) NO.1 OF 2021

GMR KAMALANGA ENERGY LTD. .....Petitioner

.V.

SEPCO ELECTRIC POWER CONSTRUCTION CORPORATION,SHANDONG,CHINA .....Opp. Party

ARBITRATION AND CONCILIATION ACT, 1996 – Section 34 – Arbitration award – Scope of Interference – Held, non-interference with, when the view taken is possible view – In the present case, neither the ground of fundamental policy of Indian Law, nor the ground of patent illegality was made out – The fact that the award is based on the oral and documentary evidence led in the case and available on record, which cannot be characterized as perversion or based on no evidence or re-written of the contract – Thus it cannot be said that finding of Tribunal is contrary to the public policy of India – Hence the petition is dismissed. (Para-24)

Case Laws Relied on and Referred to :-

1. (2022) 1 SCC 753 : Gemini Bay Transcription Pvt. Ltd. Vs. Integrated Sales Service Ltd. & Anr.
2. (2019) 15 SCC 131 : Sangyong Engg. & Construction Co. Ltd. Vs. NHAI

For Petitioner : Dr. Abhisekh Manu Singhvi, Sr. Adv. & Mrs. Pami Rath.
For Opp. Parties: Mr. Jayant Mehta, Sr. Adv. & Mr.N. Paikray

JUDGMENT Date of Judgment: 17.06.2022

K.R. MOHAPATRA, J.

This Petition under Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'the Arbitration Act') has been filed assailing the award dated 7th September, 2020 (corrected on 17th November, 2020) passed by a three member Arbitral Tribunal. The matter is heard on the question of admission.

2. The Petitioner, GMR Kamalanga Energy Limited (for convenience 'GKEL') entered into an agreement with Opposite Party-SEPCO Electric Power Construction Corporation (for convenience 'SEPCO') in 2008 for construction and operation of a Coal Fired Thermal Power Plant at Kamalanga village in Dhenkanal district of Odisha. In that process, GKEL and SEPCO entered into four agreements, which were amended subsequently. Dispute arose between the parties for delay in construction as well as on other technical issues relating to the construction and operation of the plant. On 30th March,2015, SEPCO served a notice of dispute on GKEL and initiated arbitration proceeding serving notice of arbitration dated 18th June, 2015. An Arbitral Tribunal was constituted to adjudicate upon the dispute between the parties. As per the agreement, arbitration was to be made in accordance with the provisions of the Arbitration Act. The seat of Arbitration was India though the venue was at Singapore. As per the provisions of the Arbitration Act, the Arbitration is an international commercial arbitration governed by Part-1 of the said Act. The three member Arbitral Tribunal passed the impugned award on 7th September, 2020, which was unanimous. However, both SEPCO and GKEL filed applications for correction of the award under Section 33 of the Arbitration Act and the Arbitral Tribunal passed a corrected award on 17th November, 2020. As per the impugned award, the GKEL has been directed to pay Rs.995 crores (approximately) to SEPCO (this figure has been arrived

at by converting the amount awarded in different currencies to INR at contemporaneous rates). The GKEL being aggrieved has filed present petition under Section 34 of the Arbitration Act on 15th February, 2021.

2.1 The matter was argued at length by learned counsel for the parties on the question of admissibility of the petition. In one hand, learned counsel for the Petitioner made an endeavour to encompass the argument raised within the scope of Section 34 of the Arbitration Act, learned counsel for the Opposite Party, on the other hand, made efforts to persuade this Court by arguing that the issues raised by learned counsel for the Petitioner are not within the scope and ambit of Section 34 of the Arbitration Act.

3. For convenience and appreciation of respective cases of the parties, GKEL filed convenience compilation on 17th April, 2021 as well as additional compilation on 26th July, 2021. Likewise, SEPCO filed compilation of case laws on 19th July, 2021 and additional compilation of case laws on 19th July, 2021, 21st July, 2021, 16th August, 2021 as well as on 31st August, 2021. Mr. Salve, learned Senior Advocate as well as Dr. Singhvi, learned Senior Advocate vehemently argued that the Tribunal has treated the parties unequally and tried to make out a third case which was not even the case of either of the parties. It is also argued on behalf of the Petitioner that by virtue of the impugned award, the Tribunal has effectively modified the contract between the parties by holding that the parties have waived the requirements to issue contractual notices. Dr. Singhvi, learned Senior Advocate, also made elaborate submission in response to the submission made by Mr. Mehta, learned Senior Advocate for SEPCO.

4. It is submitted by learned counsel for GKEL that although issuance of notice was a condition precedent for SEPCO to make any claim for changes in the contract price or for seeking extension of time, but the Tribunal has erroneously held that the GKEL is estopped from seeking compliance of contractual notice relying upon its email dated 18th March, 2012 without appreciating the context in which it was sent. Thus, the finding of the Tribunal that compliance with the contractual notice was waived with effect from March, 2012 is contrary to law. Further, in holding so, the Tribunal has prevented GKEL from raising the plea of lack of contractual notice by SEPCO in various claims, such as those pertaining to, inter alia, Grid Synchronisation (Issue No.6), fuel oil (Issue No.7), Coal (Issue No.8),

UCT-PGT (Issue No.10); consequentially, the Tribunal allowed SEPCO's claims for extension of time and prolongation costs for delay which were barred by SEPCO's admitted failure to issue notices. In that process, the Tribunal awarded prolongation cost of Rs.70-80 crores (approx.), which consequently led to reduction in the amount of liquidated damages recoverable by GKEL from SEPCO by Rs.100 crore approximately. While dealing with the issue, the Tribunal has treated the parties unequally by applying a different standard to each of the parties by disallowing GKEL's counter-claim amounting to more than Rs.150 crores approximately at the threshold on the basis that GKEL had failed to serve notice even though such claim for default arose after March, 2012. In that process, the total impact is for an amount more than Rs.300 crores approximately by rejecting the claim of GKEL in its counter-claim and allowing the same in favour of SEPCO.

5. It is further submitted that learned Tribunal has made out a case in favour of SEPCO, which was neither pleaded nor argued. It was not the case of SEPCO that there were separate agreements, which constituted estoppels, i.e., (a) that there was an agreement of 2010, which constituted an estoppel going forward all the way till end of the project execution; and alternatively (b) that if there was no agreement of March 2010, then there was an agreement of March 2012 which constituted an estoppel not to give any further contractual notices. Further, the plea of SEPCO of waiver or estoppel arising out of events of March 2010 being rejected by the Tribunal (paragraph 226 of the award) the very basis of SEPCO's claim that an estoppel or waiver would be operative taking into consideration the events of March 2012 could not have been accepted by the Tribunal, which dehors the SEPCO's own case. Therefore, the Tribunal has made out an independent case in favour of SEPCO basing upon the events of March 2012 to which GKEL did not have any opportunity to plead or lead evidence to that effect. Further, even if it is presumed that SEPCO had pleaded the case of waiver or estoppel based upon event of March 2012, then GKEL could have surely produced further contractual notices issued by the parties based on events of March 2012.

6. Section 34 (2)(a)(iii) of the Arbitration Act provides for setting aside of an award if a party challenging the award was not given proper notice or was unable to present its case. It is also the well-settled law that an award is liable to be set aside if the principles of natural justice has been breached or Section 18 of the Arbitration Act has been violated.

7. It is also pleaded that the Tribunal has modified the contract between the parties by holding that parties had waived the requirement to issue contractual notices. The Tribunal failed to appreciate that the claim of estoppel would fail as it was inconsistent with the clause in Section 25.5.3 of the Amended CWEETC Agreement. It is the trite that an Arbitral Tribunal cannot act outside the four corners of the contract or against the express terms of the contract before it. The Tribunal has no jurisdiction to modify the terms of a contract as has been done in the instant case. The Tribunal failed to take into consideration that the email dated 18th March, 2012 from Mr. Rao (GKEL's representative) was a simple request to SEPCO to withdraw its letter of suspension and nothing more. But the Tribunal by misinterpreting such email came to hold that Mr. Rao was asking SEPCO not to issue formal notices for any matter or claims in future unconnected with suspension. Although in the meeting dated 13th March, 2012, SEPCO agreed to withdraw its letter of suspension by 14th March 2012, but it was not done. In fact, the suspension was withdrawn only when GKEL had established Letter of Credit (L/C) of 1266000 dollars and 11450000 dollars. Thus, it is evident that withdrawal of the suspension letter by SEPCO was on the basis of a positive action taken by GKEL and not on the basis of the email of March 2012. Thus, the Tribunal has acted in excess of its jurisdiction by modifying/amending the notice clause in the Agreement.

8. Further, when the Tribunal held that the parties had waived to issue contractual notices it should have applied such waiver equally to both SEPCO and GKEL. In view of the above, it is argued on behalf of the Petitioner-GKEL that it is a fit case to be considered on merit within the scope of Section 34 of the Arbitration Act.

9. Mr. Mehta, learned Senior Advocate for the Opposite Party opened his argument submitting that while examining the admissibility of the petition under Section 34 of the Arbitration Act, the Court must keep in mind the scope and ambit of said provision vis- a-vis an international commercial arbitration.

10. It is submitted that the impugned award is unanimous one and has been rendered by the Arbitral Tribunal having three members of international repute in the matter of arbitration. The present petition is solely on the basis pertaining to merit of the dispute and an attempt to persuade this Court to re-appreciate the evidence which is ex facie in the teeth of the scope of Section

34 of the Arbitration Act. The scope and ambit of Section 34 does not permit the Petitioner to seek factual, evidentiary or legal review of findings of the award. Amendment to Section 34 introduced in 2015 further restricts the scope of interference with the arbitral award on the ground of public policy under Section 34(2)(b)(ii) of the Arbitration Act on three heads, such as (i) fraud or corruption; (ii) contravention of fundamental policy of Indian law; or (iii) conflict with most basic notions of morality or justice (Explanation-1). An important caveat is added in Explanation-2 according to which 'no review on merits of the award is allowed'. Interference of the arbitral award on the ground of patent illegality is also not available in an international commercial arbitration in view of Section 34(2) of the Arbitration Act. Referring proviso to Section 34(2A) of the Arbitration Act, it is submitted that even non- international arbitration award shall not be set aside merely on the ground of erroneous application of law or by re-appreciation of evidence. Thus, merit of international commercial arbitral award is completely outside the scope of challenge under Section 34 of the Arbitration Act. The Petitioner-GKEL endeavoured to challenge the impugned award on the issue of bias, violation of natural justice and perversity. It is submitted that these terms, though on the face of it are attractive, are completely misplaced and are nothing but fanciful expressions to camouflage its attempt to seek factual review of the award. In order to buttress the argument of 'bias', the Petitioner made a desperate attempt to argue on merit of the dispute, which is against the very scheme of the Arbitration Act. It is nothing but an attempt to circumvent the statutory prohibition to challenge an award on the ground of merit.

11. Sections 12 and 13 of the Arbitration Act provide the grounds and procedure to be followed to challenge the arbitral award on the ground of 'bias'. It is trite that the Petitioner had to take recourse to process provided therein and cannot be allowed to allege bias without following the prescribed procedure.

11.1 Section 12 of the Arbitration Act provides that an arbitral award can be challenged on the ground of bias if there exists, either direct or indirect, of any past or present relationship of the Arbitrator with any of the parties or in relation to the subject matter of dispute. The issue of bias does not clothe within its scope whether the Arbitral Tribunal has decided the matter correctly or incorrectly. The legal principles are enshrined under Section 12 (3) of the Act, i.e., if circumstances exist that gives rise to justifiable doubts

as to the Tribunal's independence or impartiality. These principles are also being articulated in several decisions of the Hon'ble Supreme Court as 'real likelihood of bias.' In any event, challenge of bias under Sections 12 and 13 does not encompass a review on the merits of the dispute. The arguments advanced by the Petitioner do not encompass the element of bias in adjudicating the matter. It is only a naked attempt by the Petitioner to challenge the award on merit through a backdoor road, which is a clear abuse of process of Court and should be nipped from the bud.

11.2 Further, the allegation of bias is made without any material, more particularly not just against Arbitrator but against the entire Tribunal, which includes its own nominee. The same is neither separated by any legal or factual ground. Further, Section 13 prescribes that a party which intends to challenge the mandate of the Tribunal on the ground of bias must do so, within fifteen days on being aware of such circumstances. Only when such challenge is not successful, the aggrieved party can challenge the award on the ground of bias. It was under legal obligation to raise such a challenge before the Tribunal within a period of fifteen days of becoming aware of alleged circumstances, which according to him gave rise to justifiable doubts as to the Tribunal's independence and impartiality.

12. The Arbitral Tribunal pronounced a unanimous award on 7th September, 2020 (as corrected on 17th November, 2020). However, the mandate of the Arbitral Tribunal continued since the Tribunal was to render an award on interest and costs. The Petitioner continued to be involved in the arbitral proceedings regarding interest and costs without raising any objection of bias against the Arbitral Tribunal.The final award was rendered on 24th June, 2021 and its corrections on 1st September, 2021. The Petitioner having failed to make any challenge under Section 13 of the Arbitration Act and continued to participate in the arbitral proceeding regarding interest and costs, it is not entitled to maintain a challenge of the award on the ground of bias.

13. It is contended by learned counsel for SEPCO that the Petitioner contended that it was unable to present its case and therefore, the principle of natural justice has been violated. Inability to present its case refers to a situation where evidence, documents or submission are accepted behind the back of the party and the party is deprived of an opportunity to comment on the same. This ground covers facets of natural justice and fair

hearing, and cannot be taken to challenge an award on merits by nit-picking. The breach of natural justice has to be made out clearly.

14. It is well-settled that an Arbitrator is a master of the proceedings and procedures [see Section 19(3) of the Arbitration Act]. The Court in seisin of the matter under Section 34 of the Arbitration Act would not interfere with the award merely because it would have done things differently, but only when there is a real bias for alleging that arbitral process was conducted irrationally or capriciously. In the instant case, ex facie the award has only been rendered on the issues where proper pleadings were made by both parties, evidence was duly led, and written submissions were exchanged etc. There is not a single document or piece of evidence, regarding which it can be said that a party was not afforded with an opportunity to respond, in accordance with law. There is nothing on record which would suggest that the Petitioner-GKEL was denied a fair hearing by learned Tribunal.

14.1 Hon'ble Supreme Court in the case of ***Gemini Bay Transcription Pvt. Ltd. Vs. Integrated Sales Service Ltd. and another***, reported in ***(2022) 1 SCC 753*** has categorically held that even the ground of perversity is not available to challenge the award rendered in an international commercial arbitration, relevant paragraph of which reads thus;

> *"60. The judgment in Ssangyong [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020)2 SCC (Civ) 213] noted in para 29 that Section 48 of theAct has also been amended in the same manner as Section34 of the Act. The ground of "patent illegality appearing on the face of the award" is an independent ground of challenge which applies only to awards made under Part I which do not involve international commercial arbitrations. Thus, the "public policy of India" ground after the 2015Amendment does not take within its scope, "perversity of an award" as a ground to set aside an award in an international commercial arbitration under Section 34, and concomitantly as a ground to refuse enforcement of a foreign award under Section 48, being a pari materia provision which appears in Part II of the Act. This argument must therefore stand rejected."*

Thus, the grounds, on which the instant petition under Section 34 of the Arbitration Act has been filed, are not subject to scrutiny by this Court in the instant proceeding.

15. Learned counsel for the parties also made elaborate argument on interim application which will be considered separately after discussing the arguments on the admissibility of the petition under Section 34 of the Arbitration Act.

16. In order to scrutinise the rival contentions raised by learned counsel for the parties, the relevant provisions of the Arbitration Act as well as case laws on the legal issues raised, are to be kept in mind. Section 34 of the Arbitration Act deals with an application for setting aside an arbitral award. It provides that challenge of an arbitral award may be made only by an application for setting aside such award in accordance with Sub-sections (2) and (3) of Section 34. Said provisions deal with in detail the grounds on which an arbitral award can be set aside. Sub-section (2A) provides that an arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award. Proviso to Sub-section (2A) makes it clear that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence. Thus, it is made clear in Sub-section (2A) that the ground of 'patent illegality appearing on the face of the award' shall not be a ground to challenge an international commercial arbitral award. Further, Sub-section (2A) also makes it clear that an arbitral award shall not be set aside merely on the ground of erroneous application of law or by re-appreciation of evidence. Thus, the submissions of learned counsel for the parties are to be scrutinized on the narrow compass available to this Court keeping in mind the restrictions as aforesaid.

17. The main grounds on which the Petitioner assails the arbitral award are that the Tribunal has made out a case for SEPCO, which was not even pleaded / argued by it. Secondly the Tribunal has modified the contract between the parties by holding that the parties had waived the requirement to issue contractual notices; and thirdly, the Tribunal having held that the parties had waived the requirement to issue contractual notices, it would have applied such waiver equally to both SEPCO and GKEL and not unilaterally to favour SEPCO. Learned Senior Advocates also made detailed argument with reference to relevant paragraphs of the impugned award. Learned Senior Advocate for the Opposite Party obviously refuted such contentions in course of his argument emphasizing that the Tribunal has not created any new case for SEPCO nor has it treated the parties unequally, as alleged.

18. Dr. Singhvi, learned Senior Advocate, in course of argument contended that the impugned award violates Section 18 and Section 34 (2)(b)(ii) of the Arbitration Act as it is in conflict with the most basic notions of morality and justice being the result of unequal treatment of the parties. While SEPCO's claim has been allowed even though it had admittedly failed to issue any notice, but the GKEL was treated unequally by rejecting its claim in the counter-claim amounting to more than Rs.15 crores (approx) at the threshold holding that the GKEL had failed to serve notice even though all such claims arose after March,2012. In support of his case, he relied upon the case law in the case of ***Sangyong Engg. & Construction Co. Ltd. v. NHAI reported in (2019) 15 SCC 131*** in which at paragraph 34, it is held that:

> *"34. What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in paras 18 and 27 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] i.e. the fundamental policy of Indian law would be relegated to "Renusagar" understanding of this expression. This would necessarily mean that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ)12] expansion has been done away with. In short, WesternGeco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as explained in paras28 and 29 of Associate Builders [AssociateBuilders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ)204] , would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. <u>However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in para 30 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204]</u> ."*
> *(emphasis supplied)*

In paragraph 35 of the said case law, Hon'ble Supreme Court held as under;

> *"35. It is important to notice that the ground for interference insofar as it concerns "interest of India" has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the "most basic notions of morality or justice". This again would be in line with paras 36 to 39 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49: (2015) 2 SCC (Civ) 204] , as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground." (emphasis supplied)*

Thus, it is held therein that it is only such arbitral award that shocks conscience of the Court can be set aside on this ground. In the case of ***Associate Builders v. DDA***, reported in ***(2015) 3 SCC 49***, paragraph 33 of which reads as follows:-

> *33. It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus, an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts."*

19. In the instant case, the arbitral Tribunal relying upon the email of Mr. Rao (GKEL's representative) came to hold that through such email Mr. Rao was asking SEPCO not to issue formal notice to it in any matter in future. Thus, it cannot be denied that finding with regard to waiver of notice is perverse and based on no evidence. As held in Associate Builders (supra), an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. This Court on re- appreciation of evidence cannot comment upon the quantity and quality of evidence relied upon by the Tribunal to come to a definite finding, unless it shocks the conscience of the Court. On perusal of the relevant paragraphs of the impugned award referred to by learned counsel for the parties, it is manifest that the Tribunal has dealt with the rival contentions of the parties while recording finding of waiver of notices. It would not be out of place to mention here that the claim of SEPCO with regard to waiver of notices in certain aspects have also been rejected by the Tribunal holding that waiver of notices in such matters is not permissible in law.

20. The allegation of 'bias' is a serious allegation against the Tribunal and the same has to be viewed with circumspection.Arbitration Act is a complete Code and it provides mechanism to raise such issue before the Tribunal itself. Section 12(3) provides that an Arbitrator may be challenged only if; (a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or (b) he does not possess the qualifications agreed to by the parties. Thus, the Petitioner had an opportunity to raise the

issue of 'bias' of the Arbitrator(s) before the Tribunal itself in terms of Section 13 of the Arbitration Act. Admittedly, no such objection with regard to 'bias' of the Tribunal was raised by the Petitioner before the Tribunal. The allegation of 'bias' must be supported with material particulars and be proved beyond any reasonable doubt.

20.1 It is the allegation of the Petitioner that the Tribunal adopted a double standard to appreciate respective cases of the parties. When in one hand, the Tribunal waived the requirement of issuance of notices by the Opposite Party basing upon the email issued by Mr. Rao, on the other hand rejected the claim of the Petitioner on the ground of lack of issuance of notice.

21. The Tribunal in paragraph-191 of the award has observed that the Petitioner-GKEL (Respondent before the Tribunal) raised its issue that Claimant's/ (SEPCO)'s failure to give notices in its statement of defence and counter-claim and submitted that if the Tribunal is satisfied that requirement of notice is a condition precedent, the claim and majority of claims of the Claimant fall away. Taking into consideration the issue raised by the GKEL (present Petitioner), the Tribunal proceeded to decide 'is a contractual notice,a condition precedent'. While adjudicating, the Tribunal also considered relevant clauses of amended CWEETC Agreement.

21.1 In order to consider the plea raised by the Petitioner, it is relevant to quote the discussion of the Tribunal at para-199 to 200 (Volume-3 of CC)

> *"199. The Respondent referred to three decisions which confirmed that 'where the service of a notice is mandatory, the clause operates as a condition precedent'. At the outset the Tribunal notes that each of the subject notice provisions does not use the words 'condition precedent' or 'mandatory' and do not expressly state that a contracting party will be denied a contractual entitlement because of a failure to follow a particular procedural requirement to give notice of a claim. It is therefore necessary to examine the operation of each notice clause to see if it has the mandatory effect of a condition precedent.*
>
> *200. The Tribunal notes that the parties have expressly stated their intention elsewhere in the Amended CWEETC Agreement that a provision is a 'condition precedent' such as in Sections 4.3.5, 4.11.1.1, 4.11.2.1 and 4.11.3.1 but have not used that language in the notice provisions under consideration. Accordingly, it is necessary to closely examine these decisions and the language used by the parties in each of the particular notice provisions to determine their proper construction."*

In furtherance of the aforesaid observation, the Tribunal proceeded to discuss different provisions of the CWEETC Agreement, wherein a reference to the notices was made. Taking into consideration the relevant provisions of CWEETC Agreement, arguments of the parties and referring to the materials on record, the Tribunal rendered the finding with regard to requirement of notice pursuant to the meeting in March, 2010. The said finding reads as under:-

> *"226. Having regard to the state of this evidence, the Claimant has not established any proper basis for a waiver or an estoppels arising out of the events at the meeting or during the break at the meeting in 2010. There may have been discussions but the evidence is vague and uncertain as to the contents of the discussions."*

The Tribunal then proceeded to discuss about the waiver of notice taking into consideration the meeting in March, 2012 between the representatives of the parties. In course of discussion, the observation of the Tribunal at para-234 is relevant (page-1359). The same reads as under:-

> *"234. The Respondent challenged the sufficiency of the evidence advanced in support of a case for waiver or an estoppel. The Respondent also relied on the terms of a no oral modification clause found in Section 25.5.3 of the Amended CWEETC Agreement which provided: 'Without prejudice to Section 4.2 and the issue of law Variation Order, no variation, amendment supplement, modification or waiver of this Agreement shall be effective unless in writing and signed by or on behalf of each Party."*

In support of its case, the Petitioner relied upon the English law in the case of Rock Advertising Ltd. Vs. MWB Business Exchange Centres Ltd., reported in 2018 UKSC 24. The relevant portion of the case law reads as under:-

> "..... the scope of estoppels cannot be so broad as to destroy the whole advantage of certainty for which the parties stipulated when they agreed upon terms including the No Oral Modification clause. At the very least (i) there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and (ii) something more would be required for this purpose than the informal promise itself."
>
> *(emphasis supplied)*

Discussing the rival contentions of the parties in the light of the ratio(supra), the Tribunal came to the following finding.

