THE INDIAN LAW REPORTS
(CUTTACK SERIES)

Containing Judgments of the High Court of Orissa.

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

AUGUST - 2022

Pages : 817 to 1086

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/-

ORISSA HIGH COURT, CUTTACK

CHIEF JUSTICE

The Hon'ble Shri Justice Dr. S. MURALIDHAR, *B.Sc,, LLM, Ph.D.*

PUISNE JUDGES

The Hon'ble Shri Justice JASWANT SINGH, *B.A, LL.B., M.B.A.*

The Hon'ble Shri Justice SUBHASIS TALAPATRA, *B.A., LL.B.*

The Hon'ble Shri Justice BISWAJIT MOHANTY, *M.A., LL.B.*

The Hon'ble Shri Justice Dr. B.R. SARANGI, *B.Com.(Hons.), LL.M., Ph.D.*

The Hon'ble Shri Justice ARINDAM SINHA, *LL.B.*

The Hon'ble Shri Justice DEBABRATA DASH, *B.Sc. (Hons.), LL.B.*

The Hon'ble Shri Justice SATRUGHANA PUJAHARI, *B.A. (Hons.), LL.B.*

The Hon'ble Shri Justice BISWANATH RATH, *B.A., LL.B.*

The Hon'ble Shri Justice S.K. SAHOO, *B.Sc., M.A. (Eng.&Oriya), LL.B.*

The Hon'ble Shri Justice K.R. MOHAPATRA, *B.A., LL.B.*

The Hon'ble Shri Justice BIBHU PRASAD ROUTRAY, *B.A.(Hons.), LL.B.*

The Hon'ble Shri Justice Dr. SANJEEB KUMAR PANIGRAHI, *LL.M., Ph.D.*

The Hon'ble Miss Justice SAVITRI RATHO, *B.A., (Hons.), LL.B.*

The Hon'ble Shri Justice MRUGANKA SEKHAR SAHOO, *M.Sc, LL.B.*

The Hon'ble Shri Justice RADHA KRISHNA PATTANAIK, *B.Sc.(Hons.),LL.B.*

The Hon'ble Shri Justice SASHIKANTA MISHRA, *M.A., LL.B.*

The Hon'ble Shri Justice A.K. MOHAPATRA, B.Com., LL.B.

The Hon'ble Shri Justice V. NARASINGH, B.Com(Hons.), LL.M.

The Hon'ble Shri Justice B.P. SATAPATHY, M.Com.., LL.B.

The Hon'ble Shri Justice M.S. RAMAN, B.Com(Hons.),LL.B.

The Hon'ble Shri Justice SANJAY KUMAR MISHRA, B.Com.,LL.B.

The Hon'ble Shri Justice GOURI SHANKAR SATAPATHY, B.Sc., LL.B.

The Hon'ble Shri Justice CHITTARANJAN DASH, B.A.,LL.B.

ADVOCATE GENERAL

Shri ASHOK KUMAR PARIJA, *B.Com., LL.B.*

REGISTRARS

Smt. Dr. BHAGYALAXMI RATH, *Registrar General I/C, Registrar (Administration)*
Shri SUMAN KUMAR MISHRA, *Registrar (Judicial)*

NOMINAL INDEX

ACTS & RULE

Acts & No.

1915-2	Bihar and Orissa Excise Act, 1915
1908-5	Civil Procedure Code, 1908
1950	Constitution of India, 1950
1973-2	Criminal Procedure Code, 1973
1860-45	Indian Penal Code, 1860
1987-29	Legal Services Authorities Act, 1987
1881-26	Negotiable Instruments Act, 1881
1959-3	Odisha Survey & Settlement Act, 1958
1972-21	Orissa Consolidation of Holding And Prevention of Fragmentation of Land Act, 1972
2017-7	Odisha Goods and Services Tax Act, 2017
1999-11	Orissa Entry Tax Act, 1999
2013-21	Odisha Protection of Interests of Depositors (in Financial Establishments) Act, 2011
1969-18	Registration of Births and Deaths Act, 1969

RULES

1. Orissa Civil Services (Pension) Rules, 1992
2. Odisha Laboratory Technicians Service (Method of Recruitment & Conditions of Service) Rules, 2019
3. Orissa Superior Judicial Service & Orissa Judicial Service Rules, 2007

TOPICAL INDEX

S U B J E C T I N D E X

CRIMINAL PROCEDURE CODE, 1973 – Section 482 – Offences under Section 306 r/w 34 of IPC – Scope of inherent power of the High Court in interfering with the investigation by the police – Held, the Court arrives at a logical conclusion that the criminal proceeding and its continuation cannot be scuttled in exercise of the inherent jurisdiction of the Court.

Swarnalata Acharya & Ors. -V- State of Orissa.

2022 (II) ILR-Cut…… 1038

CRIMINAL PROCEDURE CODE, 1973 – Section 482 – Prayer for quashing of the criminal proceeding – Charged U/Ss. 13(2), 13(1)(c)(d) of the Prevention of Corruption Act and Sections 409, 408, 471, 420 and 120-B of IPC – A common proceeding was initiated on administrative side by the Water Resources Department on the same set of charges – State Government exonerated the petitioner from the charges levelled against him – Whether exoneration in departmental proceeding *ipso facto* lead to exoneration or acquittal in a criminal case? – Held, No – This Court is not inclined to quash the criminal proceeding against the petitioner.

Subrat Das -V- State of Odisha (Vigilance).

2022 (II) ILR-Cut…… 967

CRIMINAL PROCEDURE CODE, 1973 – Section 482 – Quashing of the Proceeding – Offence U/s. 138 of the N.I. Act – Proceeding challenged on the ground of improper demand notice – In the present case, in the demand notice dishonour amount was over written and the amount written in words was not tallied to the amount written in letters – Prayer to quash the proceeding in view of such impropriety in the demand notice – Prayer of the petitioner acceded – Held, the notice tendered as a condition precedent for giving rising to the cause of action for a prosecution U/s. 138 of N.I. Act being defective and improper one, the prosecution launched thereafter for non-payment of the amount demanded, is incompetent – Hence, the same stands quashed.

Chandan Ku. Panda -V- Annapurna Panda.

2022 (II) ILR-Cut…… 964

CRIMINAL TRIAL – Conviction under Section 302 of the IPC – Plea of the appellant is that, it is a case of culpable homicide not amount to murder – As the same has been committed without any pre-meditation, in the heat of passion, upon a sudden quarrel – Prosecution case is that, there are clear two parts in the transaction of crime – The first part constitutes sudden quarrel and heated exchange of words and assault by the appellant on the deceased and the second part is that while going to his home, brought a cudgel (wooden lathi) and assaulted the deceased

EDUCATION – Admission – Admission notice 2022-23 notified in February 2022 for admission into various classes in Kendriya Vidyalaya-I & II of Cuttack – Some students were selected through special provisions of guidelines for admission – Accordingly, the students obtained transfer certificate from their respective previous School – The authority issued admission notice under the then prevailing and valid provisions/ guidelines – However, the amendment made for abolition for special category and discretionary quota by virtue of notification dated 25.04.2022 – Whether such notification will operate prospectively or retrospectively ? – Held, the notification would have prospective effect, it cannot take away the rights conferred prior to that and the process compliance thereof.

FRAUD – Sympathy and sentiments by itself cannot be a ground for passing an order where the Petitioner has miserably failed to establish a legal right in his favour – The Petitioner not only tried to mislead this Court but also suppressed the material fact –The Writ Petition is dismissed.

INDIAN PENAL CODE, 1860 – Section 302 – Conviction – Plea of appellant that this is a case of culpable homicide not amounting to murder – The Appellant sustained two injures on his person, which are one cut injury over his scalp and another contusion on his right elbow – This is the circumstance that made him angry and violent – So the assault was not pre-meditated but was the reflection of anger the Appellant had at that time – Whether the case fall within the fold of Part-I of Section 304 of the Indian Penal Code? – Held, Yes. – Accordingly, his conviction converted to Part-I of Section 304 of the I.P.C.

INTERPRETATION OF STATUTE – Doctrine of *sub-silentio* – Meaning of – The decisions which are *sub-silentio* and without argument are not applicable as binding precedents.

—— o ——

2022 (II) ILR–CUT- 817

FULL BENCH

Dr. S.MURALIDHAR, C.J, K.R.MOHAPATRA,J & B.P.ROUTRAY, J.

W.P.(C) NOS. 7458 OF 2015 & 7296 OF 2013

M/S. ECMAS RESINS PVT. LTD. …….. Petitioner

.V.

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

AND

W.P.(C) NOS. 7296 OF 2013

M/S. SHYAM METALICS & ENERGY LTD …….. Petitioners

.V.

THE COMMISSIONER OF COMMERCIAL TAXES, ODISHA & ORS. ……..Opp.Parties

ORISSA ENTRY TAX ACT, 1999 – Section 9(1),9(2),10(1) r/w 15-B of OET Rules – Whether a formal communication of the acceptance of the return filed by way of self-assessment under Section 9(2) of the Act is a pre-requisite to the reopening of an assessment under Section 10(1) of the Act? – Held, No – As far as a return filed by way of self-assessment under Section 9(1) read with Section 9(2) is concerned, unless it is 'accepted' by the Department by a formal communication to the dealer, it cannot be said to be an assessment that has been accepted and without such acceptance, it cannot trigger a notice for re-assessment under Section 10(1) of the Act read with 15-B of the Rules. (Para 43)

Case Laws Relied on and Referred to :-

1. STREV No. 64 of 2016 (decision dated 01.12.2021) : M/s. Keshab Automobiles v. State of Odisha
2. W.P.(C) No.7458 of 2015 : M/s. ECMAS Resins Pvt. Ltd. Vs. State of Orissa.
3. W.P.(C) No.7296 of 2013 : M/s Shyam Metalics & Energy Ltd. Vs. The Commissioner of Commercial Taxes, Odisha
4. AIR 1964 SC 766 : Ghanshyam Das Vs. Regional Assistant Commissioner of Sales Tax, Nagpur
5. W.P.(C) No.2777 of 2008 : M/s. Jayshree Chemicals Ltd. Vs. State
6. (1988) 68 STC 25 : M/s. Jaynarayan Kedarnath Vs. Sales Tax Officer, Cuttack-I West Circle.
7. [1974] 3 All ER 949 : Ransom (Inspector of Taxes) Vs. Higgs

For Petitioners : Mr. Jagabandhu Sahoo, Senior Advocate
Ms. Kajal Sahoo, (In W.P.(C) No.7458 of 2015)
Mr. S.P. Mishra, Senior Advocate
Mr. B.P. Mohanty, (In W.P.(C) No.7296 of 2013)

For Opp.Parties : Mr. Sunil Mishra, Additional Standing Counsel

JUDGMENT Date of Judgment : 05.08.2022

Dr. S. MURALIDHAR, C.J.

1. In both these writ petitions, a common question of law arises for consideration under the Orissa Entry Tax Act, 1999 (OET Act). The question is whether a formal communication of the acceptance of the return filed by way of self-assessment under Section 9 (2) of the OET Act is a pre-requisite to the reopening of an assessment under Section 10 (1) of the OET Act?

Background

2. At the outset, it must be noticed that in the context of the Orissa Value Added Tax Act, 2004 (OVAT Act), a similar question was considered by this Court in its decision in ***M/s. Keshab Automobiles v. State of Odisha*** (decision dated 1st December 2021 in STREV No.64 of 2016) which holds, in the context of Section 43 read with Section 39 (2) of the OVAT Act, prior to their amendment with effect from 1stOctober 2015, that unless there is a communication of the acceptance of the return filed in the first instance by way of self assessment, there cannot be a reopening of the assessment. The aforementioned decision of this Court in M/s. Keshab Automobiles (supra) has been affirmed by the Supreme Court of India in its order dated 13th July 2022 in SLP (Civil) No.9912 of 2022 (Deputy Commissioner of Sales Tax v. M/s. Rathi Steel and Power Ltd. etc. and batch) by the following order:

> "We have gone through the impugned order (s) passed by the High Court. The High Court has passed the impugned order (s) on the interpretation of relevant provisions, more particularly Section 43 (1) of the Odisha Value Added Tax Act, 2004, which was prevailing prior to the amendment. We are in complete agreement with the view taken by the High Court. No interference of this Court is called for in exercise of powers under Article 136 of the Constitution of India. Hence, the Special Leave Petitions stand dismissed.
>
> Pending application (s) shall stand disposed of."

3. In fact, W.P.(C) No.7458 of 2015 was at one stage adjourned awaiting the decision of the Supreme Court in the aforementioned SLP.

Referral order

4. As regards the reference to this Full Bench, it was made by the order dated 31st March 2022 of the Division Bench of this Court in W.P.(C) No.7458 of 2015 (***M/s. ECMAS Resins Pvt. Ltd. v. State of Orissa***) by the following order :

> "1. One of the issues involved in the present case is whether the impugned order of reassessment for the period 1st April, 2008 to 31st March, 2014 is valid in view of the non-communication of the acceptance of the original return filed by the assessee by way of self-assessment under Section 9 (2) of the Orissa Entry Tax Act, 1999 (OET Act)?

2. Mr. Sahoo, learned Senior counsel for the Petitioner placed reliance on the decision of this Court in M/s. Keshab Automobiles v. State of Odisha (decision dated 1st December, 2021 in STREV No. 64 of 2016) which holds in the context of Section 43 read with Section 39 of the Odisha Value Added Tax Act, 2004 (OVAT Act) that unless such acceptance of the return filed by way of self- assessment is actually communicated to the assessee, there cannot be a re-opening of the assessment.

3. Mr. Sunil Mishra, learned Senior Standing counsel for the Department on the other hand refers to the decision dated 7th December, 2016 of the Co- ordinate Division Bench of this Court in W.P. (C) No.22343 of 2015 (M/s. Nilachal Ispat Nigam Ltd. v. State of Odisha) which arose under the OET Act and in para 12 of which it has been concluded that for the purposes of Section 10 of the OET Act there need not be a formal communication by the Department to the Assessee of the acceptance of the original return filed by way of self-assessment under Section 9 (1) of the OET Act.

4. It will be noticed here that the decision in Keshab Automobiles (supra) arose under the OVAT Act. The effect of the amendment to Sections 39 and 43 of the OVAT Act with effect from 1st October, 2015 by way of the OVAT (Amendment) Act, 2015 was being considered there. It will be noted here that the said issue does not arise as far as the OET Act is concerned since there was no corresponding amendment to the OET Act in 2015. Also, the wording of Section 10 of the OET Act which pertains to reopening of assessment is not in pari materia with its counterpart Section 43 of the OVAT Act. Nevertheless Section 9 (2) of the OET Act which pertains to self-assessment and is a counterpart of Section 39 of the OVAT Act does contemplate 'acceptance' of the return filed by way of self-assessment. Therefore, the question whether without the communication of the acceptance of such self-assessment, there can be a re-opening of the assessment would still arise for consideration.

5. Having considered the legal position on the question of 'acceptance' of a return filed by way of self-assessment as discussed in Keshab Automobiles (supra), although it was in the context of the OVAT Act, this Court is of the view that the correctness of the opinion expressed by the co-ordinate Bench of two learned judges of this Court in para 12 of the decision in Nilachal Ispat Nigam Ltd. v. State of Odisha (supra) interpreting Section 9 (2) read with Section 10 of the OET Act requires to be re- considered.

6. Accordingly, the present petition is directed to be placed before the larger Bench of three Judges on 28th June, 2022 to consider the following question:

"Is the view taken by the Division Bench of this Court in its decision dated 7th December 2016 in W.P.(C) No.22343 of 2015 (M/s. ***Nilachal Ispat Nigam Ltd. v. State of Odisha***)in the context of Section 9 (2) read with Section 10 of the OET Act require reconsideration? In other words, whether a formal communication of the acceptance of the return filed by way of self-assessment under Section 9 (2) of the OET Act is a pre-requisite to the reopening of an assessment under Section 10 (1) of the OET Act?"

7. The interim order shall continue till the next date."

5. An identical question arises for consideration in the companion W.P.(C) No.7296 of 2013 (***M/s Shyam Metalics & Energy Ltd. v. The Commissioner of Commercial Taxes, Odisha***) in which the following order was passed on 19th July, 2022:

> "1. One of the issues raised in the present petition is whether the Assessing Officer could have exercised jurisdiction under Section 10(3) of the OET Act,1999 when there is no assessment order as such. It is pointed out that in the first instance there was a self assessment by the dealer in terms of Section 9(1) read with 9(2) of the OET Act, 1999 and there was no order as such was passed by the Assessing Officer in respect thereof.
>
> 2. It is pointed out that this very issue namely whether there can be reassessment order without there being an assessment order is pending before the Larger Bench of this Court.
>
> 3. List this matter along with W.P.(C) No.7458 of 2015 with the said batch of petitions before the Larger Bench.
>
> 4. The interim order passed earlier shall continue till the next date."

Background facts in W.P.(C) No.7296 of 2013

6. The facts in W.P.(C) No.7296 of 2013 are that the Petitioner- M/s Shyam Metalics & Energy Ltd. (SMEL) is registered as a dealer under the OVAT Act and is engaged in manufacturing and sale of sponge iron, steel billets, TMT bars etc. For the purpose of its manufacturing unit, SMEL has a captive power plant (CPP) where it manufactures electricity. Coal is one of the raw materials used in the process of manufacturing of the sponge iron, TMT bar and billets etc. Relying on a judgment of this Court in Bhushan Power and Steel Limited v. State of Orissa (2012) 56 VST 50 (Orissa) wherein it was held that coal used in the production of the electricity in the CPP cannot be treated as raw material for the manufacturing of sponge iron. Thus, it was held that the dealer was not entitled to avail concessional levy of entry tax on purchase of coal used to generate electricity in the CPP.

7. On the basis of the above decision in ***Bhushan Power and Steel Limited*** (supra), the Assistant Commissioner of Sales Tax (ACST), Sambalpur II Circle issued a notice to the Petitioner under Section 10 (3) of the OET Act seeking to reopen the assessment for the period 1st April, 2005 to 31st December, 2012. On 23rd February 2013, the Assessing Officer (AO) i.e. the ACST reopened the assessment for the period from 1st April, 2005 to 31st December, 2012 and denied the exemption on payment of entry tax@1% on the coal used for production of electricity. Accordingly, a demand of Rs. 1,67,62,329/- was raised.

8. Aggrieved by the above re-assessment order, SMEL filed W.P.(C) No.7296 of 2013 in this Court seeking the quashing of not only the re-assessment order, but also the consequential demand notice. While directing notice to issue in the present petition on 4th January 2016, this Court passed an interim order that no coercive action would be taken against the Petitioner. That stay order has continued since.

Background facts in W.P.(C) No.7458 of 2015

9. As far as W.P.(C) No.7458 of 2015 filed by ECMAS Resins Pvt. Ltd. (ERPL) is concerned, the order under challenge is dated 19th February 2015, passed by the Deputy Commissioner of Sales Tax (DCST), Puri Circle, Puri re-opening the assessment for the period 1st April 2008 to 31st March, 2014.

10. The occasion for the issuance of the notice for reopening of the assessment is that ERPL is engaged in sale of products like polyester, resins, glass articles and other polypher and epoxide resins in primary forms. ERPL is stated to have its own manufacturing unit at Hyderabad and its depot at Puri. It is stated that ERPL's depot at Puri obtains stock of products from its manufacturing unit at Hyderabad for sale in Odisha.

11. On the basis of a tax evasion report of the DCST, Vigilance Division, notice in Form E-32 was issued stating that goods purchased/received by the ERPL were chemicals of different variety falling under Entry 73 of Part-I of the Entry Tax Rate Schedule which reads "chemicals used for any purpose" and therefore, was exigible to entry tax @1% on all the products except glass fiber. The assessment order dated 19th February 2015 was passed raising a demand of Rs.60,19,134/-.

12. Although on merits, it is the contention of ERPL that unsaturated polyester resin in liquid form is not schedule goods under the OET Act and cannot be covered under 'chemicals', the assessment order is also challenged on the ground that there is no initial assessment order to begin with under Section 9 (2) of the OET Act.

13. W.P.(C) No.7458 of 2015 was filed challenging the said assessment order, in which, on 13th October 2015, this Court directed that the impugned assessment order shall remain stayed. That interim order has continued since.

14. This Court has heard the submissions of Mr. S.P. Mishra, learned Senior Advocate appearing for the SMEL and Mr. Jagabandhu Sahoo, learned Senior Advocate appearing for the ERPL. The Department was represented by Mr. Sunil Mishra, learned Additional Standing Counsel in both the matters.

Relevant provisions of the OET Act and Rules

15. To address the question referred to the Larger Bench for its opinion, reference is first required to be made to the relevant provisions of the OET Act and the Orissa Entry Tax Rules, 1999 (OET Rules) and thereafter, undertake a comparative assessment of the provisions of the OET Act and OVAT Act.

16. Under Section 2(q) of the OET Act, words and expressions used in the OET Act and not defined therein and yet defined in the OVAT Act would have same meaning assigned to them under the OVAT Act.

17. Section 9 of the OET Act talks of "self assessment" and reads as under:

> "**9.** ***Self assessment***-
>
> (1) Subject to provisions of sub-section (2), the amount of tax due from a registered dealer or a dealer liable to be registered under this Act shall be assessed in the manner hereinafter provided, for each tax period or periods during which the dealer is so liable.
>
> (2) If a registered dealer furnishes the return in respect of any tax period within the prescribed time and the return so furnished is found to be in order, it shall be accepted as self-assessed subject to adjustment of any arithmetical error apparent on the face of the said return."

18. The critical words as far as Section 9 (2) is concerned is the requirement that the return furnished "shall be accepted as self-assessed" subject to adjustment of any arithmetical error apparent on the face of the return. What constitutes 'acceptance' is the critical question. To understand this, one needs to refer to Rule 15 of the OET Rules which reads as under:

> "**15. Self-assessment**:-
>
> (1) Where a dealer files return for a tax period within the period specified in sub-rule (1) of Rule 10 and the return is found to be correctly and completely filled in, and there is no arithmetical mistake apparent on the face of such return, the said return shall be accepted as self-assessed.
>
> (2) Where there is any arithmetical mistake apparent on the face of such return, and such mistake can be reconciled without any reference to the dealer to whom the return relates, such return may accordingly be rectified and the rectification so made may be intimated to the dealer in Form E28 for information.
>
> (3) If the rectification as intimated to the dealer under sub-rule (2) is not accepted by the dealer, he may, within seven days from the date of receipt of such intimation, file an application stating therein the correct position along with reasons for occurrence of such mistake to the assessing authority, and if such authority is satisfied, the return referred to in sub-rule (2) shall be accepted as self- assessed.
>
> (4) Where the arithmetical mistake apparent on the face of the return furnished for a tax period remains un-reconciled, such mistake shall be intimated to the dealer to whom the return relates in Form E28 for necessary rectifications within fourteen days from the date of receipt of the intimation and if the assessing authority is satisfied that the mistake is bona fide and not deliberate, such authority shall accept the return as self-assessed.
>
> (5) Where the dealer fails to rectify the mistake as intimated under sub-rule (4) within the time specified therein or the mistakes are found to be deliberate with an intention to evade tax or an attempt to evade tax, the return, wherein the mistakes are found, shall be referred to audit under Section 9B of the Act."

19. Further, as far as reassessment is concerned, the relevant provision is Section 10 of the OET Act read with Rule 15 B of the OET Rules both of which read as under:

Section 10 of the OET Act:

> "***10. Reassessment in certain cases***.-
>
> (1) Where for any reason all or any of the scheduled goods brought by a dealer has escaped assessment of tax, or where value of all or any of the scheduled goods has been under-assessed, or any deduction has been allowed wrongly, the assessing authority, on the basis of information in his possession, may, within a period of seven years from the end of the year to which the tax period relates, serve a notice on the dealer in such form and in such manner as may be prescribed and after making such enquiry as he considers necessary and after giving the dealer a reasonable opportunity of being heard, proceed to assess the dealer accordingly.
>
> (2) If the assessing authority is satisfied that the escapement or under assessment of tax on account of any reason (s) mentioned in sub-section (1) above is without any reasonable cause, he may direct the dealer to pay in addition to the tax assessed under sub-section (1), by way of penalty, a sum equal to twice the amount of tax additionally assessed under this section.
>
> (3) Where any order passed by the assessing authority in respect of a dealer for any period is found to be erroneous or prejudicial to the interest of revenue consequent to, or in the light of, any judgment or order of any Court or Tribunal, which has become final and binding, then, notwithstanding anything contained in this Act, the assessing authority may proceed to reassess the tax payable by the dealer in accordance with such judgment or order, at any time within a period of three years from the date of the judgment or order."

Rule 15B of the OET Rules:

> ***15B. Audit assessment.-***
>
> (1) If the tax audit conducted under Section 9B of the Act results in findings, which the assessing authority considers to be affecting the tax liability of a dealer for a tax period or tax periods, such authority shall serve a notice in Form E30 along with a copy of the Audit Visit Report, upon such dealer, directing him to appear in person or through his authorized representative on such date, time and place, as specified in the said notice for compliance of the requirements of sub-rules (2) and (3).
>
> (2) The assessing authority may, in the notice referred to in sub-rule (1), require the dealer-
>
> (i) to produce the books of accounts maintained under the provisions of the Act and these Rules;
> (ii) to furnish records and documents required to be maintained under the Act and these Rules claiming deductions or concessions, as may be applicable;
> (iii) to furnish any other information relating to assessment of tax, levy of interest, imposition of penalty; and
> (iv) to explain the books of account, other accounts, records, documents or information referred to in sub-clauses (i), (ii) and (iii), on the date and at the time specified in the notice.

(3) In addition to the accounts and documents referred to in sub-rule (2), a dealer if so desires, may produce such other evidence and documents in support of his claim preferred in his returns, or rebut the charges made in the Audit Visit Report, or any objection which he wishes to raise.

(4) The assessing authority, while hearing the dealer on the date specified in the notice referred to in sub- rule (1) or on any date to which the hearing is adjourned for making an assessment of tax payable by him, shall-

(a) examine the accounts, documents, records or any other evidence furnished under sub-rule (2);

(b) call for such information or evidence from the dealer or any person as deemed necessary;

(c) consider the objection, if any, preferred by such dealer and examine the evidence in support thereof; and

(d) make such enquiry, as deemed necessary, for the purpose of such assessment:

Provided that not more than three adjournments shall be granted to a dealer for hearing his case.

(5) The assessing authority shall, after hearing the dealer in the manner specified in sub-rules (2), (3) and (4), assess the tax due from that dealer accordingly, in respect of a tax period or tax periods, for which the assessment proceeding has been initiated, and impose penalty under sub-section (5) of Section 9C of the Act.

(6) In the event of default by a dealer to comply with the requirement of the notice referred to in sub-rule (1), the assessing authority may make to the best of judgment, an ex parte assessment of the tax payable by such dealer in respect of such tax period or tax periods and pass an order of assessment, in writing, recording the reasons therein and shall impose penalty under sub-section (5) of Section 9C"

Provisions of the OVAT Act and Rules

20. At this stage, it is necessary to refer to the corresponding provisions of the OVAT Act. Section 39 (2) of the OVAT Act is in pari materia with Section 9 (2) of the OET Act. Likewise, Rule 48 of the Orissa Value Added Tax Rules 2005 (OVAT Rules) talks of self assessment and is in pari materia with Rule 15 of the OET Rules. Section 39 (2) of the OVAT Act and Rule 48 of the OVAT Rules read as under:

Section 39 (2) of the OVAT Act:

"***39. Self assessment***.—

xxx xxx xxx

(2) If a registered dealer furnishes the return in respect of any tax period within the prescribed time and the return so furnished is found to be in order, it shall be accepted as self assessed subject to adjustment of any arithmetical error apparent on the face of the said return."

Rule 48 of the OVAT Rules:

"***48. Self-assessment***:-

(1) Where a dealer files return for a tax period within the period specified in Rule 34 and the return is found to be correctly and completely filled in, and there is no arithmetical mistake apparent on the face of such return, the said return shall be accepted as self-assessed.

(2) Where there is any arithmetical mistake apparent on the face of such return and such mistake can be reconciled without any reference to the dealer to whom the return relates, such return may accordingly be rectified and the rectification so made may be intimated to that dealer in Form VAT-
305 for information.

(3) If the rectification as intimated to the dealer under sub-rule (2) is not accepted by the dealer, he may, within seven days from the date of receipt of such intimation, file an application stating therein the correct position along with reasons for occurrence of such mistake, to the assessing authority, and if such authority is satisfied, the return referred to in sub-rule (2) shall be accepted as self- assessed.

(4) Where the arithmetical mistake apparent on the face of the return furnished for a tax period remains un-reconciled, such mistakes shall be intimated to the dealer to whom the return relates in Form VAT-305 for necessary rectifications within fourteen days from the date of receipt of the intimation and if the assessing authority is satisfied that the mistake is bona fide and not deliberate, such authority shall accept the return as self-assessed.

(5) Where the dealer fails to rectify the mistake as intimated under sub-rule (4) within the time specified in that sub-rule or the mistakes are found to be deliberate with an intention to evade tax or attempt to evade tax, the return, wherein the mistakes are found, shall be referred to audit under Section 41."

21. As far as re-assessment is concerned, the corresponding provisions of the OVAT Act are Section 43 (as it stood prior to 1st October 2015) and Rule 50 of the OVAT Rules which read as under:

Section 43 of the OVAT Act (as it stood prior to 1st October 2015):

"***43. Turnover escaping assessment***.-
(1) Where, after a dealer is assessed under Section 39, 40, 42 or 44 for any tax period, the assessing authority, on the basis of any information in his
possession, is of the opinion that the whole or any part of the turnover of the dealer in respect of such tax period or tax periods has—

(a) escaped assessment, or
(b) been under-assessed, or
(c) been assessed at a rate lower than the rate at which it is assessable;
or that the dealer has been allowed—

(i) wrongly any deduction from his turnover, or

(ii) input tax credit, to which he is not eligible,

the assessing authority may serve a notice on the dealer in such form and manner as may be prescribed and after giving the dealer a reasonable opportunity of being heard and after making such enquiry as he deems necessary, proceed to assess to the best of his judgment the amount of tax due from the dealer.

(2) If the assessing authority is satisfied that the escapement or under assessment of tax on account of any reason(s) mentioned in sub-section (1) above is without any reasonable cause, he may direct the dealer to pay, by way of penalty, a sum equal to twice the amount of tax additionally assessed under this section.

(3) No order of assessment shall be made under sub- section (1) after the expiry of seven years from the end of the tax period or tax periods in respect of which the tax is assessable."

Rule 50 of the OVAT Rules:

"***50. Assessment of escaped turnover***. –

(1) Where a dealer has already been assessed under section 39, 40, 42 or 44 and it is required to reopen the assessment under subsection (1) of section 43 for occurrence of any or more of the events specified in that subsection, the assessing authority shall serve a notice in Form VAT -307 upon the dealer.

(2) The hearing of the dealer shall be concluded in accordance with the provisions of sub-rules (2), (3), (4) and (5) of rule 49.

(3) The assessing authority shall, after hearing the dealer in the manner specified in sub-rule (2), assess to the best of judgment, the amount of tax payable by the dealer in respect of a tax period or tax periods, for which assessment proceeding has been initiated, and impose penalty under sub-section (2) of section 43.

(4) In the event of default by a dealer to comply with the requirements of the notice referred to in sub-rule (1), the assessing authority may make, to the best of judgment, an ex parte assessment of the tax payable by such dealer in respect of such tax period or tax periods and pass an order of assessment in writing, after recording the reasons therein."

22. It must also be noticed here that scrutiny of every return by a dealer by the assessing officer (AO) is mandatory in terms of Section 7(10) and 7(11) of the OET Act. The corresponding provision in the OVAT Act is Section 38.

The decision in M/s. Keshab Automobiles

23. In the context of Section 39 (2) of the OVAT Act read with Section 43 thereof, this Court examined the issue in ***M/s. Keshab Automobiles*** (supra). The question that arose in that case was however also about the effect of the amendment brought to Section 39 (2) after 1st October 2015, whereas that issue does not arise in the context of the OET Act. It would suffice to note that the corresponding provisions of the OVAT Act namely Section 39 (2) of the OVAT Act as it stood prior to 1st October 2015 is in pari materia with Section 9 (2) of the OET Act.

24. As was held in ***M/s. Keshab Automobiles*** (supra), there had to be a formal communication of an acceptance of return or even an acknowledgment by the Department in terms of Section 39(2) of the OVAT Act as it stood prior to 1st October, 2015. The position underwent a change after 1st October 2015. This

was noticed in M/s. Keshab Automobiles (supra) where after comparing Section 39(2) as it stood prior to 1st October 2015 (which corresponds to Section 9 (2) of the OET Act) and the provision as it stood after its amendment in 1st October 2015, this Court observed as under:

> "11. …The concept of 'deemed' self assessment was introduced only with effect from 1st October, 2015. Prior thereto, if such return filed by the dealer under Section 39 of the OVAT Act and was "found to be in order" and within the prescribed time, then it was to be accepted as self assessed subject to adjustment of arithmetical errors."

25. Likewise, in ***M/s.Keshab Automobiles*** (supra) a comparison was undertaken of Section 43(1) of the OVAT Act (as it stood prior to 1st October 2015 and which corresponds to Section 10 of the OET Act) and Section 43(1) of the OVAT Act as it stood after 1st October, 2015. Analyzing both the amended and un-amended Section 43(1) of the OVAT Act, this Court in ***M/s. Keshab Automobiles*** (supra) observed as under:

> "13. It is significant that prior to its amendment with effect from 1st October, 2015 the trigger for invoking Section 43 (1) of the OVAT Act required a dealer to be assessed under Sections 39, 40, 42 and 44 for any tax period. The words "where, after a dealer is assessed" at the beginning of Section 43 (1) prior to 1st October, 2015 pre-supposes that there has to be an initial assessment which should have been formally accepted for the periods in question i.e. before 1st October, 2015 before the Department could form an opinion regarding escaped assessment or under assessment or the accused taking the benefit of a lower rate or being wrongly allowed deduction from his turnover or input tax credit to which he is not eligible.
>
> 14. However, under Section 43(1) of the OVAT Act, after its amendment with effect from 1st October, 2015 the Assessing Authority can form an opinion about the whole or part of the turnover of the dealer escaping assessment or being under assessed "on thebasis of any information in his possession". In other words, it is not necessary after 1st October, 2015 for the Assessee's initial return having to be 'accepted' before Section 43(1) could be invoked.
>
> 15. Therefore, the position prior to 1st October, 2015 is clear. Unless there was an assessment of the dealer under Sections 39, 40, 42 and 44 for any tax period, the question of reopening the assessment under Section 43(1) of the OVAT Act did not arise."

26. As far as the OET Act is concerned, the relevant provisions i.e., Section 9(2) and Section 10 correspond exactly to Section 39(2) and Section 43 respectively of the OVAT Act as those provisions stood prior to the amendment in 1st October, 2015. The same legal position as above would, therefore, hold good for the provisions of the OET Act as well.

The decision in Nilachal Ispat Nigam Limited overruled

27. However, as noted in the referral order, a different view appears to have been taken by a Division Bench of this Court in ***M/s. Nilachal Ispat Nigam***

Limited v. State of Odisha (decision dated 7th December 2016 in W.P.(C) No. 22343 of 2015). It must be noted that the judgment is dated 7th December 2016, and since it was under the OET Act and Rules thereunder, there was no occasion for the Court to refer to the corresponding provisions of the OVAT Act and the position obtaining thereunder.

28. In para 12 of the judgment in ***Nilachal Ispat Nigam Limited*** (supra) it was observed as under:

> "12. So far as the ground taken by the petitioner that the company was assessed as per the provisions of section 9(1) of the Act and as such, it is not known to them as to whether assessment has been finalized or not or in other words, whether the authorities have accepted the self assessment made by the petitioner-company under Section 9(1) has been accepted or not is concerned, we are of the considered view that Section 9 contains a provision for self assessment, which requires the dealer to be assessed in the manner provided for each tax period or periods during which the dealer is so liable and if the registered dealer furnishes the return in respect of any tax period within the prescribed time and the return so furnished is found to be in order, it shall be accepted as self assessed subject to adjustment of any arithmetical error apparent on the face of the said return. Section 10 of the Act provides for reassessment in certain cases when the authority is of the reason to believe that the dealer has escaped assessment of tax and as such communication regarding acceptance of the assessment made under the provisions of Section 9 of the Act is not required to be communicated to the petitioner and the communication can only go in a situation when on scrutiny it will be found that the same is not in order or there is arithmetical error. Under the Taxation Rule the assessee is required to furnish self assessment and the authority is required to assess the same and there is no provision provided under the Act to communicate in case of acceptance of the assessment. Although under the provision of Orissa Value Added Tax Act under Section 38 read with Section 7(10) each and every return in relation to any tax period furnished by a registered dealer shall be subject to scrutiny by the assessing authority to verify the correctness of the calculation, application of correct rate of tax and interest etc and in case of any mistake, detected in course of scrutiny, the assessing authority shall serve a notice in the prescribed form as we find even from the provision of section 7 or sub-section (11) and as such, if the authorities have not issued any notice under Section 7(11), then the assessment made by the registered dealer under the provisions of Section 9 will be said to be accepted."

29. Reference at this juncture may be made to Section 7(10) and (11) of the OET Act which read as under:

> ***7. Return and return defaults:-***
>
> xxx xxx xxx
>
> (10) Each and every return in relation to any tax period furnished by a dealer under this section, shall be subject to scrutiny by the assessing authority to verify the correctness of calculation, application of correct rate of tax and interest, claim of deductions, if any, under this Act and full payment of tax and interest payable by the dealer for such period.
>
> (11) If any mistake is detected as a result of scrutiny made under sub-section (10), the assessing authority shall serve a notice in the prescribed form on the dealer to make

payment of the extra amount of tax along with the interest as per the provisions of this Act, by the date specified in the said notice.

30. This has to be compared with the corresponding provision in the OVAT Act viz., Section 38 of the OVAT Act which reads as under:

"***38. Scrutiny of return***.—

(1) Each and every return in relation to any tax period furnished by a registered dealer under Section 33, shall be subject to scrutiny by the assessing authority to verify the correctness of calculation, application of correct rate of tax and interest, claim of input tax credit made therein and full payment of tax and interest, payable by the dealer for such period.

(2) If any mistake is detected as a result of scrutiny made under sub-section (1), the assessing authority shall serve a notice in the prescribed form on the dealer to make payment of the extra amount of tax along with the interest as per the provisions of this Act, by the date specified in the said notice."

31. Both sets of provisions of the OVAT Act and the OET Act respectively, therefore, make it mandatory for scrutiny of every return by a dealer. The corresponding Rule under the OET Rules is Rule 15 as amended with effect from 19th October 2005 which has already been extracted hereinabove.

32. Therefore, even Rule 15 of the OET Rules as amended requires the return to be 'accepted'. If this is read with Rule 10 (3) to (6) of the OET Rules, it is plain that self-assessment is not automatic. It requires compliance with Section 7(10) and 7(11) of the OET Act. The same result would be reached from a collective reading of Section 39 of the OVAT Act with Rule 48 of the OVAT Rules as they stood prior to 1st October, 2015. The long and short of this discussion is that under the OET Act there is no concept of a 'deemed' acceptance of a return filed by way of self assessment if nothing is heard from the Department after it is filed. There has to be an overt act of communication of such acceptance by the Department to the dealer.

33. Even in the context of the OVAT Act to which reference was made by the Bench in ***M/s. Nilachal Ispat Nigam Limited*** (supra), the position after 1st October 2015 where the concept of 'deemed' acceptance was introduced for the first time, made it plain that prior to such amendment there was no such concept of 'deemed' acceptance. This was noticed by this Court in ***M/s. Keshab Automobiles*** (supra) where it was concluded in para 21 to 23 as under:

"21. A comparison of the language used in the amended Section 43 (1) of the OVAT Act with its version prior to 1st October, 2015 makes it clear that a new system has been put in place as far as reopening of returns filed as "self-assessment" is concerned. Now such reopening is permitted even if there was no formal acceptance of the return

originally filed. The concept of a "deemed" acceptance of the return has been introduced for the first time since 1st October, 2015. This is not a mere procedural change. Further, the amending statute itself makes it clear that the amendments are with effect from 1st October, 2015 and not with retrospective effect from an earlier date. Therefore, the Court is precluded from presuming that the amendment to Sections 39(2) and 43 (1) of the OVAT Act and correspondingly to Rule 50 of the OVAT Rules are either merely clarificatory or retrospective.

22. From the above discussion, the picture that emerges is that if the self-assessment under Section 39 of the OVAT Act for tax periods prior to 1st October, 2015 are not 'accepted' either by a formal communication or an acknowledgment by the Department, then such assessment cannot be sought to be re-opened under Section 43(1) of the OVAT Act and further subject to the fulfillment of other requirements of that provision as it stood prior to 1st October, 2015.

23. For all of the aforementioned reasons, the reopening of the assessment sought to be made in the present case under Section 43 (1) of the OVAT Act is held to be bad in law. The question framed is accordingly answered in the negative i.e. in favour of the Assessee and against the Department. It is accordingly, held that in the absence of the completion of the assessment under Sections 39, 40,42 and 44, reassessment under Section 43 (1) of the OVAT Act is unsustainable in law."

34. This Court had in ***M/s. Keshab Automobiles*** (supra) distinguished ***M/s. Nilachal Ispat Nigam Limited*** (supra) when it observed in para 17 [It must be mentioned here that original para 17 of the judgment of this Court in ***M/s. Keshab Automobiles*** (supra) was corrected by a subsequent order dated 8th April 2022] which reads as under:

"17. A perusal of the decision of this Court in ***Nilachal Ispat Nigam Ltd***. (supra) reveals that it was in the context of the Orissa Entry Tax Act (OET Act). Secondly, this Court had no occasion in the said decision to discuss the effect of more or less similar amendments effected to the provisions of the OVAT Act which were brought into effect from 1st October, 2015. This is despite the fact that the decision is dated 7th December, 2016. The amendments did bring about a significant change to the OVAT Act and therefore had a direct bearing on the issues discussed in the said decision. Consequently, this Court finds that the decision in Nilachal Ispat Nigam Ltd. is per incuriam inasmuch as it fails to discuss the amended provisions of the OVAT Act which have a direct bearing on the issues adjudicated by this Court."

35. The decision of this Court in ***M/s. Keshab Automobiles*** (supra) has, as already noted, been affirmed by the Supreme Court of India in its order in ***Deputy Commissioner of Sales Tax v. M/s. Rathi Steel and Power Ltd. etc. and batch*** (supra). This Court, therefore, is unable to agree with the conclusion reached by the Division Bench of this Court in ***M/s. Nilachal Ispat Nigam Limited*** (supra) since it is not consistent with the legal position that emerges on the reading of Section 9(2) of the OET Act with its corresponding provision of the OVAT Act viz., Section 39(2) of the OVAT Act as it stood prior to 1st October 2015 and which has been interpreted in the above manner by this Court in ***M/s. Keshab Automobiles*** (supra).

36. Further, the decision in ***M/s. Keshab Automobiles*** (supra) also noticed earlier decisions of the Supreme Court in ***Ghanshyam Das v. Regional Assistant Commissioner of Sales Tax, Nagpur AIR 1964 SC 766*** where it was held as under:

> "10.…if a return was duly made, the assessment could be made at any time unless the statute prescribed a time limit. This can only be for the reason that the proceedings duly initiated in time will be pending and can, therefore, be completed without time limit. A proceeding is said to be pending as soon as it is commenced and until it is concluded. On the said analogy, the assessment proceedings under the Sales-tax Act must be held to be pending from the time the said proceedings were initiated until they were terminated by a final order of assessment. Before the final order of assessment, it could not be said that the entire turnover or a part thereof of a dealer had escaped assessment, for the assessment was not completed and if, completed, it might be that the entire turnover would be caught in the net."

37. This was also be seen in the context of an order passed by this Court on 29th February 2008 in W.P.(C) No. 2777 of 2008 (***M/s. Jayshree Chemicals Ltd. v. State***) where it was observed as under:

> "Apart from that, the concept of escaped assessment under Section 43 of the Orissa Value Added Tax Act comes into play only when the assessment has been made and completed.
>
> In the instant case, without assessment being complete, the notice of escaped assessment is misconceived and as such the said notice under Annexure-1 is quashed."

38. In the context of the Orissa Sales Tax Act, a Full Bench of this Court in ***M/s. Jaynarayan Kedarnath v. Sales Tax Officer, Cuttack-I West Circle (1988) 68 STC 25*** followed the judgment of the Supreme Court in Ghanshyam Das (supra) and concluded that no escapement of income from assessment can be predicted before an assessment is complete.

39. This Court is of the considered view, therefore, that the decision of the Division Bench of this Court in ***M/s. Nilachal Ispat Nigam Limited*** (supra) which holds that if the authorities have not issued any notice under Section 7 (11) of the OET Act, then the self assessment of the dealer under Section 9(2) of the OET Act should be taken to have been 'accepted' does not set down the correct legal position and to that extent, the said decision is hereby overruled.

Court not to supply the gaps in the statute

40. Mr. Mishra, learned Standing counsel for the Department then submitted that the above interpretation which exposes a gap in the provisions of the OET might result in several similar cases of re-opening of assessments being challenged by the Assessees or might prevent the Department from issuing notices for re-opening assessments.

41. It is not the task of this Court, while interpreting a taxing statute, to fill the lacunae. In ***Ransom (Inspector of Taxes) v Higgs [1974] 3 All ER 949***, it was explained by Lord Simon that:

> "It may seem hard that a cunningly advised tax- payer should be able to avoid what appears to be his equitable share of the general fiscal burden and cast it on the shoulders of his fellow citizens. But for the courts to try to stretch the law to meet hard cases (whether the hardship appears to bear on the individual tax-payer or on the general body of tax- payers as represented by the Inland Revenue) is not merely to make bad law but to run the risk of subverting the rule of law itself."

42. Referring to the above decision, Justice G.P. Singh in his ***Interpretation of Statutes*** (13th Edn., 2012) p. 829 states:

> "The same rule applies even if the object of the enactment is to frustrate legitimate tax avoidance devices for moral precepts are not applicable to the interpretation of revenue statutes. It may thus be taken as maxim of tax law, which although not to be overstressed ought not to be forgotten that, "the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax on him." The proper course in construing revenue Acts is to give a fair and reasonable construction to their language without leaning to one side or the other but keeping in mind that no tax can be imposed without words clearly showing an intention to lay the burden and that equitable construction of the words is not permissible. Considerations of hardship, injustice or anomalies do not play any useful role in construing taxing statutes unless there be some real ambiguity. It has also been said that if taxing provision is "so wanting in clarity that no meaning is reasonably clear, the courts will be unable to regard it as of any effect. (IRC v. Ross and Coulter (1948) 1 All ER 616)"

Conclusion

43. The sum total of the above discussion is that as far as a return filed by way of self assessment under Section 9(1) read with Section 9(2) of the OET Act is concerned, unless it is 'accepted' by the Department by a formal communication to the dealer, it cannot be said to be an assessment that has been accepted and without such acceptance, it cannot trigger a notice for re-assessment under Section 10(1) of the OET Act read with 15B of the OET Rules. This answers the question posed to the Court.

44. As far as the individual writ petition is concerned, it is ordered as under:

(i) In W.P.(C) No.7458 of 2015 filed by ERPL, the impugned re-assessment order dated 19th February 2015 and the consequential demand, if any, raised are hereby quashed.

(ii) In W.P.(C) No. 7296 of 2013 filed by SMEL, the impugned re-assessment order dated 23rd February 2013 and the consequential demand notice (Annexure-3) are hereby quashed.

45. The writ petitions are disposed of in the above terms.

—— o ——

2022 (II) ILR - CUT-833

Dr. S.MURALIDHAR, C.J & Dr. S.K.PANIGRAHI, J.

STREV NO. 31 OF 2011
AND
STREV NOS.19, 20, 21, 22, 23, 24, 36, 37, 40 & 41 OF 2013

STATE OF ODISHA .....Petitioner
(COMMISSIONER OF SALES TAX, CUTTACK)
.V.
M/s. GEETASHREE INDUSTRIES .....Opp.Parties
(IN STREV NO.31 OF 2011)

M/s. MAA UTTARAYANI ROLLER FLOUR MILL
(IN STREV NO.19 OF 2013)

M/s. MAA BHUASUNI ROLLER FLOUR MILL
(IN STREV NO.20 OF 2013)

M/s. SHREE MAHADEVI DAL & OIL MILL
(IN STREV NOS.21, 23 & 24 OF 2013)

M/s. SHREE HANUMAN DAL MILL
(IN STREV NO.22 OF 2013)

M/s. SHREE BALAJI DAL & FLOUR MILL
(IN STREV NO.36 OF 2013)

M/s. SHREE JAGANNATH INDUSTRIES
(IN STREV NO.37 OF 2013)

M/s. MADANLAL AGARWALLA
(IN STREV NO.40 OF 2013)

M/s. TRUPTI DAL & FLOUR MILL
(IN STREV NO.41 OF 2013)

ORISSA ENTRY TAX ACT, 1999 – Section 26 read with Entry 66 of the schedule – Whether 'Chuni', which is a by-product of 'Dal' can itself be considered 'cattle feed',which is a 'schedule goods' within the meaning of Sl.No. 66 of Part-1 of the Schedule attached to the Act ? – Held, No – 'Chuni', which is a by-product of 'Dal' is not a 'cattle feed' and is therefore, not amenable to entry tax. (Para 20)

Case Laws Relied on and Referred to :-

1. (2009) 23 VST 99 (P&H) : Garg Cattle Feed Industry Vs. Food Corporation of India.
2. (1980) 45 STC 63 : Anand Taluka Co-operative Cotton-sale Ginning & Pressing Society Ltd. Vs. The State of Gujarat.
3. (1985) 60 STC 108 : Kamadhenu Trading Company Vs. The State of Tamilnadu.
4. (1998) 111 STC 69 (SC) : Sun Export Corporation Vs. Collector of Customs.
5. AIR 1990 SC 27 : Tata Oil Mills Co. Vs. Collector of Central Excise.
6. AIR 1957 SC 657 : A.V. Fernandez Vs. State of Kerala.
7. AIR 1961 SC 1047 : Sales Tax, U.P. Vs. Modi Sugar Mills Ltd.

8. (1985) 3 SCC 284 : Indian Aluminium Cables Ltd. Vs. Union of India.

For Petitioner : Mr. Sunil Mishra, A.S.C.
For Opp.Parties: None

JUDGMENT Date of Judgment : 02.08.2022

Dr. S. MURALIDHAR, C.J

1. These revision petitions by the State of Odisha ('Department') seek to urge a common question of law for consideration, viz. "Whether 'Chuni', which is a by-product of 'Dal' i.e. pulses including broken pulses, its husk, chilka and dust can itself be considered 'cattle feed', which is 'schedule goods' within the meaning of Sl. No. 66 of Para-I of the Schedule attached to the Orissa Entry Tax Act, 1999 (OET Act)?"

2. The first of these revision petitions STREV 31 of 2011 arises from an order dated 5th February, 2011 of a Single Judicial Member of the Orissa Sales Tax Tribunal, Cuttack (Tribunal) dismissing the appeal of the State of Odisha thereby upholding the order dated 7th March, 2009 of the Deputy Commissioner of Sales Tax, Puri (DCST) holding that 'Chuni' does not come within the scope of the entry 'cattle feed' as it is only one of the raw materials for preparation of the cattle feed and, therefore, not amenable to entry tax.

3. The challenge in the next petition again by the Department i.e. STREV 19 of 2013 is to an order dated 5th January, 2013 of a Two-Member Bench of the Tribunal holding likewise. The other petitions by the Department are against orders of Single Member Benches of the Tribunal holding likewise.

4. The ground on which the plea of the Department has been negatived is that in terms of Section 26 of the OET Act, the manufacturer is to collect tax only towards sale of 'finished products'. Therefore, 'Chuni' being a by-product is not liable to Entry Tax.

5. Mr. Sunil Mishra, learned Additional Standing Counsel for the Department, submits that another Single Member of the Tribunal had taken a contrary view by an order dated 19th August, 2010 while allowing the Department 's appeals in the case of ***State of Orissa v. M/s. Madanlal Agarwalla*** as well as batch of appeals, which included the very same Opposite Party in STREV No.31 of 2011 (M/s. Geetashree Industries), which was for a different year and, therefore, either the matter should have been referred by the SJM to a Larger Bench or the said order should have been followed.

6. The Court finds that barring the Single Member order dated 19th August, 2010 in M/s. Madanlal Agarwalla (supra), all of the other orders of the Tribunal against which the present revision petitions have been filed by the State and which are subsequent orders (one of them by a Two-Member Bench) have consistently held that 'chuni' is by itself not 'cattle feed'.

7. Nevertheless, the Court considers it appropriate to settle the issue since it may lead to unnecessary confusion if inconsistent orders were to be passed by the different Benches of the Tribunal.

8. The relevant entry which is at Sl. No. 66 of Part-I of the Schedule appended to the OET Act reads as under:

"66. Cattle feed, Prawn feed and poultry feed."

9. The product, which is sought to be subject to entry tax, is admittedly 'Chuni', which is nothing but husk of pulses. It is a by- product, which comes into existence during the process of manufacturing 'Dal' i.e. pulses. This is not in dispute. Also what is not in dispute is that 'Chuni' is not independently sold as 'cattle feed'. It is used to make cattle feed. There are 17 other ingredients which go to make cattle feed apart from 'Chuni'. These include De-oiled Rice bran, Maize, Jawar, Kuthi, Wheal bran cakes and De-oiled cakes (groundnuts), Till oil cake (black)/sunflower DOC/Soyabean DOC, Biri, Chuni, Moong chuni and molasses etc. This apparently was evident from a tender call notice published by Orissa State Cooperative Milk Producers' Federation Ltd. (OMFED) in 2008.