> *"The Tribunal finds that an equitable estoppels arose in March 2012 because the Respondent by its words in the email dated 18 March 2012, having regard to the context in which it was sent, expressly and by its conduct represented that the formal notice provisions in the Agreements were not, and would not be, strictly relied on by it and encouraged and invited the Claimant to adopt the same co-operative approach and to not issue formal notices of claims. The Tribunal is satisfied that the Claimant has thereafter, to the knowledge of the Respondent, acted to its detriment by relying on the representation and Respondent's conduct, by not issuing formal notices. An estoppel arises because there is evidence of reliance by inference drawn from the terms of the Claimant's reply email dated 29 March 2012 emphasised above, from the evidence of Mr. Xu in relation to his earlier discussions with Mr. Rao and from the reaffirmation at the November 2012 Jinan Meeting. It would be unjust and inequitable having regard to all the circumstances, including the inconsistency arising out of the benefits obtained by the Respondent in the CERC proceedings, to allow the Respondent to deny a claim because the Claimant, to the knowledge of the Respondent, followed a co-operative approach as a result of the Respondent's invitation to the Claimant to do so in March 2012."*

21.2 In view of the above, it can be safely concluded that the Petitioner itself raised the issue of waiver/estoppel, relying upon the materials available on record, also the English law (supra) in support of its case. Thus, by no stretch of imagination, it can be said that the Petitioner did not get an opportunity to produce materials in support of its case with regard to waiver/estoppel. It is a case that the Petitioner itself raised the plea of waiver/estoppel and fell prey to it. As discussed earlier, the ratio in Associate Builders (supra) restricts the power of this Court to interfere with the finding of the Tribunal, which is based on little evidence or on evidence which it has not measured up in quality of trained legal mind. In view of the above, the plea of Dr. Singhvi, learned Senior Advocate to the effect that the Tribunal has made out a third case which was not even pleaded or argued by the parties is not sustainable. Also the plea of Mr. Salve, learned Senior advocate and Mr. Singhvi, learned Senior Advocate that the Tribunal has modified the contract between the parties by holding that the parties have waived the requirement of issue of contractual notice is not sustainable.

22. It is also argued on behalf of the Petitioner that the Tribunal having held that the parties have waived the requirement of issuance of contractual notices it should have applied such waiver equally to both SEPCO and GKEL and not unilaterally in favour of SEPCO. It is further argued that the Tribunal has effectively adopted different standards for each of the parties and

treated them unequally in violation of mandatory provisions of Section 18 of the Arbitration Act. As discussed earlier and on perusal of the relevant paragraphs of the impugned award, it appears that no such plea was ever raised by the Petitioner before the Tribunal. Further, no case, as discussed above, is made out by the Petitioner to come to a definite conclusion that the Tribunal has treated the parties unequally in violation of the provisions of Section 18 of the Arbitration Act.

22.1 It is also well-settled that an award is liable to be set aside if the principles of natural justice have been breached or Section 18 of the Arbitration Act has been violated. In view of the discussions made above, it can neither be said that principles of natural justice has been violated nor the parties to the arbitration have been treated unequally.

23. It is argued on behalf of the Petitioner that the Tribunal taking note of the aforesaid notices dated 19th December, 2013, 10th June, 2013 and 18th December, 2013, which were issued by SEPCO to GKEL, held that these notices were akin to the notices of 7th March,2012 issued by GKEL. It is further contended that the Tribunal did not give any weightage to the notice dated 7th March, 2012 and heavily relying upon the subsequent email dated 18th March, 2012 as well as the notices as aforesaid issued by SEPCO allowed their claim. Mr. Mehta, learned Senior Advocate refuted such plea stating that such notices cannot be compared with the email issued by the representative of the Petitioner to answer the issue of estoppel/waiver of contractual notices raised by the Petitioner. It is his contention that the plea of waiver/estoppel was not applicable to the notices dated 19th December, 2013, 10th June, 2013 and 18th December, 2013, as those were required to be issued with regard to breach of warranty raised by the Petitioner. SEPCO would not be in a position to know as to whether the equipment supplied and/or installed by it is working or not, unless it was notified within the warranty period. Thus, the same is not comparable with the issues with regard to waiver of contractual notices for extension of time, delay and damages.

23.1 Issue of waiver/estoppel of contractual notices as discussed above, were either relating to extension of time, delay and damages etc, but the notices dated 19th December, 2013, 10th June, 2013 and 18th December, 2013 are with regard to the notices for breach of warranty. Thus, Mr. Mehta has rightly pointed out that the plea of waiver/estoppel will not be

applicable to the said notices, as it would not be possible on the part of SEPCO to know the defects unless the same is intimated by the Petitioner to SEPCO. Thus, it cannot be said that the Tribunal has re-written the contract between the parties.

24. Dr. Singhvi, learned Senior Advocate, in order to invoke the jurisdiction of this Court under Section 34 of the Arbitration Act, reiterated his argument and contended that when the Tribunal has modified the contract between the parties and created a new contract by holding that the parties had waived the requirement to comply the notice provision based on a verbal communication and a simple letter in contravention to the specific provisions of the amended CWEETC Agreement, certainly violates the provisions under Section 18 of the Arbitration Act and is in breach of fundamental principles of justice and will thus be in violation of public policy of India. In support of his case, he relied upon the case law in ***Ssangyong Engineering and Construction Co. Ltd***. (supra). The relevant portion of which reads as follows:

> *"76..... This being the case, it is clear that majority award has created a new contract for the parties by applying the said unilateral Circular and by substituting a workable formula under the agreement by another formula de hors the agreement. This being the case, a fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract can never be foisted upon an unwilling party, nor can a party to the agreement be liable to perform a bargain not entered into with the other party. Clearly, such a course of conduct would be contrary to fundamental principles of justice as followed in this country, and shocks the conscience of this Court. However, we repeat that this ground is availableonly in very exceptional circumstances, such as the fact situation in the present case. Under no circumstance can any court interfere with an arbitral award on the ground that justice has not been done in the opinion of the Court. That would be an entry into the merits of the dispute which, as we have seen, is contrary to the ethos of Section 34 of the1996 Act, as has been noted earlier in this judgment."*

24.1 As discussed earlier, in the instant case, the Tribunal has not re-written the contract. When an issue with regard to waiver/estoppel of issuance of notices in violation of the amended CWEETC Agreement was raised by the Petitioner, the Tribunal was obliged to answer the same on the basis of the materials available on record. Accordingly, on discussion of the materials on record, the Tribunal came to a conclusion that the parties have agreed to waive issuance of notices as per the contractual

provision. The Tribunal, while answering the issue, has rejected the plea of waiver of contractual notices by the SEPCO relying upon the events of March, 2010 only. Basing upon the materials on record, the Tribunal came to a conclusion that by their conduct in March, 2012 the parties have consciously and diligently decided to waive issuance of contractual notices. Although the material available may not be sufficient to come to the impugned conclusion, as alleged by the Petitioner, but that cannot be a ground of interference in view of the case law discussed earlier. Further, the finding of the Tribunal does not shock the conscience of the Court, which would warrant interference with the impugned award under Section 34 of the Arbitration Act, on the plea of breach of fundamental principles of justice. Thus, it cannot be said that finding of the Tribunal is contrary to the public policy of India.

25. In that view of the matter, this Court is of the considered opinion that the impugned award does not fall under the category which warrants interference under Section 34 of the Arbitration Act.

26. Since this Court has already come to a conclusion that the Petitioner failed to satisfy the Court for interference in the impugned award under Section 34 of the Arbitration Act, there is no occasion to deal with the issue with regard to suspension and cancellation of Unit-4 raised by the Petitioner as it relates to quantum of award and cost. Had the Petitioner been successful in satisfying the Court with regard to admissibility of this petition, then occasion to consider the issue would have arisen.

27. In the result, this petition under Section 34 of the Arbitration Act does not justify to be considered for a detailed hearing. Accordingly, the petition under Section 34 of the Arbitration Act is dismissed and in the circumstances there shall be no order as to costs.

28. As the petition under Section 34 of the Arbitration Act is dismissed, no separate order is required to be passed under Section 17 of the Arbitration Act.

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2022 (II) ILR - CUT- 464

B.P. ROUTRAY, J.

CRLMC NO. 781 OF 2022

KASAR NAYAK @ KAISAR KUMAR NAIK & ANR. ……...Petitioners

.V.

STATE OF ODISHA ……Opp.Party

CODE OF CRIMINAL PROCEDUER,1973 – Section 482 – Inherent power – Offences under Section 47(a), 52 (A)(b) of Bihar And Odisha Excise Act Read with section 272,273 of IPC – Whether in a case where an accused has been released on bail but subsequently new non-bailable offences are added, is it necessary that bail earlier granted should be cancelled for taking the accused in custody or the accused should be allowed to continue on the bail earlier granted to him? – Guidelines issued. (Para-7)

Case Law Relied on and Referred to :-

1. (2019) 17 SCC 326 : Pradeep Ram Vs. State of Jharkhand & Anr.

For Petitioners : Mr. Mahes Das.

For Opp. Party : Mr. K.K. Das, Addl. Standing Counsel

ORDER Date of Order: 20.6.2022

B.P. ROUTRAY, J.

1. Present petition filed under Section 482 Cr.P.C. is directed against the order dated 21st August, 2012 of the learned S.D.J.M., Bhanjanagar passed in 2(a) C.C. No.48 of 2011.

2. The Petitioners are accused for commission of offences under Sections 272/273 of I.P.C. and Section 47(a)/52-A(b) of Bihar and Orissa Excise Act. Initially the Petitioners were arrested and forwarded to custody alleging commission of offence under Section 47(a) only. Subsequently, at the time of submission of final P.R. rest of the offences, as aforestated, were added and accordingly cognizance was taken by the impugned order dated 21st August, 2012 and the order of NBW of arrest was issued.

3. It is submitted on behalf of the Petitioners that since they were earlier released on bail in the same case, subsequent addition of other graver offences will not disentitle them from the benefit of bail availed by them and as such the order of issuance of NBW is bad in the eye of law.

4. The facts of the case reveal that both the Petitioners along with two other accused persons were initially arrested and produced before the learned Magistrate on 30th September, 2011 for alleged commission of offence under Section 47(a) of Bihar and Orissa Excise Act and subsequently all the accused persons were released on bail on 19th January, 2012 as per order of this Court passed in BLAPL No.22351 of 2011. Thereafter the final PR was submitted on 21st August, 2012 adding such other offences and consequently cognizance was taken for those higher / graver offences discussed above, and the order of NBW was issued.

5. In respect of other two accused persons besides the present Petitioners, they in the meantime have surrendered and released on bail and the case has been split up against the present Petitioners by order dated 2nd July, 2019 of the learned Magistrate.

6. It is true that there is inordinate delay in the approach of the Petitioners to challenge the impugned order which is dated 21st August, 2012. The Petitioners have not explained any satisfactory ground for approaching this Court almost after ten years. However, keeping aside the same, an important question of law is found involved herein that, in such cases where the accused has been released on bail earlier and subsequently higher / graver offences are added at the time of submission of charge-sheet whether the accused should be allowed to continue on the bail earlier granted to him, or what course would be open for the courts in such eventualities.

7. The Hon'ble Supreme Court in the case of ***Pradeep Ram v. State of Jharkhand and Another, (2019) 17 SCC 326*** have answered on this point. In the said decision one of the issues was, whether in a case where an accused has been bailed out in a criminal case, in which case, subsequently new offences are added, is it necessary that bail earlier granted should be cancelled for taking the accused in custody? The Hon'ble Supreme Court answered as follows:-

> "xxxxxx xxxxx xxxxx
>
> 31. In view of the foregoing discussions, we arrive at the following conclusions in respect of a circumstance where after grant of bail to an accused, further cognizable and non-bailable offences are added:

> 31.1. The accused can surrender and apply for bail for newly added cognizable and non-bailable offences. In event of refusal of bail, the accused can certainly be arrested.
>
> 31.2. The investigating agency can seek order from the court under Section 437(5) or 439(2) Cr.P.C. for arrest of the accused and his custody.
>
> 31.3. The court, in exercise of power under Section 437(5) or 439(2) Cr.P.C., can direct for taking into custody the accused who has already been granted bail after cancellation of his bail. The court in exercise of power under Section 437(5) as well as Section 439(2) can direct the person who has already been granted bail to be arrested and commit him to custody on addition of graver and non-bailable offences which may not be necessary always with order of cancelling of earlier bail.
>
> 31.4. In a case where an accused has already been granted bail, the investigating authority on addition of an offence or offences may not proceed to arrest the accused, but for arresting the accused on such addition of offence or offences it needs to obtain an order to arrest the accused from the court which had granted the bail.
>
> xxxxxx xxxxxx xxxxx"

8. Coming back to the instant case, here the Petitioners were earlier released on bail under the provisions of Section 439 Cr.P.C. and the NBW of arrest was issued on the prayer of the investigating officer upon submission of the final PR adding other higher / graver offences. As stated earlier, since the Petitioners have approached this Court with inordinate delay, which remains unexplained, though this Court is not interested to entertain the petition, but in the circumstances, as an important question of law is involved, this Court is inclined to pass certain directions in the interest of justice for early completion of trial.

9. Keeping in view the law settled by the Supreme Court as discussed above, it is observed that in the event the Petitioners surrender before the learned S.D.J.M., Bhanjanagar in connection with 2(a) C.C. No.48(A) of 2011 corresponding to P.R. No.40 of 2011-2012 of the Excise P.S., Bhanjanagar on or before 30th July, 2022 and apply for bail in respect of those newly added offences, their prayer for bail shall be considered in accordance with law.

10. The CRLMC is accordingly disposed of.

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2022 (II) ILR - CUT- 467

B.P. ROUTRAY, J.

MACA NOS. 502 &1003 OF 2019

BISHNUPRIYA PANDA .....Appellant

.V.

BASANTI MANJARI MOHANTY & ANR. .....Respondents

IN MACA NO.1003 OF 2019

M/s.ORIENTAL INSURANCE COMPANY LTD. .....Appellant

.V.

BISHNUPRIYA PANDA & ANR. .....Respondents

MOTOR ACCIDENT CLAIM – Death of a medical student – Calculation of notional income – Whether Tribunal is justified in fixing notional income of the deceased at Rs 50,000/- with addition of 40% future prospect? – Held, Yes – Considering the meritorious career of the deceased and certainty of her future employment after one or two years of the accident, the social status and reputation attached to the profession of a doctor this Court is in agreement with the assessment done by the learned Tribunal in determining notional income at Rs 50,000/ – Per month. (Para-13)

Case Law Relied on and Referred to :-

1. 2021 SCC OnLine SC 1083: Meena Pawaia & Ors. Vs. Ashraf Ali & Ors.

IN MACA NO.502 OF 2019

For Appellant : Mr. D.C. Dey.

For Respondents : Mr. A.A. Khan.

IN MACA NO.1003 OF 2019

For Appellant : Mr. A.A. Khan.

For Respondents : Mr. D.C. Dey

JUDGMENT Date of Judgment: 20.06.2022

B.P. ROUTRAY, J.

1. Both the appeals being arise out of the same judgment dated 06.07.2019 of the learned 2nd MACT, Cuttack in Misc. Case No.631 of 2013 wherein compensation to the tune of Rs.68,74,000/- has been granted along with interest @7% per annum to the claimant from the date of filing of the

claim application, i.e.25.9.2013, are heard together and disposed of by this common judgment.

2. Bishnupriya Panda, the original claimant is the Appellant in MACA No.502 of 2019 and the insurer has preferred MACA No.1003 of 2019.

3. The deceased was a young girl aged about 21 years prosecuting her studies in 4th year MBBS at VSS Medical College & Hospital, Burla. On 27.7.2013 at around 6.30 P.M. when the deceased was going in TVS Scooty at Boreipali Chowk, Sambalpur, the offending Truck bearing Registration No.OR-09-C-5525 dashed it from the back side being driven in a rash and negligent manner causing death of the deceased while being shifted to the Hospital.

4. The claimant, the widow mother of the deceased, filed the application claiming compensation of Rs.20 lakhs on account death of the deceased in the motor vehicular accident. Two witnesses were examined on behalf of the claimant and 18 nos. of documents were marked in evidence in support of the claim. No evidence was adduced from the side of the insurer or the owner.

5. Learned Tribunal upon adjudication directed for payment of compensation by the insurer to the tune of Rs.68,74,000/- along with 7% interest to the claimant. The learned Tribunal for determining just compensation has assessed monthly notional income of the deceased at Rs.50,000/- added with 40% of the same towards future prospects and applied '18' multiplier.

6. The insurer challenges such assessment made by the learned Tribunal by contending before this Court that when the deceased was admittedly a non-earning person fixing her notional income at Rs.50,000/- is against the principles enshrined in the M.V. Act, that too with addition of 40% future prospects. It is further submitted that besides entitlement of the claim for compensation, the alleged offending vehicle has been implanted, though was not involved in the accident, to manage grant of compensation under the M.V. Act.

7. The original claimant while pursuing the appeal has prayed for enhancement of the compensation by taking monthly notional income of the deceased at rupees one lakh instead of Rs.50,000/- calculated by the learned Tribunal.

8. First coming to the challenge advanced by the insurer regarding his contention that the offending vehicle has been implanted in this case, admittedly no evidence has been adduced either by the insurer or by the owner to that effect. It was even not pleaded by them before the Tribunal. On the other hand, it is seen from the certified copies of the police papers that the charge-sheet has been submitted against the accused-driver for commission of offences under Sections 279/337/304-A, I.P.C. to stand criminal prosecution. Besides, P.W.2 as an eye-witness of the accident has categorically deposed before the learned Tribunal narrating involvement of the present offending vehicle flawlessly. The insurer could not able to elicit anything contrary during her cross-examination and rather she stood firm in her contention. The insurer even did not choose to put any suggestion to said P.W.2 to exclude involvement of the offending vehicle in the accident. Therefore, such contention of the insurer to discard involvement of the present offending vehicle in the accident is rejected out-right being without substance. On the other hand, the evidence of said P.W.2 coupled with the copies of the police papers such as FIR, charge-sheet etc clearly establishes death of the deceased in the motor vehicular accident involving the present offending Truck.

9. Before delving further some undisputed facts need to be mentioned here. Those are, the deceased was aged about 21 years being her date of birth on 1.6.1992, she was a meritorious student in her career and she was prosecuting her 4th year MBBS course at VSS Medical College & Hospital, Burla.

While assessing her notional income, the learned Tribunal has made a detail analysis of her past career and the certainty of her future employment as a Doctor. The relevant observations of the Tribunal in this regard are reproduced below:

> "9. It is the case of the petitioner that the deceased was pursing her 4th year M.B.B.S study at the time of her death.
>
> P.W.1 has filed and proved the certificates of merit of the deceased for Class-IV to VIII. Those are marked from Exts.11 to 15.
>
> These documents reveal that from Class-IV to Class-VIII the deceased was a rank holder in the school by placing herself thrice in first position and once in second and third position.
>
> P.W.1 also filed and proved the mark sheets of her deceased daughter for Secondary School Examination of the year 2008 and Senior Secondary School Certificate Examination for the year 2010. Those are marked as Exts.17 and 18 respectively.

> Ext.17 reveals that the deceased had secured A-1 Grade in all the subjects. Exts.18 reveals that the deceased secured A-1 grade in prime subjects like Physics, Chemistry & Biology. She has also secured A-2 grade in English and Mathematics.
>
> P.W.1 has filed and proved one certificate of Scholarship amounting to Rs.20,000/- awarded to her deceased daughter by the Department of Biotechnology as the deceased had an outstanding performance in Biology in All India Senior Secondary School Certificate Examination (CBSE). It is marked as Ext.9.
>
> P.W.1 has filed two mark sheets of the year 2011 and 2012 of V.S.S. Medical College, Burla. Those are marked as Exts.10 & 10/a. These exhibits reveal that the deceased had secured 70% of marks in M.B.B.S. course of these two years.
>
> xxx xxx xxx
>
> 12. In a case of death of a student who has no income, the Tribunal has to take a notional income as the income of the deceased.
>
> Such notional income will differ from case to case. That is why no straight jacket formula can be adopted.
>
> In the case at hand, it is found that the deceased was a brilliant scholar. The deceased was making herself ready to be in the profession of medicine.
>
> Medicine as a profession, is the only profession which shall have its importance till the civilization exists, because health was/is and shall be utmost priority for every individual, family and society at large.
>
> Presently, our country is in extreme need of qualified medial professionals as there is dearth of doctors. In such a situation, any doctor with average standard will get ample opportunity of employment, either in the government or in any private sector.
>
> xxx xxx xxx"

10. Further, the learned Tribunal has added 40% of such notional income towards future prospects taking the deceased under self-employment as a Doctor.

11. Thus the learned Tribunal has considered the employment aspect of the deceased from a logical point of view for the purpose of determining just compensation. It is true that the deceased on the date of accident was a non-earning person. Taking advantage of the same, it is contended by Mr. Khan, learned counsel for the insurer that the amount prescribed in Second Schedule of the M.V. Act for non-earning persons should be made applicable, or at best the daily wage rate prescribed for highly skilled labourers on the date of

accident should be applied. Such argument advanced by the insurer is completely unacceptable. It is for the reason that a 4th year student of MBBS Course having a meritorious educational career can never be treated as a highly skilled labourer nor can her income be equated with such amount prescribed in the Second Schedule of the M.V. Act as notional income for such non-earning persons. Because considering the demand for Doctors in the society, a simple MBBS pass out, even without post graduation, will never sit ideal. Moreover, the social reputation and prestige attached to the profession of Doctor is pious and priceless.

12. The Supreme Court in the case of ***Meena Pawaia and others vs. Ashraf Ali and others, 2021 SCC OnLine SC 1083***, where the deceased was a 3rd year bachelor in civil engineering and died in the motor vehicular accident on 12.9.2012, has taken his monthly income at Rs.10,000/- at least. Further, the Supreme Court has added 40% towards future prospects. Such relevant observations of the Supreme Court are reproduced herewith.

> "……While awarding the future economical loss, when the deceased died at the young age 21-22 years and was not earning at the time of death/accident, as per catena of decisions of this Court, the income for the purpose of determining the future economic loss is always done on the basis of guesswork considering many circumstances namely the educational qualification and background of the family, etc. Therefore looking to the educational qualification and the family background and as observed herein above, the deceased was having a bright future studying in the 3rd year of civil engineering, we are of the opinion that the income of the deceased at least ought to have been considered at least Rs.10,000/- per month, more particularly considering the fact that the labourers/skilled labourers were getting Rs.5,000/- per month even under the Minimum Wages Act in the year 2012.
>
> xxx xxx xxx
>
> Therefore we are of the opinion that even in case of a deceased who was not serving at the time of death and had no income at the time of death, their legal heirs shall also be entitled to future prospects by adding future rise in income as held by this court in the case of Pranay Sethi (supra) i.e. addition of 40% of the income determined on guesswork considering the educational qualification, family background etc., where the deceased was below the age of 40 years."

13. In the instant case considering the meritorious career of the deceased and the certainty of her future employment after one or two years of the accident had she not died, the social status and reputation attached to the profession of a Doctor and the prospects in career, I fully agree with the assessment done by the learned Tribunal in determining her notional income

at Rs.50,000/- per month and consequential loss of dependency to the tune of Rs.68,04,000/-. Learned Tribunal has also rightly added Rs.70,000/- to the same towards conventional heads including loss of filial consortium to make the total compensation to Rs.68,74,000/-.

It goes without saying that the prayer for enhancement by the mother (the original claimant) is seen without merit keeping in view the initial emoluments and allowances attached to a Doctor when she enters into the professional employment

14. However, keeping in view the present rate of interest applicable in respect of the fixed deposits, the rate of interest on the compensation amount is reduced to 6%.

15. In the result, both the appeals are disposed of with a direction to the insurer, i.e. M/s.Oriental Insurance Company Limited to deposit the compensation of Rs.68,74,000/- (rupees sixty-eight lakhs seventy-four thousand) before the Tribunal along with interest @6% per annum from the date of filing of the claim application, i.e.25.9.2013 within a period of two months from today; where-after the same shall be disbursed in favour of the claimant-Bishnupriya Panda on such terms and proportion as directed by the learned Tribunal in the impugned judgment.

16. On deposit of the award amount before the learned Tribunal and filing of a receipt evidencing the deposit with a refund application before this Court, the statutory deposit made in MACA No.1003/2019 before this Court with accrued interest thereon shall be refunded to the Appellant-Insurance Company.

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2022 (II) ILR - CUT- 472

S.K. PANIGRAHI, J.

W.P.(C) NO.10034 OF 2021

KARTIK PRASAD JENA .....Petitioner

.V.

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

SERVICE LAW – Promotion – Adverse remarks – The impugned adverse remark completely lacks basis and prima-facie does not indicate any specific omission and commission – Legality of such remark questioned – Held, it leads to arbitrariness and liable to be quashed – The substantiation report completely fails to justify anywhere the reason for the reporting authority to write such adverse remark picking something from the graveyard of whimsicality, which leads to arbitrariness – In the interest of justice, it is directed that adverse CCR is hereby quashed and opposite parties are directed to reconsider the case of petitioner for promotion. (Para-23)

Case Laws Relied on and Referred to :-

1. (2001) 10 SCC 424 : Amrik Singh Vs. Union of India[1]
2. MANU/ SC/0351/1996 : State Bank of India Vs. Kashinath Kher[2]
3. AIR 1997 SC 3671 : State of U.P. Vs. Yamuna ShankerMisra and Ors[3]
4. 2018 (II) OLR 1112 : Suchismita Misra Vs. Registrar (Admn.), Orissa High Court, Cuttack[4]
5. W.P.(C) No. 35666 OF 2020 : State of Odisha Vs. Binod Kumar Das and Ors.[5]
6. 1997 (4) SCC 7 : State of U.P. Vs. Yamuna Shankar Misra & Anr.[6]

For Petitioner : Mr. S.N. Patnaik

For Opp. Parties: Mr. S.K. Samal, AGA

JUDGMENT Date of Hearing: 15.03.2022:Date of Judgment: 27.05.2022

S.K. PANIGRAHI, J.

1. The petitioner in this Writ Petition assails the illegal adverse remark communicated to him so also the arbitrary rejection of his representation for expunction of such adverse remark sans any specific substantiation. He also seeks direction from the Court to the Opposite Parties to extend all benefits to the petitioner including his promotion to the rank of Professor grade which was illegally denied to him on account of the said demoralising adverse remark against him. He further prays for quashing the adverse remark dated 07.10.2020/Annexure-2 and the rejections of representations dated 29.12.2020/Annexure -6 & dated 26.02.202/Annexure-9.

I. Factual back ground:

2. The facts, in nutshell, are that the petitioner was initially appointed as Lecturer-in Economics and later promoted to further ranks in the hierarchy. He has completed three decades of service with unblemished track record

without any adverse remark in his entire service career. The petitioner served as the Deputy Director (NGO-II) in the Directorate of Higher Education from 03.01.2018 to 08.07.2019and on transfer he is serving as Associate Professor & HOD in Economics at SCS College, Puri since 09.07.2019.

3. In compliance with the guidelines issued by the GA& PG Department in the matter of writing and maintenance of CCRS, the petitioner submitted his Performance Appraisal Report (PAR) indicating therein brief description of duties entrusted to him, physical/ financial targets and achievements and significant work done by him during the period from 19.09.2018 to 31.03.2019 through Online to his reporting authority i.e. Director of Higher Education, Odisha within scheduled date on 26.4.2019 (Annexure 1).

4. After about one year and three months of his joining at SCS College, Puri, the petitioner received aconfidential letter from the GA & PG (SE) Department,Government of Odisha bearing D.O. No.2192/SE dated 07.10.2020 wherein he was communicated with the adverse remarks in his PAR during his incumbency as Deputy Director(NGO-II) in the Directorate of Higher Education, which reads as follows:

> *"On review of the confidential report on the work for the year 2018-19 (19.09.2018 to 31.03.2019) it reveals that "you do not try to study the guidelines and act as per merits". Government hope, you will try to improve."(Annexure 2).*

5. On receipt of the D.O. letter dated 07.10.2020 issued by the GA & PG (SE) Department, Government of Orissa, the petitioner had made a representation dated 26.11.2020 to the said authority against the adverse remarks in his PAR. He narrated all the genuine grounds with supporting documents for expunction of adverse remark in his PAR, but his representation has been rejected with a cryptic order with the observation that there is no adequate ground for expunction or modification of the adverse remarks and communicated to the petitioner.

6. Being aggrieved by the adverse remark, the petitioner felt it appropriate to make a detailed representation before the Chief Secretary, Government of Odisha, pointing out his grievances and submitted the same on 08.02.2021. Since the petitioner is on the verge of his promotion such an attempt by his reporting officer and administrative department is

likely to prejudicially impact his promotion prospect. However, he was disappointed by the Opp. Party No.3 vide a letter bearing No.382 dated 26.02.2021 intimating the fate of the Representation dated 08.02.2021 rejecting the same treating it as second representation in terms of Para-14(ii) of the PAR guideline issued vide Memo No.1199/ PRO, dated 26.02.2021. (Annexure-9). Challenging such communication of adverse CCR as well as the illegal rejection of his representations, the petitioner filed the present writ petition.

II. Submissions of the Petitioner:

7. Learned counsel for the petitioner submits that the adverse remark was given but there was no reasons assigned for delayed communication of such remark by the authority. In fact, the communication dated 7.10.2020 was received by the petitioner when the PAR relates to 2018-19. The said communication was not in conformity with the law governing the field.

8. He further submits that the said adverse remarks do not reveal any defined act of omission and commission by the petitioner while discharging his duty in any specific assignment. Though, it has been mentioned that "the petitioner did not try to study the guidelines and act as per merits". No verbal or written warning was communicated or show caused to the petitionerprior to the impugned communication. It is well settled that the objective of CCR writing and communicating adverse remarks clamour for a previous warning to mend the activities or to cure the defects, if any, which is the sine qua non for writing and communicating adverse against any employee. If such warning or displeasure communication was not issued to the employee, the adverse remarks are liable to be quashed.

9. He strenuously contended that in the present case, no warning has been issued to the petitioner to mend the alleged negligence, if any. It is implicit that such an adverse remarks should not be on the foundation of a subjective satisfaction or bias for any kind of unsatisfactory services. The State being a model employer must act fairly towards its employees which presuppose the good governance. Many juniors to the petitioner have been given promotion to the rank of Professor as per promotion notification bearing Notification No.39664 dated 30.09.2021 but the same has been denied to the present petitioner only on account of the present adverse remark though he satisfies all other conditions for promotion as it is reflected from the copy of the

DPC proceeding dated 17.08.2021 obtained under RTI Act 2005. The element of arbitrariness has overpowered on the entire issue and subverted the spirit of fairness and reasonableness.

10. He further underlined that the adverse remark should be specific to the nature of defect and should correlate to the specific facts and circumstances so that an effective representation may be submitted by the employee for expunction of the same. The case in hand also openly endorses the inordinate delay in communication of adverse remark for the year 2018-2019 to the petitioner and the said remark is completely without any basis nor does it indicate any specific omission and commission.

11. He pointed with vigour that the G.A. Department has issued a comprehensive guideline for recording of PAR for Group-A officers of the State Government replacing the existing system of CCR. He specifically drawn the attention of the court to Para-14 of the said memorandum that deals with the provision for submission of representation against the adverse remark communicated to the employee. The said clause, of the memorandum deals with a representation to be submitted before G.A.(S.E.) Deptt. It has been further indicated therein that a second representation shall not in any circumstances be entertained. However, Clause No.16 of the said memorandum indicates that the adverse remark if initiated by the Special Secretary to G.A. Deptt. being the author of the same then Chief Secretary will be competent to deal with the representation. In view of this the Opp. Party No.1 has every authority to deal with a grievance made by an employee, if for any reason, the competent authority to entertain the representation of the employee failed to appreciate and more particularly to reject the representation submitted by the employee without assigning any reason while rejecting the same.

12. He further contended that the authorities have admitted that they have issued the adverse remark to the petitioner on 10.02.2020 although the relevant period is for 2018 - 2019. The government guideline which makes it clear, more particularly at page no.19 of the counter Affidavit filed by the Opposite party that the different stipulated time period for the different stages of the maintenance and communication of CCRs. but the Opp. Parties have violated the same and thereby caused serious prejudice to the petitioner as much as such action is against very objective of communicating adverse

remark if any. The said delayed communication has inflicted a deliberate carnage on the career of the petitioner.

13. The opposite parties have filed a copy of the CCR (PAR) wherein they have admitted that the views of the reviewing authority and accepting authority which is prevailing till date with respect to the CCR of the petitioner for the period from 19th September 2018 to 13th March 2019 with the overall grading "outstanding". That being the position after the views expressed by the reviewing authority and accepting authority, the remark issued by the reporting authority has lost his force and is of no consequence. However the GA department while maintaining the CCR has miserably failed to appreciate the aforesaid facts and he did not take into consideration overall grading reported by the reviewing authority and accepting authority as "outstanding" in favour of the petitioner rather being swayed by the remarks of the reporting authority has issued the adverse remark. The GA department miserably failed to treat the incomplete and improper substantiation report submitted by the reporting authority as an adequate substantiation report though the said substantiation report does not throw any light to justify the adverse remark in any manner. Moreover, the underbelly of a vindictive attitude and the wrong approach of reporting authority is tell-tale from the substantiation report as he tried to develop some more additional points which were never a part of the CCR at all while recording the CCR during the relevant period by him. Under such circumstances, not only did the Reporting officer commit a grave error but also the GA Department being the custodian of the CCR and the person responsible to communicate this adverse remark has failed to perform his part in a proper manner by applying the doctrine of reasonableness. Under such circumstances, the treatment of the CCR of the Petitioner for the period from 19th September 2018 to 31 March 2019 cannot be treated as adverse trivialising the unblemished track record of the petitioner.

14. It is further argued that the Commissioner-cum-Secretary, Department of Higher Secondary as reviewing as well as accepting authority. This is a complete wrong statement on behalf of the opposite parties. The petitioner was never aware about the contents of the remarks given by the reporting officer as well as the reviewing authority-cum-accepting authority. However, the Counter Affidavit reveals that while the reporting authority has only given the comments with respect to adverse remark that the petitioner does not try to study the guidelines and act as per

merit, the views expressed by the reviewing authority and the remarks and overall grading of the accepting authority who is none other than the reviewing authority is "outstanding". Therefore it is not at all a fact that the adverse remark given by the reporting officer has been accepted by the then Commissioner-cum-Secretary, Department of Higher Secondary Education in the capacity of reviewing as well as the accepting authority. Therefore, after the reviewing and accepting authority has decided that the overall performance of the petitioner to be outstanding, the opinion given by the reporting officer that the overall grading in respect of the petitioner for the relevant period is that of average with adverse is superseded by the views expressed by the reviewing as well as the accepting authority.

III. Submissions by the Opposite Parties:

15. Learned counsel for the Opposite Parties, It has been argued further that the reporting authority was provided with an opportunity to submit a substantiation report against the representation submitted by the petitioner whereas the reporting authority declined to review his remarks given. Accordingly, the GA and PG department by DO No.3280 dated 29.12.2020 communicated the rejection of the prayer of the petitioner. In this context, the substantiation report submitted by the reporting officer who is presently holding the post of Director/Joint Secretary of Drinking Water and Sanitation, PR & DW Department, has submitted that the petitioner has submitted the self-appraisal report with claim of 100% achievement in terms of disposal of the pension cases, court cases and grievances made by him which is factually incorrect and amounts to submission of false information. With this observation the reporting authority through his substantiation report did not accept the contention of the petitioner and stick to his opinion with respect to overall grading of the petitioner as average, which is given during the period in Dispute.

16. He further contended that the adverse remarks under annexure- 2 is issued after necessary consideration by the Reporting Authority, i.e. Director, Higher Education and as per guidelines there is no requirement of assigning the grounds of adverse remarks, except in case of Outstanding rating.

17. He further argued that the Special Secretary, G.A Department is the competent authority to consider the representation of the petitioner against adverse remarks, In the present case, the representation filed before the

Chief Secretary is not maintainable as the said representation is a second representation and further as the author of the adverse remarks is not the Special Secretary, G.A department. Only in cases where the Special Secretary of the G.A department is the author of adverse remarks then in those cases the representation is to be filed before the Chief Secretary.

18. He emphatically stated that the counter affidavit filed on behalf of Opp. Parties 1 to 4 unerringly reveals that overall grading of the petitioner for the 2018-19 is Average. Further, the claim of the petitioner in his self appraisal regarding disposal of 100% of pensions, court cases and grievances found to be incorrect by the Reporting Authority. He sought to clarify the fact of inordinate delay for communication of adverse remarks to the petitioner. As the PAR for the assessment year 2018-19 in respect of Group-A & B officers were not completed and number of PARS were awaiting the remarks of the assessing authorities, the Govt. had extended the last date up to 20.02.2020 for completion of the e-PARS for the year 2018-19 through HRMS as per the Department letter No. 402/SE, dated 10.02.2020. After said date, the online e-PARS were undertaken for reviewing.

19. He relies on a judgment of the Apex Court, in **Amrik Singh vrs. Union of India**[1] wherein in it was held that the scope of judicial review on adverse remarks by the authority is quite limited. Accordingly, the instant Writ petition deserves to be dismissed being devoid of merit.

IV. Analysis and Reasoning of this Court:

20. Heard learned Counsels for the parties. The centrality of the issue and the grievance of the petitioner are with respect to the adverse remark against the petitioner i.e. ***"you do not try to study the guidelines and act as per merits"***. If the impugned statement is analysed literally, one comes to an irresistible conclusion that the petitioner acts as per merit but don't try to study the guidelines. This sentence sounds quite oxymoronic. This statement by itself cannot construe to be so fatal that his legitimate expectation of promotion be denied unjustly. Further, one cannot decouple the fact that the Reviewing authority has awarded him the grade of Outstanding. Another facet of the instant case is that there was an inordinate delay in communication of adverse remark to the petitioner on 10.02.2020 for

1.(10 SCC 424 2001)

the year 2018-2019. The Opposite party might have a nice package of reasoning for such delay but it was duty bound to communicate in time. The impugned remark is completely without any basis and prima facie does not indicate any specific omission and commission. The substantiation report completely fails to justify anywhere the reason for the reporting authority to write such adverse remark. Even though there is absence of any construct in the substantiation of report implicating anything against the petitioner, nevertheless this being an important document having the propensity to make or mar of the future official career of an officer. It is imperative that such documentation should be prepared with utmost care and diligence and in an objective manner.

21. The Apex Curt in plethora of decisions held that the controlling officer/ reporting officer need to show objectivity, impartiality withand fair assessment without any prejudice whatsoever with highest sense of responsibility. In ***State Bank of India V. Kashinath Kher***[2], it was held that the controlling officer should show objectivity, impartiality and fair assessment without any prejudice whatsoever with highest sense of responsibility to inculcate in the officer's devotion to duty, honesty and integrity so as to improve excellence of the individual officer, lest the officers get demoralised which would be deleterious to be efficacy and efficiency of public service. Similarly, in the case ***State of U.P. vs. Yamuna ShankerMisra and Ors***[3], the Supreme Court succinctly held that:

> *"8. It is seen from the record that the respondent maintained constantly good record earlier to the adverse remarks made for the aforesaid period. It would appear that subsequently also he had good confidential reports on the basis of which the clouds over his conduct were cleared and he was given further promotion. Mr. Rakesh Dwivedi, learned Advocate General, in fairness, therefore, has stated that since the respondent has been regularised after the subsequent good reports, the dispute does not survive for adjudication on merits."*

22. Our own High Court in ***Suchismita Misra v. Registrar (Admn.), Orissa High Court, Cuttack***[4] wherein it refers to the case of ***DevDutt v. Union of India and others*** in paras -17, 25 and 26 as follows:

> *"17. In our opinion, every entry in the A.C.R. of a public servant must be communicated to him within a reasonable period, whether it is a poor, fair,*

2. MANU/ SC/0351/1996 , **3**. 2018 (II) OLR 1112**, 4**. AIR 1997 SC 3671

average, good or very good entry. This is because non-communication of such an entry may adversely affect the employee in two ways: (1) had the entry been communicated to him he would know about the assessment of his work and conduct by his superiors, which would enable him to improve his work in future (2) He would have an opportunity of making a representation against the entry if he feels it is unjustified, and pray for its up-gradation. Hence, non communication of an entry is arbitrary, and it has been held by the Constitution Bench decision of this Court in Maneka Gandhi vs. Union of India; MANU/SC/0133/1978: (1978) 1 SCC 248 that arbitrariness violates Article 14 of the Constitution.

25. In the writ petition, it has been prayed to quash the communication of the adverse entry for the years 2010 and 2011 vide Annexure-1 and order of rejection of the representation made by the petitioner and also prayer for upgrading the CCR of petitioner as outstanding for the year 2010 and 2011.

26. In view of the aforesaid observation that the entry in the ACR 2010 and 2011 are liable to be expunged, the Court do so. Accordingly, we hereby direct the intimation vide Annexure-1 that the Character Roll of the petitioner in 2010 and 2011 as 'Poor' is also quashed."

Further, this High Court in ***State of Odisha v. Binod Kumar Das and ors.***[5], has confirmed the decision of the learned Tribunal quashing the impugned adverse remark relying upon ***State of U.P. v. Yamuna Shankar Misra & Anr.***[6] and taking into account the good service of the petitioner throughout his career.

23. In view of the above discussion and guided by the decisions of the Apex court and this High Court, the impugned remark completely lacks basis and prima facie does not indicate any specific omission and commission. The substantiation report completely fails to justify anywhere the reason for the reporting authority to write such adverse remark picking something from the graveyard of whimsicality. Though this court is less empowered to substitute the opinion of the authority or question the subjective satisfaction which is by no means unfettered unless it leads to arbitrariness. In the present case, subjective satisfaction of the reporting officer seems to have dominated to shape the impugned remarks without reference to any specific substantiation. Guided by the submissions and perusal of documents, in the interest of justice, it is directed that the adverse CCR under Annexure-2 is hereby quashed and the Opp. Parties are directed to reconsider the case of the Petitioner for his promotion to the post

5. 1997 (4) SCC 7 & 6. W.P.(C) No. 35666 OF 2020

of Professor ignoring the adverse CCR under Annexure-2 and his case for promotion be considered with all consequential service and financial benefits within a period of two months from today.

24. Accordingly, the Writ Petition is allowed. No order as to costs

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2022 (II) ILR - CUT- 482

MISS. SAVITRI RATHO, J.

CRLREV NO. 984 OF 2009

1. BISWA PRAKASH MAHAPATRA
2. PADMA CHARAN SUBAHU SINGH
3. MANBODH @ MANABODHA BHOI .....Petitioners

.V.

1. STATE OF ORISSA
2. JAYA SHANKAR ACHARY .....Opp. Parties

CODE OF CRIMINAL PROCEDURE, 1973 – Sections 397,401 r/w section 482 – Inherent power of High Court – Whether a non-compoundable offences can be quashed in exercise of Revisional power? – Held, Yes – The High Court while exercising its Revisional or appellate power, may exercise its inherent power – It is trite, both in relation to substantive as also procedural matter – The inherent power can be exercised suo-moto in the interest of justice – If such a power is not conceded, it may even lead to injustice to an accused.

Case Laws Relied on and Referred to :-

1. 2021(2) OLR SCC 807 : Ram Gopal Vs. State of Madhya Pradesh.
2. (2012) 10 SCC 303 : Gian Singh Vs. State of Punjab.
3. (2019) 5 SCC 688 : State of Madhya Pradesh Vs. Laxmi Narayan.
4. (2003) 4 SCC 675 : B.S.Joshi Vs. State of Haryana.
5. (2008) 9 SCC 677 : Nikhil Merchant vs. Central Bureau of Investigation & Anr.
6. (2008) 16 SCC 1 : Manoj Sharma Vs. State and Others.
7. (2012) 10 SCC 303 : Gian Singh Vs. State of Punjab & Anr.
8. (2006) 7 SCC 296 : Popular Muthiah Vs. State Represented By Inspector of Police.
9. (2001) 8 SCC 570 : Dinesh Dutt Joshi Vs. State of Rajasthan & Anr.
10. (2003) 6 SCC 641 : State Through Special Cell, New Delhi Vs. Navjot Sandhu Alias Afshan Guru & Ors.

For Petitioners : Mr. Santosh Ku. Nanda

For Opp. Parties: Mr. Sibani Shankar Pradhan, AGA
Mr. B.S. Rayaguru (For O.P.No.-2)

JUDGMENT Date of Judgment: 29.04.2022

MISS. SAVITRI RATHO, J.

The petitioners namely, Biswa Prakash Mahapatra, Padma Charan Subahu Singh and Manbodh @ Manabodha Bhoi have filed this Criminal Revision petition challenging the order dated 29.06.2009 passedby the learned S.D.J.M., Sonepur in G.R. Case No.34 of 2008 taking cognizance of offences under Sections 406/409/34 of the I.P.C. against the petitioners.

2 The petitioner no.1 was the Managing Director of Orissa Corporation Marketing Federation Ltd., Petitioner No.2 was the Assistant Registrar Cooperative Societies-cum-Management I/c, CARD Bank, Sonepur (Sonepur Cooperative and Rural Development Bank) and Petitioner No.3 was the Secretary of CARD Bank, Sonepur officiating since 01.04.2007 till date. Petitioner No.3 is a Class-III employee of the CARD Bank and Petitioner Nos.1 and 2 are Government Officers. .

3. The allegations in brief as contained in the FIR are that one Jay Shankar Achary of Dherapada, Sonepur who was an employee of CARD Bank and taken voluntary retirement, had filed 1 C.C. Case No. 08 of 2008 against the petitioners before the learned S.D.J.M., Sonepur with allegation to the effect that while the complainant has served the CARD Bank for 30 years and taken voluntary retirement since 31.05.2007, after retirement the complainant has not received his contribution to the Provident Fund (C.P.F.) dues though the same was deducted from his salary when he was in service. He had approached the petitioner no.3, who the present Secretary of the Bank but he avoided to make the payment. He served Advocate Notice on petitioner no.3 but the latter made some false excuses. The learned S.D.J.M., Sonepur under Section 156 (3) of Cr.P.C. sent the complaint case for registration of F.I.R. and Sonepur P.S. Case No. 08 dated 22.02.2008 was registered against the three petitioners, under Section 406/34 of the I.P.C.

During pendency of the investigation, the dues of the complainant were paid on 01.11.2008 for which an application was filed by the complainant - Opp. party No.2 Jay Shankar Achary before the learned

S.D.J.M., Sonepur stating that he does not want to proceed with the case as he has received all his dues. But this prayer was rejected by the learned SDJM holding that the investigation is still in progress and final report was yet to be received, it was a case under Section 406 of I.P.C. which is triable by warrant procedure for which the petition appeared to be premature and not in accordance with law. The petitioners had approached this Court in CRLMC No 2835 of 2008 challenging the said order but the same was withdrawn on 12.02.2009 as investigation was still pending.

Thereafter charge sheet dated 17.06.2009 for commission of offences under Sections 406/409 read with Section 34 of the I.P.C. was submitted and the learned S.D.J.M., Sonepur took cognizance of the offences under Sections 406/409 read with Section 34 of the I.P.C. against the petitioners and issued summons to the petitioners.