10. Another indication was the list of exempted goods under Schedule-A of the Orissa Value Added Tax Act (OVAT Act). Chokad, which is nothing but husk of 'Dal', is shown at Sr. No.3 of Schedule-A of the OVAT Act pertaining to exempt goods. Cattle feed has been separately mentioned with Chokad. In other words, both are not one and the same although Chokad could be an ingredient of cattle feed. This is the logic that appears to have prevailed with the DCST, who passed the order dated 7th March 2009, which was upheld by the SJM of the Tribunal by the order dated 5th February, 2011.

11. Turning now to the order of the Single Member Chairman of the Tribunal dated 19th August, 2010 holding the contrary view, it is seen that it has relied on decision pertaining to 'cattle fodder' but in the context of exemption from tax granted to such product. For instance, in ***Garg Cattle Feed Industry v. Food Corporation of India, (2009) 23 VST 99 (P&H)***, the question was whether 'cattle fodder' or 'cattle feed' would be exempted within the contemplation of exempt notification. This was the same context in ***Anand Taluka Co-operative Cotton- sale Ginning and Pressing Society Ltd. v. The State of Gujarat (1980)***

45 STC 63 held that Cotton oil-cake amounts to 'cattle feed'. Again, in ***Kamadhenu Trading Company v. The State of Tamilnadu, (1985) 60 STC 108***, it was held that hay, straw or rice bran or husk and dust of pulses and grams are normally used as 'cattle feed'. All of these were in the context of exemption notifications which exempted certain products from the ambit of taxation. It is in the same context in which the decision in ***Sun Export Corporation v. Collector of Customs, (1998) 111 STC 69 (SC)*** was rendered.

12. However, it cannot be straightaway inferred, on the above basis as has been done by the Single Member Chairman of the Tribunal, that even in the context of bringing a product within the ambit of tax under the OET Act, the same principle would apply and therefore, 'Chuni' is not a distinct commodity compared to 'cattle feed'.

13. It is one thing to say that a certain product was exempted for the purposes of taxation by virtue of interpretation of an exemption notification, it is another to say that it is amenable to tax by bringing it within the ambit of another product shown in the Schedule to the OET Act and, therefore, bringing it within the fold of taxation. The approach to both cannot be the same. The following passage in Principles of Statutory Interpretation by Justice G P Singh (13th Edition, 2012), p. 850-851 sets out the legal position lucidly:

> *"The general rule is strict interpretation of exemptions….There can, however, be no doubt that exemptions made with a benevolent object e.g. to encourage increased production or to give incentive to co-operative movement or for the purpose of developing urban or rural areas for public good….have to be liberally construed."*

14. In ***Tata Oil Mills Co. v. Collector of Central Excise AIR 1990 SC 27*** where the exemption was allowed for use of indigenous rice bran oil in manufacture of soap, the question was whether it would be available even if soap is made from rice bran fatty acid derived from rice bran oil. It was observed in that context as under:

> "6….The requirement is that the soap manufacture should, to a prescribed extent, be from rice bran oil as contrasted with other types of oil. The contrast is not between the use of rice bran oil as opposed to rice bran fatty acid or hydrogenated rice bran oil; the contrast is between the use of rice bran oil as opposed to other oils. That is the ordinary meaning of the words used. These words may be construed literally but should be given their fullest amplitude and interpreted in the context of the process of soap manufacture. There are no words in the notification to restrict it to only to cases where rice bran oil is directly used in the factory claiming exemption and to exclude cases where soap is made by using rice bran fatty acid derived from rice bran oil. The whole purpose and object of the notification is to encourage the utilisation of rice bran oil in the process of manufacture of soap in preference to various other kinds of oil (mainly edible oils) used in such manufacture and this should not be defeated by an unduly narrow interpretation of the language of the notification even when it is clear that rice bran oil can be used for manufacture of soap only after its conversion into fatty acid or hydrogenated oil."

15. For instance in ***Sun Export Corporation v. Collector of Customs*** (supra), the relevant entry in the exemption notification read: "10. Animal feed including compound livestock feed." The word "including" therefore permitted a wider and liberal interpretation of the term 'animal feed'.

16. However, when it comes to bringing a product within the ambit of taxation, then the rule of strict interpretation has to apply. As explained in ***A.V. Fernandez v. State of Kerala AIR 1957 SC 657***

> "29…in construing fiscal statutes and in determining the liability of a subject to tax one must have regard to the strict letter of the law and not merely to the spirit of the statute or the substance of the law. If the Revenue satisfies the Court that the case falls strictly within the provisions of the law, the subject can be taxed. If, on the other hand, the case is not covered within the four corners of the provisions of the taxing statute, no tax can be imposed by inference or by analogy or by trying to probe into the intentions of the legislature and by considering what was the substance of the matter."

17. In Commissioner of ***Sales Tax, U.P. v. Modi Sugar Mills Ltd. AIR 1961 SC 1047***, the principle was explained thus:

> "10…In interpreting a taxing statute, equitableconsiderations are entirely out of place. Nor can taxing statutes be interpreted on any presumptions or assumptions. The court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed; it cannot imply anything which is not expressed; it cannot import provisions in the statute so as to supply any assumed deficiency."

18. What perhaps is determinative is Section 26 of the OET Act, which clearly states that it is only a finished product which would be amenable to entry tax. Conscious of this, the Single Member Chairman tries to bring 'Chuni' within the ambit of a 'finished' and a separate 'commercial' product. However, the fact remains that 'chuni' or 'chokad' is only a by-product and not a complete finished product in itself. The finished product as far as the present case is concerned is 'cattle feed' which is what is mentioned in Entry 66 of the Schedule to the OET Act. So, the question to be asked is can in the context of Section 26 of the OET Act read with Entry 66 'Chuni' to be considered in itself to be a finished product and, therefore, not different from 'cattle feed'? The answer to this has to be in the negative since 'Chuni' is one of the 16 ingredients into the making of 'cattle feed' and it is not the same thing as 'cattle feed' as occurring in Entry 66 of the Schedule to the OET Act.

19. Viewing it from another perspective, which is the trade parlance perspective, if one were to seek to buy 'cattle feed' in the market for such product, would one be given plain 'chuni'? Again, the answer has to be in the negative. Clearly the traders in such products would understand the distinction between the two. As explained in ***Indian Aluminium Cables Ltd. v. Union of India (1985) 3 SCC 284***.

> "12…in determining the meaning or connotation of words and expressions describing an article in a tariff schedule, one principle which is fairly well settled is that those words and expressions should be construed in the sense in which they are understood in the trade, by the dealer and the consumer. The reason is that it is they who are concerned with it, and, it is the sense in which they understand it which constitutes the definitive index of legal intention."

20. For all of the aforementioned reasons, the Court is of the view that 'Chuni' which is the by-product of 'Dal' is not 'cattle feed' and is therefore not amenable to entry tax. Accordingly, there is no merit in any of these revision petitions and they are, therefore, dismissed as such.

—— o ——

2022 (II) ILR -CUT-838

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

W.P.(C) NO.12369 OF 2016

NILAKANTHA TRIPATHY ……..Petitioner

.V.

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

ORISSA SUPERIOR JUDICIAL SERVICE & ORISSA JUDICIAL SERVICE RULES, 2007 – Rule 44 – Retirement in public interest – Whether there is necessity of giving a hearing to the petitioner prior to such decision? – Held, No – Compulsory retirement is not a punishment and it was taken in the interest of better administration of justice – There is no need of any interference – The petition is dismissed. (Paras 14,15)

Case Laws Relied on and Referred to :-

1. 1994 Supp.(3) SCC 424 : S. Ramachandra Raju Vs. State of Orissa.
2. (1992) 2 SCC 299 : Baikuntha Nath Das Vs.Chief District Medical Officer,Baripada.

For Petitioner : Mr. Budhadev Routray, Senior Advocate
Mr. J. Biswal

For Opp.Parties: Mr. P. K. Muduli, Additional Government Advocate

JUDGMENT Date of Judgment : 05.08.2022

Dr. S. MURALIDHAR, C.J.

1. In this petition, the Petitioner, who was working as a Chief Judicial Magistrate (CJM), has questioned the decision of the High Court not to continue him in service after crossing the age of 58 years.

2. It must be mentioned at the outset that the entire service record of the Petitioner was produced before the Court and perused by it. By an order dated 7th

July 2022, the Court permitted the Petitioner to peruse his service record in the chamber of Registrar (Judicial). The Petitioner perused the record and after the submissions of the counsel for the parties were heard, order was reserved on 27th July, 2022.

3. The background facts are that the Petitioner was successful in the examination conducted by the Odisha Public Service Commission and by a Notification dated 28th January, 1987, he was appointed as Munsif (on probation) in Orissa Judicial Service (OJS)-II, Puri and joined in that post on 16th February, 1987. He became a Judicial Magistrate First Class on 14th March, 1989 and served in various locations in the State of Odisha. He was promoted as Senior Civil Judge in 2005 and posted at Rourkela by an order dated 28th October, 2005.

4. In terms of the relevant provisions of the Orissa Superior Judicial Service and Orissa Judicial Service Rules, 2007 ('the 2007 Rules'), the Petitioner was continued in service after attaining the age of 50 years. By a Notification dated 7th July 2010, he was posted as CJM, Baripada. In 2012, on attaining the age of 55 years, he was allowed to continue as CJM, Baripada. He was then transferred as CJM, Jharsuguda by a Notification dated 18th July, 2013. At the meeting of the Review Committee held on 6th October 2015, it was decided to recommend to the High Court the Petitioner's compulsory retirement in public interest. The Full Court accepted the recommendation at its meeting on 15th October, 2015. The consequential notification compulsory retiring the Petitioner was issued by the Government on 5th November, 2015.

5. This Court heard the submissions of Mr. Budhadev Routray, learned Senior Counsel appearing for the Petitioner and Mr. P.K. Muduli, learned Additional Government Advocate for the State.

6. Mr. Routray submitted that throughout the career of the Petitioner his performance was found satisfactory and that is why he continued in service on attaining the ages of 50 and 55 years in terms of Rule 44 of the 2007 Rules. Mr. Routray submitted that in terms of Rule 41 of the 2007 Rules, the provisions of the Orissa Civil Services [OCS] (CCA) Rule, 1962 shall mutatis mutandis apply to the members of the OSJS and OJS. He further submitted that as far as the Petitioner is aware, there is not a single adverse entry in his CCRs, so as to hold that his continuation in service would be against public interest. He further submitted that if at all the Review Committee was of the view that the continuance of the Petitioner beyond 58 years was against public interest and, therefore, he should be removed from service prematurely then in terms of Rule 41 of the 2007 Rules, he ought to have been given a hearing.

7. In the petition, it is mentioned how in 2011, a disciplinary proceeding was initiated against the Petitioner and a memorandum of charge was served on him on 30th July, 2012 to which he replied. An enquiry was conducted but the Petitioner was never asked to appear before the Disciplinary Authority and he was never supplied a copy of the Inquiry Report. Mr. Routray submitted that although the scope of judicial review in such matters is limited, in the present case there does not appear to be material to justify the decision of the High Court not to continue the Petitioner in service.

8. Mr. P.K. Muduli, learned Additional Government Advocate appearing for the State-Opposite Parties, on the other hand, submitted that the service record of the Petitioner would show that the recommendation of the Review Committee, which was accepted by the Full Court is justified. While it was correct that the Petitioner was retained in service on attaining the ages of 50 and 55, it is not correct that there was no allegation at all against him during that period. He submitted that although an Inquiry Report was submitted in the Departmental Enquiry, it was never acted upon since it was decided to prematurely retire the Petitioner. The action taken under Rule 44 is not a punishment unlike disciplinary action taken under [OCS] (CCA) Rule, 1962. He submitted that the Rule 44 of the 2007 Rules was an independent provision and did not contemplate the giving of an opportunity of hearing. Further, the order of compulsory retirement is not a punishment and, therefore, principles of natural justice were not attracted.

9. The entries for the years 2011, 2012, 2013 and 2014 were "average and unfit for promotion", 'good', 'good' and 'average' respectfully. It is pointed out that the Petitioner never had entries of 'outstanding' and 'very good' in his CCRs as such claimed by him. The impugned decision was taken on over all consideration of not only CCRs of the relevant period under review but the entire record of service, the personal files, overall performance, the yardstick as well as vigilance inputs including the aspect of integrity and suitability before taking the decision in the matter. Public interest was definitely of paramount importance. The mere fact that he was allowed to cross the efficiency bar and granted ACP would not itself lead to the conclusion that his service was satisfactory and that there was no basis for the decision to retire him on his reaching the age of 58.

10. The above submissions have been considered.

11. As already mentioned, the service record of the Petitioner has been carefully perused by the Court. To begin with the CCRs of the Petitioner for the years 1989, 1990, 1991, 1993, 1994, 1998,1999, 2006, 2011 and 2014 reveal that in all these years he got the 'Average' grading and an adverse remark in 1990

was communicated to him as were the adverse remarks for 1992, 1994 and 1995. In some of these years, the Reviewing Authority has remarked that his knowledge of law was 'Average' and that "he needs improvement" and also that he should "improve upon English". The conduct of departmental proceedings and the submission of the report of enquiry appear to have taken some time. By the time the inquiry report was placed before the Full Court, the Petitioner's case for continuation after the age of 58 came up for consideration and the impugned decision was taken.

12. Rule-44 of the 2007 Rules reads as under:

> "***44. Retirement in public interest-***
>
> *(1) Notwithstanding anything contained in these rules the Governor shall, in consultation with the High Court, if he is of the opinion that it is in the public interest so to do, have absolute right to retire any member of the service who has attained the age of fifty years, by giving him/her notice of not less than three months in writing or three months pay and allowances in lieu of such notice.*
>
> *(2) Whether any officer of these service should be retired in public interest under Sub-rule (1) shall be considered at least three times, that is, when he is about to attain the age of fifty years, fifty-five years, and fifty- eight years:*
>
> *Provided that nothing in sub-rule (2) shall be construed in public interest as preventing the Governor to retire a member of the service at any time after he/she attains the age of fifty years on the recommendation of High Court under sub-rule (1)."*

13. The decision whether to continue an officer in service after attaining the age of 50, 55 and 58 is taken at two levels: At the first level, there is a Review Committee comprising of Senior Judges of the High Court including the Chief Justice, which carefully peruses the entire service record of the officer. Thereafter it recommends to the Full Court whether such officer should be retained in service. At the second level, the recommendation of the Review Committee is deliberated in the Full Court and then a final decision is taken in that regard. This is the precise procedure followed in the present case. In taking the decision to compulsorily retire the Petitioner, the Full Court kept in view the legal principles as explained in ***S. Ramachandra Raju v. State of Orissa, 1994 Supp.(3) SCC 424*** in the following words:

> *"9.....The entire service record or character rolls or confidential reports maintained would furnish the back drop material for consideration by the Government or the Review Committee or the appropriate authority. On consideration of the totality of the facts and circumstances alone, the government should form the opinion that the government officer needs to be compulsorily retired from service. Therefore, the entire service record more particular the latest, would form the foundation for the opinion and furnish the base to exercise the power under the relevant rule to compulsorily retire a government officer. When an officer reaching the age of compulsory retirement, as was pointed out by this Court, he could neither seek alternative appointment nor meet*

the family burdens with the pension or other benefits he gets and thereby he would be subjected to great hardship and family would be greatly affected. Therefore, before exercising the power, the competent appropriate authority must weigh pros and cons and balance the public interest as against the individual interest. On total evaluation of the entire record of service if the government or the governmental authority forms the opinion that in the public interest the officer needs to be retired compulsorily, the court may not interfere with the exercise of such bona fide exercise of power but the court has power and duty to exercise the power of judicial review not as a court of appeal but in its exercise of judicial review to consider whether the power has been properly exercised or is arbitrary or vitiated either by mala fide or actuated by extraneous consideration or arbitrary in retiring the government officer compulsorily from service."

14. It is now well settled that compulsory retirement is not a punishment and the necessity of giving a hearing to the Petitioner prior to such decision being taken does not arise. This has been explained in a large number of cases including ***Baikuntha Nath Das v. Chief District Medical Officer, Baripada (1992) 2 SCC 299***, where the legal principles were summarized as under:

"34. The following principles emerge from the above discussion:

(i) An order of compulsory retirement is not a punishment. It implies no stigma nor any suggestion of misbehaviour.

(ii) The order has to be passed by the government on forming the opinion that it is in the public interest to retire a government servant compulsorily. The order is passed on the subjective satisfaction of the government.

(iii) Principles of natural justice have no place in the context of an order of compulsory retirement. This does not mean that judicial scrutiny is excluded altogether. While the High Court or this Court would not examine the matter as an appellate court, they may interfere if they are satisfied that the order is passed (a) mala fide or (b) that it is based on no evidence or (c) that it is arbitrary – in the sense that no reasonable person would form the requisite opinion on the given material; in short, if it is found to be a perverse order.

(iv) The government (or the Review Committee, as the case may be) shall have to consider the entire record of service before taking a decision in the matter – of course attaching more importance to record of and performance during the later years. The record to be so considered would naturally include the entries in the confidential records/character rolls, both favourable and adverse. If a government servant is promoted to a higher post notwithstanding the adverse remarks, such remarks lose their sting, more so, if the promotion is based upon merit (selection) and not upon seniority.

(v) An order of compulsory retirement is not liable to be quashed by a Court merely on the showing that while passing it uncommunicated adverse remarks were also taken into consideration. That circumstance by itself cannot be a basis for interference.

Interference is permissible only on the grounds mentioned in (iii) above. This aspect has been discussed in paras 30 to 32 above."

15. Having perused the entire service record of the Petitioner, the Court is satisfied that there were materials on record for the Full Court to have accepted the recommendation of the Review Committee that it was in public interest and in the interest of better administration of justice that the Petitioner should not be continued in service after attaining 58 years of age.

16. Consequently, the Court is not persuaded to grant the relief as prayed for. The petition is dismissed.

—— o ——

2022 (II) ILR - CUT-843

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

CRLA NOS. 184, 183 & 697 OF 2012 AND CRLA NO. 619 OF 2011

AMIT @GULLU @AMITAV KUMAR ……..Appellants
(IN CRLA NO. 184 OF 2012)
CHANDAN SHARMA @CHANDAN KU.SHARMA
(IN CRLA NO.183 OF 2012)
LAMBU @CHANDRA MOHAN JHA
(IN CRLA NO.697 OF 2012)
CHHUNU @CHUNNI @MOHAN CHOWDHURY
(IN CRLA NO.619 OF 2011).

.V.

STATE OF ODISHA ……..Respondent

CRIMINAL TRIAL – Offences punishable under Sections 395, 396 & 397 of IPC and Sections 25 & 27 of the Arms Act – Plea of the appellant that 17 persons were sent up for trial, out of which 13 have been acquitted and four have been convicted – Accordingly, the conviction for the offence under Sections 395 and 396 IPC cannot be sustained in law – Held, Merely because some of the accused absconded and less than five persons faced the trial, it cannot be said that the offence under Section 391 IPC punishable under Section 395 IPC, is not made out – What is required to be considered is the involvement and commission of the offence of robbery of five persons or more and not whether five or more persons were tried – Once it is found on evidence that five or more persons conjointly committed the offence of robbery or attempted to commit the robbery a case would fall under Section 391 of IPC and would fall within the definition of "dacoity" – Consequently, it cannot be said that the present four Appellants cannot be convicted for the offence under Section 395 read with Section 397 of IPC.

Case Laws Relied on and Referred to :-

1. AIR 1998 SC 1220 : Om Prakash v. State of Rajasthan.
2. 2021 SCC Online 1023 : Ganesan v. State represented by Station House Officer.
3. AIR 1990 SC 1459 : Vijayee Singh v. State of U.P.
4. AIR 1970 SC 1321 : Budhsen v. State of U.P.
5. AIR 1972 SC 283 : Sheikh Hasib@Tabarak v. State of Bihar.
6. AIR 1974 SC 791 : Sampat Tatyada Shinde v. State of Maharashtra.
7. (2020) 15 SCC 562 : Raja v. State by the Inspector of Police.
8. AIR 1962 SC 399 : Tori Singh v. State of U.P.
9. AIR 1965 SC 87 : Manipur Administration v. Thokchom Bira.

For Appellants : Mr. Salman Khurshid, Senior Advocate,
Mr. Avijit Pal, Ms. Lubna Naaz and Mr. Sommya Chaturvedi,
(In CRLA 184 of 2012)
None - (In CRLA Nos.183 & 697 of 2012 & CRLA No. 619 of 2011)

For Respondent : Mr. Janmejaya Katikia, Additional Government Advocate

JUDGMENT Date of Judgment : 23.08.2022

BY THE BENCH

1. These four appeals are directed against the judgment dated 20th September, 2011 passed by the Additional Sessions Judge (Fast Track Court-II), Bhadrak in Sessions Trial No.91/66 of 2007-09 convicting the Appellants for the offences punishable under Sections 395, 396 & 397 IPC and Sections 25 & 27 of the Arms Act and sentencing them as under:

I. to undergo imprisonment for life each and a fine of Rs.1000/- and in default to undergo further six months rigorous imprisonment (RI) each for the offence under Section 396 IPC;

II. to undergo RI for ten years each and fine of Rs.1000/- and in default to undergo further RI for six months each for the offence under Section 395 IPC;

III. to undergo RI for seven years each for the offence under Section 397 IPC;

IV. to undergo RI for three years each and fine of Rs.500/- and in default to undergo RI for three months each for the offence under Section 25 of the Arms Act;

V. to undergo RI for three years each and fine of Rs.500/- and in default to undergo RI for three months each for the offence under Section 27 of the Arms Act;

all the sentences were directed to run concurrently.

2. At the outset, it must be mentioned that seventeen persons were sent up for trial, of which four of them i.e. Lambu @ Chandra Mohan Jha- Accused No.1 [A1] (Appellant in CRLA No.697 of 2012); Amit @ Gullu @ Amitav Kumar [A6] (Appellant in CRLA No.184 of 2012); Chhunu @ Chunni @ Mohan Chowdhury [A7] (Appellant in CRLA No.619 of 2011) and Chandan Sharma @ Chandan Kumar Sharma [A8] (Appellant in CRLA No.183 of 2012) were found guilty of the aforementioned offences and the remaining thirteen were acquitted of all the offences.

Case of the Prosecution

3. On 23rd February 2007, Sri Maguni Charana Mahanta (PW-6), the Manager of Central Bank of India, Bhadrak Branch, Bhadrak submitted a written complaint to the Officer-In-Charge (OIC), Police Station (PS), Bhadrak stating that at about 1.25 pm on that date the cashier of the Bank, Rabindra Nath Mandal (PW-13), the Arm Guard, Dibakar Sahu (deceased), and the sub-staff-Lal Mohan Singh (deceased) collected cash from the Life Insurance Company of India (LIC) Bhadrak Branch and while coming out of the LIC building towards the gate where the hired vehicle was parked,"4 or 5 persons fired at the above employees, and snatched the gun and cash box from them." The complainant stated that there was cash to the tune of Rs.24,09,274.90, which included the cash received from both the LIC as well as the Railway counter. Immediately, the LIC staff informed the nearby outpost over phone and the injured staff were shifted to the Bhadrak Medical by PW-13.

4. In the FIR that was lodged at 3.30 pm on 23rd February 2007, in the column titled ‘Accused’, it was written 'unknown'. The original written report referred to above was treated as the FIR.

5. The case of the prosecution as spoken by its star witness, PW-13 i.e. the cashier of the Bank, was that he along with the two deceased went to collect cash from the Railway and the LIC in Bhadrak by hiring a private vehicle. The cash collected from both places was kept in a tin box. While emerging from the LIC office carrying the tin box towards the car, PW-13 heard a sound of firing and saw one bullet hit on the finger of Sanat Kumar Majumdar (PW-10), the driver of the car and the bullet injuries on the two deceased. He saw that six persons were fleeing away on three motorcycles by carrying a tin box. He immediately gave information to PW-6 over telephone about the occurrence.

6. The two deceased i.e. Dibakar Sahu, the Arm Guard and Lal Mohan Singh, the sub-staff were shifted to the Bhadrak Hospital and from there to the SCB Medical College and Hospital, Cuttack (SCB). While Lal Mohan Singh died on the way, Dibakar Sahu died in the hospital.

7. On 23rd February 2007, Dr. Amarendra Nayak (PW-14) of the SCB conducted the post-mortem (PM) on the dead body of Lal Mohan Singh. On dissection, he found a foreign body looking like a fired bullet. He found there tear and blood stains on the shirt of the deceased and blast-like effect and powder deposits thereon. PW-14 found the bullet's entry and exit wound and opined that the death was homicidal.

8. On the same day, PW-14 conducted the PM of the deceased Dibakar Sahu and found four punctured lacerated wounds and multiple contusions. He recovered the deformed bullet like postulate from the dead body. There was both gunshot entry and exit wounds. Here again, he opined that the death was homicidal.

9. Dr. Dipti Murty Panda (PW-16) at Bhadrak DHH, who examined Dibakar Sahu at around 2 pm, found two gunshot injuries and one entry wound with profuse bleeding. He also examined Lal Mohan Singh and found two gunshot penetrating injuries and one exit wound on his body.

10. According to the prosecution, there were three injured bystanders—Kiran Kumar Khuntia (PW-9), Arpita Mohanty (PW-11) and Bijay Barik (PW-12). Their injuries were proved by Dr. Goura Chandra Jena (PW-17), who examined PW 9 and found one entry wound on right side of umbilicus and then referred PW 9 to the SCB. He examined PW-12 and found one entry wound and one exit wound and again referred him to SCB. He examined PW-11 and opined that the injuries were caused within 6 hours of the time of examination and referred her to the SCB.

11. The case was registered at the Bhadrak Town Police Station (PS) as Case No. 31 of 2007. Shri Rabindra Kumar Jena (PW-32), the Inspector of Police, on receipt of the information, proceeded to the spot where he found blood stains, empty cases of ammunitions and broken guns. He prepared a spot map and mentioned the details of the spot in the crime details form. He examined the complainant at the spot. At 5 pm, the scientific team reached at the spot and inspected it. Later on that date, he seized three pieces of broken double barrel gun, two empty cartridge cases of 9 mm pistol, a fired bullet, saline extraction of blood stain from the road of the LIC office, sample gauze cloth, etc.; seized the Maruti Esteem car, which was hired to carry the cash. PW-32 examined the driver (PW-10) at the Hospital. He also examined other witnesses on 24th February, 2007. He stated that on 26th February 2007, he received reliable information regarding three motorcycles and a car used by the culprits. He seized one motorcycle from the Chermpa Railway Station. The identity of some of the accused was ascertained on 27th February 2007. A1 was arrested in the house of

one Ratnakar Patra at Balasore and a motorcycle was also seized as was a mobile phone. He searched a rented house of A1 and seized some cash. On 27th February 2007 itself PW-32 managed to arrest apart from A1, Hrushikesh Das (A2), Laxmidhara Behera (A3), Chanda @ Sk. Haffizuddin (A4) and Lali @ Mir Alim (A5) and forwarded them to the Court of SDJM, Bhadrak. A team was sent on the next date to Patna for further investigation. On 12th March 2007, one of the suspects, Raju Kumar Ray, was brought by the team that went to Patna.