4. The learned counsel for the petitioner submits that the order of cognizance has been passed mechanically as the complainant had approached the Court before submission of chargesheet for withdrawing the case as he had received his dues and had filed an application on 01.11.2008 before the learned SDJM (Annexure 4) stating that he did not wish to proceed with the case. His alternate submission is that specific allegations are not available against Petitioners No.1 and 2 and even assuming the allegations to be true , the ingredients of section 406 or 409 IPC are not made out against any of the petitioners. His alternate submission is that even assuming for a moment that no fault can be found with learned S.D.J.M. for taking cognizance of the offences as the offences under Section – 406/409 of the I.P.C. are not compoundable, but in view of the decisions in the case of ***Ram Gopal vs. State of Madhya Pradesh*** reported in ***2021(2) OLR SCC 807*** and ***Gian Singh vs. State of Punjab reported in (2012) 10 SCC 303***, in exercise of its inherent power, this court can quash the order of cognizance and further proceedings, as the complainant - informant has received his dues and does not wish to proceed with the case.

5. Learned counsel for the State does not dispute the position of law regarding scope of inherent power of this Court to quash proceedings involving non-compoundable offences on the ground of settlement but submits that in a revision, proceedings involving non compoundable offences cannot be quashed and that even assuming that the Court can exercise inherent power, it should not quash the proceedings merely because the

complainant does not wish to proceed with the case, but should consider the nature of allegations against the accused - petitioners. He relies on the decision of the Supreme Court in the case of ***State of Madhya Pradesh vs. Laxmi Narayan reported in (2019) 5 SCC 688*** in support of his submissions.

6. Mr B.S. Rayaguru learned counsel appearing on behalf of the Opp. party No.2 (complainant-informant) submits that the dues of Opp Party no 2 have been paid since long and after payment of the same, he had approached the Court of the learned SDJM Sonepur with an application to withdraw the case but the prayer was rejected mainly on the ground that investigation was in progress and that the case involved an offence under Section – 406 of the I.P.C. Without considering his intention of not proceeding with the case, the police has filed chargesheet and the learned SDJM has taken cognizance of the offences.

Learned counsel further submits that since Opp party No 2 has no intentions of proceeding against the petitioners, but he will be unnecessarily summoned to the Court leading to wastage of valuable time and resources of the Court as well as wastage of his own time .

7. The decisions in the case of ***B.S.Joshi vs. State of Haryana reported in (2003) 4 SCC 675***; ***Nikhil Merchant vs. Central Bureau of Investigation and Another*** reported in ***(2008) 9 SCC 677*** and ***Manoj Sharma vs. State and Others*** reported in ***(2008) 16 SCC 1*** were doubted by a two judge Bench in Gian Singh vs. State :(2010) 15 SCC 118 on 23.10.2010 and hence the matter was referred to a larger Bench and the reference was answered by a three judge Bench in ***Gian Singh vs. State of Punjab & Anr.: (2012) 10 SCC 303***. After referring to and discussing a catena of its own decisions as well as of various High Courts, the Supreme Court held that the decisions in **B.S. Joshi** (supra), **Nikhil Merchant** (supra) and ***Manoj Sharma*** (supra) could not be said to be not correctly decided. The relevant portions of the decision are extracted below:

> *…"61. The position that emerges from the above discussion can be summarized thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz.:*

(i) to secure the ends of justice, or

(ii) to prevent abuse of the process of any court.

In what cases power to quash the criminal proceeding or complaint or FIR may be exercised where the offender and the victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have a serious impact on society. Similarly, any compromise between the victim and the offender in relation to the offences under special statutes like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity, etc.; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and predominatingly civil flavour stand on a different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, the High Court may quash the criminal proceedings if in its view, because of the compromise between the offender and the victim, the possibility of conviction is remote and bleak and continuation of the criminal case would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and the wrongdoer and whether to secure the ends of justice, it is appropriate that the criminal case is put to an end and if the answer to the above question(s) is in the affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceedings."

In the case of **Nikhil Merchant** (supra) the Supreme Court had held as follows :

…"28. The basic intention of the accused in this case appears to have been to misrepresent the financial status of the Company, M/s Neemuch Emballage Ltd., Mumbai, in order to avail of the credit facilities to an extent to which the Company was not entitled. In other words, the main intention of the Company

and its officers was to cheat the Bank and induce it to part with additional amounts of credit to which the Company was not otherwise entitled.

29. Despite the ingredients and the factual content of an offence of cheating punishable under Section 420 IPC, the same has been made compoundable under sub-section (2) of Section 320 CrPC with the leave of the court. Of course, forgery has not been included as one of the compoundable offences, but it is in such cases that the principle enunciated in ***B.S. Joshi*** *case becomes relevant.*

30. In the instant case, the disputes between the Company and the Bank have been set at rest on the basis of the compromise arrived at by them whereunder the dues of the Bank have been cleared and the Bank does not appear to have any further claim against the Company. What, however, remains is the fact that certain documents were alleged to have been created by the appellant herein in order to avail of credit facilities beyond the limit to which the Company was entitled. The dispute involved herein has overtones of a civil dispute with certain criminal facets. The question which is required to be answered in this case is whether the power which independently lies with this Court to quash the criminal proceedings pursuant to the compromise arrived at, should at all be exercised?

31. On an overall view of the facts as indicated hereinabove and keeping in mind the decision of this Court in B.S. Joshi case and the compromise arrived at between the Company and the Bank as also Clause 11 of the consent terms filed in the suit filed by the Bank, we are satisfied that this is a fit case where technicality should not be allowed to stand in the way in the quashing of the criminal proceedings, since, in our view, the continuance of the same after the compromise arrived at between the parties would be a futile exercise."…

In the case of ***Ram Gopal*** (supra) compromise had been entered into after conviction of the accused for commission of non compoundable offence like Section-307 IPC and other offences under the I.P.C wherein the Supreme Court inter alia held as follows:

"…18. It is now a well crystalized axiom that the plenary jurisdiction of this Court to impart complete justice under Article 142 cannot ipso facto be limited or restricted by ordinary statutory provisions. It is also noteworthy that even in the absence of an express provision akin to Section 482 Cr.P.C. conferring powers on the Supreme Court to abrogate and set aside criminal proceedings, the jurisdiction exercisable under Article 142 of the Constitution embraces this Court with copious powers to quash criminal proceedings also, so as to secure complete justice. In doing so, due regard must be given to the overarching objective of sentencing in the criminal justice system, which is

grounded on the sublime philosophy of maintenance of peace of the collective and that the rationale of placing an individual behind bars is aimed at his reformation.

19. We thus sum up and hold that as opposed to Section 320 Cr.P.C. where the Court is squarely guided by the compromise between the parties in respect of offences 'compoundable' within the statutory framework, the extra- ordinary power enjoined upon a High Court under Section 482 Cr.P.C. or vested in this Court under Article 142 of the Constitution, can be invoked beyond the metes and bounds of Section 320 Cr.P.C. Nonetheless, we reiterate that such powers of wide amplitude ought to be exercised carefully in the context of quashing criminal proceedings, bearing in mind: (i) Nature and effect of the offence on the conscious of the society; (ii) Seriousness of the injury, if any; (iii) Voluntary nature of compromise between the accused and the victim; & (iv) Conduct of the accused persons, prior to and after the occurrence of the purported offence and/or other relevant considerations.

20. Having appraised the afore stated parameters and weighing upon the peculiar facts and circumstances of the two appeals before us, we are inclined to invoke powers under Article 142 and quash the criminal proceedings and consequently set aside the conviction in both the appeals. We say so for the reasons that:

Firstly, the occurrence(s) involved in these appeals can be categorized as purely personal or having overtones of criminal proceedings of private nature;

Secondly, the nature of injuries incurred, for which the Appellants have been convicted, do not appear to exhibit their mental depravity or commission of an offence of such a serious nature that quashing of which would override public interest;

Thirdly, given the nature of the offence and injuries, it is immaterial that the trial against the Appellants had beenconcluded or their appeal(s) against conviction stand dismissed;

Fourthly, the parties on their own volition, without any coercion or compulsion, willingly and voluntarily have buried their differences and wish to accord a quietus to their dispute(s);

Fifthly, the occurrence(s) in both the cases took place way back in the years 2000 and 1995, respectively. There is nothing on record to evince that either before or after the purported compromise, any untoward incident transpired between the parties;

Sixthly, since the Appellants and the complainant(s) are residents of the same village(s) and/or work in close vicinity, the quashing of criminal proceedings will advance peace, harmony, and fellowship amongst the parties who have decided to forget and forgive any ill will and have no vengeance against each other;and

Seventhly, the cause of administration of criminal justice system would remain uneffected on acceptance of the amicable settlement between the parties and/or resultant acquittal of the Appellants; more so looking at their present age."

In the case of **Laxmi Narayan** (supra) this Court has held as follows:

"13. Considering the law on the point and the other decisions of this Court on the point, referred to hereinabove, it is observed and held as under:

i) that the power conferred under Section 482 of the Code to quash the criminal proceedings for the non-compoundable offences under Section 320 of the Code can be exercised having overwhelmingly and predominantly the civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes and when the parties have resolved the entire dispute amongst themselves;

ii) such power is not to be exercised in those prosecutions which involved heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society;

iii) similarly, such power is not to be exercised for the offences under the special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender;

iv) offences under Section 307 IPC and the Arms Act etc. would fall in the category of heinous and serious offences and therefore are to be treated as crime against the society and not against the individual alone, and therefore, the criminal proceedings for the offence under Section 307 IPC and/or the Arms Act etc. which have a serious impact on the society cannot be quashed in exercise of powers under Section 482 of the Code, on the ground that the parties have resolved their entire dispute amongst themselves. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to framing the charge under

Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. However, such an exercise by the High Court would be permissible only after the evidence is collected after investigation and the charge sheet is filed/charge is framed and/or during the trial. Such exercise is not permissible when the matter is still under investigation. Therefore, the ultimate conclusion in paragraphs 29.6 and 29.7 of the decision of this Court in the case of Narinder Singh (supra) should be read harmoniously and to be read as a whole and in the circumstances stated hereinabove;

v) while exercising the power under Section 482 of the Code to quash the criminal proceedings in respect of non- compoundable offences, which are private in nature and do not have a serious impart on society, on the ground that there is a settlement/compromise between the victim and the offender, the High Court is required to consider the antecedents of the accused; the conduct of the accused, namely, whether the accused was absconding and why he was absconding, how he had managed with the complainant to enter into a compromise etc.

14. Insofar as the present case is concerned, the High Court has quashed the criminal proceedings for the offences under Sections 307 and 34 IPC mechanically and even when the investigation was under progress. Somehow, the accused managed to enter into a compromise with the complainant and sought quashing of the FIR on the basis of a settlement. The allegations are serious in nature. He used the fire arm also in commission of the offence. Therefore, the gravity of the offence and the conduct of the accused is not at all considered by the High Court and solely on the basis of a settlement between the accused and the complainant, the High Court has mechanically quashed the FIR, in exercise of power under Section 482 of the Code, which is not sustainable in the eyes of law. The High Court has also failed to note the antecedents of the accused."..

In the present case the complainant-informant, has made specific allegations against Petitioner no.3 only. The matter has been settled between the parties since long. Merely because the offences are not compoundable under Section 320 of the Cr.P.C, this is a fit case where technicality should not be allowed to stand in the way in the quashing of the criminal proceedings as the continuance of the same after the compromise arrived at between the parties would be a futile exercise (as decided in the case of **Nikhil Merchant** (supra)). That apart this case will not come under the category of cases which the Supreme Court took exception to in the case of **Laxmi Narayan** (supra). Therefore in my opinion, this is a fit case for

exercising inherent power under Section –482 of the Cr.P.C to quash the proceedings.

8. Now to deal with the objection of the learned counsel for the State pertaining to quashing of a non compoundable offence in exercise of revisional power.

Faced with a similar situation, the Supreme Court in the case of ***Popular Muthiah vs. State Represented By Inspector of Police reported in (2006) 7 SCC 296*** while framing the following amongst many questions :

> …. *"ii) Whether only because of the fact that the appellate power of the High Court in terms of Sections 374(2), 386 and 391 does not contain any specific power to direct further investigation, the High Court lacked jurisdiction from seeking recourse to its inherent and supervisory powers under Sections 482 and 483 of the Code of Criminal Procedure in a case of this nature?*

has set the matter to rest . After referring to its earlier decisions in the cases of ***Dinesh Dutt Joshi vs. State of Rajasthan and Another, [(2001) 8 SCC 570 , State Through Special Cell, New Delhi vs. Navjot Sandhu Alias Afshan Guru and Others : (2003) 6 SCC 641 and other*** decisions , has held as follows :

> *…."The High Court while, thus, exercising its revisional or appellate power, may exercise its inherent powers. Inherent power of the High Court can be exercised, it is trite, both in relation to substantive as also procedural matters.*
>
> *In respect of the incidental or supplemental power, evidently, the High Court can exercise its inherent jurisdiction irrespective of the nature of the proceedings. It is not trammeled by procedural restrictions in that*
>
> *(i) power can be exercised suo motu in the interest of justice. If such a power is not conceded, it may even lead to injustice to an accused.*
>
> *(ii) Such a power can be exercised concurrently with the appellate or revisional jurisdiction and no formal application is required to be filed therefor.*
>
> *(iii) It is, however, beyond any doubt that the power under Section 482 of the Code of Criminal Procedure is not unlimited. It can inter alia be exercised where the Code is silent where the power of the court is not treated as exhaustive, or there is a specific provision in the Code; or the statute does not fall within the purview of the Code because it involves application of*

a special law. It acts ex debito justitiae. It can, thus, do real and substantial justice for which alone it exists"……

…."So far as inherent power of the High Court is concerned, indisputably the same is required to be exercised sparingly. The High Court may or may not in a given situation, particularly having regard to lapse of time, exercise its discretionary jurisdiction. For the said purpose, it was not only required to apply its mind to the materials on records but was also required to consider as to whether any purpose would be served thereby."…..

In the case of **Dinesh Dutt Joshi** (supra) , the Supreme Court has held as follows :

…"The principle embodied in the section is based upon the maxim: ***quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsae esse non potest*** *i.e. when the law gives anything to anyone, it gives also all those things without which the thing itself would be unavailable. The section does not confer any new power, but only declares that the High Court possesses inherent powers for the purposes specified in the section. As lacunae are sometimes found in procedural law, the section has been embodied to cover such lacunae wherever they are discovered. The use of extraordinary powers conferred upon the High Court under this section are however required to be reserved, as far as possible, for extraordinary cases."……*

… "The decisions of this Court emphasised the fact that there exists a distinction between two classes of cases, viz., (i) where application of Section 482 is specifically excluded and (ii) where there is no specific provision but limitation of the power which is sought to be exercised has specifically been stated."

The Supreme Court in the case **Navjot Sandhu Alias Afshan Guru** (supra), has held as follows :

…."Section 482 of the Criminal Procedure Code starts with the words "Nothing in this Code". Thus the inherent jurisdiction of the High Court under Section 482 of the Criminal Procedure Code can be exercised even when there is a bar under Section 397 or some other provisions of the Criminal Procedure Code. However as is set out in ***Satya Narayan Sharma*** *case this power cannot be exercised if there is a statutory bar in some other enactment. If the order assailed is purely of an interlocutory character, which could be corrected in exercise of revisional powers or appellate powers the High Court must refuse to exercise its inherent power. The inherent power is to be used only in cases where there is an abuse of the process of the court or where interference*

is absolutely necessary for securing the ends of justice. The inherent power must be exercised very sparingly as cases which require interference would be few and far between. The most common case where inherent jurisdiction is generally exercised is where criminal proceedings are required to be quashed because they are initiated illegally, vexatiously or without jurisdiction. Most of the cases set out hereinabove fall in this category. It must be remembered that the inherent power is not to be resorted to if there is a specific provision in the Code or any other enactment for redress of the grievance of the aggrieved party. This power should not be exercised against an express bar of law engrafted in any other provision of the Criminal Procedure Code. This power cannot be exercised as against an express bar in some other enactment."

The present revision application has been filed under section 397 Cr.P.C, 401 Cr.P.C read with Section – 482 Cr.P.C. It is pending since the year 2009 and the further proceedings have been stayed since then. About thirteen years have elapsed in the meanwhile. When the complainant – informant has filed an application in the Court of the learned S.D.J.M. stating that he does not want to proceed with the case as all his dues have been paid and reiterated the same thing before this Court , the chances of conviction of the accused-petitioners in the trial will be bleak. Therefore, refusing to exercise inherent power under Section-482 Cr.P.C for quashing the proceedings in these circumstances especially when the Supreme Court has in a number of decisions quashed similar proceedings before commencement of trial and even after conviction, would in my opinion amount to a travesty of justice and wastage of valuable resources and time of the Court. I consider this to be a fit case for exercise of inherent power under Section – 482 of the Cr.P.C to quash the impugned order dated 29.06.2009 passed by the learned S.D.J.M., Sonepur in G.R. Case No.34 of 2008, taking cognizance of the offences under Sections 406/409/34 of the I.P.C. against the petitioners.

9. In view of the aforesaid discussion and the decisions of the Supreme Court referred to above, the impugned order dated 29.06.2009 passed by the learned S.D.J.M., Sonepur in G.R. Case No.34 of 2008 , taking cognizance of the offences under Sections 406/409/34 of the I.P.C. against the petitioners is quashed in exercise of power under Section 482 Cr.P.C .

10. The Criminal Revision is accordingly allowed.

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2022 (II) ILR - CUT- 494

MRUGANKA SEKHAR SAHOO, J.

W.P.(C) NO. 6479 OF 2015

SHIVADATTA TRIPATHY …….Petitioner

.V.

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

SERVICE LAW – The claim of the petitioner to treat him as recruitee/appointee for the year 2011 and to accord all consequential service benefits – The petitioner applied for the post of Sikshya Sahayak pursuant to an advertisement on dated 23.01.2011 – His candidature was rejected – But later on as per the order of the Hon'ble Court petitioner engaged as "Sikshya Sahayak" – Whether the claim, retrospective continuation of petitioner service is sustainable? – Held, No. – As the petitioner was borne in the cadre of on 23.08.2013 i.e. after his joining in the service, any claim prior to that is not sustainable.

(Para-19)

Case Laws Relied on and Referred to :-

1. 2021 SCC OnLine SC 821 : State of Bihar & Ors. Vs. Arbind Jee.
2. (2020) 5 SCC 689 : K. Meghachandra Singh & Ors. Vs. Ningam Siro & Ors.
3. (1998) 4 SCC 456 : Jagdish Ch. Patnaik Vs. State of Orissa.

For Petitioner : Mr. Sidhartha Swain

For Opp. Parties: Mr. Sangram Jena, Standing Counsel

JUDGMENT Date of Hearing : 06.04.2022 :Date of Judgment: 06.05.2022

MRUGANKA SEKHAR SAHOO, J.

The writ petition has been filed by the petitioner, who is serving as Sikshya Sahayak in Banamalipur Government M.E. School, challenging the order dated 13.02.2015 (Annexure-8) passed by the Collector-cum-Chief Executive Officer, Zilla Parishad, Nayagarh-opposite party no.3, whereby, the Collector has heard the petitioner in person (pursuant to the earlier order passed by this Court in W.P.(C) No.9355 of 2014) and has rejected the claim of the petitioner to treat him as recruitee/appointee for the year 2011 and to accord him all consequential service benefits.

2.1. The brief background of the case is that on 23.01.2011, the opposite party no.3- Collector-cum-Chief Executive Officer, Zilla Parishad, Nayagarh issued advertisement for appointment of Sikshya Sahayak on contract basis in

Upper Primary (U.P.)/Up-graded M.E. Schools in the district of Nayagarh. The petitioner applied for the post of Sikshya Sahayak under Nayagarh under the Trained Graduate Arts category. His candidature was rejected on the ground that Sikhya Sastri qualification of Rastriya Sanskrit Sansthan is not equivalent to B.Ed certificate.

2.2. The case of the petitioner is that the petitioner possesses a "Sikshya Sastri" Degree: from Rastriya Sanskrit Sansthan, New Delhi, which is a recognized Institution, however in the final select list his name was excluded on account of his degree not being B.Ed degree. The petitioner contends that the Sikshya Sastri Degree of Rastriya Sanskrit Sansthan is equivalent to the corresponding B.Ed Degree of Utkal University.

2.3. Thereafter, the petitioner raised his grievance regarding to the non-selection, before the opposite party no.4-District Project Co-ordinator, Sarva Shikshya Abhiyan, Nayagarh and apprised him that "Sikshya Sastri" is equivalent to the Utkal University B.Ed. Course. The petitioner further asserted that his name found place in the list of trained candidates for the post of Trained Graduate Teacher (Arts), at Sl. No.196.

3. The petitioner then filed W.P.(C) NO.8051 of 2011, challenging the decision of the authority in not selecting him, with a prayer to quash the notification of selection dated 05.02.2011, issued by the School and Mass Education Department.

4. This Court by its order dated 25.08.2011 was pleased to dispose of the aforesaid writ petition along with W.P.(C) No.10325 of 2011 with the following observations :

> *"The respondents are directed to consider the appointment of the petitioners along with other applicants having acquired necessary qualification of B.A., B.Ed within a period of four weeks from the date of the order."*

5. Subsequently, the petitioner filed CONTC No.2605 of 2011, alleging non-compliance of the order dated 25.08.2011 and the said petition was disposed of on 29.03.2012 with an undertaking by the learned Standing Counsel for the School and Mass Education Department to comply the Court's order and for such compliance, the time was extended till the end of April, 2012.

6. Subsequently, some other contempt petitions were filed by the petitioner and ultimately by order dated 17.08.2013, Collector-cum-Chief Executive Officer, Zilla Parishad, Nayagarh-opposite party no.3 issued engagement order dated 17.08.2013 engaging the petitioner as "Sikshya Sahayak" in Barpalli "A" primary school under Khandapada Block. Pursuant to the said appointment order the petitioner joined on 23.08.2013.

7. Afterwards, the petitioner started claiming his engagement with effect from 2011 on the ground that the advertisement was made in 2011, filed another writ petition, i.e., W.P.(C) No.9355 of 2014, the said writ petition was disposed of by order dated 18.08.2014 directing the authority to consider the case of the petitioner and the petitioner's case was rejected by the opposite party no.3-Collector-cum-Chief Executive Officer, Zilla Parishad, Nayagarh by office order dated 13.02.2015 which has been impugned in the present writ petition.

8. A counter affidavit has been filed on behalf of the opposite party nos.3 and 4, sworn to by the in-charge District Project Co-ordinator, Sarba Sikhsya Abhijan (SSA), Nayagarh, on behalf of opposite party no.3-Collector-cum-Chief Executive Officer, Zilla Parishad, Nayagarh.

At paragraph-6 of the counter affidavit, it has been specifically averred that there was a notification of School and Mass Education Department No.2618/SME dated 05.02.2011 to the effect that the Rastriya Sikshya Sansthan Deemed University has not been recognized. It has been further stated on behalf of opposite party nos.3 and 4 that after the order dated 25.08.2011 in the earlier writ petition, i.e., W.P.(C) No.8051 of 2011, the authority considered the cases of Sikshya Sashtri applicants whose candidature was earlier rejected and the District Selection Committee found that only three posts of B.A., B.Ed, category were left vacant, all the three vacancies were filled-up. Several persons including the petitioner could not be accommodated due to lack of vacancies from the Recruitment year 2011.

9. At paragraph-9 of the counter affidavit, it has been further stated on behalf of opposite party nos.3 and 4 that pursuant to the subsequent advertisement for "Sikshay Sahayak" by the Government, School and Mass Education Department, in the year 2012 (January), the present petitioner applied in the B.Ed category, was selected as Sikshay Sahayak and his name found place at serial no.10 of the merit list. Pursuant to his selection, the

petitioner did not join. It is further asserted, the petitioner was available to respond to the authorities as he was working as Block Resource Teacher (Child with Special Need) under the administrative control of opposite party no.4. The petitioner's continuance as Block Resource Teacher is supported by Annexure C/4 to the counter affidavit that is the absentee statement.

10. However, as the events have unfolded, after filing of CONTC No.1734 of 2012, during the pendency of contempt proceeding alleging non-compliance of this Court's order dated 29.03.2012 in CONTC No.2605 of 2011 and order dated 25.08.2011 in W.P.(C) No.8051 of 2011 and W.P.(C) No.10325 of 2011, the petitioner was issued the order of engagement on contractual basis, viz, order no.1998 dated 17.08.2013.

11. The petitioner has filed a rejoinder affidavit sworn to on 23.06.2016 and filed on 23.06.2016. In the said rejoinder, the petitioner has not disputed the fact that there was no vacancy for the year 2011 recruitment year as contended in the counter affidavit on behalf of opposite party nos.3 and 4.

A co-ordinate Bench of this Court by earlier order dated 27.01.2020 had directed as follows :

> *"Both the counsel are directed to satisfy the Court on the next occasion that if the petitioner joined in the post without any protest, whether the benefit can be admissible to him from the year 2011 or from the date of his joining, i.e., in the year 2013.*
>
> *List after two weeks.*

Further by order dated 12.02.2020, it was directed by this Court as quoted hereunder :

> *"…… Mr. B. Satpathy, learned Standing Counsel for School and Mass Education Department contended that for the period from 2011 to till the date of engagement, the petitioner is not entitled to get any benefit because the petitioner was engaged somewhere for the said period. To that extent also, learned counsel for the petitioner wants to file affidavit.*
>
> *On the request of learned counsel for the petitioner, list after two weeks. After be filed in the meantime."*

12. On perusal of the entire records, it is found that the petitioner has filed an affidavit dated 28.02.2020 pursuant to the order by this Court dated

12. On perusal of the entire records, it is found that the petitioner has filed an affidavit dated 28.02.2020 pursuant to the order by this Court dated 12.02.2020. In the said affidavit, particularly at paragraph-5, the petitioner has stated that "he is in no manner responsible for delay in engagement, the petitioner is entitled to get the service benefits from the year 2011". Nothing else has been stated regarding the specific query made by this Court vide order dated 12.02.2020.

In reply to the said affidavit of the petitioner dated 28.02.2020 an additional affidavit has been filed by opposite party no.4 dated 28.02. 2020, wherefrom Paragraphs-5 & 7 are quoted hereunder :

> *"5. That it is respectfully submitted that since the petitioner was employed as Block Resource Teacher in Bhapur Block under SSA, Nayagarh from August 2012 to July,2013 on monthly salary @ 7335/- as admitted at para-6 of the affidavit dated 28.2.2020, his continuance from 2011 as Sikshya Sahayak is not permissible under law as one cannot be allowed to continue in two separate post at the same time.*
>
> *7. That since the petitioner joined on 23.08.2013 executing agreement on 20.08.2013 without protest and he was employed from August,2012 to July,2013 as Block Resource Teacher in Bhapur Block, his claim to treat him as appointee of the year 2011 with continuity of service from the year 2011 does not have merit consideration and as such the writ petition filed by the petitioner is liable to be dismissed."*

13. From the aforesaid, it is apparent that the petitioner was gainfully employed from August, 2012 to July,2013 on monthly salary @ 7335/- as a Block Resource Teacher in Bhapur Block under SSA, Nayagarh. In view of such uncontroverted facts, the claim of the petitioner to get the service benefits in his subsequent engagement on contract as Sikshya Sahayak vide engagement order no.1998/SS dated 17.08.2013 is untenable for a period when he was concededly engaged as Block Resource Teacher.

14. Further, for continuance of the petitioner in his engagement from August, 2012-2013, the petitioner has received his salary and, therefore, seeking further service benefits for the selfsame period is misconceived.

15. Learned counsel for the petitioner has relied on the decision rendered by a co-ordinate Bench of this Court dated 11.07.2011 in ***Basanta Kumar***

Rout vs. State of others, in W.P.(C) No.12228 of 2011 along with two other writ petitions.

In ***Basanta Kumar Rout*** (supra), this Court was considering the contention as raised in those writ petitions, i.e., the prayer of the petitioner to get engaged as Sikshya Sahayak after their candidature was rejected on the ground that non-resident person of the Block was not entitled to apply for engagement as Swechhasevi Sikhya Sahayak in that particular Block.

After disposal of the writ petition, W.P.(C) No.14133 of 2006 (Chandramani Jena & others v. State of Orissa & others) and W.P.(C) No.14981 of 2006 in order dated 23.08.2007, directing the petitioner therein to be given appointment; Basanta Kumar Rout and others, had approached this Court praying for similar relief. In the batch of writ petitions where Basanta Kumar Rout and others were the petitioners, this Hon'ble Court granted similar relief.

In considered opinion of this Court the facts of the case in Basanta Kumar Rout being different, inasmuch as Basanta Ku. Rout did not claim inclusion of any earlier period of service to get the benefit rather he challenged the decision of the authority not to give him appointment.

16. Learned Counsel for the State has relied on decisions of the Hon'ble Supreme Court dated 28.09.2021 ***Civil Appeal No.3767 of 2010, the State of Bihar and others v. Arbind Jee : 2021 SCC OnLine SC 821 and K. Meghachandra Singh and others v. Ningam Siro and others: (2020) 5 SCC 689.***

17. In ***K. Meghachandra Singh and others*** (supra) at paragraph-28, referring to the earlier decisions rendered by the Hon'ble Supreme Court in ***Jagdish Ch. Patnaik v. State of Orissa : (1998) 4 SCC 456***, the Hon'ble Court, following the decision in Jagdish Ch. Patnaik (supra) reiterated :

> *"28. … … The Court observed that there could be time-lag between the year when the vacancy accrues and the year when the final recruitment is made. Referring to the word "recruited" occurring in the Orisss Service of Engineers Rules,1941 the Supreme Court held in Jagdish Ch. Patnaik (supra) that person cannot be said to have been recruited to the service only on the basis of initiation of process of recruitment but he is borne in the post only when, formal appointment order is issued."* *[Emphasis supplied]*

18. It is submitted by Mr. Jena, learned Standing Counsel for the School and Mass Education Department that applying the said principle, the petitioner in the present writ petition cannot claim the benefits prior to his date of joining, i.e., dated 23.08.2013, joining without any protest after executing the agreement dated 23.08.2013.

Mr. Jena, learned Standing Counsel further highlights the fact that the petitioner prior to 23.08.2013, was employed under the Block Authority, Bhapur, as a Block Resource Teacher from August, 2012 to July, 2013.

19. Applying the principle as laid down in ***K. Meghachandra Singh and others (supra)*** to the present case, it has to be held that the petitioner was borne in the cadre of Sikhya Sahayak only after he joined on 23.08.2013, by executing the agreement with the authority and cannot claim for any service benefit prior to that.

20. In ***State of Bihar and others v. Arbind Jee*** (supra), the Hon'ble Apex Court considered the issue, "whether the respondent is entitled to claim seniority in service from a retrospective date i.e., 20.11.1985, as was ordered by the High Court or whether he is entitled for seniority from the date he entered service".

Following the earlier decisions rendered by the Hon'ble Supreme Court, the Hon'ble Court set aside the order passed by the High Court in granting retrospective seniority to the respondent.

It would also be apt to note that the respondent in the said case, Arbind Jee, who got appointment as per the directions of the Hon'ble Supreme Court, never raised any claim relating to his appointment to an earlier date before the Hon'ble Supreme Court and also post appointment, had never raised any grievance within reasonable time for fixing his date of appointment, earlier to the date he entered the service on 10.02.1996.

21. To draw an analogy, in the present case, the petitioner was working in a different post as "Block Resource Teacher" under Bhapur Block prior to he joined as "Sikshya Sahayak" on 23.08.2013 and never had claimed in his earlier writ petition to treat him as a "Sikshya Sahayak" appointee of the year 2011, without continuing in service from 2011.

22. In view of the aforesaid discussions, the writ petition is dismissed being devoid of any merit. All the interim orders passed earlier stand vacated. However, there shall be no order as to costs.

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2022 (II) ILR - CUT- 501

SASHIKANTA MISHRA, J.

CRLREV NO. 651 OF 2004

BHABANI SHANKAR CHOUDHURY ……..Petitioner

.V.

STATE OF ODISHA ……..Opp. Party

CRIMINAL TRIAL – Application under 397,401 of Cr.P.C – Framing of charges for the offence under section 408 of IPC – Requirements of – Held, the Court at the stage of framing of charges is not required to delve deep into the material on record to ascertain their probative value – All that is required at this stage is to see if the materials on record are sufficient for the court to presume that the alleged offences was committed by the accused – This court finds no reason to interfere with the order. (Para-12)

For Petitioner : M/s. S.K. Mund, D.P. Das, J.K.Panda, P.K. Ray & S. Panigrahi

For Opp. Party : Mr. S.K. Mishra, Addl. Standing Counsel

JUDGMENT Date of Judgment: 20.06.2022

SASHIKANTA MISHRA, J.

The petitioner in the present revision is an accused in GR case No. 330 of 1995 of the Court of learned Chief Judicial Magistrate, Sundargarh charged for the offence under section 408 of IPC. The said case corresponds to Hemgir P.S. Case No. 32 of 1995. In the present revision, he has challenged the order dated 01.09.2004 passed by learned trial court in framing charge under section 408 of IPC against him.

2. The prosecution case, in brief, is that a complaint was lodged before the Hemgir Police Station by one Manoranjan Sahu, BDO of Hemgir Block alleging that the petitioner, who was the president of Large-sized Multipurpose Cooperative Society (LAMPCS) of Gopalpur, misappropriated

Government money to the tune of ₹2 lakhs meant for IRDP beneficiaries along with one Khyama Sagar Singh, the Ex-Managing Director of the said Society. Investigation was thereafter conducted into the allegations and upon completion of the same, charge-sheet was submitted against the petitioner and the said Khyama Sagar Singh under Section 408 of IPC. The Court below after examining the allegations and the materials placed by the prosecution including statement of the witnesses examined by the investigating officer, held that there is ground for presuming that the accused persons have committed the offence under section 408 of IPC and accordingly framed charge under the aforementioned Section against them.

Questioning the correctness of the order framing charge as aforesaid, the petitioner has approached this Court in the present revision.

3. Heard Sri H.K. Mund, learned counsel for the petitioner and Sri S.K. Mishra, learned Additional Standing Counsel for the State.

4. Sri Mund has made a two-fold argument: Firstly, being an elected president of the society the petitioner is neither a clerk nor a servant and therefore, Section 408 of IPC is not attracted; and Secondly, entrustment of property/money being the most essential ingredient of the offence under section 408, the same not having been proved, prime facie, framing of charge by learned Court below is not legally tenable.

5. Sri Mishra, on the other hand contends that being elected as the President of the Society does not mean that the Society does not exercise any control over the petitioner, rather he remains responsible to the society. Therefore, there is a fiduciary relationship between the petitioner and the society for which, he must be treated as a servant of the Society. As regards proof of entrustment, it is contended that several witnesses examined by the I.O. have clearly and unequivocally stated about the role played by the petitioner along with the other accused in misappropriating Government money. Therefore, according to Sri Mishra, learned Court below has rightly framed charge under section 408 of IPC against the petitioner.

6. As regards the question of framing charge, it is trite law that at that stage the Court has to form a presumptive opinion regarding commission of the offence but is not expected to delve deep into the evidence to see whether adequate materials exist to return a finding of guilt against the accused. In

other words, all that the Court is required to do at the stage of framing charge is to sift through the evidence and materials placed by the prosecution and to form a prima facie opinion as to whether the same suggest commission of the alleged offence by the accused or not.

7. Coming to the case at hand, as already stated, it is contended that the basic ingredients necessary to constitute the offence under section 408 of IPC are absent. According to Sri Mund, the petitioner was elected as President of Gopalpur LAMPCS. As such, he was required to preside over the meetings and was responsible for policy decisions for smooth management of the institution. Therefore, he is neither a clerk nor a servant of the society.

8. For better appreciation of this contention, it would be proper to examine the relevant provision of law as quoted hereunder:

> ***408. Criminal breach of trust by clerk or servant****. —Whoever, being a clerk or servant or employed as a clerk or servant, and being in any manner entrusted in such capacity with property, or with any dominion over property, commits criminal breach of trust in respect of that property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.*

Thus, it is clear that in order to constitute the offence under section 408, the following need to be proved:

i) the accused was a clerk or servant of the person reposing trust which, in the instant case would be the society (LAMPCS);

ii) in such capacity the accused was entrusted with property or had dominion over it; and

iii) the accused dishonestly misappropriated such property or converted the same to his own use, etc.

Now the question is, whether the accused petitioner being elected as the President of the Society can be treated as a clerk or servant. As submitted by Sri Mund, in course of hearing, the petitioner was one of the elected members of the Cooperative Society which forms the Board of the Society. The Board is presided over by the President. The Managing Director is the Chief Executive Officer of the Society and sues and can be sued on its behalf. The role of the President is confined to presiding over meetings of the Board which takes policy decisions and therefore, the President has nothing to do with the day-to-day functioning of the Society's affairs.

9. The words 'clerk' and 'servant' have not been defined in the Indian Penal Code. Therefore, they have to be assigned their ordinary dictionary meanings. The Advanced Learner's Dictionary, 9th Edition, refers to 'Clerk' as a person whose job is to keep the records or accounts in an office, shop/store etc. 'Servant' is referred to as a person who works in another person's house, and cooks, cleans, etc. for them; a person who works for a company or an organization. As per Black's Law Dictionary, 7th Edition, 'Clerk' means a public official whose duties include keeping records and accounts; the court officer responsible for filing papers, issuing process, and keeping records of court proceedings as generally specified by rule or a statute or an employee who performs general office work. As per the said dictionary, a 'Servant' means a person who is employed by another to do work under the control and directions of the employer.

10. Thus, it is seen that the term 'servant' has a broader connotation than the word 'clerk'. In other words, a clerk is a person who is engaged to do a specific work by the employer but a servant is a person who can be assigned with any work by the employer but both are under the control of the employer. If the argument of Sri Mund is accepted it would imply that the elected President, or for that matter the other members of the Society operate beyond its purview, which would obviously be a preposterous proposition. Whether elected or not the President and other members of the board remain individually and collectively responsible to the Society and therefore they cannot, in law, do anything contrary to the Society's interest. To the above extent therefore, even the President would have to be treated as a 'servant' of the Society within the meaning of Section 408 of IPC. The contention raised by Sri Mund cannot, therefore, be accepted.

11. The next point urged by Sri Mund is that even assuming that the petitioner can be treated as a clerk or servant of the society, fact remains that in the absence of clear proof of entrustment of the allegedly misappropriated amount, the charge under section 408 of IPC cannot be framed. A perusal of the FIR and the statement of the beneficiaries/witnesses examined by the Investigating Officer would reveal that the petitioner is alleged to have collaborated with the Managing Director of the Society to obtain their signatures on blank papers showing payment of government money to them but actually misappropriated the same. In fact, the FIR also reveals that a part of the misappropriated money meant for the IRDP beneficiaries was deposited in the account of the petitioner at Cooperative Bank, Hemgir. This

is enough to presume that the petitioner had control over the money in question or at least power to deal with it. Thus, it can be said that he had dominion over the money in question. This would therefore, be a case where government money was transferred to the society for being disbursed to the concerned beneficiaries under the IRDP scheme. The fact that the petitioner and the other accused dealt with the money as alleged is sufficient to hold that the same was deemed to have been entrusted by the society to them and/or they had dominion over it. The argument of Sri Mund in this regard is, therefore, untenable.

12. Having dealt with the preliminary contentions raised by Sri Mund, this Court also deems it proper to examine the materials on record to see if the Court below was justified in framing charge under section 408 of IPC. As already stated, the petitioner was operating in the capacity of a servant of the Society and government money was deemed to have been entrusted to him in such capacity. The FIR allegations are prima facie supported by the statements of the beneficiaries, who were examined by the IO. Most of the said beneficiaries have stated in their Section 161 Cr.P.C. statements that the President and Managing Director obtained their signatures on blank papers and misappropriated the subsidy received from the PD, DRDA. As already stated hereinbefore, the Court at the stage of framing charge is not required to delve deep into the materials on record to ascertain their probative value. All that is required at this stage is to see if the materials on record are sufficient for the Court to presume that the alleged offence was committed by the accused. In view of the above discussion, this Court is left with no doubt that there are sufficient materials to form a presumptive opinion regarding commission of the alleged offence by the petitioner and therefore, the Court below must be held to have rightly framed charge against the accused petitioner under Section 408 of IPC.

Of course, this does not mean that the right of the accused to raise the contentions also during trial basing on the evidence adduced is foreclosed by this order.

13. For the foregoing reasons therefore, this Court finds no justified reason to interfere with the impugned order. The criminal revision is therefore dismissed. Since the original case is of the year 1995, learned Court below is directed to try and dispose of the same as expeditiously as possible, preferably within a period of eight months from today.

2022 (II) ILR - CUT-506

A.K. MOHAPATRA , J.

CRLREV NO. 375 OF 2021

NISSAN SHALOM CHILDREN HOME (SAA) ……..Petitioner

.V.

xxx xxxx xxxx ……..Opp. Parties

JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015 – Sections 38, 57, 58 & 59 r/w Regulation 12 (2) and 17(1)of the Adoption Regulation – Inter-country Adoption/ Transnational Adoption – Adoption from registered institution – Destitute child declared free for Adoption U/s. 38 of the Act. – CARA also issued no objection – Permission sought from the District Court U/s. 58 (3) of the Act. – But the District Court denied permission on the ground of non-availability of the pre-adoption foster care – Order of the District Court challenged in the present revision petition – Held, considering the materials available on record, this Court is convinced that the legal requirements having been complied with and since the CARA has already issued No Objection Certificate, the adoption should have been allowed by the learned District Judge – Hence the impugned judgment passed by the learned District Judge is here by set-aside. (Para 17,18&19)

For Petitioner : Mr. Dwarika Prasad Mohanty, P.K. Swain, M. Pal and R. Mohanty

For Opp. Parties : Mr. Aswini Kumar Mohanty, Mr. K.K. Nayak, Addl. Standing Counsel

JUDGMENT Date of Hearing 25.03.2022: Date of Judgment: 22.04.2022

A.K. MOHAPATRA , J.

1. The present revision is directed against the impugned order dated 17.02.2021 passed by the District Judge, Gajapati at Paralakhemundi passed in Adoption Misc. Case No.03 of 2020 under Annexure-1 rejecting the adoption of minor female child, namely, xxxx xxxx, who is presently under the care and custody of the petitioner's institution NISSAN Shalom Children Home (Specialized Adoption Agency (SAA)), located at Biswanath Nagar, Paralakhemundi in the district of Ganjam.

2. Bereft of unnecessary details, the factual backdrop of the present case, is that the petitioner's institution is a registered and recognized agency

working in the field of Child and Social Welfare in the district of Gajapati wherein destitute and relinquished children are rehabilitated. The minor female child, namely, xxxx xxxx, whose adoption is the subject matter of adjudication in the present revision petition, is presently under the care and custody of the petitioner's institution. The female child in question sought to be adopted as an abandoned/orphan child aged about 10 years as she was born on 11.09.2011. Further she was declared legally free for adoption by the district Child Welfare Committee, Gajapati under Section 38 of the Juvenile Justice Act. It is also stated that no guardian has yet been appointed for the said child and therefore, permission of the Court is sought for in her adoption under Section 58(3) of the Juvenile Justice (Care and Protection of Children) Act, 2015 (in short 'the JJ Act, 2015').

3. The Opposite Party No.1, namely, Miss Maria Teresa Sanchez Anguita, who is a single parent and a citizen of Spain at present working as Administrative Assistant in the Legal Consultancy at Universodad de Castilla La Mancha UCLM Calle Altagracia, Coidad Real Spain expressed her intention to adopt the female child named hereinabove. The Opposite Party No.1, who desires to adopt a child, accordingly approached the agency concerned, after meeting the female child in question. She developed a weakness for the child and decided to adopt the child in question. Accordingly, she has submitted her application after completion of all legal formalities under J.J. Act, 2015. The Prospective Adoptive Parent (PAP) (Opposite Party No.1) was also found eligible and suitable to adopt the child by Foreign Care Agency, namely, '***NINOS SIN FRONTERAS'***(translated into English '***CHILDREN WITHOUT FRONTIERS'***). It is further stated in the petition that the Opposite Party submitted her home study report prepared as per the law. The foreign adoption agency involved in the process has also been approved by the appropriate Central Authority under the Juvenile Justice Act.

4. It is apt to mention here that the Opposite Party No.1 was also found eligible by the Central Adoption Resources Authority (CARA) as per provisions contained under Section 57 of the Juvenile Justice Act and Regulation 5 of the Adoption Regulation. After completion of the legal formalities, CARA has also issued 'No Objection Certificate' in favour of the proposed adoption as per Regulation 58 of the Adoption Regulation. All other necessary undertaking having been submitted by the Opposite Party for the post-adoption follow ups like the ascertainment of the progress

and well being of the child in the adoptive family as has been stipulated under Section 59(11) of the J.J. Act, 2015, the Specialized Agency i.e. the present petitioner submitted a petition before the District Judge, Gajapati at Parlakhemundi under Section 59(7) of the Juvenile Justice Act read with Regulation 12(2) and 17(1) of the Adoption Regulation.

5. The petition which was filed before the District Judge, Gajapati seeking permission for transnational adoption was made under Section 59(7) of the J.J. Act read with the relevant provision of the adoption regulation. The petitioner as well as Opposite Party No.1 submitted all relevant documents in support of their claim to adopt the child in question. Learned District Judge, Gajapati after taking evidence and after hearing the parties, by order dated 17.02.2021 has rejected the petition filed by the petitioner and thereby refused to grant permission for transnational adoption of minor child in question.

6. It is relevant to mention here that prior to filing of the criminal revision, the petitioner had filed CRP No.06 of 2021 disposed of by order dated 20.09.2021, this Court granted liberty to withdraw the same and to re-file an appropriate petition, which is the present criminal revision petition.

7. Heard Mr. D.P. Mohanty, leaned counsel for the petitioner and Mr. K.K. Nayak, learned Additional Standing Counsel for the State and Mr. Aswini Kumar Mohanty, learned counsel appearing for the Opposite Parties. Perused the records from LCR, which was called for by this Court by order dated 25.02.2022.

8. Mr. Mohanty, learned counsel for the petitioner submits that the impugned order dated 17.02.2021 passed in Adoption Misc. Case No.03 of 2020 contains nothing but an emotional outburst on the part of the learned District Judge, Gajapati by taking a cue from the provision under Section 61(1)(a) of the J.J. Act. It is further submitted by Mr. Mohanty, learned counsel for the petitioner that while rejecting the proposed adoption, the learned District Judge, Gajapati was really concerned about the welfare of all the children likely to be given in adoption. He further submits that while considering the aforesaid adoption Misc. Case, learned District Judge, Gajapati has lost sight of the provisions of the Act as well as regulation which specifically deal with the safety and future of the child likely to be given in adoption. He, therefore, submits that no amount of emotion can take

the place of the legal provision. Further leaned counsel for the petitioner submits that learned District Judge, Gajapati unnecessarily and mistakenly questioning the legislative competence of the law makers, by losing sight of the relevant provisions of the statute has passed the impugned order.