12. On 4th April 2007, at the raid conducted at hotel Sagar Inn in Bhadrak, A6, A7, A8, Tutu @ Mayanka Kumar, Masterjee @ Sunil Kumar (A9) were arrested and Rs.4 lakh of cash was seized along with weapons. Several other arrests took place of other accused on 10th April, 2007.

13. Shri Partha Sarathi Pattnaik (PW-24) working as JMFC, Bhadrak conducted Test Identification Parade (TI Parade) in the Bhadrak jail premises on 5th March, 2007. Manas Kumar Panda (PW-7), Asutosh Sahu (PW-1), Sanat Kumar Majumdar (PW-10) and Ananta Gopal Das (PW-2) were the witnesses, who identified the present four Appellants. The TI parade in respect of A6, A7 and A8 was held on 11th April, 2007.

14. It must be noticed here that A6, A7, Tutu @ Mayanka Kumar (the case against whom was split up) and Masterjee @ Sunil Kumar (A9) were arrested in connection with Bhadrak PS Case No.90 of 2007 while they assembled at hotel Sagar Inn and were preparing to commit dacoity.

15. On completion of investigation, the police submitted a charge-sheet against A1, A2, A3, A4, A5, A6, A7, A8, A9 and Tutu @ Mayanka Kumar under Sections 396/307/120-B IPC and sections 25/27 of the Arms Act. The charge-sheet was submitted against accused Sanjay Singh @ Subodh Kumar, Raju Kumar Ray @ Paswan under Section 120-B/109 IPC and against Mintu @ Dharmendra Kumar (A10), Bibek Kumar Sharma (A11) and Rajib Kumar Sharma (A12) under Section 120-B IPC. Accused Sanjaya Kumar Sinha (A13), Sanjit Kumar (A14), Vikram Kumar Gupta (A15), Krushna Chandra Behera (A16) were charge-sheeted under Section 120-B IPC mentioning that there was not sufficient evidence against them. The police sought permission of the Court to continue the investigation under Section 173 (8) Cr PC.

16. The SDJM., Bhadrak took cognizance against A13, A14, A15 and A16 although sufficient evidence was not collected against them during investigation. The case against Raju Kumar Ray @ Paswan and Tutu @ Mayank Kumar was split up on 13th October, 2009 by the ADJ., Bhadrak. A supplementary charge-sheet was filed against J.P.@ Jai Prakash @ Bipin Sharma (A17) and the case

was committed for trial in ST Case No.171 of 2007 dated 16th November, 2009. The said case was tagged with the present case and A17 faced trial along with other accused persons.

17. On behalf of the prosecution, 34 witnesses were examined. The accused took the plea of denial and false implication. A1 claimed that he had no Yamaha motorcycle and that his mobile phone had not been seized by the police. A2 stated that his Pulsar motorcycle was not seized from his house, but had been seized when his son had been to meet him at the PS. A5 claimed he was not arrested from hotel Sagar Inn, but was called from his house and arrested at the PS. A6 stated that on 3rdApril 2007, one Manoj Das of Orissa Police had brought him from his house. A7 also stated that he was brought from his house and was forced to sign on some blank papers. A8 claimed that on 3rd April, 2007, the police had brought him from his house. A9 stated that on 5th April 2007, Manoj Das brought him from Bihar and obtained his signature on a plain paper.

18. The defence examined 7 witnesses. 3 witnesses were examined on behalf of A2; A9 examined himself as DW4; A7 examined himself as DW5; A4 and A5 were examined as DW6 and one Madan Mohan Parida, who was originally being arraigned as PW, was examined as DW7 on behalf of A7.

The trial Court judgment

19. The trial Court on an analysis of the evidence, returned the following findings:

> (i) From the evidence of PWs 6, 7 and 13 it was proved that on 27th February 2010, PW 13 along with the deceased collected the aforementioned cash from the ECR and the LIC, Bhadrak branch;
>
> (ii) Based on the TI Parade, the evidence of PW 24 i.e. the Judicial Magistrate who conducted the TI Parade, and the evidence of PWs 1 and 7, it was proved that between 1 and 2 pm on 23rd February, 2007 there was a dacoity committed in front of the LIC office; the security guard was assaulted by gun and six persons including the four accused i.e., A-1, A-6, A-7 and A-8 were involved in the dacoity.
>
> (iii) The evidence of PW 7 was very clear, cogent and trustworthy. There was no reason to discard the evidence on the question of participation of the four accused. Inasmuch as the spot map (Ext-35) does not, as explained by PW 32 (IO), reveal all the shops located around the LIC Office, the failure to locate the shop of PW 7 therein did not affect his evidence that it was in fact in front of the LIC Office.
>
> (iv) Both the deceased died by gunshot injuries. The driver viz, PW 10 of the Maruti car hired to take the cash, was injured. He corroborated the evidence of PWs 6 and 13 about the occurrence. PW 10, the injured eyewitness, had identified only A-1 and not the other accused. As regards, the minor discrepancies in the evidence of PWs 1, 2 and 7, it was observed as under by the trial Court:

"P.W. 1, P.W.2 and P.W. 7 were the persons of lower strata of the society. They were examined in the court about two and half to three and half years, after the occurrence. It is not expected from them that they would give a graphic description of the occurrence. In this case, the occurrence started from firing and thereafter culprits snatched away the tin box containing the cash and fired short towards the security guard and thereafter started indiscriminating firing and fled away. The witnesses were present at different places and they have only saw a part of the occurrence. As because, the witnesses were not stated about the whole occurrence so, the part of the reliable evidence of the witness cannot be rejected only for that ground."

(v) The evidence of PW 7 and PW 18 clearly revealed that six persons were present at the time of occurrence and they went away by motor cycle. That all the six persons went away by motor cycle after the occurrence showed that they had committed the offence conjointly. Admittedly, prosecution failed to establish the identity of two other persons who were present at the spot along with accused Amit @ Gullu @Amitabh Kumar, Chandan Kumar Sharma, Lambu @Chandramohan Jha and Mohan Chaudhury. Therefore, the prosecution was able to establish that six persons were involved in the offence. Consequently, the contentions of the defence that the prosecution had failed to establish the involvement of five or more persons in the occurrence was liable to be rejected.

(vi) Considering the date of arrest of the accused persons and the date of holding the TI Parade, there was no delay in holding it.

(vii) The apprehension of Amit @ Gullu @ Amitabh Kumar, Chunnu @ Chunni @ Mohan Choudhury, Chandan Kumar Sharma and Mir Lali @ Mir Ali from Hotel Sagar Inn was an incriminating piece of circumstance against them.

(viii) The prosecution failed to establish the alleged seizure of cash, arms and ammunition from the accused persons. The bags alleged to have been seized as per Ext 86 to 90 were not produced in this case.

(ix) In absence of any certificate by any responsible officer of the cellular Company of the call detail report (CDR), Ext. 74 to Ext. 81 could not be taken into consideration.

(x) The prosecution failed to bring home the charges against A-1, A-2, A- 3, A-4, A-5, A-9 to A-17. Also, no evidence was produced by the prosecution as regards the seizure of fire arms. There was no direct or circumstantial evidence to establish the conspiracy between the accused persons for committing dacoity and murder. Therefore, it was held that the charge under Section 120B IPC had not been established.

(xi) Ultimately, the trial Court concluded as under:

"76. From the above discussion, I hold on 23.2.07 during (Noon) the occurrence took place in front of L.I.C. Office, Bhadrak at Bonth Chhak. Accused Lambhu @ Chandramohan Jha, Amit @ Gullu @ Amitabh Kumar, Chhunu @ Chunni @ Mohan Chaudhury and accused Chandan Kumar Sharma along with two others conjointly have committed dacoity of cash of Rs.24,09,274.90 of Central Bank of India, Bhadrak. During occurrence accused persons were illegally possessing firm arm like revolver, country made pistol and use the same causing death of Dibakar Sahu and Lalmohan Singh. Accused persons also caused fire arm injury to Kiran Khuntia, Sanat Majumdar, Arpita Mohanty and Bijoy Barik on the vital part of their bodies. The above named four accused persons were correctly identified by the eye witnesses during Test Identification Parade and in the Court. Accused Amit @ Gullu @ Amitabh Kumar, Chhunu @ Chunni

> @ Mohan Chaudhury and Chandan Kumar Sharma were apprehended by the police from hotel Sagar Inn at Charampa. Accused Chandra Sharma was staying at Mishra Guest House at Charmpa prior to two days of the occurrence in the name of Rakesh Kumar and he left the guest house, just prior to the occurrence. Police seized the weapon of offence (revolver and country made pistol) used at the time of occurrence. Prosecution failed to establish the identity of two other accused persons present during the occurrence, alongwith the above named four accused persons. Since, two of the other accused persons are still absconder, so the non- identification of two other accused persons no-way affect the prosecution case about the involvement of six persons during the occurrence. As I hold six persons were present at the time of occurrence, so all the accused persons are conjointly liable for the offence committed in this case. Therefore, I hold prosecution able to establish the offence against Lambu @ Chandramohan Jha, Amit @Gullu @Amitabh Kumar, Chhunu @Chunni @Mohan Chaudhury and Chandan Kumar Sharma u/s. 395, 396, 397 I.P.C. & u/s. 25/27 of Arms Act beyond all reasonable doubt."

The offence punishable under Section 396 IPC

20. Mr. Salman Khurshid, learned Senior Counsel appearing for the Appellants along with Mr. Avijit Pal, learned counsel submitted that 17 persons were sent up for trial of which 13 have been acquitted and four have been convicted. Accordingly, the conviction for the offence under Sections 395 and 396 IPC cannot be sustained in law. Since there is no charge as regards the offence of murder punishable under Section 302 IPC vis-à-vis each of the four accused, the Appellants cannot possibly be convicted for that offence. If Section 395 IPC goes then automatically Sections 396 and 397 IPC also will have to go since they are interlinked and they cannot be understood in isolation. Without the charge under Section 395 being proved, Sections 396 and 397 cannot be contemplated. Reliance is placed on the judgment of the Supreme Court in ***Om Prakash v. State of Rajasthan AIR 1998 SC 1220.***

21. On the other hand, Mr. Katikia, learned Additional Government Advocate for the State relied on the decision in ***Ganesan v. State represented by Station House Officer 2021 SCC Online 1023*** and pointed out that as long as there is involvement of more than five persons shown in the crime, the fact that less than five may have been found involved in the offence punishable under Section 395 IPC would not result in their being acquitted of such offence as not made out only because five persons were not convicted for that offence.

22. The above submissions have been considered. It is no doubt true that Section 391 IPC envisages five or more persons conjointly committing or attempting to commit a robbery and, in such event, every person so committing or attempting would be held to be guilty of the offence of dacoity. Section 396 IPC provides for dacoity with murder and Section 397 provides for robbery or dacoity with attempt to cause death or grievous hurt. While it is no doubt true

that the essential ingredients are that there shall be more than five persons involved in the robbery, in the present case, the involvement of more than five persons was shown in the first place in the FIR, as it was filed against 'unknown persons'. In other words, even if the identity of some of the other persons is not known, the fact remained that there were more than five involved and this fact has not been able to be dislodged by the defence.

23. In ***Om Prakash v. State of Rajasthan*** (supra) neither the charge nor the finding recorded by the trial Court was that the three convicted persons "and two other unknown persons had committed dacoity." Only five named accused were alleged to have committed the offence. It was in those circumstances that it was held that with two of them having been acquitted, it was as if the remaining three alone had committed the offence and, therefore, it was not proper to convict the remaining under Section 395 IPC.

24. However, the facts in the present case are closer to the facts in ***Ganesan v. State represented by Station House Officer*** (supra) where it was observed as under:

> "53. … Even there are concurrent findings recorded by all the courts below that five persons were involved in committing the offence of robbery. Merely because some of the accused absconded and less than five persons came to be tried in the trial, it cannot be said that the offence under Section 391 IPC punishable under Section 395 IPC is not made out. What is required to be considered is the involvement and commission of the offence of robbery of five persons or more and not whether five or more persons were tried. Once it is found on evidence that five or more persons conjointly committed the offence of robbery or attempted to commit the robbery a case would fall under Section 391 IPC and would fall within the definition of dacoity."

25. In the present case, the involvement of more than 17 persons who were sent up for trial is evident. In fact, the witnesses talked about six persons coming on three motor bikes at the scene of crime and then fleeing away. The other two were not known. Therefore, the involvement of six persons in the actual crime is more than adequately brought out in the case of the prosecution. Consequently, it cannot be said that the present four Appellants cannot be convicted for the offence under Section 395 read with Section 397 of IPC.

Section 105 Evidence Act

26. It was then contended that for the purpose of Section 105 of the Evidence Act, the evidence brought on record created doubt regarding the involvement of the present Appellants in the crime and therefore, they must be given the benefit of doubt. Reliance in this regard is placed by Mr. Khurshid on the judgment in ***Vijayee Singh v. State of U.P. AIR 1990 SC 1459.***

27. In reply, it was submitted by Mr. Katikia, learned AGA that the evidence of PWs 1, 2, 7 and 10 about the involvement of six persons in the crime was clear. Of those six persons the evidence proved beyond doubt the participation of the present four Appellants, who were identified in the TI Parade by the aforementioned PWs 1, 2, 7 and 10. There was no occasion therefore, for giving the accused the benefit of doubt under Section 105 of the Indian Evidence Act.

28. The Court has carefully examined the testimonies of PWs 1, 2, 7 and 10 as well as that of PW 24, the JMFC who conducted the TI Parade. Neither the procedure for holding TI Parade has been able to be shown to be not in consonance with the legal requirement nor the actual identification of the Appellants by the aforementioned witnesses in the TI Parade been shown to be doubtful. In other words, the identity and the involvement of each of the present Appellants is more than adequately proved through the TI Parade.

TI Parade

29. It is then contended that two of the victims of the crime i.e. PWs 13 and 10 had not participated in the TI Parade to identify the Appellants and therefore, there was a reasonable doubt created over their involvement. Reliance is placed on the decision in ***Rahimal v. State of UP (1992) CriLJ 3819***. It was further submitted that the TI Parade by itself cannot be substantive evidence under Section 9 of the Evidence Act. Reliance is placed on the decisions in ***Budhsen v. State of U.P. AIR 1970 SC 1321; Sheikh Hasib @ Tabarak v. State of Bihar AIR 1972 SC 283 and Sampat Tatyada Shinde v. State of Maharashtra AIR 1974 SC 791.***

30. In response, it is submitted by Mr. Katikia that in the present case the T.I. Parade is one of the elements in the pieces of evidence which corroborated the eyewitness testimony.It was not projected by the prosecution as a substantive piece of evidence.

31. Having carefully perused the trial Court judgment as well as the entire evidence on record, the Court accepts the plea of the prosecution that in the present case the TI Parade evidence has not been relied upon by the prosecution as a substantive piece of evidence but only as corroborating the main evidence. In ***Raja v. State by the Inspector of Police (2020) 15 SCC 562***, the Supreme Court explained the legal position as under:

> "15. It has been accepted by this Court that what is substantive piece of evidence of identification of an accused, is the evidence given during the trial. However, by the time the witnesses normally step into the box to depose, there would be substantial time gap between the date of the incident and the actual examination of the witnesses. If the

accused or the suspects were known to the witnesses from before and their identity was never in doubt, the lapse of time may not qualitatively affect the evidence about identification of such accused, but the difficulty may arise if the accused were unknown. In such cases, the question may arise about the correctness of the identification by the witnesses. The lapse of time between the stage when the witnesses had seen the accused during occurrence and the actual examination of the witnesses may be such that the identification by the witnesses for the first time in the box may be difficult for the court to place complete reliance on. In order to lend assurance that the witnesses had, in fact, identified the accused or suspects at the first available opportunity, the Criminal Appeal No. 740 of 2018 etc. Raja etc. vs. State by the Inspector of Police TIP which is part of the investigation affords a platform to lend corroboration to the ultimate statements made by the witnesses before the Court. However, what weightage must be given to such TIP is a matter to be considered in the facts and circumstances of each case.

16. Again, there is no hard and fast rule about the period within which the TIP must be held from the arrest of the accused. In certain cases, this Court considered delay of 10 days to be fatal while in other cases even delay of 40 days or more was not considered to be fatal at all. For instance, in *Pramod Mandal v. State of Bihar* the accused was arrested on 17.01.1989 and was put up for Test Identification on 18.02.1989, that is to say there was a delay of a month for holding the TIP. Additionally, there was only one identifying witness against the said accused. After dealing with the decisions of this Court in *Wakil Singh v. State of Bihar, Subhash v. State of Uttar Pradesh* and Soni v. State of Uttar Pradesh in which benefit was conferred upon the accused because of delay in holding the TIP, this Court considered the line of cases taking a contrary view as under:

"18. The learned counsel for the State submitted that in the instant case there was no inordinate delay in holding the test identification parade so as to create a doubt on the genuineness of the test identification parade. In any event he submitted that even if it is assumed that there was some delay in holding the test identification parade, it was the duty of the accused to question the investigating officer and the Magistrate if any advantage was sought to be taken on account of the delay in holding the test identification parade. Reliance was placed on the judgment of this Court in *Bharat Singh v. State of U.P*. In the aforesaid judgment this Court observed thus: (SCC p. 898, para 6)

"6. In *Sk. Hasib v. State of Bihar* it was observed by the Court that identification parades belong to the investigation stage and therefore it is desirable to hold them at the earliest opportunity. An early opportunity to identify tends to minimise the chances of the memory of the identifying witnesses fading away due to long lapse of time. Relying on this decision, counsel for the appellant contends that no support can be derived from what transpired at the parade as it was held long after the arrest of the appellant. Now it is true that in the instant case there was a delay of about three months in holding the identification parade but here again, no questions were asked of the investigating officer as to why and how the delay occurred. It is true that the burden of establishing the guilt is on the prosecution but that theory cannot be carried so far as to hold that the prosecution must lead evidence to rebut all possible defences. If the contention was that the identification parade was held in an irregular manner or that there was an undue delay in holding it, the Magistrate who held the parade and the police officer who conducted the investigation should have been cross-examined in that behalf."

xx xx xx

> 18. … The purpose of identification parade is succinctly stated by this Court in *State of Maharashtra v. Suresh* as under: (SCC p. 478, para 22)
>
> 22. …We remind ourselves that identification parades are not primarily meant for the court. They are meant for investigation purposes. The object of conducting a test identification parade is twofold. First is to enable the witnesses to satisfy themselves that the prisoner whom they suspect is really the one who was seen by them in connection with the commission of the crime. Second is to satisfy the investigating authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence."
>
> 19. It is, thus, clear that if the material on record sufficiently indicates that reasons for "gaining an enduring impression of the identity on the mind and memory of the witnesses" are available on record, the matter stands in a completely different perspective. This Court also stated that in such cases even non- holding of identification parade would not be fatal to the case of the prosecution."

32. The TI Parade in the present case has been held in accordance with the procedure established by law and has created no doubt in the mind of the Court over the identity and therefore, the involvement of the four accused persons. Merely because PWs 10 and 13 may not have participated in the actual TIP would not in any manner dilute the value of the said evidence.

Shops of bystander witnesses

33. It is then contended that the spot map (Ext. 35) did not show the shops of PWs 1 and 7 who were projected as eyewitnesses. Relying on the decision in ***Tori Singh v. State of U.P. AIR 1962 SC 399***, it is submitted that this is a material omission and amounts to also a material contradiction.

34. This Court would tend to agree with the trial Court that this omission to show the shops of PWs 1 and 7 in the spot map cannot be viewed as a material omission. As explained by the IO (PW 32), not all the shops in the area were indicated in the spot map. These are indeed small shops which are not permanent structures and were able to be easily dismantled and taken away at short notice. Their omission from the spot map therefore, does not create a serious doubt over the presence of PWs 1 and 7 on the scene of crime.

Issue of Estoppel

35. It is then contended that the arms, ammunitions and cash seized in connection with Bhadrak Rural P.S. Case No. 90 of 2007 was bought in the case by the order of the learned S.D.J.M., Bhadrak. PW 32 received the seized articles in connection with the present case. The present Appellant along with A-2 Hrusikesh Das and A-9 Masterji were acquitted in the said case. The S.I. of that case J.N. Jena was not examined in that case and there the trial Court drew an adverse inference. In other words, the prosecution was held to have failed to

establish the seizure of cash, arms and ammunitions in that case. Relying on the decision in ***Manipur Administration v. Thokchom Bira AIR 1965 SC 87***, it is submitted that the benefit of that acquittal must enure to the present Appellants and they would be entitled to acquittal here as well.

36. This Court is unable to agree with the above submission. Irrespective of whether the Appellants along with certain other accused were acquitted in the other case, the fact of their involvement in the present case has been more than adequately established by the prosecution. PW 7, who was able to identify all the four Appellants, very clearly stated that he saw one person assaulting another by means of a gun and after the assault, the gun was thrown below the bridge in front of the LIC Office; the person who was assaulting took the tin box containing the cash and fled away by a Pulsar Motorcycle, which was in a starting condition by another person. He further clearly stated that "the person was carrying a tin box and was sitting on the Pulsar Motorcycle started firing in all directions and four persons and two in the motorcycle followed them". He could see together all six persons come in three motorcycles towards Bonth Chhak.

37. PW 10 who was the injured driver also spoke of one person moving his head as a result of which the bullet hit on the palm of his right hand. He too correctly identified A-1 Chandra Mohan Jha. PW-1 who was having a tea shop at the spot correctly identified A-6 (Amit) as the person who fired one shot skywards and another shot towards a different direction. In the TI Parade he correctly identified A-1 and A-2. Therefore, the involvement of all these persons with their fire arms has been more than adequately proved. This is apart from the fact that bullets were recovered from the injured persons PWs 9 and 11 and the weapons of offence were also seized from the accused persons. The report under Ext.98 of the ballistic expert proved that the Ext. K bullet recovered from the body of PW 9 and Ext-L bullet recovered from PW 11 were fired from Ext-M the automatic pistol seized by the Police from the possession of the accused.

38. In that view of the matter, it is not possible for the present Appellants be given the benefit of doubt since they were acquitted in the other criminal case.

Alternate submission

39. It was contended by an alternative submission by Mr. Khurshid, learned Senior counsel for the Appellants that at the highest this could be an offence under Section 302 IPC and not Section 395 read with Section 397 IPC. Since this Court has already rejected the above submission regarding Section 395 read with Section 397 IPC, there is no occasion of this Court to consider whether the

accused can in the alternative be convicted under Section 302 IPC. With two persons having been killed and by being fired at with deadly weapons in their vital parts, the question of applying Section 304 Part I IPC as pleaded by Mr. Khurshid also does not arise.

Conclusion

40. For all of the aforesaid reasons, the Court finds no reason to interfere with the impugned judgment and order of sentence of the trial Court. The appeals are accordingly dismissed. No order as to costs.

41. Wherever bail has been granted to any of the Appellants, the bail bonds shall stand cancelled and those Appellants who are on bail shall forthwith surrender in any event not later than 1st September, 2022 failing which the IIC of the concerned police station will take immediate steps to have them arrested and brought back to custody to serve out the remainder of their sentence.

—— o ——

2022 (II) ILR - CUT-856

Dr. S. MURALIDHAR, C.J & CHITTARANJAN DASH, J.

W.A. NO. 128 OF 2013

NILAMANI SAHOO (DEAD) …….. Appellant

.V.

BATA KRUSHNA SAHOO (DEAD) & ANR. …….. Respondents

ODISHA CONSOLIDATION OF HOLDINGS AND PREVENTION OF FRAGMENTATION OF LAND ACT, 1972 – Section 37(2) – Appellant filed Consolidation Revision for correcting the map – The Opp.Party made construction over the suit land for which the Appellant filed Civil Suit for permanent injunction – The petitioner filed a petition with a prayer to stay further proceeding in the suit on account of pendency of consolidation revision – The prayer was declined by the Civil Judge and the same was confirmed by the Writ Court – Whether the proceedings in Civil Suit should be stayed during the pendency of Consolidation revision inspite of the final publication of notification under Section 41 of the Act ? – Held, Yes – It has authoritatively settled the legal position that only because of a notification under Section 41 of the Act, the power of the Commissioner to entertain a revision petition under Section 36 of the Act is not taken away – The revisional power is an integral part of the scheme of the Act –The logical course would have been to stay the further proceedings. (Para 10)

Case Laws Relied on and Referred to :-

1. 2010 (II) OLR 379 : Netrananda Behera v. Khetrabasi Behera.
2. 1993 (II) OLR 194 : Gulzar Khan v. Commissioner of Consolidation.

For Appellant : Mr. J. Bhuyan
For Respondents: Mr. T.K. Swain

ORDER Date of Order : 24.08.2022

Dr. S. MURALIDHAR, C.J.

1. This is an appeal directed against a judgment dated 29th April,2013 passed by the learned Single Judge dismissing W.P.(C) No. 9534 of 2013 filed by the Appellant, which in turn was directed against an order dated 10th April, 2013 of the Civil Judge (Junior Division), Kujanga in Civil Suit No.78 of 2009 declining to stay further proceedings in the suit on account of pendency of consolidation proceedings before the Consolidation Officer (CO) under the Odisha Consolidation of Holdings and Prevention and Fragmentation of Land Act, 1972 ('Act').

2. At the outset, it must be noted that while directing notice to issue in the present appeal on 26th July, 2013 this Court had stayed further proceedings in the aforementioned civil suit. That interim order has continued since.

3. The background facts are that the Appellant and the Respondents were the recorded owners of properties in Sabik Khata No. 240, Plot No.1142 to an extent of Ac 0.28 decimals in Mouza Balarampur which stood recorded in the name of their ancestors. In the remarks column, a note was made regarding possession.

4. During the initial stage of consolidation operation, the land was divided into two plots and recorded separately in Consolidation Khata No. 411, Plot No.754 Ac 0.14 in the name of the Appellant and his other co-sharers whereas Hal Khata No.165 Plot No.761, Ac 0.14 decimals was recorded in the name of the father of the Respondents.

5. It is stated that the Appellant got the property in Plot No.754 by mutual partition and therefore, has no grievance as regards that area.However, according to the Appellant, while preparing the map, the Consolidation Authorities carved out Hal Plot No.761 adjacent to the village road whereas the plot of the Appellant i.e.754 was towards the rear side of Plot No.761 right behind it. This prevented the Appellant from approaching his land from the village road. At a time when the village had not yet been notified under Section 41 of the Act, the Appellant filed Consolidation Revision No. 2750 of 2005 before the Director,

Consolidation, Odisha under Section 37(2) of the Act for correcting the map so that the Appellant could approach his land from the village road.