9. Mr. Mohanty, learned counsel for the petitioner further submits that the learned District Judge, Gajapati has failed to realize that he had to conduct the proceeding in accordance with the provisions contained in the J.J. Act, 2015 and the relevant rules framed there under and he is not bound by the procedure as laid down in the Civil Procedure Code, 1908 and the Indian Evidence Act, 1872. He further submits that the procedure that should have been followed by the District Judge, Gajapati has been laid down in the J.J. Act, 2015 as well as Adoption Regulations. He further draws the attention of this Court to Section 103 of the Juvenile Justice Act to impress upon this Court that the said special statute provides that the appeal or revision against the order passed under the J.J. Act, 2015, the procedure laid down in the Criminal Procedure Code, 1973 has to be followed. He further contends that the learned District Jude, Gajapati has committed gross error of law while coming to the conclusion that as a Civil Court it can draw authority from Section 9 of the Civil Procedure Code to protect Constitutional right / civil right of a child. In such view of the matter, the learned counsel for the petitioner made an attempt to convince this Court that the entire approach of the learned District Judge, Gajapati in the present matter was erroneous and misleading. It is further contended by learned counsel for the petitioner that learned District Judge, Gajapati has repeatedly hammered in his judgment on the issue of conspicuous absence of a procedure for pre-adoption foster care of a child in a case of Inter – Country adoption under Section 59 of the J.J. Act, 2015. So far the Intra – Country adoptions are concerned, the same are governed by the provision which is extracted herein below:-

xxx xxx xxx xxx

> "(3) On the receipt of the acceptance of the child from the prospective adoptive parents along with the child study report and medical report of the child signed by such parents, the Specialised Adoption Agency shall give the child in pre-adoption foster care and file an application in the court for obtaining the adoption order, in the manner as provided in the adoption regulations framed by the Authority."

The above quoted provision has been enacted in the statue by the law makers for the purpose of creating a bondage of attachment between the child in question and the proposed adoptive parents (PAP) and further the test of

adaptability of the child to the changed circumstances, atmosphere and surroundings in a new family, before a child is given in adoption to the prospective adoptive parents.

10. So far as the question of giving a child in pre-adoption foster care in a case of transnational adoption is concerned, learned counsel for the petitioner draws attention of this court to the provisions contained under Section 59 of the J.J. Act, 2015.

The relevant portion i.e. Section 59(7) needs to be examined by this Court has been quoted herein below.

> '59. Procedure for inter-country adoption of an orphan or abandoned or surrendered child-
>
> xxx xxx xxx xxx
>
> (7) On receipt of the acceptance of the child from the prospective adoptive parents, the Specialised Adoption Agency shall file an application in the court for obtaining the adoption order, in the manner as provided in the adoption regulations framed by the Authority.
>
> xxx xxx xxx xxx

From the above quoted provision, it can be seen that in a case of intra-country adoption, in fact, there is no provision for pre-adoption foster care of the child by the (PAP), as is available in the case of Intra-country adoption guided by the aforesaid provision. Learned District Judge, Gajapati had focused almost his entire attention to the fact of non-availability of the pre-adoption foster care in a case of transnational adoption and as such, learned court below has expressed its concern with regard to the safety, well being and future of the child in question.

11. It is further submitted by learned counsel for the petitioner that under Section 59(7) of the J.J. Act, the Specialize Adoption Agency is required to file an application in the court for obtaining adoption order, and it further provides that ***"as provided in the adoption regulations framed by the authorities."***

Further it is brought to the notice of this Court that corresponding to the provisions of Section 59(7) of the J.J. Act.2015, Adoption Regulation, 2017 Chapter-IV provides the detailed procedure to be followed in the

case of Inter- Country adoption by the non-resident Indian, Overseas Citizens of India and Foreign Prospective Adoptive Parents. Further under Rule-16 of the Adoption Regulation, 2017 under Chapter-IV clearly provides pre-adoption foster care even in case of foreign prospective adoptive parents.

Rule 16(2) of the adoption regulation, 2017 which is relevant in the in the present context is extracted herein below:-

> *"16. No Objection Certificate of Authority and pre-adoption foster care.-*
>
> *(2) The prospective adoptive parents may take the child in pre-adoption foster care for a temporary period within India after issuance of No Objection Certificate by the Authority while the court order is pending, by furnishing an undertaking to the Specialised Adoption Agency in the format at Schedule VIII."*

12. Referring to Rule 16(2) of the Adoption Regulation, 2017, learned counsel for the petitioner further contends that the said provision for adoption in the case of inter-country or transnational adoption is identical to the provisions contained in Section 55(3) of the J.J. Act, 2015 which is applicable to cases of intra-country adoption of children.

13. On a bare reading of the two provisions, this court found that the provision contained under Section 58(3) of the J.J. Act,2015 has been made mandatory by use of the word 'shall' by law makers. Whereas, it is not so in the case of inter-country / transnational adoptions governed under Chapter-IV, Rule 16(2) of the adoption regulation wherein the word 'may' has been used by the law makers making it directory. Therefore, in a case of inter-country / transnational adoption, the court is required to follow the procedure of pre-adoption foster care of the child likely to be given in adoption. Therefore, this Court is of the considered view that the conclusion of the learned District Judge, Gajapati to the effect that there is no provision pre-adoption foster care of child in a case of inter-country / transnational adoption is baseless and incorrect. Further, learned District Judge, Gajapati while rejecting the application for adoption has heavily relied upon the fact that there is specific provision in the statute for pre-adoption foster care of the child likely to be given in adoption in the case of inter- country and transnational adoption is completely fallacious and as such, inconsistent in law. Further such a conclusion by the learned District Judge, Gajapati has vitiated the entire order passed by him rejecting the proposed adoption.

14. While considering the social surrounding and atmosphere of the child likely to be given in adoption, who admittedly belong to the Tribal community, learned District Judge, Gajapati in paragraph-8 of the impugned judgment has come to the conclusion that even in a case of legal requirement are applied to the PAPs and SAA, the child in question being an innocent Tribal child should be allowed to stay in a Tribal society and where in he/she was brought up so far. While giving such observation, the learned District Judge, Gajapati has lost sight of the fact that the child in question is an abandoned one and after she was rescued from the Tribal society she has been handed over to the SAA where she has been looked after. Therefore, the aforesaid reasons given by the learned court below makes no sense and as such, this Court is unable to persuade itself to accept such reasons given by the learned court below.

15. In the impugned rejection order, the learned District Judge, Gajapati has referred to the law laid down in several judgments of the Hon'ble Supreme Court of India as well as this Court. The law laid down by the judgments referred to by the learned District Judge, Gajapati, are well accepted and undisputed. The petitioner does not even question the validity and applicability of such judgments to the facts of the present case. While considering the aforesaid judgments, the learned court below has lost sight of an important development in the law relating to adoption, care and protection of children in India. The Juvenile Justice (Care and Protection of the Child) Act, 2015 is a complete Code by itself. Further the Adoption Regulations, 2017 under the J.J. Act, 2015 specifically deals with the cases of adoption. It cannot be interpreted to say that much of apprehension expressed prior to 2015 by the Hon'ble Supreme Court as well as High Courts have been taken note of by the law makers and adequate safe guards have been provided under the amended J.J. Act of the year 2015. It is needless to state here that the amended J.J. Act, 2015 takes care of the safety, protection and well being of children in our country. Therefore, the apprehension expressed by the learned District Judge, Gajapati appears to be unfounded.

So far as the State of Odisha is concerned, the State Government in exercise of power conferred under Section 110(1) of the J.J. Act, 2015 has framed a set of rules, which is known as Juvenile Justice (Care and Protection) Rule, 2018. The said rules were notified by the State Government vide a Gazette notification. Chapter-VII of the rules provides for the procedure to be

adopted in the child adoption issues. The rules so framed provide personal safety measures in case of adoption of orphan obtained or surrendered child. It is relevant to note the provisions (33) of the rules.

> *"33 Procedure for Enquiry (1) the Committee was enquired into the circumstances under which the child was protest and accordingly declares while to need care and protection.*
>
> *29. The committee after making enquiry as per provisions of the Act was issued an order in Form-25 declaring abandoned child legally free for adoption and the same was sent for information to the authority."*

Learned District Judge, Gajapati as it appears has completely lost sight of the aforesaid provisions of the Rules. A competent authority on enquiry gives a certificate that the child is legally free for adoption and in such eventuality it is no more open to the authority to comment upon the genuineness and correctness of such a decision.

16. So far as the law relating to inter-country/transnational adoption in India is concerned, this Court had an occasion to scan the provisions of law, rules and regulations for adoption in a case of transnational adoption i.e. in the matter of ***Subhadra Mahatab Seva Sadan, Khurda vrs. XXXX (Criminal Revision No.94 of 2022 decided on 15.03.2022)*** and finally allowed the application for adoption. After analyzing the legal provisions in the above mentioned case, this court has finally come to a conclusion that the under the amended provisions of law for adoption, the responsibility of court has been reduced to some extent with introduction of various safety measures/mechanism in the statute itself. Further authorities have created to do the background check of the proposed adoption cases.

17. In the above referred case, while considering an identical issue of transnational /intra-country adoption after the child was declared legally free from adoption and the CARA had granted NOC and there was no legal impediment in permitting adoption by the PAP, this Court had allowed the adoption of the child by the PAPs in the said case. This Court in the above noted judgment /order in the case of ***Subhadra Mahatab Seva Sadan, Khurda*** (supra) has specifically held that the order of the learned district judge refusing to grant permission was unsustainable in law as the same was contrary to the law declared in the Hague Convention,1993 which was signed and ratified by the member Nations and also in view of the provisions contained in JJ. Act, 2015.

18. Further considering the materials available on record, this Court is convinced that the legal requirements having been complied with and since the CARA has already issued No Objection Certificate, the adoption should have been allowed by the learned District Judge, Gajapati to provide poor helpless and abandoned child in question a better future fill with love and care of family and parents.

19. Resultantly, this Court is of the considered view that while considering the issue of adoption, the learned District Judge, Gajapati has completely misdirected himself and being driven by emotions and apprehensions has lost sight of relevant provisions of act as well as rules and as such the impugned judgment passed in adoption Misc. Case No.3 of 2020 dated 17.02.2021 is liable to be set aside and the same is hereby set aside. Accordingly, the revision petition is allowed and the Opposite Party No.1 PAP is hereby granted permission to adopt the minor female child in question by following the relevant laws and regulations. Further the Opposite Party No.1 is directed to submit monthly report with regard to status and well being of the minor child to the Embassy of India in Spain till such time as would be ordered by the Indian Embassy in Spain. Further it is open to the Officers in the Indian Embassy in Spain to visit the residence of the PAP with prior notice and in the event such a notice is given by the Indian Embassy to the Opposite Party No.1 PAP, she shall make necessary arrangements for the visit of the Indian Embassy Officer in Spain to her residence where the child in question resides with her adoptive family.

20. With the aforesaid directions, the revision petition is allowed. However, there shall be no order as to cost.

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2022 (II) ILR - CUT- 514

A.K. MOHAPATRA , J.

WPC(OAC) NO. 696 OF 2018

KANHU CHARAN JENA ……..Petitioner

.V.

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

WPC(OAC) No. 697 of 2018

LAXMIDHAR BEHERA ……..Petitioner

.V.

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

WPC(OAC) NO.698 OF 2018

BIJAY KUMAR NAYAK .....Petitioner

.V.

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

WPC(OAC) NO.699 OF 2018

UJJAL KUMAR BEHERA .....Petitioner

.V.

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

SERVICE LAW – Petitioner appointed as resource teacher pursuant to IEDC scheme – The IEDC scheme was come to an end on 31.03.2009, accordingly the service of resource teacher also came to an end – Subsequently the petitioner was appointed as elementary teacher w.e.f 18.08.2010 – Whether the service rendered by the petitioner as resource teacher would be counted for the purpose of seniority, promotion, pension and fixation of pay? – Held, Yes. (Para-25)

Case Laws Relied on and Referred to :-

1. Civil Appeal No.1499 of 1998 : State of Odisha & Ors. Vs. Dipti Paul.
2. (2002) 10 SCC 656 : Dhyan Singh & Ors. Vs. Stae of Hariyana.

For Petitioners : Mr. Laxmikanta Mohanty

For Opp. Parties : Mr. R.C. Pattanaik, Standing Counsel for the School and Mass Education Department

ORDER Date of Hearing 09.03.2022: Date of Order: 22.04.2022

A.K. MOHAPATRA , J.

1. This matter is taken up through Hybrid Arrangement (Virtual/Physical Mode).

The above noted four applications involved a similar issue and have been filed with identical prayers. Therefore, all the four mattes are taken up together for final hearing and for the sake of brevity the facts involved in the WPC(OAC) No.696 of 2018 is being discussed by this Court here in below for analysis of the factual background of the four cases.

2. Heard Mr. Laxmikanta Mohanty, learned counsel for the petitioner and Mr. R.C. Pattanaik, learned Standing Counsel for the School and Mass Education Department.

3. The above noted four applications were initially filed before the Odisha Administrative Tribunal and upon abolition of the Odisha Administrative Tribunal, the matters have been transferred to this Court along with many other pending matters.

4. The above noted Original Applications have been filed by the petitioners with a prayer to direct the Opposite Parties to take into account the period of service rendered by the petitioners as resource teachers for the purpose of counting seniority, promotion, pension and fixation of their pay. It has also been prayed by the petitioners for a direction to the Opposite Parties to fix the pay of the petitioners after giving them benefit of pay protection which they would have got as per the ORSP Rules, 2006 and that a further direction be given to the Opposite Parties to consider and treat the case of the petitioners under the provisions of Orissa Civil Services (Pension) Rules, 1992 as it stood prior to its amendment in the year 2005.

5. The factual backdrop of the case, as culled out from the pleadings of the parties, is that the Government of India under the National Education Policy formulated and floated a scheme, which is known as Scheme of Integrated Education for the Disabled Children (in short 'IEDC'). The said scheme was also adopted by the State of Odisha and pursuant to the scheme stapes were taken to recruit the Teachers in accordance with the scheme. Accordingly, the Director, State Council for Education Research and Training, Odisha, Bhubaneswar-Opposite Party No.2 placed requisition with the employment exchange to sponsor the names of the eligible candidates to be recruited as Resource Teachers.

6. Pursuant to the aforesaid advertisement, the employment exchange sponsored the name of the present petitioners, who was I.A.(C.T.) candidate. The petitioners were called to appear before the selection board and after scrutinizing their candidature, who had applied for recruitment to the post of resource teachers, the Selection Board selected the petitioners for the said posts. Thereafter, the Opposite Party No.2 issued appointment letters dated 22.02.1997, appointing the petitioner under the aforesaid IEDC Scheme in the regular scale of pay of Rs.1080-1800/- (trained scale) with usual D.A. as admissible under the Rules from time to time. The petitioners were also asked to attend the orientation programme at their cost and full time training in Special Education when required by the Director. In support of

their contentions, the petitioners have filed extract of their respective Service Books.

7. After their appointments and joining, the petitioners were not allowed to subscribe to the G.P.F. and they were not allowed to contribute to the G.I.S. The petitioners were only extended the benefit of revised pay under the ORSP Rules, 1998. The petitioners were allowed and they were continuing as a regular Government Servant and they were also being extended all the benefits and facilities, which are payable to Government servant.

8. While the petitioners were discharging their duties to the satisfaction of the authorities, the above noted scheme was modified by the Central Government in the year 2001. Under the modified scheme although nomenclature of the scheme remained the same with slight modification and variation, however, the broad guidelines remained the same. Therefore, the petitioners were allowed to continue as such without any variation in the terms of appointment.

9. It is apt to mention here that the State Government also formulated a scheme which is known as State Policy for persons with disability and the said scheme provides as follows:-

> "The State shall endeavour to provide opportunities for early childhood and pre-school education for children with disabilities.
>
> The State shall ensure provisions of required number of trained teachers, therapists, supporting staff, teaching learning materials and assistive devices in special schools for the children with disabilities.
>
> Special curriculum shall be devised for children in each category of disability in consultation with specialized institutions and experts with the objective of reducing the physical and academic burden on children and to make learning a joyful.
>
> State Government shall provide scholarship to the students with disabilities from primary level to University level, vocational/technical training besides conveyance allowance to locomotor handicapped students and readers allowance to visually handicapped students."

10. On 21.10.2008, the Government of India in the Ministry of Human Resources Development communicated to the Commissioner-cum-

Secretary to Government, School and Mass Education Department, Orissa, Bhubaneswar-Opposite Party No.1 highlighting the fact that the new scheme of Inclusive Education for Disabled at Secondary Stage (IEDCS) has been approved by the Government of India for implementation from the current financial year. It was further clarified that the new scheme was to be replaced in place of the existing scheme i.e. IEDC. The new scheme was prepared to take within its fold the children after completion of eight years of elementary schooling and to pursue further studies at the secondary stage (Class-IX to XII). Thus, the scheme was designed to cover all children passing out of elementary school and studying at the secondary stage in Government/local body/Government aided schools and that persons with one or more disabilities have been continued under the provisions of the Persons with Disability (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.

11. Further in the aforesaid letter dated 21.010.2008 in paragraph-6 it has been clearly indicated that the Government of India has requested the State Governments to take necessary steps and also to make necessary provisions in the State Budget to implement the scheme by making adequate financial provisions from out of the State own funds. The letter dated 21.10.2008 was forwarded by Opposite Party Nos.1 and 2 for taking all necessary follow up actions.

12. Pursuant to letter dated 21.10.2008 and 29.12.2008, the Opposite Party No.2 issued office order dated 16.03.2009 stating therein that the existing scheme i.e. IEDC would continue upto 31.03.2009. It was also indicated that the service of the Resource Teachers will come to an end on 31.03.2009. In view of the condition in the appointment letter, accordingly list of teachers was also prepared and published vide an office order, whose services are likely to be terminated which includes the name of the petitioners also.

13. It is submitted by learned counsel for the petitioners that the letter dated 21.10.2008 and letter dated 29.12.2008 nowhere indicates that the existing scheme i.e. IEDC is going to be closed. On the contrary, the existing scheme was being replaced by a new and better scheme for imparting education to the disabled children. He further submits that under the new scheme, the scope and area of operation has been expanded and the same has been extended to the secondary stage of education for the disabled

children. Therefore, the main thrust of the argument of the learned counsel for the petitioners was that the scheme was completely misinterpreted by the Opposite Parties with a *malafide* intention. He further submits that his contention also gets corroboration from the fact that on 30.03.2009, the Government of India sanctioned a sum of Rs.84,38,395/- in favour of the School and Mass Education department, Government of Odisha. Further, expenditure has been incurred for imparting Integrated Education to the Disabled Children in the State.

14. Learned counsel for the petitioners made an attempt to draw a distinction between the integrated and inclusive education and as such, he submits that the State Government more particularly Opposite Party No.2 has also lost sight of such facts. It was submitted by him that inclusive education is different from integrated education. Under Integrated education, students with disability were placed in a school without making any change in school, to accommodate and support the diverse needs of the disabled children. Further such children are taken care of by developing a system and structure in such a manner that the same will meet the specific needs of all learners.

15. Learned counsel for the petitioner further submits that a proposal was routed by the Respondent No.2 in response to letter dated 12.05.2009 of the Government of India for assessing the suitability/unsuitability of the teachers and attendants who were appointed under the IEDC Scheme for their appointment/adjustment in the new scheme i.e. IEDCS. He further contends that the Director of Secondary Education carrying out the aforesaid exercise and prepared a list of suitable candidates which includes the name of the petitioner for appointment as a teacher under the new scheme. Although the proposal was sent to Opposite Party No.2, no steps were taken by Opposite Party No.1 to finalize the list of suitable candidates and as such, the appointment of the petitioner could not take place and that he was not absorbed/adjusted under the new scheme.

16. The Government of Odisha in School and Mass Education Department issued a resolution dated 10.11.2021 inter alia providing that vacant posts as well as newly created posts for the elementary schools shall be filled up by the candidates having the requisite qualification. Pursuant to the said resolution although the petitioner had the requisite qualification, they were never given appointment on regular basis as decided by the

Government under the aforesaid resolution. It is further stated that pursuant to letter dated 21.05.2010 of Opposite Party No.1 followed by letter dated 07.07.2010 of Opposite Party No.2, the Opposite Party No.3 issued office order on 18.08.2010 by allotting the petitioner to the District Inspector of Schools for absorption in the Elementary Cadre for Level-V posts in Government Primary Schools against an existing vacancy in the scale of Pay of Rs.5200-20200+GP 2200 with other admissible benefits.

Pursuant to the letter dated 18.08.2010 by Opposite Party No.3, the petitioner was issued with an appointment letter by the opposite parties whereunder the petitioner was appointed as elementary teacher in Level-V posts against the existing vacancy in Sharaddhapur Nodal U.P. School, Jaleswer and accordingly, the petitioner joined on 19.08.2010.

17. It is further contended by learned counsel for the petitioner that the petitioner was recruited in a regular manner against the vacant sanctioned posts and he was extended with all the benefits as is due and admissible to a regular Government servant. However, the aforesaid appointment of the petitioner by the Government was never carried out in letter and spirit. On the contrary, the petitioner was allowed to perform his duties in lieu of a fixed remuneration, which was much less than the regular pay scale attached to the sanctioned posts which they were holding. It is further alleged that while the petitioner was working as the Resource Teacher under IEDC Scheme, the petitioner has not been paid his admitted salary for the period November, 2002 to March, 2009. Although several representations were made, the authorities did not pay any heed to such representations. It is further alleged that similarly placed persons, who were appointed prior to the petitioner have been adjusted against elementary cadre in the year 1995 without terminating their services and further they have also got benefit of continuity in service and pay protection. They were also extended the benefit of GPF. It is further alleged that although the petitioner stands on similar footing, they have not been extended such benefit of service and other benefits including the pensionary benefits. It is further stated that although the petitioner was subsequently appointed in the regular elementary cadre and he has been discharging duties similar to that of a primary school teacher i.e. teaching disabled children in the primary section along with normal students, they have been grossly discriminated and as such, the petitioner and similarly placed other resource teachers have not been extended the benefits as has been given to the such primary school teachers.

18. The Director, Elementary Education, Odisha-Opposite Party No.3 has filed a counter affidavit in this case wherein it has been admitted that the petitioner was appointed as an Assistant Teacher under the scale of pay of Rs.5200-20200-with GP-2200 with usual DA as admissible. It is further stated that the petitioner was engaged as resource teacher under the Central Sponsored scheme for disabled children and that after closure of the scheme, the petitioner along with similarly situated other persons were absorbed in the Elementary Cadre Teacher in Level-V posts. In the counter affidavit, the Director, Elementary Education, Odisha has categorically denied that the petitioners are not entitled to the benefit of counting their service period as resource teacher while considering their seniority and other financial benefits. It is further stated that the engagement of the petitioner as resource teacher was conditional and that after closure of scheme on 31.03.2009, the service of the petitioner and similarly placed other persons were terminated and thereafter on humanitarian ground, the petitioner and other similarly placed persons were absorbed as primary school teachers afresh.

19. In the counter affidavit, it is further stated that as per Rule-56 of the Orissa Service Code a Government servant begins to draw the pay and allowances to his post w.e.f. the date of which he/she assumes the duties and further as per the provision in Orissa Service Code, the petitioner is entitled to draw the initial salary from the date he actually joined as regular primary school teacher. Further referring to the judgment of the Hon'ble Supreme Court in the case of ***State of Odisha and others vrs. Dipti Paul*** in Civil Appeal No.1499 of 1998 dated 11.08.1999, it was submitted that a person employed under a specific scheme had no right to claim any regularization of his service only because he has completed 240 or more days of work. Similarly reliance was also placed on a judgment of the Hon'ble Supreme Court in the case of ***Dhyan Singh and others vrs. Stae of Hariyana*** ; reported in (2002) 10 SCC 656 to emphasize no service period shall be considered for regularization/seniority.