6. By an order dated 15th July, 2006 the Director, Consolidation accepted the claim of the Appellant and directed the CO to enquireinto the matter and correct the map, if necessary. It is stated that the said revision petition preferred by the Appellant is still pending before the CO, Kujanga for final adjudication.

7. According to the Appellants, the Respondents in the meanwhile started raising a construction covering the entire frontage of Plot No. 761 without any passage for the Appellant to approach his plot from the village road. This prompted the Appellant to file Civil Suit No.78 of 2009 seeking permanent injunction against the Respondents, not to undertake any construction on Plot No.761. After the Civil Judge dismissed the Appellant's application for interim relief on 11th December, 2009 he approached the Additional District Judge (ADJ), Jagatsinghpur in FAO No.53 of 2009. By judgment dated 17th September, 2012 the ADJ allowed the FAO and directed the Respondents not to raise any construction or cause obstruction to the ingress and egress of the Appellant to his plot.

8. When the consolidation proceedings was pending before the CO, the Appellant applied to the Civil Judge under Section 151 CPC for stay of further proceedings till final adjudication of the revision petition pending before the CO, Kujanga. By the impugned order, the learned Single Judge rejected the prayer. Aggrieved by the said order dated 10thApril,2013 the Appellant preferred W.P.(C) No. 9534 of 2013 before the learned Single Judge. By the impugned judgment dated 29thApril, 2013 the learned Single Judge dismissed the said writ petition and accordingly, the present appeal has been filed.

9. Although the Appellant cited the decision of this Court in ***Netrananda Behera v. Khetrabasi Behera 2010 (II) OLR 379*** before the learned Singe Judge in support of the plea that the suit had to be stayed till disposal of the revision petition before the CO, the learned Single Judge held that the said decision was not applicable since the final notification under Section 41 of the Act had already been published and with that the Consolidation Authority had no more power or jurisdiction to decide the claim of the parties and the suit was not barred. Consequently, it was held that the effect of Section 4 got wiped out and would not bar the Civil Court from entertaining the suit.

10. Having heard learned counsel for the parties, the Court is of the view that the impugned order of the learned Single judge requires to be reversed for the following reasons:

(i) A Full Bench of this Court in ***Gulzar Khan v. Commissioner of Consolidation 1993 (II) OLR 194*** has authoritatively settled the legal position that only because of a notification under Section 41 of the Act, the power of the Commissioner to entertain a revision petition under Section 36 of the Act is not taken away. It was explained that the revisional power is an integral part of the scheme of the Act. In particular, the majority judgment in ***Gulzar Khan*** (supra) explained the legal position as under:

> "35. It is, however, apparent that if any cause of action were to arise after closure of the operations, it is the Civil Court which has to be approached because in that case the consolidation authorities at the grass root would not be available. This apart as already indicated, if the case be such which would attract principle (ii) of Magulu Jal's case the Civil Court would have jurisdiction. May we say that if fraud had been played while decision had been taken by the consolidation operations, the same would also provide a ground to approach the Civil Court after closure of the operations. It may be pointed out here that Karbalai Bagum's case (supra) was one of fraud and it was, inter alia, because of this that the bar of Section 49 was not accepted to oust the jurisdiction of the Civil Court.
>
> 36. We may conclude our views relating to Civil Court's jurisdiction by stating that the same would be available after closure of consolidation operations only in any one of the following circumstances ;
>
> (i) The cause of action accruing after the closure of the consolidation operations, ala Suba Sing.
>
> (ii) If the consolidation authorities had taken the decision without complying with the provisions of the Act or had not acted in conformity with the fundamental principle of judicial procedure (which would take within its fold the case of violation of natural justice), vide principle No. (ii) of Magulu.
>
> (iii) Obtaining of order from the hand(s) of consolidation authorities by playing fraud on the party who seeks to approach the Civil Court, as per Karbalai Begum's case.
>
> 37. The aforesaid being the position, it is apparent that a forum has to be available to a person who was to be aggrieved, after Section 41 notification has been issued, with any order having been passed or anything having been done during the consolidation operations affecting his right, title and interest. As stated in the opening sentence of this judgment, there cannot be a right without any remedy; and, according to us, the remedy can be made available principally by Section 37 of the Act. As to when such a situation may arise need not be spelt out, indeed, it cannot be; the probability of such a situation arising cannot obviously be ruled out. The power being unlettered, we cannot put any fetter, any such action of ours would render some really hard-pressed people without a remedy. May we repeat that we are not at the question as to when power under Sec, 37 would be or should be exercised. As already pointed out, this power shall be available only under compelling circumstances,but on compelling circumstances existing, we cannot shut out the invocation of the power. May we also observe that though Section 37 has conferred an unfettered powerit is settled law that every power be it administrative or judicial, has as to be exercised in a reasonable manner, and the reasonable exercise of power inheres in its exercise within a reasonable time as stated at pp. 1245-6 of Manasaram v. S. P. Pathak : AIR1983 SC 1239. This apart no power is really unfettered every power has to be exercised according to rules of reason and justice, not according to private opinion; according to law, and not according to humour. The exercise of discretionary power cannot be arbitrary, vague and fanciful it has to be legal and regular."

(ii) With the legal position being absolutely clear that the revision petition was not barred, the logical course would have been to stay the further proceedings in C.S. No.78 of 2009 while awaiting the decision in the Consolidation Revision No. 2750 of 2005 pending before the Director, Consolidation of Odisha under Section 37(2) of the Act.

11. Consequently, while setting aside the impugned order of the learned Single Judge and allowing the present appeal, the Court further directs that till the disposal of the aforementioned remanded Consolidation Revision No.2750 of 2005 by the Director, Consolidation, Odisha, further proceedings in C.S. No.78 of 2009 pending before the Court of the Civil Judge (Junior Division), Kujanga shall remain stayed. The aforementioned consolidation case will now be listed before the CO, Kujanga on 19th September, 2022 and he is requested to dispose of the said revision petition within a period of four months thereafter.

12. It may be noted here that during the pendency of the present writ appeal, the sole Appellant has died. His legal representatives (LRs) have already been substituted in the aforementioned revision case which will now proceed on that basis before the CO, Kujanga.

13. Learned counsel for the Respondent No.1 informs that he too has expired and his LRs will have to be brought on record in the aforementioned revision case as well as in the suit. It will be open to the LRs of Respondent No.1 to get themselves substituted in his place in the revision petition by filing an appropriate application which will be taken up for hearing on the first day of listing of the revision petition i.e. 19th September, 2022.

14. The writ appeal is disposed of in the above terms. An urgent certified copy of this order be issued as per rules.

—— o ——

2022 (II) ILR - CUT-860

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

W.P.(C) NO. 15798 OF 2022

M/S. JINDAL INDIA THERMAL POWER LTD. ……..Petitioner

.V.

THE COMMISSIONER OF COMMERCIAL TAXES AND G.S.T. & ORS. ……..Opp.Parties

(A) ODISHA ENTRY TAX ACT, 1999 – Section 10 – Notice for reassessment is required to be issued within a period of seven years from the end of the year to which the tax period relates – Conjoint

reading of Section 10(1), Section 2(p) and Section 2(oo) of the Act r/w Rule 10 of the said Rules makes it clear that, for the tax period commencing from 01.04.2013 to 31.03.2014, the end of the year to which they relate would be 31.03.2014 – The notice for reassessment under Section 10 being issued on 13.01.2022 – Whether such notice is sustainable under the Law ? – Held, No.

(B) ODISHA ENTRY TAX ACT, 1999 – Section 3(2) – Levy of tax – Burden of proof – Lies upon whom ? – Held, *onus* lies on the assessee to satisfy the Assessing Authority by adducing evidence to the effect that subject-goods have already been subjected to entry tax or that the entry tax has been paid by any other person or dealer under the OET Act. (Para 7.6)

For Petitioner : Mr. Surya Prasad Mishra, Senior Advocate
M/s. Rudra Pr.Kar, Asit Ku.Dash & Abhishek Dash.

For Opp.Parties : Mr. Sunil Mishra, A.S.C. (CT&GST Organisation)

ORDER Date of Hearing & Order : 02.08.2022

BY THE BENCH

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

2. Assailing the Order of assessment dated 31.03.2022 passed by the Sales Tax Officer, Angul Circle, Angul, ("Assessing Authority" for short) in exercise of powers conferred under Section 10 of the Odisha Entry Tax Act, 1999 (for brevity referred to as "OET Act"), raising a demand to the tune of Rs. 83,06,37,489/- comprising tax of Rs. 27,68,79,163/- and penalty of Rs. 55,37,58,326/- pertaining to the tax periods from 01.04.2013 to 30.09.2015, the Petitioner has approached this Court by invoking provisions of Article 226 of the Constitution of India, inter alia, contending that:

> *(a) The assessment order vide Annexure-19 pursuant to notice dated 13.01.2022 in Form-E 32 for the tax periods from 1.4.2013 to 30.09.2015 is not tenable inasmuch as the assessment for the year 2013-14 is barred by limitation as envisaged in Section 10(1) of the said Act; and*
>
> *(b) On account of misconception and misunderstanding of Accounting Standard the assessing authority construed addition of Rs.6019,11,90,908/- shown in the balance sheet against Note-11 (Tangible Assets) for the year 2014-15 as if the entry of goods have been effected during said period.*

3. The fact submitted by the petitioner and not disputed by the opponent reveals that by Order dated 08.01.2018 the audit assessment under Section 9C of the OET Act was passed by Joint Commissioner of Sales Tax, Angul Range, Angul pursuant to Audit Visit Report by raising a demand of

Rs.9,03,81,036/- pertaining to the tax periods covering 01.04.2013 to 30.09.2015. The self-same person in the capacity of Additional Commissioner of Sales Tax of Angul Range has sought to invoke power under Section 10 contemplating reassessment for the said tax periods by issue of Notice dated 04.12.2018 on the ground that unaccounted for purchases of tangible assets, plant and machinery, to the tune of Rs. 6019,11,90,908/- shown as addition during the year 2014-15 escaped assessment while completing assessment under Section 9C. The said authority vide communication dated 30.04.2019 intimated that the notice issued for reassessment under Section 10 being issued due to inadvertence has been withdrawn. On account of this fact, this Court disposed of W.P.(C) No. 5047 of 2019 wherein said notice was under challenge. On 22.06.2019, the Deputy Commissioner of CT&GST, Angul Circle, Angul issued Notice under Section 10 with respect to tax periods from 01.04.2013 to 30.09.2015; but on 06.11.2019 an Office Order has been passed by the said authority indicating that said notice issued inadvertently has been withdrawn. Another notice dated 26.11.2019 for the aforesaid tax periods contemplating reassessment under Section 10 was issued by the Joint Commissioner of Sales Tax, Angul Range, Angul which again was stated to be withdrawn vide Office Order dated 05.12.2019. The Deputy Commissioner of CT&GST, Angul Circle who issued notice dated 22.06.2019 again invoked power under Section 10 and issued fresh notice dated 17.02.2020 for reassessment under Section 10 with respect to aforesaid period citing the same reason as was shown earlier. However, vide communication dated 16.12.2021 it was stated that said notice dated 17.02.2020 has been withdrawn.

3.1. While the matter stood thus, the Sales Tax Officer, Angul Circle, Angul issued yet another notice dated 13.01.2022 contemplating reassessment under Section 10 of the OET Act for the same tax periods from 01.04.2013 to 30.09.2015 on the same ground alleging unaccounted for purchase of plant and machinery to the tune of Rs. 5786,14,12,516/-. The said notice culminated in passing of assessment order dated 31.03.2022 under Section 10 by the Sales Tax Officer, Angul Circle, Angul by raising a demand to the tune of Rs. 83,06,37,489/-.

4. It is contended by Sri Surya Prasad Mishra, Senior Advocate assisted by Sri Rudra Prasad Kar, Advocate and Sri Asit Kumar Dash, Advocate that the assessing authority was not within his jurisdiction to assess the petitioner in respect of tax periods from 01.04.2013 to 31.03.2014.

4.1. It is next contended that the turnover alleged to have been escaped assessment is misconceived in view of the fact that the purchase of plant and machinery has been made since 2009-10 and the said purchase of assets shown

to have been capitalized in the Balance Sheet for the year 2014-15 are as per requirement of Accounting Standard. Amplifying such contention it has been explained that the capitalization of pre-operative expenses in the year plant got operational is in accordance with the provisions of the Companies Act, 2013 and in compliance of requirement of Accounting Standards being AS-10 (fixed assets) and AS-16 (borrowing costs) issued by the Institute of Chartered Accountants of India. It is submitted that the petitioner-company incurred capital work-in-progress expenses and project development cost during the period from the financial year 2009-10 to financial year 2013-14 towards construction/ installation of the thermal power plant.

4.2. It is further elaborated that the power plant project normally takes several years in conceptualizing, designing, erection, installation and commissioning. The petitioner has incurred capital work-in-progress of Rs. 5472,56,81,731/- during the periods from 2009-10 till 2013-14 towards construction of 2X600MW Thermal Power Plant. It is, therefore, urged that the assessing authority having not taken into consideration such vital fact, heavy demand raised by way of reassessment after audit assessment order under Section 9C being confirmed by the Additional Commissioner of Sales Tax (Appeals), Central Zone, Cuttack, now pending before the Odisha Sales Tax Tribunal in Second Appeal No. 54 (ET) of 2021, is tainted with arbitrariness and irrationality.

4.3. It is further submitted that the Assessing Authority could have been more circumspect while undertaking reassessment proceeding under Section 10 of the OET Act. On earlier occasion the Deputy Commissioner of CT&GST, Angul Circle, Angul issued notice requiring the petitioner-company to deposit outstanding entry tax along with interest to the tune of Rs.36,41,13,766/- for the tax periods from 01.04.2010 to 30.04.2017, which was subject-matter of W.P.(C) No.13515 of 2019. This Court, considering the undertaking of the petitioner that it would discharge its tax liability in 36 instalments starting from 01.09.2019, while allowing it do so, observed as follows:

> *"5. Considering the facts and submissions made, the prayer made on behalf of the petitioner-Company is allowed. The petitioner-Company is directed to pay the outstanding Odisha Entry Tax dues pertaining to the period 01.04.2010 to 30.04.2017 amounting to Rs.36,41,13,766/- crores in 36 (thirty six) monthly installments starting from 1st September, 2019. The amount, if any, already paid by the petitioner-Company towards outstanding Odisha Entry Tax dues for the aforesaid period, shall be adjusted in the aforesaid installments. However, the petitioner-Company will pay 12% interest per annum on the outstanding Odisha Entry Tax dues i.e. Rs.36,41,13,766/- crores while completing the installments. Any failure in payment of two consecutive installments shall amount to contempt and it will be open for the opposite parties-revenue to initiate appropriate contempt proceeding against the petitioner- Company.*

6. However, we make it clear that the interest on the aforesaid amount for the period from 1st April, 2010 to 30th April,2017 will be subject to order to be passed in W.P.(C) No.21007 of 2017 and batch of cases pending before this Court.

7. With the aforesaid order, this writ petition stands disposed of."

Therefore, it is contended that the petitioner-company has been scrupulously adhering to such arrangement as allowed by this Court. The reassessment proceeding, therefore, in respect of the tax periods from 01.04.2013 to 30.09.2015 is not permissible.

5. Mr. Sunil Mishra, learned Additional Standing Counsel for the CT&GST Organisation upon instruction submitted that the contention as to capitalization is in accordance with the provisions of the Companies Act, 2013 and in compliance of requirement of Accounting Standards being AS-10 (fixed assets) and AS-16 (borrowing costs) issued by the Institute of Chartered Accountants of India was never put forth by the petitioner-company before the Assessing Authority. He further submitted that even if this Court holds the assessment pertaining to 2013-14 has been hit by limitation period stipulated under Section 10 of the OET Act, it would have no impact on the determination of liability inasmuch as no part of turnover pertaining to 2013-14 has been taken into consideration in the impugned reassessment.

6. With regard to initiation of proceeding by issue of notice for reassessment for the tax periods from 01.04.2013 to 31.03.2014 it is pertinent to take note of sub-section (1) of Section 10 of the OET Act which reads as follows:

"*10. Reassessment in certain cases.—*

(1) Where for any reason all or any of the Scheduled goods brought by a dealer has escaped assessment of tax, or where value of all or any of the scheduled goods has been under- assessed, or any deduction has been allowed wrongly, the assessing authority, on the basis of information in his possession, may, ***within a period of seven years from the end of the year to which the tax period relates****, serve a notice on the dealer in such form and in such manner as may be prescribed and after making such enquiry as he considers necessary and after giving the dealer a reasonable opportunity of being heard, proceed to assess the dealer accordingly." [Emphasis supplied]*

6.1. The term "year" and "tax period" has been defined in the OET Act. Section 2(p) defines "year" to mean "the financial year" and Section 2(oo) lays down that "tax period" means such period for which return is required to be furnished by or under this Act". Section 7 of the said Act specifies that every registered dealer and every dealer who is liable to get himself registered under the OET Act is required to furnish every month a return within stipulated date as prescribed under Rule 10 of the Odisha Entry Tax Rules, 1999.

6.2. Conjoint reading of Section 10(1), Section 2(p) and Section 2(oo) of the Act read with Rule 10 of the said Rules makes it clear that for the tax periods commencing from 01.04.2013 to 31.03.2014, the end of the year to which they relate would be 31.03.2014. Thus, the notice for reassessment under Section 10 being issued on 13.01.2022, it is manifest that the proceeding in respect of the year 2013-14 was not initiated within the time-frame envisaged under sub-section (1) of Section 10. It is clearly stipulated in said sub-section that the notice in Form E32 prescribed under Rule 15D(1) was required to be served on the petitioner within a period of seven years from the end of the year to which the tax periods from 01.04.2013 to 31.03.2014 relate. In other words, on 31.03.2021 seven year lapsed from the end of the "year" in respect of the tax periods from 01.04.2013 to 31.03.2014. Therefore, on the date of issue of notice in Form E32, i.e., 13.01.2022, the Assessing Authority was not competent to exercise power under Section 10 of the O.E.T. Act. Thus, it is held that the assessment for the tax periods from 01.04.2013 to 31.03.2014 is barred by limitation as provided under Section 10(1) of the OET Act.

7. As regards the contention of the petitioner through its counsel that the subject-goods, i.e., plant and machinery, which were brought from outside into the local area during the period from 2009-10 till 2014-15 and subsequently capitalized in the year 2014-15, had already suffered entry tax, the same is subject to factual adjudication by the competent authority.

7.1. Refuting the said contention of the counsel for the petitioner, Mr.Sunil Mishra, learned Additional Standing Counsel (CT&GST Organisation) furnished a copy of instruction dated 22.07.2022 under the signature of the Assessing Authority wherein the following has been stated:

> *"As regard point No.-2, I am to say that the contention now taken never raised before me at the time of adjudicating the case. In every occasion the person appearing on behalf of the dealer- company has challenged the jurisdiction of the assessing authority and objected that there is no material with the revenue which proves that there is no escapement of turnover. ****
>
> *But as per the audited balance sheet in column No.-11 it has been categorically mentioned addition of plant and machinery was of Rs.6019,11,90,908/-. In bifurcation figures submitted by the CA in Point No.-11, it has been clearly mention the purchase of plant and machinery from local and inter-State source but the dealer- company never explained/produced any books of accounts in support of such claim."*

7.2. It has been brought to the notice of this Court by the senior counsel for the petitioner-company that such a statement by the Assessing Authority is fallacious in view of written submission dated 03.03.2022 (Annexure-12 of the writ petition) furnished to the Assessing Authority by the company, wherein it has been stated thus:

"1. That the figure of addition of Rs.6019,11,90,908/- shown in Schedule-11 of balance sheet for F.Y. 2014-15 includes work in progress of previous year starting from 2009-10 onwards. Therefore, this figure does not relate to the purchases during F.Y. 2014-15 only and therefore not relevant for entry tax purposes.

*****

*5. The figure of plant and machinery capitalized in the books of accounts also includes the following items which were incurred from FY 2009-10 onwards. ****

*The capitalization of pre-operative expenses in the year of plant got operational is in accordance with the provision of Companies Act, 2013 and in compliance with Accounting Standards issued by Institute of Chartered Accountants of India (ICAI), and referred to in Section 133 of the Companies Act, 2013, read with Rule 7 of the Companies (Accounts) Rules, 2014. ****

Thus, the purchases made in the FY 2014-15 along with work in progress expenses of previous years were capitalized in the FY 2014-15."

7.3. Glance at Assessment Order dated 31.03.2022 reveals the following:

*"On 03.03.2022 under the signature of the authorized signatory, the dealer-company has filed a petition which are kept in record.****

*I have gone through the record vis-à-vis the submission made by the dealer-company and the CA report original filed and now filed. ***"*

7.4. From the aforesaid statements, it is glaring on face of record that the instruction provided to the Additional Standing Counsel by the Assessing Authority pursuant to direction of this Court vide Order dated 11.07.2022 is incorrect.

7.5. On the issue of sufferance of entry tax on the value of goods it is noteworthy to notice provisions of sub-section (2) of Section 3 of the OET Act which is extracted herein below for ready reference:

*"3. **Levy of tax**.—*

(2) The tax leviable under this Act shall be paid by every dealer in scheduled goods or any other person who brings or causes to be brought into a local area such scheduled goods whether on his own account or on account of his principal or customer or takes delivery or is entitled to take delivery of such goods on such entry:

Provided that no tax shall be levied under this Act on the entry of scheduled goods into a local area, if it is proved to the satisfaction of the assessing authority that such goods have already been subjected to entry tax or that the entry tax has been paid by any other person or dealer under this Act.

Explanation.—

Where the goods are taken delivery of on their entry into a local area or brought into the local area by a person other than a dealer, the dealer who takes delivery of the goods from such person or makes carriage of the goods shall be deemed to have brought or caused to have brought the goods into the local area."

7.6. It transpires from the aforesaid provision that onus lies on the assessee to satisfy the Assessing Authority by adducing evidence to the effect that subject-goods have already been subjected to entry tax or that the entry tax has been paid by any other person or dealer under the OET Act.

7.7. In the above premises, this Court is of the considered opinion that as the explanation of the petitioner-company has not been given due consideration by the Assessing Authority. As has already been held that the assessment in respect of the tax periods from 01.04.2013 to 31.03.2014 out of the impugned tax periods from 01.04.2013 to 30.09.2015 undertaken for assessment under Section10 is time-barred, and the assessment is required to be set aside for fresh consideration pertaining to rest of the periods, i.e., from 01.04.2014 to 30.09.2015, the Assessing Authority is also required to consider the submissions furnished to him by the petitioner on different dates with reference to evidence available on record and/or to be produced by the petitioner-company.

8. In the aforesaid premises, it is held that the impugned reassessment order dated 31.03.2022 passed under Section 10 of the OET Act is unsustainable being barred by limitation so far as it relates to the tax periods from 01.04.2013 to 31.03.2014. However, so far as assessment for the tax periods from 01.04.2014 to 30.09.2015 is concerned, the same is liable to be set aside and remanded to the Assessing Authority-Sales Tax Officer, Angul Circle, Angul. Consequently, the writ petition stands allowed.

9. The assessment order dated 31.03.2022 is hereby set aside and the matter relating to the tax periods 01.04.2014 to 30.09.2015 is remanded to the Sales Tax Officer for proceeding with the matter afresh. For this purpose, the petitioner is directed to participate in the proceeding by producing books of account related to aforesaid tax periods and at liberty to furnish evidence to justify its claim that the alleged unaccounted for purchases of goods have already suffered entry tax. The Assessing Authority shall pass appropriate order after verification of the authenticity of claim made by the petitioner by taking into account the explanation submitted and documents produced/caused to be produced. The petitioner shall appear before the Sales Tax Officer, Angul Circle, Angul on 26th of August, 2022 for necessary instructions. No unnecessary adjournments shall be granted to or availed by the petitioner. Endeavor shall be made by the Assessing Authority to conclude the entire assessment proceeding within two months from the date of appearance of the petitioner as directed.

9.1. With the aforesaid observation and direction the writ petition stands disposed of.

—— o ——

2022 (II) ILR - CUT-868

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

W.A. NOS. 942, 943, 944, 945, 946, 947, 948, 949 & 988 OF 2022

PRINCIPAL, KENDRIYA VIDYALAYA-I, CUTTACK ……..Appellant

.V.

PRATHAMESH BASANTIA (MINOR), REP. THROUGH HIS FATHER GUARDIAN & ORS. ……..Respondents

W.A. NO. 943 OF 2022
PRINCIPAL, KENDRIYA VIDYALAYA II, CUTTACK
-V- AJAY KUMAR SETHY & ORS.

W.A. NO. 944 OF 2022
PRINCIPAL, KENDRIYA VIDYALAYA II, CUTTACK
-V- BENUDHAR NAYAK & ORS.

W.A. NO. 945 OF 2022
PRINCIPAL, KENDRIYA VIDYALAYA I, CUTTACK
-V- N.N. RAJALAXMI OJHA & ORS.

W.A. NO. 946 OF 2022
PRINCIPAL, KENDRIYA VIDYALAYA I, CUTTACK
-V- SOMANATH MAJHI & ORS.

W.A. NO. 947 OF 2022
PRINCIPAL, KENDRIYA VIDYALAYA I, CUTTACK
-V- SAI SIDHI SAMANTARAY (MINOR)
REP.THRU' HIS FATHER GUARDIAN & ORS.

W.A. NO. 948 OF 2022
PRINCIPAL, KENDRIYA VIDYALAYA I, CUTTACK
-V- JASODHARA NANDA & ORS.

W.A. NO. 949 OF 2022
PRINCIPAL, KENDRIYA VIDYALAYA I, CUTTACK
-V- ITISMITA NAYAK & ORS.

W.A. NO. 988 OF 2022
PRINCIPAL, KENDRIYA VIDYALAYA II, CUTTACK
-V- NANDINI ROUT & ORS.

(A) EDUCATION – Admission – Admission notice 2022-23 notified in February 2022 for admission into various classes in Kendriya Vidyalaya-I & II of Cuttack – Some students were selected through special provisions of guidelines for admission – Accordingly, the students obtained transfer certificate from their respective previous School – The authority issued admission notice under the then prevailing and valid provisions/guidelines – However, the amendment made for abolition for special category and discretionary quota by virtue of notification dated 25.04.2022 – Whether such notification will operate prospectively or retrospectively ? – Held, the notification would have prospective effect, it cannot take away the rights conferred prior to that and the process compliance thereof.

(B) DOCTRINE OF PROMISSORY ESTOPPEL – Whether it applied against the Government/its Instrumentalist ? – Held, Yes. – Case law discussed.

(C) INTERPRETATION OF STATUTE – Doctrine of *sub-silentio* – Meaning of – The decisions which are *sub-silentio* and without argument are not applicable as binding precedents. (Para 22)

(D) PER INCURIAM – Concept of – Discussed.