20. Further referring to Rule-15(explanation-1) of the Elementary Cadre Rules 1997 (Amended Rules 2014), it was contended that all persons working as regular Assistant Teachers of Government Primary and Upper Primary Schools shall be treated as Level-V from the date of commencement of the said Rules. The seniority of such persons shall be determined with reference to the date of their appointment as such. Therefore, it was argued by the learned counsel for the School and Mass Education Department on one

fact that retrenched Resource Teacher were reappointed against the regular teachers on the date he/she has joined as such. Thereby much emphasis was led by learned Standing Counsel for the School and Mass Education Department that the period of service under the Scheme cannot be counted towards seniority for Level-V service under the Orissa Elementary Education (Method of Recruitment and Conditions of Services of the Teachers and Officers) Rules 1997. In such view of the matter, learned Standing Counsel for the School and Mass Education Department justifies the action of the Government in denying the benefit of counting service of the petitioner and similarly placed persons rendered under IEDC Scheme for the purpose of considering the seniority/promotion/pension etc. and for pay protection.

21. Learned counsel for the petitioner relying upon the rejoinder affidavit submits that the petitioner was appointed against a Regular Vacant post of primary school teacher with regular scale of pay. It is further submitted that the resource teachers were appointed by the Opposite Party No.2 on being sponsored by State Employment Exchange, Odisha. In such view of the matter, it was further stated that the petitioner and similarly placed other persons cannot be treated in a discriminatory manner and further they should have been extended similar benefits as has been given to the persons, who were regularized in service in the year, 1995. It is further submitted in the rejoinder affidavit that after regular appointment w.e.f. 19.08.2010, the service book of the petitioner was opened indicating his entry in Government service w.e.f. 22.02.1997. Therefore, it is submitted by learned counsel for the petitioner that once the Government has accepted the petitioner is initially entry into Government service w.e.f. 22.02.1997, later on Government is estopped to turn around and take stand that the period from 22.02.1997 up to 19.08.2010 shall not be taken into consideration for considering the seniority/promotion/pay protection, pension of the petitioner. In other words, once the service book has been opened indicating the entry of the petitioner in Government service w.e.f. 22.02.1997, it is no more open to the Government to take a stand that the petitioners were continuing under the Scheme from 22.02.1997 to 31.03.2009 under the scheme.

22. It is further stated in the rejoinder affidavit that persons similarly placed as resource teachers like the petitioner and whose services were terminated along with the petitioner, had approached the Odisha Administrative Tribunal by filing O.A. No.53(C) of 2016 and a batch of

cases. The Odisha Administrative Tribunal after hearing the parties, allowed the cases by its order dated 04.01.2018 with a clear direction to count the entire period of service from the date of initial appoint for the purpose of grant of secondary service benefits like seniority/promotion/pension and fixation of pay under ORSP Rules, 2008 within a period of three months from the date of the order. Order dated 04.01.2018 passed by the Odisha Administrative Tribunal in O.A. No.53(C) of 2016 and batch of cases, were challenged by the Opposite Parties before this Court in W.P.(C) No.4826 of 2019. This Court after hearing the parties dismissed the writ application vide order dated 03.12.2019 thereby confirming the order dated 04.01.2018 passed by the Odisha Administrative Tribunal in O.A. No.53(C) of 2016.

23. It is further contended by learned counsel for the petitioner that the order dated 04.01.2018 passed in O.A. No.53(C) of 2016, which was confirmed by this Court by order dated 03.12.2019 passed in W.P.(C) No.4826 of 2019 was further challenged before the Hon'ble Supreme Court of India by the State of Odisha, which was registered as SLP(Diary) No.218 of 2021. The said SLP(Diary) No.218 of 2021 was taken up for admission by the Hon'ble Apex Court and by order dated 01.03.2021 SLP preferred by the State of Odisha has been dismissed by the Hon'ble Supreme Court of India thereby confirming the order dated 04.01.2018 passed by the Odisha Administrative Tribunal in O.A. No.53(C) of 2016.

24. It is further submitted that O.A. No.3214 (C) of 2011 was also filed by the persons similarly placed with the petitioner before the Tribunal, which was also allowed by the Odisha Administrative Tribunal. Thereafter the same was challenged before this Court by filing W.P.(C) No.3254 of 2017 and batch of other writ applications. This Court after hearing the parties dismissed all the writ application. The order passed in W.P.(C) No.3254 of 2017 was carried in appeal before the Hon'ble Supreme Court at the instance of the State of Odisha by filing SLP. The said SLP which was filed by the State of Odisha before the Hon'ble Supreme Court was also dismissed. Thereafter, the Opposite Party No.1 vide order dated 19.12.2019 directed the Director, Elementary Education, Odisha to comply with the said orders by granting benefits as directed through all the District Education Officer and Block Education Officer of the concerned district.

25. Having heard the rival contentions advanced by the respective parties, taking into consideration the factual background of the present case and the fact that the order passed in the matter of similarly place teachers by the Odisha Administrative Tribunal, which was confirmed by this Court as well as by the Hon'ble Supreme Court, this Court is of the considered view that it is no more open to this Court to take a different view than the view that was taken by the Odisha Administrative Tribuhal in its order dated 04.01.2018 while disposing of the O.A. No.35(C) of 2016 and a batch of other matters which were not only confirmed by this Court but eventually affirmed by the Hon'ble Supreme Court of India by dismissing the SLP filed by the State of Odisha. In such view of the matter, this Court hereby allows the above noted writ petitions and directs the Opposite Parties to count the period of service of the petitioner as well as other similarly placed persons from the date of their initial appointment as resource teachers and to extend the consequential benefits like seniority/promotion/pension and fixation of pay under ORSP Rules, 2008 as due and admissible. Further it is directed that since the petitioners in above noted writ petitions were appointed prior to the OCS Pension Rules, 2005 came into force, they are also eligible to cover under OCS Pension Rules, 1992, and they are entitled to benefits thereunder. Further the Opposite parties are directed to carry out the entire exercise as directed hereinabove within a period of three months from the date of production of certified copy of this order.

26. With the aforesaid observation/direction, these writ petitions stands disposed of. However, there shall no order as to cost.

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2022 (II) ILR - CUT- 524

A.K. MOHAPATRA, J.

W.P.(C) NO. 4779 OF 2022

KANTARO KONDAGARI @ KAJOL .....Petitioner

.V.

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

ODISHA CIVIL SERVICE (PENSION RULE), 1992 – Rule 56 (5)(d) – Read with section 6 of the transgender persons (Protections of Rights)

Act, 2019 and Rule 5 of the 2020 Rules – Whether transgender (women) is eligible to receive the family pension as per Rule 56 (5) (d) as an unmarried daughter – Held, Yes – The petitioner as a transgender has every right to choose her gender and accordingly she got the certificate as per the Rule 6 of 2000 Rule and submitted her application for grant of family pension under 56(1) of 1962 Rule – Further such right has been recognized and legalized by the judgment of the Hon'ble apex Court in NALSA Vs. Union of India, and as such, the law laid down by the Hon'ble Supreme Court is binding on all – Therefore the present writ petition is here by allowed.

Case Law Relied on and Referred to :-

1. (2014) 5 SCC 438 : NALSA Vs. Union of India.

For Petitioner : Mr. Omkar Devdas, S. Dash, A. Suhail and P. Ray
For Opp. Parties : Mr. K.K. Nayak, Addl. Standing Counsel

JUDGMENT Date of Hearing 13.05.2022: Date of Judgment: 20.05.2022

A.K. MOHAPATRA , J.

1. This matter is taken up through Hybrid Arrangement (Virtual /Physical Mode).

2. Heard Mr. Omkar Devdas learned counsel for the petitioner as well as Mr. K.K.Nayak learned counsel for the State. Perused the records.

3. The present writ petition has been filed by the petitioner with a prayer for a direction to the opposite parties to sanction family pension in favour of the petitioner, who is a transgender (women) and unmarried daughter of late Balaji Kondagari within a stipulated period of time.

4. The gist of the petitioner's case, in brief, is that father of the petitioner late Balaji Kondagari was a Government servant working in Rural Development Department under Executive Engineer RW Division, Rayagada. After the death of late Balaji Kondagari, his wife Smt. Binjama Kondagari was sanctioned and disbursed with the family pension. On 11.07.2020, Smt. Binjama Kondagari expired due to old age related health issues. Thereafter the present petitioner applied for family pension under Rule 56 of the Odisha Civil Services (Pension) Rules,1992 for sanction of family pension in her favour to the Executive Engineer RW

Division, Rayagada. It is further stated that the present petitioner and her sister come under the category of unmarried daughter, widow or divorced daughter and as such eligible to get family pension.

5. So far Rule 56(1) Odisha Civil Services (Pension) Rules, 1992 is concerned, the same provides for pension to specific class of family members of deceased Government employee entering into Government service and was holding a post in a pensionable establishment on or before 01.01.1964 and family pension to specific class of family members of the deceased Government servant, who was a Government servant and retired / died on or before 31.12.1963. Further the Pension Rules, 1992 under Rule 56(5)(d) provides that family pension is also payable in case of any unmarried daughter even after attaining the age of 25 years till her marriage or death whichever is earlier subject to condition that the monthly income of the daughter does not exceed Rs.4,440/- per month from employment in Government, semi Government, statutory bodies, corporation, private sector, self- employment shall be eligible to receive family pension.

6. On perusal of the pleadings in the writ petition, it was also found that the Rural Development Department/Executive Engineer, RW Division, Rayagada vide letter No.2855 dated 29.06.2021 written to the Principal Accountant General (A&E), Odisha, Bhubaneswar after scrutinizing the application of the present petitioner found her eligible to receive family pension and accordingly recommended the case of the petitioner for sanction of family pension amounting to Rs.8,995+TI per month in favour of the petitioner. The said letter further reveals that the family pension shall be payable to the petitioner w.e.f. 12.07.2020 and shall be subject to the provisions of Rule 56(5) of the Odisha Civil Services (Pension) Rules, 1992 and further it was stipulated that the petitioner shall get family pension till her marriage or death whichever is earlier. On further careful scrutiny of the letter under reference it is found that the authority has recommended the case knowing fully well that the petitioner is a transgender (daughter).

7. It is also contended by leaned counsel for the petitioner that the authorities have not considered the application of the petitioner for grant of family pension although the Rule 56 of Orissa Civil Services (Pension) Rules, 1992 which provides for payment of family pension to the unmarried daughter. It is also submitted by learned counsel for the petitioner that since

the petitioner belongs to transgender community, the authorities are treating the petitioner in a discriminatory manner and not sanctioning the family pension as is due and admissible to her after the death of her parents. He further submits that such conduct of the authorities are in gross violation of the pension rules as provided under rule 56(5)(d) which states that in case of an unmarried daughter even after attaining the age of 25 years till her marriage or death whichever is earlier subject to condition that the monthly income of the daughter does not exceed four thousand four hundred and forty per months from the employment in Government, Semi Government, statutory bodies, corporation, private sector, self-employment shall be eligible to receive family pension.

8. It is further contended by leaned counsel for the petitioner that the petitioner is a transgender (Women) and vide certificate dated 02.12.2021 issued by the District Magistrate under Rule 5 of the Transgender Persons (Protection of Rights) Rules, 2020 and read with Section 6 of the Transgender Persons (Protection of Rights) Act, 2019 has been given legal recognition as being a transgender (women). The authorities have ealt the case of the petitioner in a discriminatory manner and they have failed to apply the provisions of law as provided under the aforesaid Rules, 2020.

9. In course of argument, learned counsel for the petitioner relies upon the judgment of the Supreme Court of India in the case of ***NALSA vrs. Union of India*** **: reported in (2014) 5 SCC 438** wherein the Hon'ble Supreme Court of India has recognized the right of the transgender community as citizens of the country at par with other citizens. It is alleged by learned counsel for the petitioner that the petitioner has been treated in a way which is in violation of Articles 14 and 21 of the Constitution of India.

10. In the judgment of the Hon'ble Supreme Court in **NALSA vrs. Union of India** (supra), has observed that Article 1 of the Universal Declaration of human rights, 1948, states that all human being are born free and equal in dignity and rights. Article 3 of the Universal Declaration of Human Rights states that everyone has a right to life, liberty and security of person. Article 6 of the International Covenant on Civil and Political Rights, 1966 affirms that every human being has the inherent right to life, which right shall be protected by law and no one shall be arbitrarily deprived of his life. Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights, 1966 provide that no

one shall be subjected to torture or to cruel, inhuman or degrading treatment/ punishment. Further it has also been observed in the aforesaid judgment with reference to Paragraph-21 of the United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (dated 24.01.2008) specifically deals with protection of individuals and groups made vulnerable by discrimination or marginalization. Para-21 of the Convention states that State are obliged to protect from torture or ill-treatment all person regardless of sexual orientation or transgender identity and to prohibit, prevent and provide redress for torture and ill-treatment in all contests of State custody or control. Article 12 of the Universal Declaration of Human Rights and Article 17 of the International Covenant on Civil and Political Rights state that no one shall be subjected to "arbitrary or unlawful interference with his privacy, family, home or correspondence." The aforesaid principles have been adopted by many countries including India. Further, the above referred principles adopted by many countries are aimed to protect human rights of transgender people since it has been noticed that transgenders/transsexuals often face serious human rights violations, such as harassment in workplace, hospital, places of public conveniences,marketplaces, theatres, railways stations, bus-stands and so on.

In the aforesaid reported judgment of Hon'ble Supreme Court of India in the case of NALSA (supra), the Hon'ble Supreme Court has also analyzed Article-14 vis-à-vis rights of transgender in India in Paragraph-61 of the judgment reported in (2014) 5 SCC 438, which is quoted herein below:-

xx xx xx xx

> "61. Article 14 of the Constitution of India states that the State shall not deny to "any person" equality before the law or the equal protection of the laws within the territory of India. Equality includes the full and equal enjoyment of all rights and freedom. Right to equality has been declared as the basic feature of the Constitution and treatment of equals as unequals or equals will be violative of the basic structure of the Constitution. Article 14 of the Constitution also ensures equal protection and hence a positive obligation on the State to ensure equal protection of laws by bringing in necessary social and economic changes, so that everyone including TGs may enjoy equal protection of laws and nobody is denied such protection. Article 14 does not restrict the word "person" and its application only to male or female. Hiraj/transgender persons who are neither male/female fall within the expression "person" and, hence, entitled to legal protection of laws in all spheres of State activity, including

employment, healthcare, education as well as equal civil and citizenship rights, as enjoyed by any other citizen of this country."

xx xx xx xx

11. Further in the context of discriminatory and arbitrary treatment meted out to transgender citizen of India, the Hon'ble Apex court in paragraph-67 in the case of NALSA vrs Union of India (supra) has observed as follows:-

xx xx xx xx

"67. TGs have been systematically denied the rights under Article 15(2), that is, not to be subjected to any disability, liability, restriction or condition in regard to access to public places. TGs have also not been afforded special provisions envisaged under Article 15(4) for the advancement of the socially and educationally backward classes (SEBC) of citizens, which they are, and hence legally entitled and eligible to get the benefits of SEBC. State is bound to take some affirmative action for their advancement so that the injustice done to them for centuries could be remedied. TGs are also entitled to enjoy economic, social, culture and political rights without discrimination, because forms of discrimination on the ground of gender are violative of fundamental freedoms and human rights. TGs have also been denied rights under Article 16(2) and discriminated against in respect of employment or office under the State on the ground of sex. TGs are also entitled to reservation in the matter of appointment, as envisaged under Article 16(4) of the Constitution. State is bound to take affirmative action to give them due representation in public services."

xx xx xx xx

12. In the context of the right of a person to have the gender of his/her choice, the Hon'ble Supreme court in the case of NALSA (supra) in paragraph-106 has observed as follows:-

xx xx xx xx

"106. The basic principle of the dignity and freedom of the individual is common to all nations, particularly those having democratic set-up. Democracy requires us to respect and develop the free spirit of human being which is responsible for all progress in human history. Democracy is also a method by which we attempt to raise the living standard of the people and to give opportunities to every person to develop his/her personality. It is founded on peaceful co-existence and cooperative living. If democracy is based on the recognition of the individuality and dignity of man, as a fortiori we have to recognize the right of human being to choose his sex/gender identity which is integral to his/her personality and is one of the most basic aspect of self-determination, dignity and freedom. In fact, there is a growing recognition that

> the true measure of development of a nation is not economic growth; it is human dignity."

xx xx xx xx

13. After analyzing the factual scenario and the law both the International and India, the Hon'ble Supreme Court of India in paragraph-135, which contains the declaration of law relating to the transgender in India, specifically in 135.2, which is relevant for the purpose of the present case has been quoted herein below:-

xx xx xx xx

> "135.2 Transgender persons' right to decide their self- identified gender is also upheld and the Centre and State Governments are directed to grant legal recognition of their gender identity such as male, female or as third gender."

xx xx xx xx

14. At this stage, learned counsel for the petitioner submits that the family pension has already been sanctioned by the competent authority in favour of the petitioner vide letter No.2855 dated 29.06.2021 under Annexure-3. However, he submits that the Principal Accountant General (A&E), Odisha, Bhubaneswar-Opposite Party No.5 has not been taking any step for disbursal of the family pension in favour of the petitioner. It is further contended that the petitioner has already approached the Opposite Party No.5 by filing a representation which was received by the Executive Engineer, Rural Works Division, Rayagada-Opposite Party No.4 on 31st of March, 2021.

15. Learned counsel for the State, on the other hand, submits that it appears that the matter is not processed and the same is pending before the Accountant General (A&E), Odisha, Bhubaneswar for consideration. He further submits that in the event this Court directs the authorities to consider and disburse the family pension within a stipulated period of time as the competent authority i.e. Ex. Engineer, R W division has already recommended the case of the petitioner, the same shall be considered by the opp. Parties in the light of the law laid down by the Hon'ble Supreme Court of India.

16. In view of the aforesaid factual position and the analysis of law laid down by the Hon'ble Supreme Court of India and taking into consideration the submissions made by the respective parties, this Court is of the considered view that the petitioner as a transgender has every right to choose her gender and accordingly, she has submitted her application for

grant of family pension under Section 56(1) of Odisha Civil Services (Pension) Rules, 1992. Further such right has been recognized and legalized by judgment of the Hon'ble Apex Court in NALSA's Case (supra) and as such, the law laid down by the Hon'ble Supreme Court is binding on all. Therefore, the present writ petition filed by the petitioner deserves to be allowed and the same is hereby allowed. The Principal Accountant General (A&E), Odisha, Bhubaneswar (Opposite Party No.5) is directed to process the application of the petitioner as expeditiously as possible preferably within a period of six weeks from the date of communication of certified copy of this order. The Opposite Party No.5 is further directed to immediately calculate, sanction and disburse the family pension as is due and admissible to the petitioner within the aforesaid stipulated period of time. Accordingly, writ petition is allowed. However, there shall be no order as to cost.

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2022 (II) ILR - CUT- 531

V. NARASINGH, J.

RVWPET NO.140 OF 2022

PRAVASINI MOHANTY ……..Petitioner

.V.

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

CODE OF CIVIL PROCEDURE,1908 – Order XLVII Rule 1 – Review – Condition precedent for exercise of review jurisdiction – Held, it is settled law that every error whether factual or legal cannot be made subject matter of review under Order 47 Rule 1 of the code though it can be made subject matter of appeal arising out of such order – In order to attract the provision of Order 47 Rule 1 of the code, the error/ mistake must be apparent on the face of the record of the case.

(Para-17)

Case Laws Relied on and Referred to :-

1. AIR 1952 SC 16 : Commissioner of Poice, Bombay Vs. Gordhandas Bhanji.
2. AIR 2008 1888 : Pancham Chand & Ors Vs. State of Himachal Pradesh & Ors.
3. AIR 1980 SC 674 : M/s. Northern India Caterers Vs. Lt. Governor, Delhi.
4. AIR 2003 SC 2095 : Rajendra Kumar Vs. Rambhai.
5. (2019) 5 SCC 86 : Asharfi Devi Vs. State of U.P.

For Petitioner : Mr. S.K. Pattanaik
For Opp. Parties : Mr. S.S. Pradhan, AGA

JUDGMENT Date of Hearing & Judgment: 23.06.2022

V. NARASINGH, J.

1. The Writ Petitioner had approached this Court by filing W.P.(C) No.7322 of 2020 assailing the order passed by the Collector-cum-District Magistrate, Puri-O.P. No.2 dated 20.01.2022 in A.W.W. Misc. Case No.110 of 2010 (Annexure-1) to the WP(C) thereby affirming the order dated 08.05.2015 by which the petitioner working as Anganwadi Helper in Bisimatri Anganwadi Centre was disengaged and Opposite Party No.5, (Pravasini Mohanty) was allowed to continue as such.

2. On consideration of materials on record this Court by Judgment dated 05.05.2022 at Annexure-9 allowed the Writ Petition. Paragraphs thereof relevant for just adjudication of the present RVWPET is extracted hereunder.

> *x x x x x "17. It is clear from the impugned order that in objective assessment was made to test the qualification inter se between the petitioner and two others who participated in the selection procedure.*
>
> *18. On such objective assessment based on the guidelines in which all the members of the Selection Committee participated, admittedly the petitioner secured the highest mark. In the face of such selection it was not open to the Collector to come to a conclusion in a highly arbitrary manner without any rhyme and reason that the selection of opposite party No.5 is to take precedence over that of the petitioner.*
>
> *19. Considering the submission of learned counsel and taking into account the recitals in the counter affidavit, this Court is of the considered opinion that the impugned order is outcome of arbitrary, exercise of power and is tainted with malafide due to non-application of mind and hence, the same is set aside.*
>
> *20. In terms of the earlier direction of this Court in the writ petition at the instance of the petitioner quoted hereinabove (order dated 30.01.2018 in W.P.(C) No.23721 of 2015), opposite party no.4 is directed to issue appointment order to the petitioner as Anganwadi Helper of Bisimatri Anganwadi Centre within 60 (sixty) days from the date of receipt/production of certified copy of this order."* ***x x x x x***

3. Review Petition has been filed at the instance of the said Opposite Party No.5 in the Writ Petition No.7322 of 2020 for review of the judgment dated 05.05.2022 at Annexure-9.

4. The ground (s) of review as urged by the learned Senior Counsel appearing for the Review Petitioner (Opposite Party No.5) is extracted hereunder;

> *" i). that the writ petitioner had suppressed the real background facts of the case and had made false and fraudulent averments before this Hon'ble Court and adopted sharp practice to obtain the order in her favour.*
>
> *ii). that the Collector, Puri (O.P.No.2) had on two occasion held that action of C.D.P.O., Nimapara (O.P.No.4) in appointing the petitioner as Anganwadi Helper in Bisimatri Anganwadi Centre under I.C.D.S., Nimapara was illegal, improper, and based on manipulation and fraud, yet the O.P.No.4-C.D.P.O., Nimapara, while filing the counter in this case had deliberately supported her own action by filing the false and misleading counter contrary to the orders of the Collectors, Puri (O.P.No.2) to help the petitioner and support her illegal appointment.*
>
> *iii). that the order passed in this writ application is based on error apparent in the face of the record and this is fit case for review of the Judgment passed on 05.05.2022."*

5. It is submitted by the learned Senior Counsel for the petitioner with vehemence that since the tenor of the counter was contrary to the factual matrix of the case at hand relating to selection of Anganwadi Helper and the same was taken into consideration by this Court while passing the judgment under review, in the interest of Justice in exercise of review jurisdiction, the said judgment ought to be reviewed and the Writ Petition is liable to be dismissed or in the alternative, recalling the judgment under review matter should be heard afresh.