Case Laws Relied on and Referred to :-

1. Kerala High Court, Writ Appeal No. 760/2022 (decided on 03.08.2022) : Kendriya Vidyalaya Sangathan & Ors. vs. Elna Chinchu.
2. (2014) 6 SCC 798 : Major Saurabh Charan & Ors. v. Lieutenant Governor, NCT of Delhi.
3. 1998 SCC Online Del 812 : Joint Action Committee of Kendriya Vidayalaya Employees Vrs. Union of India.
4. (2006) 8 SCC 702 : MRF Limited, Kottayam v. Asst. Commissioner (Assessment) Sales Tax.
5. 2019 SCC Online SC 1569 : State of U.P. v. Birla Corporation Ltd.
6. (2016) 6 SCC 766 : Manuelsons Hotels Pvt. Ltd. v. State of Kerala.
7. (2004) 6 SCC 465 : State of Punjab v. Nestle India.
8. (1979) 2 SCC : Motilal Padampat Sugar Mills Co. Ltd v. State of U.P.
9. 2020 (1) Mh. L.J.904 : KM Refineries & Infraspace Ltd. v. State of Maharashtra.
10. (1996) 5 SCC 468 : D.C.M. Ltd. v. Union of India.
12. (1989) 1 SCC 101 : Municipal Corporation of Delhi vs. Gurnam Kaur.
13. 1999 (I) OLR 349 : Ferro Alloys Corporation Ltd. vs. Union of India.

For Appellant : Mr. Hrusikesh Tripathy

For Respondents : Mr. Prafulla Kumar Rath (W.A. No.942 of 2022)

JUDGMENT Date of Hearing and Judgment : 25.08.2022

JASWANT SINGH, J.

1. The present batch of intra Court Writ Appeals are taken together as they involve similar facts and identical issues and assail the common order dated 24.06.2022 passed by learned Single Judge in W.P.(C) No.11562 of 2022. Further, the W.A. No.988 of 2022 arising out of order dated 15.07.2022 passed in W.P.(C) No.16358 of 2022 is based on the aforesaid common order dated 24.06.2022.

2. The brief facts of the case are that certain students were recommended by Collector & District Magistrate, Cuttack vide Letters dated 09.02.2022, 17.02.2022 and 04.03.2022 for admission to various classes in Academic Session

2022-2023 out of (i) the quota of the Chairman, V.M.C. of Kendriya Vidyalaya reserved for the wards of employees of the Sponsoring Agency/State Government, and (ii) under his discretionary quota as per Para 1(XVI(b)) and Para 1(XVII) respectively under Part-B (Special Provisions) of guidelines for admission in Kendriya Vidyalayas for Academic Session (2022-2023) issued on23.02.2022. The relevant portion of Para 1 of Part B (Special Provisions) of Guidelines for Admission in Kendriya Vidyalayas is produced below:

> ***"GUIDELINES FOR ADMISSION IN KENDRIYA VIDYALAYAS***
>
> **PART-A**
> **GENERAL GUIDELINES**
>
> In suppression of all the guidelines governing admissions in Kendriya Vidyalayas that have been issued in the past, the following guidelines are issued to regulate admissions in the Kendriya Vidyalayas with effect from the academic session 2022-23 & onwards.
>
> Xxxx
>
> **PART-B**
> **SPECIAL PROVISIONS**
>
> 1. Following categories of children would be admitted over and above the class strength except where stated otherwise in the provision itself (e.g. Item No. XVI)
>
> Xxxxx
>
> (xvi)(a) 05 seats in each section of class-1, within the approved class strength (40) will be filed by the children of Sponsoring Agency in all schools except those specifically notified otherwise by the Commissioner.
>
> (b) ***Similarly, 10 seats in all other classes put together (not more than 02 seats in each section) can be recommended by the Chairman VMC for the wards of employees of the Sponsoring Agency***. In case adequate number of applications for admission of the wards of employees of Sponsoring Agency are not available, the Chairman VMC can recommend wards of other Transferable/Non-transferable Central/State Government employees including Autonomous Bodies/PSUs/IHL. ***These admissions will be over and above the class strength, if otherwise eligible as per KVs Admission Guidelines.***
>
> (xvii) ***Chairman, Vidyalaya Management Committee can recommend maximum two Admissions in the concerned Kendriya Vidyalay/Shift under his Discretionary Quota***. These two admissions may be recommended in one class or all Classes put together, the children so recommend should be otherwise eligible as per KVS Admission Guidelines (upto 30th June)".

The recommended names of the students along with their classes in the two Kendriya Vidyalayas situated in Cuttack (for short, K.V.-I & K.V.-II) out of Discretionary Quota & State Sponsored quota of Chairman V.M.C. (Collector-cum-D.M.) are mentioned below:

> **I**. S.R. Sreyan, S/o-N.N. Rajalaxmi Ojha, Collector, Cuttack, Class-II, Petitioner in W.P.(C) No.12485 of 2022 and Respondent in W.A. No.945 of 2022 recommended under Sponsoring Agency Quota.

II. Sai Sidhi Samantaray, S/o-Samir Kumar Samantaray, Class-II, Petitioner in W.P.(C) No.13494 of 2022 and Respondent in W.A. No.947 of 2022 recommended under Sponsoring Agency Quota.

III. Sibaprashad Sethy, S/o-Ajay Kumar Sethy, Collectorate, Cuttack, Class-III, Petitioner in W.P.(C) No.12482 of 2022 and Respondent in W.A. No.943 of 2022 recommended under Sponsoring Agency Quota.

IV. Anwesha Priyadarshini, D/o- Itismita Nayak, Class-IV, Petitioner in W.P.(C) No.14027 of 2022 and Respondent in W.A. No.949 of 2022 recommended under Sponsoring Agency Quota.

V. Tajashree Dash, D/o- Somnath Majhi, Class-III, Petitioner in W.P.(C) No.12487 of 2022 and Respondent in W.A. No.946 of 2022 recommended under Sponsoring Agency Quota.

VI. Srusti Srujani Pati, D/o- Jasodhara Nanda, Class-VII, Petitioner in W.P.(C) No.13645 of 2022 and Respondent in W.A. No.948 of 2022 recommended under Sponsoring Agency Quota.

VII. Prathamesh Basantia, S/o-Pradipta Kumar Basantia, Class-VI, Petitioner in W.P.(C) No.11562 of 2022 and Respondent in W.A. No.942 of 2022 recommended under Discretionary Quota.

VIII. Sai Adarsh Nayak, S/o-Benudhar Nayak, Class-VI, Petitioner in W.P.(C) No.12484 of 2022 and Respondent in W.A. No.944 of 2022 recommended under Sponsoring Agency Quota.

IX. Krisha Mohapatra, D/o-Nandini Rout, Class-IV, Petitioner in W.P.(C) No.16358 of 2022 and Respondent in W.A. 988 of 2022 recommended under Sponsoring Agency Quota.

The students above numbered from I to VI were recommended vide Letter dated 17.02.2022 while the student in Number VII was recommended vide Letter dated 09.02.2022 to take admission in K.V.-I, CDA Cuttack and student numbered VIII & IX were recommended by Letter dated 04.03.2022 & 17.02.2022 to take admission in K.V.-II, Khapuria, Cuttack.

3. The recommendation of the above students were crystallized by an Admission Notice dated 05.04.2022 & 06.04.2022 issued by the Principal(s) of K.V.-I & II to secure admission on 13.04.2022. The Admission Notice dated 05.04.2022 issued for K.V.-I is reproduced below:-

"KENDRIYA VIDYALAYA NO.1 CUTTACK
ADMISSION NOTICE

The following students are sponsored by Hon'ble Chairman (VMC) & District collector and Magistrate of Cuttack to take admission in Kendriya Vidyalaya No.1 Cuttack for the session 2022-2023.

Parents of the following candidates are hereby informed to visit the Vidyalaya for registration and Provisional Admission of their ward with required documents.

Sl. No.	NAME OF CANDIDATE	PARENT'S NAME	CLASS	REMARKS
1	PRATHAMESH BASANTIA	PRADIPTA KU BASANTIA	VI	
2	XXX	XXX	XXX	
3	S.R.SREYAN	RAJALAXMI OJHA	II	
4	SAI SIDHI SAMANTARAY	SAMIR KU SAMANTARAY	II	
5	XXX	XXX	XXX	
6	TAJASHREE DASH	SOMNATH MAJHI	III	
7	XXX	XXX	XXX	
8				
9	XXX	XXX	XXX	
10				
11	XXX	XXX	XXX	ADMISSION TEST ON 12.04.2022. (SUBJECT - HINDI, ENG, MATH, SCIENCE AND SSC OF CLASS VIII) 9.00 AM TO 12.00 NOON
		IX only		
12	XXX	XXX	XXX	

DATE OF ADMISSION — 13.04.2022 TIME - 8.30 TO 10.30 AM DOCUMENTS:

PRINCIPAL"

Similarly, the Admission Notice dated 06.04.2022 to seek admission from 08.04.2022 to 16.04.2022 in K.V. II is reproduced below:

"ADMISSION NOTICE FOR STUDENTS OUT OF DISCRETIONARY QUOTA OF CHARIMAN VMC & OUT OF SPONSORING AGENCY/ STATE GOVT. QUOTA"

Reference to the letter No.62/Res. dated 09.02.2022, No.71/Res. dated 17.02.2022,No.105/Res. dated 04.03.2022 and No.141/Res. dated 12.03.2022 the following candidates have been recommended by the Collector-cum-Chairman, VMC, KV No.2 Cuttack to seek the admission out of Discretionary Quota and Sponsoring Agency Quota as mentioned below. The parents of the following candidates are instructed to register the names of their wards as recommended for provisional admission in Kendriya Vidyalaya No.2 Cuttack w.e.f. 08.04.2022 to 16.04.2022. The provisional admission may be given on the basis of the submission of the documents subject to verification by the admission committee of the Vidyalaya.

Xxx

B. List of candidates recommended by the Chairman out of Sponsoring Agency/State Govt. Quota of the Chairman, VMC.

SL.NO.	NAMES OF CANDIDATES	NAME OF FATHER /MOTHER	TO SEEK ADMISSION IN CLASS	REMARK
3	Siba Prasad Sethy	Ajay Kumar Sethy	Class-III	
6	Miss Krisha Mohapatra	Nandini Rout	Class IV	
9	Sai Adarsh Nayak	Benudhar Nayak	Class VI	Ltr No. 105/Res. Dated 04.03.2022

4. However, on 12.04.2022, the K.V-II issued a letter wherein the above admissions to the students were kept in abeyance till further orders. Similar notice was issued on 13.04.2022 by K.V. No-I. The Letter is reproduced below:-

> *"As per the directions of KVS Hqrs, New Delhi, you are hereby informed that "No admissions should be done under* ***Special Provisions*** *" (****under para 1 of Part-B-page No.8,9,10,11) till further orders.***
>
> *This is for your information and necessary action".*

5. It is pertinent to note that vide Office Memorandum dated 25.04.2022 the Kendriya Vidyalaya Sanghathan, Headquarter after approval notified the amended Special Provision under Part B of KVS Admission Guidelines 2022-23. After amendment, the guidelines governing the admission of Respondents/ students by recommendation of Chairman of Vidyalaya Management Committee (V.M.C) i.e. Collector-cum-District Magistrate through Special Category under Para 1(XVI(b) and Discretionary Quota under Para 1(XVII) of Part-B (Special Provisions) was abolished. The relevant extracts of the contents of the memo dated 25.04.2022 for ready reference are reproduced below:

> "F.11331/2022-23/KVS(HQ)/Academic/ Dated 25.04.2022
>
> **Office Memorandum**
>
> The amended Special Provision under Part B of KVS Admission Guidelines 2022-23 **duly approved** by competent authority of KVS are hereby notified as follows."
>
> By way of the instant circular, the position which emerged is as under:
>
> (**a**) The following categories were added by the memo dated 25.04.2022 which is reproduced below:
>
> *"(xiv) 50 Admissions in Kendriya Vidyalays for ward of group-B & C employees of Central Police Organizations, that is, CRPF, BSF, ITBP, SSB, CISF, NDRF & Assam Rifles under Ministry of Home Affairs posted for internal security, border guarding, disaster response & other difficult areas based on list provided by the MHA.*
>
> *(xv) Admissions of wards of Kashmir Migrants will be given as per the following conditions (existing provision included in the guidelines).*

This issues with the approval of the Competent Authority."

(**b**) At the cost of repetition, the relevant abolished portion is again reproduced below :

"(xvi) (a) 05 seats in each section of class-1, within the approved class strength (40) will be filed by the children of Sponsoring Agency in all schools except those specifically notified otherwise by the Commissioner.

*(**b**) **Similarly, 10 seats in all other classes put together (not more than 02 seats in each section) can be recommended by the Chairman VMC for the wards of employees of the Sponsoring Agency**. In case adequate number of applications for admission of the wards of employees of Sponsoring Agency are not available, the Chairman VMC can recommend wards of other Transferable/Non-transferableCentral/State Government employees including Autonomous Bodies/PSUs/IHL. **These admissions will be over and above the class strength, if otherwise eligible as per KVs Admission Guidelines**.*

*(xvii) **Chairman, Vidyalaya Management Committee can recommend maximum two Admissions in the concerned Kendriya Vidyalay/Shift under his Discretionary Quota**. These two admissions may be recommended in one class or all Classes put together, the children so recommend should be otherwise eligible as per KVS Admission Guidelines (upto 30th June)".*

6. On being aggrieved by the Letter dated 12.04.2022 & 13.04.2022, the above mentioned students approached this Court by various Writ petitions. They submitted that all the above students had taken the Transfer Certificate (TC) as suggested by the K.V. School to secure admission and complied with all the requirements proposed by Kendriya Vidyalaya Sangathan. In the reply to the said writ petitions, the Kendriya Vidyalaya Sangathan (Opposite Parties in the petition) filed a counter affidavit dated 11.06.2022 providing that the Letter/ Notice dated 12.04.2022 & 13.04.2022 will operate prospectively. Further, it did not dispute the above mentioned claims made by Students/Petitioners. Basing upon such counter affidavit dated 11.06.2022 the learned Single Judge allowed the writ petitions and directed to grant admission to the aforementioned students as per the admission notices dated 05.04.2022 & 06.04.2022 issued by both the Kendriya Vidyalayas situated in Cuttack. The operative portion of the order of the Learned Single Judge dated 24.06.2022 is reproduced below :-

"5. Learned counsel for the petitioner submits in the present case, in fact, the petitioner was asked to submit their detail particulars along with Transfer Certificate for taking admission and as far as students are concerned, no further action was left to be done by the students for getting admission after their admissions were notified. It is further submitted that the Transfer Certificate dated 11.04.2022 (Annexure-6) of the student was issued by the School, countersigned by the Block Education Officer, Cuttack Sadar on 12.04.2022.

6. There is no indication in the affidavits filed by the opposite parties that the students did not comply with any of the condition of admission after the admission notice was notified by the Kendriya Vidyalaya.

7. In view of the very fair stand taken by the opposite parties in the affidavit dated 11.06.2022 in response to the order dated 18.05.2022, at para- 4 and para-7 (which are quoted herein):-

"4. That the Amended/Revised Admission Guidelines for the Session 2022-23 will operate Prospectively. Hence, the order dated 12.04.2022 will applicable prospectively.

7. xxx xxx. Therefore, the Special Provisions Scheme continued till it was withdrawn by the order dated 12.04.2022 of the Competent Authority."; the writ petition has to be allowed.

8. It is directed that the authorities shall grant admission to the student as per the Admission Notice issued by Kendriya Vidyalaya No-1: Cuttack, annexed to the writ petition marked as Annexure-1. The admission process shall be completed immediately after receipt of the certified copy of this order.

9. The writ petition is allowed accordingly".

7. Hence the present 09 (Nine) Writ Appeals.

8. Counsel for the parties heard at length and with their able assistance perused the pleadings.

Learned counsel for the appellants states that the issue at hand in present appeals regarding grant of admission to Kendriya Vidyalaya Schools under State Sponsoring Quota and Discretionary Quota in terms of Admission Policy dated 23rd February, 2022 duly amended/revised vide Memo dated 25th April, 2022 is squarely covered by the decision of a Division Bench of Kerala High Court in ***Writ Appeal No. 760 of 2022 titled, "Kendriya Vidyalaya Sangathan & others vs. Elna Chinchu" decided on 03.08.2022*** wherein the original policy and the impact of the revised policy have been duly considered and the findings were returned in favour of the appellant/Kendriya Vidyalayas. He submits it has been held that mere recommendations of the students under both the above said categories did not vest any right of seeking admission based on doctrine of legitimate expectation.

To a pointed query, learned counsel for the appellants has admitted that only nine extra admissions without prejudice to any other students to seek admission were involved in the present bunch of appeals.

On the other hand, Mr. Prafulla Kumar Rath, learned counsel for the respondents has referred to the additional affidavit dated 18th May, 2022 filed by the Deputy Commissioner (available at page 111) wherein it is the stand of the appellants itself that the amended/revised guidelines for the Sessions 2022-23 (notified on 25th April, 2022) shall operate prospectively and thus, the rights, though limited, have accrued to the students/respondents for taking admission due to fulfilling the requirements of the Admission Notice much prior to withdrawal

of the previous provisions of admission policy on 25th April, 2022. The students would be entitled to be considered and granted admission based on recommendations under the existing provisions of the admission policy having been cleared for admission. In support, he cited two judgments i.e. the judgment of the Hon'ble Supreme Court in ***Major Saurabh Charan and Others v. Lieutenant Governor, NCT of Delhi (2014) 6 SCC 798*** and the judgment of the Hon'ble Delhi High Court in Joint Action Committee of ***Kendriya Vidayalaya Employees Vrs. Union of India, 1998 SCC Online Del 812***. He further submits that the students having obtained Transfer Certificates from their previous schools had changed their position so as to be entitled the protection under the doctrine of promissory estoppel and doctrine of prospective application. Further, it is also submitted that the Division Bench judgment of the Kerala High Court is a decision based on consideration of doctrine of legitimate expectation and not doctrine of promissory estoppel and hence is liable to be ignored viewed from the principle of sub- silentio

9. Two important factors which merit consideration in the present case are that we are dealing with the admission of students of Class II, III, VII etc. and these students, being eligible / fulfilling the criteria, have in pursuance to the Policy duly approved and notified applied for their admissions, got the required recommendations from the competent authority for the Special Provisions (Discretionary Quota and State Sponsoring Quota) and pursuant to the Admission Notice by the Appellant Institution based on approved Admission Policy for such admission under such quota have taken the transfer certificate from the previous institution they were attending. The relinquishing of lien on seat from the previous institution, naturally, has resulted in a chain reaction to the availability of seats in these various previous institutions and the process of admitting new/fresh students.

10. All the processes regarding recommendation [17.02.2022 / 04.03.2022], admission notice [05.04.2022/ 06.04.2022] for registration and provisional admission, direction to submit transfer certificate which was issued on 11.04.2022 and countersigned by Block Education Officer on 12.04.2022, for the admissions under the Special Provisions was issued prior to the order of keeping the said Special Provision in abeyance [12.04.2022/13.04.2022] and much before the abolition of such quota/portion of Admission Policy [25.04.2022]. No formal action was required to be submitted at the end of the students and what only remained was the formal admissions. There is no dispute regarding the fact that the children are eligible and were entitled to admission except for the action of abolition of Special category [Para 1(XVI(b)] and Discretionary Quota [Para 1(XVII)] of Part B (Special Provisions) through recommendation of Chairman, VMC w.e.f. 25.04.2022.

11. It is undisputed that the abolition of Special category [Para 1(XVI(b) and Discretionary Quota [Para 1(XVII)] of Part B (Special Provisions) are prospective and not retrospective in nature. In the present case, the process of the said admissions under Special category/Discretionary Quota for Academic Session 2022-2023 started in February 2022 and continued till 12.04.2022 was well within the framework of the then existing and valid provisions, which was completed to the stage of asking the students concerned to submit their transfer certificates [implying to severe the admission and lien on seat in the previous institution] which in turn upon such relinquishment must have been put to process of admission by the previous institutions/schools. All these processes were carried out with the direct and reciprocal positive action and procedures at the end of the Appellant who suddenly at the stage of giving formal admission orders kept the process in abeyance and later abolished the said Special category /Discretionary Quota admissions.

12. In the present case, based on the existing provisions [as existed prior to 25.04.2022] there was completion of the process by the competent authorities for recommendation of the Special Provisions admissions. The students believing such process to be valid and true and within the framework of the prevailing provisions, participated in such a process which was further carried out by the positive actions of the appellants by issuing the Admission Notice under the then prevailing and valid provisions and also directed the students during such process to severe their relation with the previous institution and submit their transfer certificates. Thus having acted upon the prevailing provisions which were operational and active mode of admission during such period and having changed their position irreversibly at the point of time having taken the transfer certificate (TC) from the previous institution, in our considered opinion the principle of estoppel, would come into operation against the appellant. It was a process initiated and carried by the Appellants under the established provisions and the respondents having changed their position to their prejudice brings into play the principle of estoppel.

13. In the Indian legal jurisprudence, the principle of estoppel is engrained as a rule of evidence incorporated in Section 115 of The Indian Evidence Act, 1872 which provides as under:

> *"When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe such a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."*

14. To invoke and apply the principle of estoppel and make any promise binding on the Government/its instrumentalities, the following are the basic ingredients :

(a) The Government/its instrumentalities makes the promise within the ambit of law.

(b) There is an intention to enter into a legal relationship by such promise.

(c) The other party (promise) must do an act in furtherance of that promise or is forbidden to do anything.

15. In catena of judgments by the High Court and the Hon'ble Supreme Court, the doctrine of promissory estoppel has been applied against the Government/its instrumentalities and the defence based on executive necessity has been categorically negated. The Government& its instrumentalities are not exempted from liability to carry out the representation made by it to its future conduct. The judgments to be noticed are ***MRF Limited, Kottayam v. Asst. Commissioner (Assessment) Sales Tax (2006) 8 SCC 702; State of U.P. v. Birla Corporation Ltd., 2019 SCC Online SC 1569; Manuelsons Hotels Pvt. Ltd. v. State of Kerala (2016) 6 SCC 766; State of Punjab v. Nestle India (2004) 6 SCC 465; Motilal Padampat Sugar Mills Co. Ltd v. State of U.P. (1979) 2 SCC and KM Refineries & Infraspace Ltd. v. State of Maharashtra, 2020(1) Mh. L.J.904***.

Further, in MRF (Supra) the Supreme Court held as follows:

"32. State and its instrumentalities……can be made subject to the equitable doctrine of promissory estoppel in cases where because of their representation the party claiming estoppel has changed its position and if such an estoppel does not fly in the face of any statutory prohibition, absence of power and authority of the promisor and is otherwise not opposed to public interest, and also when equity in favour of the promisee does not outweigh equity in favour of the promisor entitling the latter to legally get out of the promise."

"34.…where a right has already accrued, for instance, the right to exemption of tax for a fixed period and the conditions for that exemption have been fulfilled, then the withdrawal of the exemption during that fixed period cannot affect the already accrued right. Of course, overriding public interest would prevail over a plea based on promissory estoppel, but in the present case there is not even a whisper of any overriding public interest or equity……"

16. The doctrine of promissory estoppel is an equitable doctrine and it must yield when the equity so requires. In ***D.C.M. Ltd. v. Union of India, (1996) 5 SCC 468*** it is held as under:

"6.……We have considered the rival submissions. It is well settled that the doctrine of promissory estoppel represents a principle evolved by equity to avoid injustice and, though commonly named promissory estoppel, it is neither in the realm of contract nor in the realm of estoppel. The basis of this doctrine is the inter-position of equity which has always proved to its form, stepped in to mitigate the rigour of strict law. It is equally true that the doctrine of promissory estoppel is not limited in its application only to

defence but it can also find a cause of action. This doctrine is applicable against the Government in the exercise of its governmental public or executive functions and the doctrine of executive necessity or freedom of future executive action, cannot be invoked to defeat the applicability of this doctrine. It is further well established that the doctrine of promissory estoppel must yield when the equity so requires. If it can be shown by the Government or public authority that having regard to the facts as they have transpired, it would be unequitable to hold the Government or public authority to the promise or representation made by it, the court would not raise an equity in favour of the person to whom the promise or representation is made and enforce the promise or representation against the Government or public authority. ……"

17. In the present case, the dominance of the factors weigh in favor of the students / respondents than the justification and public interest highlighted by the appellant. The decision to discontinue the Discretionary Quota and State Sponsoring Quota under the Special Provision is taken after the process of admission had commenced and already completed except formally granting admissions by positive acts of appellant themselves. All the required processes were completed based on the then prevailing and valid Special Provisions as issued prior to the Order of keeping the said Special Provision in abeyance [12.04.2022/13.04.2022] and much before theabolition of such special provision [25.04.2022]. When no further formal action was required to be submitted at the end of the students and when they have changed their position in respect of their status in their respective previous schools, the equity rests in favor of these students who are availing the status provided to them under the provisions laid for the admissions in the appellant/ Sangathan. It was the process initiated in terms of the prevailing/valid provisions and culminated to the extent that the students have irreversibly changed their position to their detriment and grave prejudice. Once the abolition of the special provision is held to be prospective then the ongoing process under the then prevailing/existing provision cannot be held to be invalid and prospectivity will relate to the actions beyond 25.04.2022 when the scheme was abolished and not prior thereto. The appellant failed to evaluate this aspect that its unilateral action will have grave consequences for the students who are small children and have been through this process of admission duly acknowledged and acted upon by the schools/appellants by taking positive steps of issuing admission notices and thereupon their satisfaction asking the students to submit their transfer certificates. It also cannot be ignored that the seats being over and above the normal seats and are further curtailed and having sealing of two students in each Kendriya Vidyalaya under Discretionary Quota and 10 seats in all other classes put together (not more than 02 seats in each section) under State Sponsoring Agency Quota, thus keeping in mind the principles of fairness and equity, in the given peculiar circumstance would not seriously burden the system for this Academic Session in the two schools of the appellants. Hence, the appellants are directed not to apply the rigors of the

revised policy w.e.f. 25th April, 2022 based on the doctrine of promissory estoppel and further hold that the students/respondents are entitled to completion of the process of admission under the Special Provisions relating to Discretionary Quota and State Sponsored Quota as it existed in the original Admission Policy 2022-2023.

18. Furthermore, it is undisputed that the admission process under the Policy duly approved/Notified for Admissions 2022-2023 in February 2022 was completed on 12/13.04.2022 when such approved Policy and the governing regulations were in operation and remained so till the act of superseding by amendment the Special Provisions which was approved and notified only on 25.04.2022. In this regard, reference to Section 6 of the General Clauses Act, 1897, is relevant to the context of the validity of the action under the February 2022 Admission Notice and its completion by 12.04.2022, which for ready reference is provided as under :

> *"6. Effect of repeal.—*
>
> *Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not—*
>
> *(a) revive anything not in force or existing at the time at which the repeal takes effect; or*
>
> *(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or*
>
> *(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or*
>
> *(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or*
>
> *(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;*
>
> *and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed.*

19. The Supreme Court in the case of ***Major Saurabh Charan and Others v. Lieutenant Governor, NCT of Delhi (2014) 6 SCC 798*** was seized of a similar matter wherein the appellants were parents transferred to Delhi from various other states. They applied for admission of their wards based upon an order passed by LG of Delhi on 18- 12-2013 whereby fixed parameters were fixed for admission of students to private unaided recognized school in New Delhi. The parameter provided for an additional 5 points to students whose parents were transferred to Delhi from other states. Further, many students acted upon the order and were confirmed or in various stages of admission. However, on 27-02-

2014, the Directorate of Education issued a Notification and deleted the points for inter-state transfer cases and passed the following relevant direction-

> *"iii. If the school has conducted draw of lots for those applicants securing 70 points that draw shall remain valid for the selected/confirmed candidates only. Fresh draw of lots shall be held for remaining applicants having 70 points including wait listed applicants and those applicants who were earlier securing 75 points because of inter-State transfer case category."*

Hence, the direction validated the admission of only selected/confirmed students. However, for other students it provided for drawing of fresh lots.

The said direction was challenged and the matter finally reached the Supreme Court. The Supreme Court observed that imparting elementary and basic education is a constitutional obligation on all States. Further, the Court held that it was inappropriate/illegal to take away the admissions being granted under notification dated 18.12.2013 by a subsequent notification dated 27.02.2014. The relevant extract is reproduced below:-

> *"Having considered the matter, we deem it appropriate to relieve the appellants from the hardship of having the admission being granted earlier under Notification dated 18-12-2013 from being taken away by the subsequent Notification dated 27-2-2014, issued in the mid-stream. In our considered opinion, it was not permissible for the Administration to alter the basis of admission after the admission process had started and further having participated in the selection process the criteria for selection could not have been questioned by unsuccessful participants."*

The Court also granted admission to the successful students under the notification dated 18.12.2013 but not yet admitted due to subsequent notification on the basis of the undertaking by the counsel of the Delhi administration.

20. In the case of Joint Action Committee of ***Kendriya Vidayalaya Employees Vrs. Union of India, 1998 SCC OnLine Del 812***, the Delhi High Court was called upon to adjudicate the validity of the discretionary quota in allotting seats for admission in Kendriya Vidyalayas. The Delhi High Court struck down such quota on the basis that it violates article 14 of the Indian Constitution and is arbitrary and irrational.

However, in doing so, it protected the admission of those students which were admitted, cleared or recommended by the committee up-to 28.08.1998 i.e. the date on which this Court had passed an interim order staying further admission under the scheme. The relevant extract is reproduced below:-

> *"Though the Scheme is being struck down we have to take care to protect the interest of those whose admissions were either cleared or recommended by the Committee upto 28.08.98, the date on which this Court had passed an interim order staying further admissions under the Scheme. Those students who have already been admitted under the*

Scheme or those who have been cleared for admissions by the Committee must have rested their hopes or may have already commenced taking instructions in KVS. Striking down their admissions would adversely tell upon their career and the loss may be irreparable."

21. In the present case the intent and effect of the process followed under the Admission Notice 2022- 2023 notified in February 2022 was that the Special Provision is applicable and the students will be admitted under it. The students participated in the process and their admission was crystallised on 12.04.2022 when the students/respondents got the transfer certificates from the previous schools on the direction of the appellant's school and on such date the said special provisions notified in Admission Notice 2022-2023 in February 2022 was operative and valid. The amendment made in such notification prospectively on 25.04.2022 cannot take away the rights crystallised prior to that and the processes followed in compliance thereof. Such an interpretation in the peculiar facts of present case and issue being dealt with will be an unfair and harsh approach when the rights and claim are being dealt with for effect and execution in the present session only. We find that the claim of the respondents/students whose names had been recommended and cleared for admission are fully supported by the judgment of the Hon'ble Supreme Court in **Major Saurabh Charan** (Supra) as also by the judgment of the Hon'ble Delhi High Court in ***Joint Action Committee of Kendriya Vidayalaya Employees*** (Supra).

22. The reliance of the appellant on the judgment of the Division Bench of the Kerala High Court in ***WA 760 of 2022 titled, "Kendriya Vidyalaya Sangathan & others vs. Elna Chinchu***" dated 03.08.2022 is misplaced because the case of the respondent-students as pleaded and argued before us is not founded on the principle of legitimate expectation, which was core and star argument lead and dealt with in the aforementioned judgment. The appellants may have a case against the plea of legitimate expectation by the students/ respondents but the aforementioned judgment is sub-silentio on the issue of estoppel, which is applicable and available in favour of the present respondent(s) /students. In this regard reference is made to the decision of the Hon'ble Supreme Court in ***Municipal Corporation of Delhi vs. Gurnam Kaur, (1989) 1 SCC 101*** wherein it is held as under:

"11. x xxx

A decision should be treated as given per incuriam when it is given in ignorance of the terms of a statute or of a rule having the force of a statute. So far as the order shows, no argument was addressed to the court on the question whether or not any direction could properly be made compelling the Municipal Corporation to construct a stall at the pitching site of a pavement squatter. Professor P.J. Fitzgerald, editor of the Salmond on Jurisprudence, 12th Edn. explains the concept of sub silentio at p. 153 in these words:

"A decision passes sub silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind. The court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the court should not have decided in favour of the particular party unless it also decided point B in his favour; but point B was not argued or considered by the court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass sub silentio."

23. In the afore-stated judgment in ***Gurnam Kaur's case*** (supra) after due consideration of the English authorities held that the decisions which are sub-silentio and without argument are not applicable as binding precedents.

24. This High Court in ***Ferro Alloys Corporation Ltd. vs. Union of India, 1999 (I) OLR 349*** held as under:

"12. The concept of per incuriam is that those decisions which are given in ignorance in forgetfulness of some relevant statutory provisions or some authority. Where the judgment does not consider the statutory provision it passes on sub- silentio. Incuria literally means 'carelessness'. In practice per incuriam appears to mean per ignoratium. English Courts have developed this principle in relation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered, 'in ignoratium of a statute or other binding authority'. (See Young v. Bristol Aeroplane Co. Ltd., (1944) 2 All ER 293). Same has been accepted, approved and adopted by the apex Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedent as a matter of law. In Jaisri Sahu v. Rajdwan Dubey : AIR 1962 SC 83 the Apex Court while pointing out the procedure to be followed when conflicting decisions are placed before a Bench extracted a passage from Halsbury's Laws of England incorporating one of the exceptions when the decision of an appellate Court is not binding.

13. Does this principle extend and apply to a conclusion of law, which was neither raised nor preceded by any consideration? In other words can such conclusions be considered as declaration of law? Here again the English Courts and jurists have carved out an exception to the rule of precedents. It has been explained as rule of sub-silentio. "A decision passed sub-silentio, in technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the Court or present to its mind." (Salmond on Jurisprudence, 12th Edn., P. 153), In Lancaster Motor Company (London) Ltd. v. Bremith Ltd.: (194.1) 2 All ER 11, the Court did not feel bound by earlier decision as it was rendered 'without any argument, without reference to the crucial words of the rule and without any citation of the authority'. It was approved by the apex Court in Municipal Corporation of Delhi v. Gurnam Kaur : (1989) 1 SCC 101. The Bench held that, 'precedents sub-silentio and without argument are of no moment'. The Courts thus have taken recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141."

X x x x

25. In the aforementioned decision, this High Court held that a judgment cannot be considered as binding vis-à-vis a legal point it didn't consider and reason. Thus, in the facts of the present case, the applicability of the judgment by Kerala High Court in W.A. 760 of 2022 titled, ***Kendriya Vidyalaya Sangathan & others vs. Elna Chinchu dated 03.08.2022*** is passed sub-silentio on the issue of estoppel and principle of fairness which are equitable doctrines evolved to avoid injustice and cannot be taken as a binding precedent.

26. In view of the above considerations, we do not find merit in the appeals and the same are consequently dismissed. The order of the learned Single Judge is upheld with the aforestated observations. The appellants are directed to complete the process of admission qua the nine respondents/students within a period of two weeks from today based on the relevant provisions of the unrevised Admission Policy 2022-2023 failing which the officials concerned shall make themselves liable to be hauled up in contempt proceedings.

27. The Appeals stand dismissed with the above directions. No orders as to costs. Registry is directed to attach photocopy of this judgment in all connected files.

—— o ——

2022 (II) ILR - CUT-884

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

JCRLA NO.15 OF 2017

HADU @HADA GOND …… Appellant

.**V**.

STATE OF ORISSA …….Respondent

CRIMINAL TRIAL – Conviction under Section 302 of the IPC – Plea of the appellant is that, it is a case of culpable homicide not amount to murder – As the same has been committed without any pre-meditation, in the heat of passion, upon a sudden quarrel – Prosecution case is that, there are clear two parts in the transaction of crime – The first part constitutes sudden quarrel and heated exchange of words and assault by the appellant on the deceased and the second part is that while going to his home, brought a cudgel (wooden lathi) and assaulted the deceased severely on the vital parts of the body – Whether the conviction of appellant is liable to be converted under Section 304, Part-II of the IPC? – Held, No – Reason indicated. (Para-14)

Case Laws Relied on and Referred to :-

1. AIR 1975 SC 654 : Santosh v. State of Madhya Pradesh.
2. 1984 CRI.L.J. 1116 : Lachhman Dhublia v. The State of Odisha
3. AIR 1954 SC 652 : 1954 Cri LJ 1676 : Charmru Budhwa v. State of Madhya Pradesh.
4. AIR 1956 SC 116: 1956 Cri LJ 291 : Willie (William) Slaney v. State of Madhya Pradesh.
5. AIR1968 SC 1390 : 1968 Cri L J 1647 : Laxman Kalu Nikaje v. State of Maharashtra.
6. AIR 1979 SC 1525 : 1979 Cri LJ NOC 168 : Mirza Hidayatullah Baig v. State of Maharashtra.
7. AIR 1979 SC 1532 : 1979 Cri LJ 1135 : Shankar v. State of Madhya Pradesh.
8. AIR 1983 SC 185 :1983 Cri LJ 346 : Hari Ram v. State of Haryana.
9. AIR 1983 SC 284: 1983 Cri LJ 429 : Jawahar Lal v. State of Punjab.

For Appellant : M/s. Subhalata Choudhury, Mr. Sarbeswar Behera

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

JUDGMENT Date of Judgment : 12.07.2022

S. TALAPATRA, J.

1. This appeal, by the convict (from Jail), arises from the Judgment and order dated 16.09.2016 delivered in C.T. No. 130 of 2013 (T) by the Addl. Sessions Judge, Nabarangpur. By the said Judgment, the convict (hereinafter referred to as the appellant) has been convicted under Section 302 of the IPC for intentionally causing death of Deusu Gond by inflicting injuries on his head by means of Cudgel. Pursuant to the said Judgment of conviction, the appellant has been sentenced to suffer imprisonment for life with fine of Rs. 10,000/- (Rupees ten thousand) in default whereof, to undergo further R.I. for one year for committing the offence punishable under Section 302 of the IPC.

2. Briefly stated the prosecution case, as revealed, is that on 28.03.2013 at about 4.30 in the afternoon, when Deusu Gond (the deceased) was proceeding through the village road, the appellant picked up quarrel with him in front of the house of one Aditya Gond. There had been heated exchange of words between the deceased and the appellant. All of a sudden, the appellant, being enraged brought out a wooden stilt from a nearby fence and started giving blows indiscriminately on the person of the deceased. The deceased fell down on the ground with bleeding injuries on his head and other parts of the body and became unconscious. The people, who were present at the place of occurrence during that time, shifted the injured deceased to the house of the appellant and the appellant was asked to take the injured deceased for medical treatment. During that time, the informant, namely Pradeep Gond (P.W.5) appeared there and on hearing the incident, he shifted the injured deceased to Jodanga Medical,

where the injured deceased was given preliminary treatment. The Medical Officer at Jodinga Medical had referred the injured deceased to Umerkote Medical for better treatment. But the deceased succumbed to his injuries before he could be shifted to Umerkote Medical. On the following day at 10.30 A.M., an FIR was lodged, which was registered as Raighar PS Case No.47/2020. It has revealed from the records that the Investigating Officer visited the spot, examined several witnesses, seized blood stained earth and sample earth from the spot. The Investigating Officer had also seized the weapon of offence i.e. the blood stained wooden stilt from the spot and held inquest over the dead body of the deceased. The Investigating Officer had arrested the accused, sent the dead body for post mortem examination, seized the blood stained wearing pant of the appellant and seized the apparels in the wearing of the deceased. That apart, the Investigating Officer got the appellant medially examined and seized biological samples, as collected by the Medical Officer. The Investigating Officer received the Post Mortem report. The seized weapon of offence was produced before the Medical Officer, who conducted autopsy. On completion of the Post Mortem examination, the materials as seized were sent to the Regional Forensic Science Laboratory (RFSL), Berhampur for clinical examination and report. After the investigation was complete, the investigating officer found a strong prima facie case and filed the charge sheet (the report under Section 173(2) of the Cr. P.C).

3. Having taken the cognizance, on 06.08.2013, the charge was framed against the appellant for causing murder of Deusu Gond, the deceased, under Section 302 of the IPC. The said charge was flatly denied by the appellant.

4. In order to substantiate the charge, the prosecution adduced as many as 22 witnesses in addition to the documentary evidence. The appellant did not adduce any evidence in order to rebut or in his defence. After recording of the prosecution's evidence, the appellant was examined under Section 313 of the Cr.P.C. The appellant during the said examination denied the incriminating evidence as concocted or as untrue. Having appreciated the evidence as led in the trial, the impugned Judgment has been returned by convicting the appellant. It has been observed by the trial Judge that on scrutiny of the prosecution evidence, it is found that P.W.1, P.W.10 & P.W.21 are the seizure witnesses in respect of seizure of the wearing apparels of the deceased vide the seizure list marked Ext.1. P.Ws. 4 & 13 are the witnesses before whom the biological samples of the appellant, such as, nail clippings, blood were seized by the investigating officer, vide the seizure list marked as Ext.3. P.W.21 and P.W.3 are the seizure witnesses of the wearing pant of the appellant vide the seizure list marked as Ext.2. P.W.6 has testified that during the investigation, the investigating officer (P.W.22) effected the seizure of cudgel (wooden lathi) from the house of P.W. 5

vide the seizure list marked Ext.6. P.W.7, P.W.15, P.W.16, P.W.17 and P.W.20 are the witnesses in whose presence P.W.22 held inquest over the dead body of the deceased. P.W.18 is the scribe, who had written the FIR (Ext.5). P.W.11 has simply stated that, he heard about the murder of the deceased by the appellant and he had seen the dead body of the deceased lying in front of his house. P.W.14 is the witness of seizure of sample earth and blood stained earth from the place of occurrence by P.W. 22. P.W. 12, the wife of the deceased, has testified that she was absent in her village on the day of occurrence. Having heard about the occurrence, she had returned to her village and saw the dead body of the deceased. P.W.5 (the informant) had not witnessed the occurrence, but having information, he had filed the FIR. P.W.5 went to the house of the appellant on hearing about the occurrence and found his brother (the deceased) lying there with injuries on the back side of head and chest. He was told that the appellant had inflicted those injuries on the person of the deceased. P.W.5, as stated earlier, shifted the injured deceased to the Jodenga Medical. Even though the Medical Officer had referred the injured deceased to Umerkote Hospital for better treatment, but before he could be taken to Umerkote Hospital, he succumbed to his injuries. Immediately after his death, an FIR (Ext.4) was lodged before the Police. So far as the culpability of the appellant is concerned, the evidence of P.W.8 and P.W.19, who had given the eye-witness account of the occurrence, was relied heavily by the prosecution. P.W.8 is a co-villager of the deceased, in front of whose house, the occurrence took place and P.W.19 is another brother of the deceased. P.W.8 has categorically testified that he had intervened the quarrel and tried to pacify both the appellant and the deceased but the appellant came with a cudgel (somewhere referred, as the wooden lathi, which was seized) and dealt blows on the chest of the deceased. Having received such blows, the deceased fell down on the ground and lost sense. Out of fear, P.W.8 fled away from the spot.

5. In the Judgment, it has been observed that, there was no reason (at least there is nothing in the evidence) for P.W.8 to falsify in order to implicate the appellant. Even P.W.19 has testified that he saw the accused hitting hard on the person of the deceased with the cudgel. The deceased received injuries on his chest and head. Some villagers caught hold of the appellant. Subsequently, the injured deceased was shifted to the Medical (one hospital) but the life of the deceased could not be saved. The trial Judge found that the eye witnesses are credible and held that the appellant dealt blows by means of cudgel on the head of the deceased, which is a vital part and caused bleeding injuries. The evidence of P.W.9 (the Medical Officer) has corroborated the evidence of P.W.8 and P.W.19 as regards the injuries inflicted on the head of the deceased. P.W.9 (the Medical Officer), who conducted the autopsy by dis-section of the dead body,

found the cause of death due to injury to occipital region of the head and presence of intracranial haemorrhage which was caused for damage of the vital part of the brain leading to cardio-pulmonary failure. P.W.9 has categorically stated in the trail that the internal injury to the brain (of the deceased) has been caused by external injuries, inflicted on the head. Those external injuries are the primary cause of the death. It has been observed by the trial Judge on appreciation of evidence as follows:-

> *…."there is clear evidence on record that the accused after giving blows by cudgel on the person of the deceased went to his house and again returned to the spot and dealt cudgel blows on the chest. The above facts and the conduct of the accused clearly goes to show that the accused has had required intention to cause death of the deceased…"*

It has been further observed that the transaction of crime would stand to show the *mens rea* with sufficient intention to cause death of the deceased. Based on such findings, the judgment of conviction as challenged by this appeal has been passed. Counsel for the parties did not challenge the finding so far it concerns with the death of the deceased, but so far the knowledge and intention as concerned with dealing with the blows have been seriously questioned.

6. Mr. Behera, learned counsel appearing for the appellant has submitted that it is apparent from the evidence that the culpable homicide in the case in hand cannot be termed murder, as the same has been committed without any pre-meditation, in the heat of passion, upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel and unusual manner. Thus, the indictment or the charges framed under Section 302 of the IPC is bound to fall through, in as much as the conduct of the appellant is squarely covered by Exception 4 of Section 300 of the IPC. Mr. Behera, learned counsel, has pointed out that the appellant is languishing in jail since 09.03.2013. Mr. Behera has strenuously contended that the conviction is liable to be converted under Section 304, Part-II of the IPC against the appellant for committing culpable homicide not amounting to murder.

7. Mrs. Saswata Patnaik, learned Addl. Government Advocate appearing for the State has seriously refuted the said submission advanced for the appellant. She has stated that there are clear two parts in the transaction of crime. The first part constitutes sudden quarrel and heated exchanged of words and assault by the appellant on the deceased and the second part is the appellant's going to his home, bringing a cudgel (wooden lathi) and assaulting the deceased severely on the vital parts of the body. If it were that the appellant has only committed the first part of the assault, such conduct would have come under Exception 4 of Section 300 of the IPC. But the second part of the transaction

clearly demonstrates that the assault was done with intention of causing of bodily injuries and the bodily injuries were intended to be inflicted.The said fact having been established by evidence is adequate to hold that such assault in the ordinary course of nature is likely to cause death. Illustration *thirdly* under Section 300 of the IPC being conformed to, the said culpable homicide is *murder*. Hence, no interference of this Court is called for in the impugned Judgment of conviction.

8. Mr. Behera, learned counsel has placed reliance on a few decisions to buttress his contentions. In ***Santosh v. State of Madhya Pradesh*** reported in ***AIR 1975 SC 654***, the Apex Court has observed that the Sessions Judge appears to have overlooked the various clauses of Section 300 of the IPC. An intention to kill is not required in every case. A knowledge that the natural and the probable consequences of the act would be death will suffice for a conviction under Section 302 of the IPC. Mr. Behera, learned counsel has submitted that there had been no knowledge of probable consequences, as from the records it appears that both the appellant and the deceased were inebriated. As such, as emphasized, the element of knowledge cannot be inferred.

9. In order to nourish the submission on interpretation, it has been contended by Mr. Behera, learned counsel that, there is no evidence of any previous ill-feeling or enmity between the appellant and the deceased. The appellant did not intend to cause of death or bodily injuries which are sufficient in the ordinary course of nature, to cause death. But as he dealt the blows on the vital part of the body, he has been presumed to have that knowledge that, by that act, he was likely to cause death. If a person is said to have given a blow on a vital part of the deceased, it has been held in several cases that no one can impute knowledge that such an injury was likely to cause death. The offence, in the circumstances, would fall under Section 304, Part II, of the IPC.

In ***Lachhman Dhublia v. the State of Odisha***, reported in ***1984 CRI. L.J. 1116***, as referred by Mr. Behera, learned counsel for the appellant, several decisions of the Apex Court have been relied by this Court:

> "9. In ***Charmru Budhwa v. State of Madhya Pradesh, AIR 1954 SC 652: 1954 Cri LJ 1676*** the accused was found to have given one blow with a lathi on the head of the deceased and their Lordships held that when the fatal injury was inflicted by the accused on the head of the deceased by only one blow it could as well be that the act by which death was caused was not done with the intention of causing death or causing such bodily injury as was likely to cause death.
>
> In ***Willie (William) Slaney v. State of Madhya Pradesh, AIR 1956 SC 116: 1956 Cri LJ 291***, the accused gave a single blow with a hockey stick on the head of the deceased and he was held guilty for the offence under Section 304, Part II, I.P.C.

In ***Laxman Kalu Nikaje v. State of Maharashtra; AIR1968 SC 1390 : 1968 Cri L J 1647***, the accused dealt a single blow with a weapon on the chest of the deceased. The injury was found to be situated 2" below the outer 1/3" of right clavicle on the right side of the chest and penetrated to the depth of 2" into the chest cavity. Death was caused mainly because it cut the auxillary artery and veins and caused shock and haemorrhage leading to the death. In these circumstances, their Lordships held that the offence came within the third part of Sec. 299, I.P.C. Accordingly, the conviction under Section 302, I.P.C. was altered to one under Section 304 I.P.C.

In ***Mirza Hidayatullah Baig v. State of Maharashtra, AIR 1979 SC 1525 : 1979 Cri LJ NOC 168***, the accused dealt a single blow on the head of the deceased with a walking stick. It was held that the appellant did not have the intention to cause the particular injury which resulted from the blow given to the deceased. But as he aimed the blow at the head of the deceased which is a vital part of the body he must be presumed to have the knowledge that death was the likely result of that act. Accordingly, the conviction under Section 302, I.P.C. was altered to one under Section 304, Part II, I.P.C.

In ***Shankar v. State of Madhya Pradesh : AIR 1979 SC 1532 : 1979 Cri LJ 1135***, the accused caused an injury on the neck of the deceased with a dagger. Their Lordships found that there was no premeditation for the murder and that the accused had no intention of causing the particular injury that he caused to the deceased. But he must be deemed to have the knowledge that death may be caused by his act. Accordingly, the conviction under Section 302, I.P.C. was altered to one under Section 304, Part II, I.P.C.

In ***Hari Ram v. State of Haryana, AIR 1983 SC 185 :1983 Cri LJ 346***, the accused in the heat of an altercation seized a jelli and thrust it into the chest of the deceased. On the evidence, their Lordships held that the accused had no intention to kill and accordingly he was convicted under Section 304, Part II, I.P.C.

In ***Jawahar Lal v. State of Punjab, AIR 1983 SC 284: 1983 Cri LJ 429***, the accused had given a solitary blow of knife to the deceased which fell on his chest. The accused had no malice against the deceased. He had no quarrel with the deceased and the accused did not make any attempt at giving a second blow. Their Lordships held that the accused could not be said to have intention to cause that particular injury and that even if the injury proved to be fatal, the case would not be covered by Section 300, Para 3, but the accused could be attributed to the knowledge that he was likely to cause death. Accordingly the conviction under Sec.302, I.P.C. was altered to one under S. 304, Part II, I.P.C."

10. Mr. Behera, learned counsel has contended that the appellant cannot be attributed to have intention to cause that particular injury and that, even if the injury is proved to be fatal, the case wouldnot be covered by *thirdly* under Section 300, As the appellant cannot be attributed to have the knowledge that his act was likely to cause an injury which may cause death and hence, the conviction is liable to be altered to Section 304, Part-II of the IPC.

11. For appreciation of the submission of learned counsel for the parties, it would be appropriate to evaluate the evidence, as recorded in the trial, in a meaningful manner. There is no dispute that PWs.8 and 19 are the eye witnesses of the transaction of crime. The evidence of P.W.9 came to corroborate the

ocular evidence of P.Ws.8 and 19. As already noted, the remaining witnesses including P.W.22, i.e., the investigating officer are of formal nature and their evidence had little ramification on the finding of the conviction. As such, this Court would read a little extensively the evidence of P.W.8 and P.W.19. Sudu Rout, P.W.8 has testified, after identifying the appellant as the perpetrator, that in the previous year meaning 2013, at about 04:00 P.M., the appellant assaulted Deusu Gond with lathi. He intervened and tried to pacify them. The appellant left the spot thereafter, went to his house and returned with lathi and again assaulted Deusu on his chest. Deusu fell down and became unconscious. Out of fear,he left the spot. His statements could not be dented in the cross-examination.

12. P.W.19 namely Bhika Gond testified in the trial and stated that the deceased is his brother. About 3 years back (from the date ofrecording of the statement of P.W.19) at about 04:00P.M., the appellant had picked up quarrel with his brother (the deceased) near the house of Ghasi and assaulted him by means of a piece of wood. As a result, his brother sustained injuries on his chest and head. The villagers arrived there and caught hold of the appellant. His brother (the deceased) was taken to the hospital where he died. In the cross-examination, P.W.19 has admitted that, he does not know the date of occurrence. His house is 100 meters away from the spot. He has made a very significant statement that Sudu (P.W.8) and Udit, not examined in the trial, and himself were present in the scene of occurrence. His statement in the cross examination requires to be reproduced and is reproduced hereunder:

> ***"At the time of my arrival, accused was assaulted the deceased and the deceased was lying on the ground. I cannot say if my brother (deceased) and the accused were addicted with liquor.P.W.19 has stated the diameter of the Lathi used by the appellant was about 4 inches."***

He has denied the fact that the appellant neither quarreled with the deceased nor assaulted the deceased. The evidence of P.W.9, Dr. Ashis Ranjan Prusty is vital for the case in hand in as much as he had carried out the post-mortem examination over the dead body of Deusu Gond (the deceased).

According to the post mortem examination report (Ext.6) the following external injuries were found on the dead body of the deceased.