6. Brief background shorn of unnecessary details is quoted hereunder for convenience of ready reference;

> i. The Writ Petitioner had approached this Court by filing W.P.(C) No.7322 of 2020 assailing the order passed by the Collector-cum-District Magistrate, Puri, Opposite Party No.2 therein dated 20.01.2022 at Annexure-1 in AWW Misc Case No.110 of 2020, affirming the earlier order dated 08.05.2015 passed by Collector-cum-District Magistrate, Puri by which the selection of the petitioner as Anganwadi Helper (AWH) was set aside and Opposite Party No.5 was allowed to continue as AWH.
>
> ii. In the said Writ Petition counter affidavit was filed on behalf of Opposite Party Nos.2,3 and 4 (Collector-cum-District Magistrate, Puri, District Social Welfare Officer and Child Development Project Officer respectively). Petitioner filed rejoinder reiterating her stand in this W.P.(C).
>
> iii. The present review petitioner whose appointment was under challenge in the said writ petition was cited as Opposite Party No.5.

> iv. Opposite Party No.5 did not choose to file any counter affidavit nor participated in the hearing.
>
> v. On consideration of materials on record this Court set aside the impugned order passed by the Collector directing the disengagement of the Writ Petitioner and taking note of the earlier direction of this Court dated 30.01.2018 and 08.05.2015 in W.P.(C) No.23721 of 2015, at the instance of the Writ Petitioner, directed for issuance of appointment order to the petitioner as AWH vice Opposite Party No.5..

7. As extracted herein above, learned senior counsel on behalf of Review Petitioner (Opposite Party No.5 in the Writ Petition) contends that the stand taken by the said Opposite Party Nos.1 to 4 is contrary to the record and therefore, such stand in the counter ought not to have weighed with this Court while passing the judgment at Annexure-9 against the interest of Opposite Party No.5. It is submitted relying on the following judgments;

- ***AIR 1952 SC 16 - Commissioner of Poice, Bombay-v-Gordhandas Bhanji***
- ***AIR 2008 1888 – Pancham Chand and others -v- State of Himachal Pradesh and others***

that it amounts to supplementation of the impugned order by reasons by way of affidavit and as such the same being contrary to the settled position of law that an order is to be judged on the basis of reasons mentioned therein, the review of the judgment merits consideration.

7(A). It is apposite to notice that Annexure-2 (RVWPET) the Grama Sabha Resolution dated 30.01.2010 on which the Review Petitioner rests her case was admittedly not part of the pleadings of the W.P.(C), the judgment of which is subject matter of this RVWPET.

8. On a bare perusal of the counter affidavit, it can be seen that the Opposite Party Nos.1 to 4 had supported the impugned order of cancellation of engagement of the Writ Petitioner as Anganwadi Helper.

9. Paragraph-9 of the counter affidavit is extracted hereunder for convenience of ready reference;

> x x x x x "9. That since the Collector, Puri, has passed a speaking order detailing the entire aspects, no defect can be traced out in the impugned order and as such the prayer sought for in the writ petition being devoid of any merit is thus liable to be dismissed." x x x x x

10. Even accepting the contention of the learned senior counsel at its face value that the contents of the impugned order ought to be accepted as gospel truth even then in the factual matrix of the case at hand, the errors which according to the review petitioner weighed with this Court in passing the judgment under review can by no stretch of imagination be said to be error apparent on the face of the record.

11. It can at best be categorized as error of appreciation, in view of the recitals in the counter affidavit extracted herein above.

12. What Constitutes "an error apparent on the face of the record" has been clarified by the Apex Court in the case of ***AIR 1980 SC 674 – M/s. Northern India Caterers v. Lt. Governor, Delhi*** ;

> "Para-9…
>
> x x x x x "Such an error exists if of two or more views canvassed on the point it is possible to hold that only one of them. If the view adopted by the Court in the original judgment is a possible view having regard to what the record states, it is difficult to hold that there is an error apparent on the face of the record." x x x x
>
> (emphasis supplied)

13. It cannot be said, as noted, that in the case at hand a different stand being taken in counter affidavit and as such the decision cited by the learned senior counsel have no application.

14. It is thus reiterated that there being no error apparent on the face of record which is the condition precedent as stated by the Apex Court in the Case of ***Rajendra Kumar V. Rambhai reported in AIR 2003 SC 2095*** for entertaining a Review application, the RVWPET does not merit consideration.

15. The relevant portion of the Rajendra Kumar (Supra) is extracted hereunder;

> x x x x x "The limitations on exercise of the power of review are well settled. The first and foremost requirement of entertaining a review petition is that the order, review of which is sought, suffers from any error apparent on the face of the order and permitting the order to stand will lead such error, finality attached to the judgement/order cannot be disturbed." x x x x x
>
> (emphasis supplied)

16. It is apt to note that, the Apex Court has cautioned regarding exercise of review jurisdiction in a routine manner and observed thus:-

> *x x x x x "for there is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterised as vitiated by "error apparent". A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error." x x x x x*
>
> ***(Ref: AIR 1964 SC 1372 – Thungabhadra Industries Ltd. v. Govt. of A.P.)***

17. The factual errors if any as being canvassed assiduously by the learned senior counsel cannot be the basis for exercise of review jurisdiction. Reference in this regard can be made to the judgment of the Apex Court in the case of ***Asharfi Devi V. State of U.P. reported in (2019) 5 SCC 86.***

> *x x x x x "18. It is settled law that every error whether factual or legal cannot be made subject-matter of review under Order 47 Rule 1 of the Code though it can be made subject-matter of appeal arising out of such order. In other words, in order to attract the provisions of Order 47 Rule 1 of the Code, the error/mistake must be apparent on the face of the record of the case." x x x x x*
>
> *(emphasis supplied)*

18. On a conspectus of materials on record and examining the stand taken by the review petitioner, on the touchstone of law relating to exercise of review jurisdiction, this Court does not find any merit in the review application and the same accordingly stands rejected.

19. As prayed for it shall be open for the petitioner to seek return of the certified copy of the judgment under review at Annexure-9 by substituting the same by an authenticated photo stat copy.

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2022 (II) ILR - CUT- 537

BIRAJA PRASANNA SATAPATHY, J.

WPC(OAC) NOS. 3396,3398,3399,3402,3404,3410,3620, 3625,3621, 3622,3623,3624,3626,3627,3628, 4294, 4295,4296, 4300, 4301, 4302, 4303,4304,4305,4309, 4310 & 4311 of 2013.

NARAYAN SENAPATI .....Petitioner

.V.

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

CONSTITUTION OF INDIA, 1950 – Articles 14,16 and 39 – Equal pay for equal work – Persons working as work sarker in housing and urban development were allowed the scale of pay of Rs. 5,200-20,000/- with G.P. of Rs. 1900/-, whereas the claim of similarly situated work sarkers working in works department, on the issue of similar pay has been rejected by the authority – Effect of – Held, contrary to the principles of equal pay for equal work – The rejection of claim of petitioners amounts to non-compliance of provision under Article 14 and 16 of the Constitution of India as well as the provisions of equality contained in Article 39 of the Constitution of India.

Case Laws Relied on and Referred to :-

1. (2017) 9 S.C.C 379 : State of Punjab & Ors. Vs. Senior Vocational Staff Masters Association & Ors.
2. A.I.R 1982 S.C 879 : Randhir Singh Vs. Union of India & Ors.

For Petitioner : M/s. Manoj Kumar Mishra, Sr. Counsel, D.K. Pattanaik.

For Opp. Parties : M/s. M.K. Balabantaray, Standing Counsel

JUDGMENT Date of Hearing: 01.04.2022: Date of Judgment: 12.05.2022

BIRAJA PRASANNA SATAPATHY, J.

1. This matter is taken up through Hybrid Mode.

2. Heard Mr. Manoj Kumar Mishra, learned Senior Counsel along with Mr. D.K. Patnaik appearing on behalf of the Petitioner and Mr. M.K.Balabantaray, learned Standing Counsel appearing for the State-Opp. Parties.

3. Since similar issue has been raised in all these batch of Writ Petitions, all were taken up simultaneously for hearing and disposed of vide this common order.

4. All these Writ Petitions have been filed with a prayer to quash the order dated 19.7.2013 under Annexure-10 and for a direction to the Opp. Parties to allow the scale of pay attached to a Class-III post as per the ORSP Rules, 2008.

5. It is submitted that all the Petitioners while working in the establishment of Executive Engineer, Bhubaneswar (R & B), Divn No.-1, they were brought over to the regular establishment in Works Department and they joined in the said establishment from the date of issuance of the order of regularization as Work Sarkar. It is submitted that subsequently on introduction of the ORSP Rules, 1998, the Scale of Pay of Work Sarkar which is of a Class-III scale, was fixed at Rs.2650-4,000/-. It is also submitted that on coming into force of the O.R.S.P. Rules, 2008, the Scale of Pay of Work Sarkar working in the different Departments of the Government was fixed at Rs.4440-7440 with Grade Pay of Rs.1650/- which was the corresponding Pay Scale of Rs.2650-4000/-, which was paid under O.R.S.P. Rules, 1998. It is further submitted that while the matter stood thus, Work Sarkars working in the Housing and Urban Development Department (hereinafter referred to as "the H & U.D Deptt.), Govt. of Odisha approached the learned Industrial Tribunal in I.D. Case No.45 of 1992 claiming the scale of pay allowed in favour of Junior Clerk in the Government Department. Learned Tribunal vide award dated 30.11.2000 directed the H & UD Deptt. to allow the scale of pay applicable to the post of Junior Clerk in favour of the workmen working in the said Deptt. in the post of Tax Collector/Licence Moharir/Law Moharir/Work Sarkar/Amin. It is submitted that the award passed by the learned Tribunal in I.D. Case No.45 lf 1992 was challenged before this Court in W.P.(C) No.15593 of 2007 and this Court vide order dated 24.9.2009 dismissed the said Writ Petition and thereby confirmed the award passed by the learned Tribunal. It is further submitted that the State in the H & UD Deptt. thereafter challenged the same before the Hon'ble Apex Court in SLP (C) No.19218 of 2011. But, the Hon'ble Apex Court also dismissed the said Special Leave Petition vide order dated 28.11.2011 under Annexure-4.

6. Mr. Mishra, learned Sr. Counsel submitted that after confirmation of the order passed by the learned Tribunal in I.D. Case No.45 of 1992 by this Court as well as by the Hon'ble Apex Court, the Work Sarkars working in the H & U.D. Deptt. were allowed the Scale of Pay of Rs.5,200-20,200/- with G.P of Rs.1900 vide order at Annexure-5. Mr. Mishra, learned Senior counsel

appearing for the Petitioner further submitted that taking into account the benefit of the Scale of Pay allowed in favour of the Work Sarkar working in the H. & UD Deptt., the Petitioners in all these cases moved the Works Deptt. with a prayer to allow them the Scale of Pay as allowed in favour of the Work Sarkars working in H & UD Deptt.The Work Sarkars Union also submitted representation on 18.5.2012 under Annexure-6 with a request to allow the Scale of Pay of Rs.5,200-20,200 with G.P of Rs.1900 in favour of the Work Sarkars working in the Works Deptt. of the Government. It is further submitted that on receipt of such representation, Opp. Party No.1 vide his letter dated 14.12.2013 under Annexure-6 requested Opp. Party No.2 to examine the demands of the Work Sarkars of the Works Deptt. in connection with anomaly in their scale of pay. It is also submitted that in spite of the claim raised by the Petitioners and the request made under Annexure-8, when the grievance of the Petitioners was not considered by allowing the scale of pay as allowed in favour of the Work Sarkar working in H & UD Deptt., the Petitioners approached the learned Tribunal. It is submitted that learned Tribunal when directed Opp. Party No.1 to consider the claim of the Petitioners vide order dated 13.3.2013 Government-Opp. Party No.1 without proper appreciation of the said claim and the admitted anomaly in the scale of pay of Work Sarkar working in H & U.D. Department vis-à-vis Works Deptt., rejected the said claim vide the impugned order dated 19.7.2013 under Annexure-10. Mr. Mishra, accordingly submitted that since similarly situated Work Sarkar working in H & U.D. Deptt. were allowed the Scale of Pay of Rs.5,200-20,200/- with G.P of Rs.1900, the rejection of the claim of the Petitioners who are similarly situated Work Sarkar working in the Works Deptt., is prima facie illegal and violative of Article 14 & 16 of the Constitution of India. It is also submitted that the post of Work Sarkar as admitted by the Opposite Parties is a Class-III post and the said admission is reflected in the information provided under R.T.I vide Annexure-3 series and Annexure-4. It is also submitted that the Work Sarkars working in different Departments of the Government were getting similar Scale of Pay in terms of the O.R.S.P Rules, 1998 and their pay scale was fixed to Rs.4,400-7,440 with Grade Pay of Rs.1650/- as per O.R.S.P Rules, 2008. But, in view of the award passed by the learned Tribunal in I.D. Case No.45 of 1992, which was confirmed by this Court as well as by the Apex Court, the Work Sarkars working in H & U.D. Department were allowed the Scale of Pay of Rs.5,200-20,200 with Grade Pay of Rs.1900/- as provided in O.R.S.P Rules, 2008 and the said scale is applicable to a Class-III post.

7. In view of such submissions made by Mr. Mishra, learned Senior Counsel, he prayed for interference of this Court with regard to illegal rejection made by Opp. Party No.1 in his order dated 19.7.2013 under Annexure-10.

8. Mr. Mishra, in support of his aforesaid stand relied on a decision of the Hon' ble Apex Court reported in the case of ***State of Punjab & Others Vs. Senior Vocational Staff Masters Association and Others, reported in (2017) 9 S.C.C 379***. Mr. Mishra, learned counsel appearing for the Petitioner submitted that the Hon'ble Apex Court in the said reported decision taking into account the provision contained in Article 14-18 of the Constitution of India as well as the Principles of Equality contained in Articles 38,39,39-A, 43 & 46 of the Constitution held that no orders causing civil consequences can be passed without observing the Rules of natural justice. Hon'ble Apex Court in the said reported decision held as follows:-

> *"23. It is a cardinal principle of law that government has to abide by rule of law and uphold the values and principles of the Constitution. Respondents herein alleged that creating an artificial distinction between the persons in the same cadre would amount to violation of Article 14 i.e. equality before law and hence, such an act cannot be sustained. The doctrine of equality is a dynamic and evolving concept having many dimensions. Articles 14-18 of the Constitution, besides assuring equality before the law and equal protection of the laws, also disallow discrimination which lacks the object of achieving equality, in matters of employment. It is well settled that though Article 14 forbids class legislation but it does not forbid reasonable classification. When any rule of statutory provision providing classification is assailed on the ground that it is contrary to Article 14, its validity can be sustained if it satisfies two tests, namely, that the classification was to be based on an intelligible differentia which distinguishes persons or things grouped together from the others left out of the group, and the differentia in question must have a reasonable nexus to object sought to be achieved by the rule or statutory provision in question. In other words, there must be some rational nexus between the basis of classification and the object intended to be achieved by the Statute or the Rule.*
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> *24. It is evident that at the time of initial appointment, both the degree holders and the Diploma holders were appointed by a common process of selection where for the engineering trade a degree was required and for the non-engineering trade a diploma was considered as the appropriate qualification. A common advertisement was issued and a common process of selection led to the appointment of all persons who were designated as Vocational Masters. They were appointed on a pay scale higher than the general lecturers. They continued to draw a higher scale till the year 1978 when the pay scale of the general lecturers was brought at par with the*

pay scale of the Vocational Masters. It is only in the year 1995 that an effort was made by the State Government to create a distinction between the degree holders as vocational lecturers and diploma holders as vocational masters.

26. The principle of equality, is also fundamental in formulation of any policy by the State and the glimpse of the same can be found in Articles 38, 39, 39A, 43 and 46 embodied in Part IV of the Constitution of India. These Articles of the Constitution of India mandate that the State is under a constitutional obligation to assure a social order providing justice- social, economic and political, by inter alia, minimizing monetary inequalities, and by securing the right to adequate means of livelihood and by providing for adequate wages so as to ensure, an appropriate standard of life, and by promoting economic interests of the weaker sections. Meaning thereby, if the State is giving some economic benefits to one class while denying the same to other then the onus of justifying the same lies on the State specially in the circumstances when both the classes or group of persons were treated as same in the past by the State. Since Vocational Masters had been drawing same salary as Vocational Lecturers were drawing before the application of 4th pay commission, any attempt to curtail their salary and allowances would amount to arbitrariness which cannot be sustained in the eyes of law if no reasonable justification is offered for the same.

27. We are conscious of the fact that a differential scale on the basis of educational qualifications and the nature of duties is permissible. However, it is equally clear to us that if two categories of employees are treated as equal initially, they should continue to be so treated unless a different treatment is justified by some cogent reasons. In a case where the nature of duties is drastically altered, a differential scale of pay may be justified. Similarly, if a higher qualification is prescribed for a particular post, a higher scale of pay may be granted. However, if the basic qualifications and the job requirements continued to be identical as they were initially laid down, then the Court shall be reluctant to accept the action of the authority in according a differential treatment unless some good reasons are disclosed. Thus, the decisions relied upon by learned senior counsel are clearly distinguishable and are not applicable to the facts of the present case.

29. It is by now well settled that no orders causing civil consequences can be passed, without observing rules of natural justice as it was held in Bhagwan Shukla vs. Union of India & Ors. AIR 1994 SC 2480 wherein it was held as under:

"3. We have heard learned counsel for the parties. That the petitioner's basic pay had been fixed since 1970 at Rs, 190 p.m. is not disputed. There is also no dispute that the basic pay of the appellant was reduced to Rs. 181 p.m. from Rs. 190 pan. in 1991 retrospectively w.e.f. 1812.1970. The appellant has obviously been visited with civil consequences but he had been granted no opportunity to show cause against the reduction of his basic pay. He was not, even put on notice before his pay was reduced by the department and the order came to be made behind his back without following any procedure known to law. There, has, thus, been a flagrant violation of the principles of natural justice and the appellant has been made to suffer huge

financial loss without being heard. Fair play in action warrants that no such order which has the effect of an employee suffering civil consequences should be passed without putting the concerned to notice and giving him a hearing in the matter. Since, that was not done, the order (memorandum) dated 25.7.1991. which was impugned before the Tribunal could not certainly be sustained and the Central Administrative Tribunal fell in error in dismissing the petition of the appellant. The order of the Tribunal deserves to be set aside. We, accordingly, accept this appeal and set aside the order of the Central Administrative Tribunal dated 17.9,1993 as well as the order (memorandum) impugned before the Tribunal dated 25.7.1991 reducing the basic pay of the appellant From Rs. 190 to Rs. 181 w.e.f. 18.12.1970."

9. Mr. Mishra, learned counsel appearing for the Petitioner also relied on a decision of the Hon'ble Apex Court in the case of ***Randhir Singh Vs. Union of India and Others, reported in A.I.R 1982 S.C 879*** which deals with the question of equal pay for equal work. Hon'ble Apex Court in the said decision, in Para 6-8 held as follows:-

6. No doubt, equation of posts and equation of pay are matters primarily for the Executive Government and expert bodies and not for the courts, but where all things are equal that is, where all relevant considerations are the same, persons holding identical posts may not be treated differentially in the matter of their pay merely because they belong to different departments. Of course, if officers of the same rank perform dissimilar functions and the powers, duties and responsibilities of the posts held by them vary, such officers may not be heard to complain of dissimilar pay merely because the posts are of the same rank and the nomenclature is the same.

7. There can be and there are different grades in a service, with varying qualifications for entry into a particular grade, the higher grade often being a promotional avenue for officers of the lower grade. The higher qualifications for the higher grade, which may be either academic qualifications or experience based on length of service, reasonably sustain the classification of the officers into two grades with different scales of pay. The principle of equal pay for equal work would be an abstract doctrine not attracting Article 14 if sought to be applied to them.

8. Construing of Articles 14 and 16 in the light of the Preamble and Article 39(d), it is clear that the principle "equal pay for equal work" is deducible from those Articles and may be properly applied to cases of unequal 300 scales of pay based on no classification or irrational classification though those drawing the different scales of pay do identical work under the same employer."

10. Mr. Mishra, accordingly submitted that the Petitioners are eligible and entitled to get the benefit of Scale of Pay as was allowed in favour of the

Work Sarkar working in H & U.D. Deptt. i.e. the pay scale of Rs.5,200-20,200 with G.P of Rs.1900/-.

11. Mr. M.K. Balabantaray, learned Standing Counsel made his submission relying on the stand taken in the counter affidavit. But, though Mr. Balabantaray did not dispute the award passed by the learned Tribunal in I.D. Case No.45 of 1992 and the confirmation of the same by this Court as well as by the Hon'ble Apex Court and the extension of the benefit of Scale of Pay vide order dated 16.3.2012 under Annexure-5, but submitted that vide the said order under Annexure-5, through the aforesaid scale of pay was allowed in favour of the Work Sarkar working in the H & U.D Deptt., but it was indicated that the said extra financial burden will be borne by the concerned urban local bodies. But in case the claim of the petitioners will be allowed, who are working in the Works Deptt., the Govt. will be directly burdened with the extra demand that has to be borne by it. It is further submitted that the Petitioners only after coming to know that the scale of pay of work Sarkar working in the H & U.D. Department has been enhanced to Rs.5,200-20,200 vide order under Annexure-5, which was allowed in terms of award passed by the learned Industrial Tribunal, they claimed similar benefit. Accordingly, it is submitted that the claim of the present petitioners has been rightly rejected vide impugned order dated 19.7.2013 under Annexure-10 and no interference is called for by this Court in the said order.

12. Mr. Balabantaray further submitted that creation and abolition of a post are clearly executive function and this Court cannot arrogate itself the power of the executive or the legislative. It is also submitted that this Court is not competent to issue any direction to pay any salary component to its regular employees as these are purely executive functions.

13. Mr. Balabantaray in support of his aforesaid submission relied on a decision of the Hon'ble Apex Court passed on 16.11.2006 in the case of ***Indian Drugs and Pharmaceuticals Ltd. Vs. Workman, Indian Drugs Pharmaceuticals Ltd.***

14. Heard learned counsel for the parties. Perused the materials available on record.

15. It is not disputed that the workmen working in different Department of the Government were allowed the Scale of Pay of Rs.2650-4000/- as

provided under O.R.S.P. Rules, 1998. It is also not disputed that the scale of pay of Rs.2650-4000/- was fixed in the Pay Scale of Rs.4,440-7440/- with Grade Pay of Rs.1650/- under O.R.S.P. Rules, 2008. It is also not disputed that the post of Work Sarkar is a Class-III post. Therefore, in view of the order passed by the Govt. in the H & U.D. Department on 16.3.2012 allowing the scale of pay of Rs.5,200-20,200 with G.P. of Rs.1900/- in favour of the similarly situated Work Sarkar in the Government in the said Department, the order dated 19.7.2013 vide Annexure-10 amounts to non-compliance of the provision under Article 14 & 16 of the Constitution of India as well as the provisions of equality contained in Article 39 of the Constitution of India. The said action is also contrary to the principle of equal pay for equal work as held by the Hon'ble Apex Court in the case of Randhir Singh (supra). The decisions relied on by the learned Standing Counsel is not applicable to the facts of the present case as the said case relates to regularization of temporary employees who are working as D.L.Rs.

16. Therefore, in view of the facts narrated above and the decisions relied on by Mr. Mishra, learned Senior Counsel appearing for the Petitioner, this Court is of the considered opinion that Opp. Party No.1 illegally rejected the claim of the Petitioners to get the benefit of the scale of pay of Rs.5,200-20,200/- with Grade Pay of Rs.1900/- vide impugned order 19.7.2013 under Annexure-10.

17. This Court accordingly while quashing the same, directs the Opp. Parties to extend the benefit of the scale of pay of Rs.5,200-20,200/- with G.P of Rs.1900/- in favour of the Petitioners herein. This Court further directs the Opp. Parties to sanction and disburse the differential salary as due and admissible in favour of the Petitioners within a period of three months from the date of receipt of this order.

18. All the Writ Petitions are accordingly disposed of with the aforesaid observations and directions.

19. There shall be no order as to costs.

20. Photocopy of this order be placed in the connected cases.

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