> ***i) Lacerated wound of size 2 c.m. * 2 c.m. * 2 c.m. on left parietal region,***
> ***ii) Lacerated wound of size 2 * 2 * 1 c.m. on occipital region,***
> ***iii)Abrasion with swelling on both scapular region.***

P.W. 9 has observed in the report as under:

> ***"Wall, ribes and cartilages were intact and congested, pleura was intact and congested. Larnyx and trachea were intact and congested and contained frothy exudate. Right lung intact, congested and filled with blood. Left lung intact, congested and filled with blood."***

13. P.W.9 has clearly stated that the cause of death is due to injury in the occipital region and presence of intracranial haemorrhage, which caused damage to the vital centre of brain and that led to cardio- pulmonary failure. According to him, the nature of death is homicidal. There was no meaningful cross-examination. Apart that, P.W.9 has categorically opined that, the injuries found on the body of the deceased can be caused by the recovered weapon of offence (Ext.7). The seizure of the cudgel has not been contested by the counsel for the appellant. What appears from the reading of the evidence is that according to P.W.9, there was no external injury over the chest nor were there any internal injuries under the ribs. Even there was no lacerated injury or swellings on the chest of the deceased. The post mortem examination was commenced within 24 hours of death. Even then, there is no sign of any injury or sign of assault on the chest of the deceased. Hence, the part of the evidence of P.W.8 that the appellant went to his house and returned with a lathi and thereafter assaulted Deusu on his chest cannot be believed by this Court. P.W.19 did not tell the narrative of assault after return of the appellant from his house, as indicated by Mrs. S. Patnaik, learned counsel appearing for the State. However, P.W.8 had introduced that story. There is no reason to disbelieve him as a whole. But his testimony to the extent of assaulting on the chest has become clouded by the post mortem report. It has not been contested that Deusu was seriously injured and later on, he succumbed to those injuries. Therefore, what transpires is that, there was heated exchange of words and out of rage, the appellant struck blow by a lathi (the wooden stilt) on the left parietal region and on occipital region. The assault on the other parts of the head cannot be ruled out, as P.W.9 has categorically observed that abrasions and the swelling on both scapular region were found. In Santosh (*supra*), the injuries were not on the vital parts of the body and it has been observed that, injuries on the vital parts of the body was deliberately avoided and hence, no inference on intention to murder could be drawn. Knowledge of probable consequences of an act would suffice for conviction under Section 302 IPC. In this regard, Mr. Behera, learned counsel has tried to impress upon this Court that both the deceased and the appellant was inebriated at the time of occurrence. Hence, knowledge of the consequence cannot be inferred. We are constrained to observe that, there is no evidence that the appellant or the deceased were in inebriated condition. The suggestion that was projected from the defence was squarely denied by the witness. Hence, the said contention is bound to fall through.

14. We are to weigh now the impact of the evidence that the appellant dealt two vital blows on the left parietal region and on the occipital region. We cannot be oblivious that the injury that was inflicted to occipital region of the head has caused the damage to the brain center, which was instrumental to

cardio-pulmonary failure. The cardio-pulmonary failure has been inferred as the cause of death by P.W.9 and such observation has not been challenged by the appellant. As we have already observed that there were more than two assaults, as both sides of scapular regions had abrasion with swelling. Those stand to show cruel and unusual manner of assault. What has been observed by this Court in *Lachhman Dhublia (supra)* having referred to several decisions of the Apex Court is that, if there was a single blow, in the case that the accused did not make any attempt to give the second blow, it may be held that the accused did not have intention to cause that injury and that even if the injury is proved to be fatal, the case would not be covered by Section 300 *thirdly*. But in that case, the accused would be attributed to the knowledge that he was likely to cause an injury which might cause death. Accordingly, the conviction under Section 302 of the IPC was altered to one under Section 304, Part-II of the IPC. The present case is not a case of single blow. The transaction of crime is in two parts. There were several blows according to the post mortem report on the scapular region and out of those injuries, the injury that was inflicted by the appellant on occipital region was fatal. Hence, it cannot be inferred that the appellant did not have any intention to cause the particular injury. On the contrary, we are satisfied that the evidence, as adduced by the prosecution, is sufficient to show that the said assault was done with intention of causing bodily injury and such injury as intended to be inflicted is adequate in ordinary course of nature to cause death.

15. Hence, the prosecution has been successful in proving the charge of murder. In view of the above observations, no interference in the Judgment of conviction or in the order of sentence is called for.

16. In the result, the appeal stands dismissed.

17. Send down L.C.Rs. forthwith.

—— o ——

2022 (II) ILR - CUT-893

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

CRLA NO.62 OF 2016

SURENDRA MUNDA …… Appellant

.**V**.

STATE OF ODISHA …….Respondent

INDIAN PENAL CODE, 1860 – Section 302 – Conviction – Plea of appellant that this is a case of culpable homicide not amounting to murder – The Appellant sustained two injures on his person, which are

one cut injury over his scalp and another contusion on his right elbow – This is the circumstance that made him angry and violent – So the assault was not pre-meditated but was the reflection of anger the Appellant had at that time – Whether the case fall within the fold of Part-I of Section 304 of the Indian Penal Code? – Held, Yes. – Accordingly, his conviction converted to Part-I of Section 304 of the I.P.C. (Paras16,17)

For Appellant : Mr. A.K. Budhia
For Respodent : Mr. S.S. Kanungo, A.G.A.

JUDGMENT Date of Judgment : 12.07.2022

B.P. ROUTRAY, J.

1. The Appellant is a life convict. He has preferred the appeal against the judgment of the learned Additional Sessions Judge, Fast Track Court, Rourkela passed in Sessions Trial Case No.118/62 of 2009 convicting and sentencing him for life along with fine of Rs. 2000/- for commission of offence under Section 302 of the Indian Penal Code (for short 'the I.P.C.').

2. One Gumuni Patra is the elder sister of the deceased Dhabaleswar Patra and staying in the house of the deceased in village Sihsadihi under Banei Police Station. On 12th January, 2009 in the afternoon Gumuni and the Appellant were quarreling in front of the house of the deceased. During quarrel, the Appellant fell down as he had drunken at that time and sustained injuries. Then out of anger he went inside his house and brought out an axe (budia). Seeing this, Gumuni ran into the house of the deceased to save her life and the Appellant chased her. Inside the house of the deceased the Appellant could not find Gumuni, but saw the deceased sitting on a cot. The Appellant without finding Gumuni assaulted on the head and neck of the deceased by means of the axe saying as to why he kept his sister in his house who is regularly quarreling with him. He dealt 3-4 blows on the head and neck of the deceased. As a result of the assault, the deceased got severely injured and as other witnesses rushed hearing the shout, the Appellant fled away. The deceased was shifted to the hospital and while undergoing treatment he succumbed to the injuries after one month, i.e. on 11.02.2009.

3. F.I.R. was lodged by the wife of the deceased on the same day of occurrence, i.e. on 12thJanuary, 2009 at about 8.15 PM which was registered as Bonai P.S. Case No. 2 dated 12thJanuary 2009, initially for commission of offence under Section 307 of I.P.C. and turned to a case of murder upon death of the deceased subsequently.

4. P.W.15-Kanhu Charan Behera, the Sub-Inspector of Police took up investigation and arrested the accused without delay, i.e. on the same day of occurrence. He also visited the spot, examined the witnesses and collected sample earth as well as blood stained earth. The Appellant, while in police custody, disclosed the place of concealment of the weapon of offence, i.e. the axe and at his instance the same was recovered. The wearing apparels of the Appellant as well as of the deceased were also seized by P.W.15.

5. The Appellant did not admit the guilt and took the plea of complete denial of prosecution allegations.

6. Prosecution in order to prove their case, examined 15 witnesses and exhibited 14 documents marked as Ext.1 to Ext.14. The wife of the deceased, who is the informant in the case, could not be examined as she died out of shock during treatment of the deceased in the hospital, i.e. before death of the deceased.

7. No evidence was adduced from the side of the defense.

8. The learned trial court based on the evidence of the eye-witnesses, viz., P.Ws.4, 5, 6 and 13 as well as the evidence of other witnesses including the evidence of the autopsy doctor (P.W.1), treating doctors (P.Ws.2 and 12), convicted the Appellant with the finding that the prosecution has well proved the charge against the Appellant.

9. It is submitted on behalf of the Appellant that the trial court erroneously accepted P.W.4, 5, 6 & 13 as eyewitnesses who are not so but post occurrence witnesses only and therefore, the conviction based on the evidence of such eyewitnesses is not sustainable. It is further contended that the Appellant had no intention to kill the deceased as reveals from the circumstances and as such, this is not a case of murder but is a case of culpable homicide not amounting to murder falling within the ambit of Section 304-II of the I.P.C.

10. Before examining the contentions it needs to be seen at the outset about the nature of death of the deceased which must satisfy as homicidal as it is a case of murder. In this regard, the evidence of the doctors viz. P.W.1, 2 & 12 are important.

P.W.1 is the doctor who conducted autopsy over the dead body of the deceased. He noticed 4 external injuries on the dead body, which are one bruise of size 3" X ½" over the forehead, one cut wound of size 3" X ½" X ½" over the nape of the neck and two abrasions of size 1" X 1" and 1½" X ½" over left inner and right inner scapular area respectively. All such injuries were old and ante-mortem in nature as per the opinion of P.W.1. The post mortem examination was conducted on 11th February, 2009.

P.W.2 is the doctor who examined the deceased on that same day of occurrence and found three injuries on his person which are two cut injuries of size 5cm X 0.1cm X 0.5cm and 5cm X 2.5cm X 0.5cm respectively and one contusion of size 5cm X 2cm X 1cm. The cut injuries are one each on the scalp and neck and the contusion is on the forehead. This witness has also examined the axe and opined that those injuries are possible by the said weapon. The deceased died on 11.02.2009 at Ispat General Hospital, Rourkela while undergoing treatment and P.W.12 is the Nuro Surgeon treating him. As per P.W.12 the spinal cord of the deceased was completely damaged at C-5 & C-6 level.

Thus Keeping in view such medical evidence and the report of injury (Ext.2) prepared by P.W.2 and the circumstances narrated by the witnesses, it is confirmed that the deceased died homicidal nature of death.

11. The foundation for conviction of the Appellant, as evinced from the discussions made in the impugned judgment, is mainly the evidence of prosecution witnesses No. 4, 5, 6, & 13 as well as recovery of the weapon of offence under Section 27 of the Indian Evidence Act at the instance of the Appellant from the thatched roof of the house of the Appellant. On the backdrop of the submission advanced on behalf of the Appellant not to treat P.Ws.4, 5, 6 & 13 as witnesses to the occurrence, it is seen upon scrutiny of their evidence that they all have stated to have reached near the deceased hearing hullah from the house. In this regard P.W.4 has admitted in her cross-examination that having heard the noise of Parabati (wife of the deceased) she went to the spot. Similarly, P.W.5 has stated that having heard the shout of the deceased he and other ladies went to the spot and saw the deceased falling on the ground. P.W.6 has also stated in the same line that hearing hullah of the wife of the deceased she reached at the spot. But the evidence of P.W.13, sister of the deceased, is clear to the effect that she was an eyewitness to the assault. Nothing adverse could be elicited from her by the defense during cross-examination. Rather she had confirmed her presence at the scene of occurrence by stating that she had came to her brother's house on the occasion of *"Push Purmima"*. At the same time, the statements of P.W.4, 5 & 6 are to the effect that they saw the Appellant chasing Gumani (the sister of the deceased) who entered into the house of the deceased and the Appellant following her also entered into the house. Such evidence of those witnesses remains uncontroverted. So even conceding for a moment to the submission of the learned counsel for the Appellant that they are not the occurrence witnesses, still their immediate presence at the crime scene cannot be ruled out because they have seen the Appellate chasing Gumuni and immediately thereafter they reached near the deceased hearing the hullah from the house. Moreover, the statement of P.W. 13 regarding her witnessing the

assault remains unimpeached. So upon a cumulative assessment of the evidences of P.W.4, 5, 6 & 13, the assault by the Appellant on the deceased cannot be doubted. Therefore, the contention of the Appellant to entirely discard out the evidence of such witnesses is without merit. Accordingly, it is reiterated that the assault on the deceased by the Appellant through the axe is clearly established beyond unreasonable doubt.

12. Next to examine the other evidence regarding recovery of the weapon of offence i.e. the axe, the same has been duly established from the evidence of P.W.5 as well as the I.O. (P.W.15). But unfortunately said weapon of offence has not been produced by the prosecution before the court and no reason has been assigned thereof for non-production of the same. However, in view of the clear and cogent evidence of P.Ws.4, 5, 6 & 13, non-production of the weapon of offence at the time of trial has no impact on prosecution case.

13. Learned counsel for the Appellant to buttress his submission that this is a case of culpable homicide not amounting to murder, draws our attention to the circumstance that the Appellant was chasing the sister of the deceased and without finding her dealt blows on the deceased out of anger and frustration. As per the submission of the learned counsel for the Appellant, the impact of the injuries were not that serious to cause instant death of the deceased at the spot.

14. Before dealing with the submissions of the Appellant, it is important to have a relook to the nature of injuries inflicted on the body of the deceased. As per P.W.1, the autopsy doctor, the deceased sustained one cut wound, one bruise and two abrasions. P.W.1 has not stated anything about the cause of death and as per him the opinion is reserved as the viscera was sent for examination. According to the statement of P.W.2, the doctor who treated the deceased immediately on the date of assault upon his arrival in the hospital, has found two cut injuries, one each on the scalp and neck, and another contusion. According to him, the cut injury over the scalp and the contusion over the forehead were simple in nature. As per the evidence of P.W.12, the Nero Surgeon of the hospital where the deceased breathed last, he found it is case of traumatic quadriplegia with a complete transaction of the spinal cord at C-5 and C-6 level. This P.W.12 has not submitted any report about the treatment of the deceased.

15. To bring a case fall within the ambit of culpable homicide not amounting to murder, it must come within those five exceptions of Section 300 of the I.P.C. In a case where death is resulted by such assault committed without pre-meditation in a heat of passion as contended to be in the instant case, the associate circumstances leading to such assault are to be scanned minutely.

16. The circumstances reveal from the prosecution case are that, there was a quarrel immediately preceding the occurrence and in course of that quarrel the Appellant sustained injuries, though due to his fault as per prosecution version. But the admitted fact remains that, the Appellant sustained two injures on his person, which are one cut injury over his scalp and another contusion on his right elbow. This is the circumstance that made him angry and violent to chase Gumuni with the axe. Since Gumuni concealed her and the Appellant could not find her, he settled the score on the deceased by assaulting him with the axe he was carrying. So the assault was not pre-meditated but was the reflection of anger the Appellant had at that time. Thus upon a close analysis of such circumstances and the nature of injuries sustained by the deceased as per the opinion of P.W.2, the treating doctor, where out of three injuries two are simple in nature, we are inclined to bring this case fall within the fold of Part-I of Section 304 of the Indian Penal Code.

17. It is submitted at the Bar that the Appellant is inside custody from the date of occurrence i.e., since 12thJanuary, 2009 when he was arrested by P.W.15. This is also confirmed on verification of copy of the order-sheets available in the L.C.R. as well as the order-sheets of the present appeal. This means that the Appellant is in custody for more than thirteen years as on date. As such, we modify his conviction to be under Part-I of Section 304 of the I.P.C. and sentence him the period undergone in custody till date. Accordingly it is directed to release the Appellant forthwith if his detention is not required in any other case.

18. The appeal is disposed of as allowed to the above extent.

—— o ——

2022 (II) ILR - CUT-898

BISWAJIT MOHANTY, J.

W.P.(C) NO. 34205 OF 2021

SACHALA PATNAIK ……..Petitioner

.V.

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

THE REGISTRATION OF BIRTHS AND DEATHS ACT, 1969 – Section 17, 13 – Whether a person born on 08.04.1945 is eligible to get birth certificate under the Act? – Held, Yes – Although the Act is prospective in nature, sub-section (3) of Section 13 clearly cover past cases where no entry could be made within the time prescribed. (Para 10)

Case Law Relied on and Referred to :-

1. O.J.C. No. 5701 of 2001 : Kamala Singh Vs. Registrar of Birth and Deaths-cum-Executive Officer, Anandapur & Anr.

For Petitioner : M/s. Ashok Das, M.R. Dash, S.A.K. Dora & G.R. Behera.

For Opp.Parties: Mr. D.K. Mohanty, A.S.C.
M/s. Ramesh Sahoo, S. Pradhan & S. Mishra

JUDGMENT Date of Hearing : 28.07.2022 : Date of Judgment: 02.08.2022

B. MOHANTY, J.

1. This writ application has been filed by the petitioner praying for quashing of the order dated 22.02.2021 passed by the Executive Magistrate, Berhampur in Misc.Case No.79 of 2021 rejecting her prayer for a direction to Registrar of Births and Deaths, Berhampur Municipal Corporation, Berhampur (opposite party No. 6) for recording her date of birth to be 08.04.1945. Additionally she has prayed that a direction be issued to the opposite party No.3 to register and issue the birth certificate to her.

2. The case of the petitioner is that she is a lady of 77 years and a retired Government employee. She is a permanent resident of Berhampur in the district of Ganjam. After retirement from service and after death of her husband, she has been residing at Berhampur along with her only daughter. After marriage, the daughter is now permanently staying in United States of America and since the petitioner is suffering from various diseases and nobody is there to look after her, for which she wants to go to U.S.A. so that her daughter can take care of her. For that purpose, she has to obtain a Green Card from U.S.A. for which, birth certificate is necessary. From the non-availability certificate issued under Section 17 of the Registration of Births and Deaths Act,1969, for short 'the Act' by Registrar of Births and Deaths of Berhampur Municipal Corporation under Annexure-1, the petitioner could come to know that event of her birth has not been registered by the authorities. In such background, she filed Misc.Case No.79 of 2021 before the Executive Magistrate, Berhampur along with necessary documents for a direction to Registrar of Births and Deaths, Berhampur Municipal Corporation, Berhampur (opposite party No.6) for issuance of birth certificate in her favour reflecting her date of birth to be 08.04.1945. However, the said application was rejected by the Executive Magistrate, Berhampur on 22.02.2021 under Annexure-2 on the ground that since 'the Act' is prospective in nature and it regulates only the events that have taken place after coming into force 'the Act', he cannot issue the order to Registrar of Births and Deaths, Berhampur Municipal Corporation (opposite party No. 6) for issuance of birth

certificate as the petitioner was born much earlier i.e. on 08.04.1945. Challenging the same, the present writ petition has been filed with the above noted prayers.

3. Despite notice, opposite party Nos.1, 2, 4 & 5 have not filed any counter. A counter affidavit has been filed by the opposite party Nos.3 & 6. There they have stated that for issuance of Green Card, no birth certificate is necessary and since the date of birth is 08.04.1945, no birth certificate can be issued under 'the Act' which is prospective in nature. Accordingly, they have defended the impugned order passed by the opposite party No.5. In this context, they have also relied on Odisha Registration of Births and Deaths Rules, 1970, for short '1970 Rules'.

4. Mr. Das, learned counsel for the petitioner relying on affidavit dated 30.11.2021 filed by the petitioner enclosing a copy of Matriculation Certificate issued by the Board of Secondary Education, Odisha in her favour submitted that the date of birth of the petitioner as per the said certificate is 08.04.1945 and though relying upon the said document, the petitioner has applied for issuance of birth certificate under Section 13(3) of 'the Act' as the birth was not registered within one year of its occurrence, however, such prayer has been rejected by the Executive Magistrate, Berhampur under Annexure-2 without application of mind by referring to non-existent provisions of law like Section 13(4)(8) of 'the Act' and the '1970 Rules'. He submitted that such rejection order has been passed by the Executive Magistrate, Berhampur on a wrong interpretation with regard to the operation of 'the Act'. He submitted that no doubt 'the Act' is prospective in nature but it also takes into account the events which have taken place before coming into force of 'the Act'. In this context, he relied on an unreported Division Bench order of this Court in the case of **Kamala Singh Vs. Registrar of Birth and Deaths-cum-Executive Officer, Anandapur and another** passed in O.J.C. No. 5701 of 2001. Accordingly, he contended that the impugned order should be set aside and direction be given to opposite party No.6 for issuance of birth certificate to the petitioner.

5. In reply, Mr. D.K. Mohanty, learned Additional Standing Counsel stoutly defended the impugned order under Annexure-2 saying that since 'the Act' is prospective in nature, it will only apply to the events which have taken place after coming into force of 'the Act' and not to a birth which took place earlier. Since the petitioner was born much prior to coming into force of 'the Act', rightly the Executive Magistrate, Berhampur has refused to entertain her application for a direction to the opposite party No. 6 for recording/registering her date of birth as 08.04.1945 and for issuing the consequential birth certificate.

6. Mr. R. Sahoo, learned counsel appearing for opposite party Nos.3 & 6 also supported the stand taken by Mr. Mohanty, learned Additional Standing Counsel.

7. Heard Mr. A. Das, learned counsel for the petitioner, Mr. D.K. Mohanty, learned Additional Standing Counsel and Mr. R.Sahoo, learned counsel representing opposite party Nos. 3 & 6.

8. The basic facts of this case are not in dispute and are as follows. The birth of the petitioner was never registered by the municipal authorities and, accordingly, when applied, non-availability certificate was issued under Annexure-1 by the opposite party No. 6 on 23.11.2020. In such background, she filed a petition under Section 13(3) of 'the Act' praying for issuance of necessary direction to opposite party No.6 for recording/registering her date of birth as 08.04.1945. However, such an application has been rejected vide impugned order under Annexure-2 on the ground that since 'the Act' and the '1970 Rules' are prospective in nature and they regulate only the event that have taken place after coming into force of 'the Act' and the above noted Rules and since the birth of the petitioner took place much prior to coming into force of the above noted Act and '1970 Rules', therefore, the prayer of the petitioner for a direction to opposite party No. 6 for issuance of birth certificate cannot be acceded.

9. Scanning of the impugned order under Annexure-2 shows gross non-application of mind by the Executive Magistrate, Berhampur. The Magistrate has referred to Section 13(4)(8) of 'the Act' which does not exist in the statute book. He has also referred to '1970 Rules' which has been repealed long back by the Odisha Registration of Births and Deaths Rules, 2001, for short "2001 Rules". Further at various places he has referred to date of death, death certificate etc. in the order, which were not at all the matters in issue. Though he has referred to Sub-Section 1 of Section 1 of 'the Act', the said provision nowhere indicates that 'the Act' and '1970 Rules' came into force with effect from 01.07.1970 as indicated in the impugned order. The said Sub-Section only reads as follows:

> "This Act may be called The Registration of Births and Deaths Act, 1969".

Rather Sub-Section 3 of Section 1 of 'the Act' makes it clear that 'the Act' will come into force in a State on such date as the Central Government may, by notification in the Official Gazettee, appoint. It is not disputed that 'the Act' came into force in 1970 and Section 13 of 'the Act', which is relevant for our purpose reads as follows:

> "**13. Delayed registration of births and deaths** –
> (1) Any birth or death of which information is given to the Registrar after the expiry of the period specified therefor, but within thirty days of its occurrence, shall be registered on payment of such late fee as may be prescribed.

> (2) Any birth or death of which delayed information is given to the Registrar after thirty days but within one year of its occurrence shall be registered only with the written permission of the prescribed authority and on payment of the prescribed fee and the production of an affidavit made before a notary public or any other officer authorized in this behalf by the State Government.
>
> (3) Any birth or death which has not been registered within one year of its occurrence, shall be registered only on an order made by a Magistrate of the first class or a Presidency Magistrate after verifying the correctness of the birth or death and on payment of the prescribed fee.
>
> (4) The provisions of this section shall be without prejudice to any action that may be taken against a person for failure on his part to register any birth or death within the time specified therefor and any such birth or death may be registered during the pendency of any such action."

10. Sub-Section 3 of Section 13 of 'the Act' is important in this case as under the said provision, the petitioner has applied for issuance of necessary direction to opposite party No.6 for registration of her birth date. The said Sub-Section as well as other Sub-Sections of Section 13 uses the phrase 'any birth or death'. Thus there exists great emphasis on the phrase 'any birth or death'. This phrase cannot be interpreted only to mean birth or death occurring only after coming into force of 'the Act'. If such a restricted interpretation is given, then the same will cause great injustice to persons born before the coming into force of 'the Act'. The very use of word 'any' makes it clear that it applies to cases of all births whether occurring prior to or after the commencement of 'the Act'. It is settled that a statute cannot lose its prospective operational character because a part of the requisites for taking actions under it is drawn from a time antecedent to its passing. Secondly, even otherwise in the present case, the petitioner never made a prayer for registering her date of birth from a date prior to coming into force of 'the Act'. Thirdly, a general survey of Section 13 of 'the Act' would show that the main intention of the said section appears to give relief to the persons, who apply for registration of births and deaths after some amount of delay. For all these reasons, it cannot be said that the births and deaths which occurred before coming into force of 'the Act' cannot be taken into account by the authorities under 'the Act' for the purpose of issuance of birth or death certificate. Lastly, this Court in the case of **Kamala Singh** (supra) has made it clear that though 'the Act' is prospective in nature, however, Sub-Section (3) of Section 13 clearly covers past cases where no entry could be made within the time prescribed. In order to make things clear, the relevant portion of the above noted order is quoted hereunder:

> "The Registration of Births and Deaths Act,1969 (hereinafter referred to as 'the Act') has been enacted with a view to get adequate and accurate countrywide registration data for purposes of national planning and other development programmes. The Preamble of the Act indicates that the Act was enacted to provide for regulation of births and deaths.

> Sub-section (3) of Section 13 of the Act provides that any birth or death which has not been registeredwithin one year of its occurrence shall be registered only on an order made by a Magistrate of the first class or a Presidency Magistrate after verifying the correctness of the birth or death and on payment of the prescribed fee. Although the Act is prospective in nature, sub-section (3) of Section 13, referred to above, seeks to cover past cases where no entry could be made within one year of the occurrence, i.e. birth or death. This being the legal position, the learned Magistrate has clearly failed to exercise jurisdiction vested in him by law by observing that the death of the husband of the petitioner being on 09.11.1958, i.e. prior to the commencement of the Act, he cannot pass any order".

In my humble opinion, the case of the petitioner is covered by the ratio of the above noted order. In such background, it is clear that the learned Magistrate has committed an error by giving a restrictive interpretation to the provisions of the statute.

11. For the above noted reasons, the impugned order dated 22.02.2021 passed by the Executive Magistrate, Berhampur in Misc. Case No.79 of 2021 under Annexure-2 is hereby quashed and the matter is remitted back to the Magistrate for his reconsideration. The Magistrate is directed to complete such exercise within a period of four weeks from the date of production of certified copy of this judgment and communicate the result of such exercise to the petitioner as well as opposite party No.6.

12. Accordingly, the writ petition is disposed of.

—— o ——

2022 (II) ILR - CUT-903

Dr. B.R. SARANGI, J

W.P.(C) NOs. 33301, 32900, 33346 & 33366 OF 2020

AKHILA KUMAR NAIK & ORS. ……..Petitioners

.V.

STATE OF ODISHA & ORS. …… Opp.Parties

W.P.(C) No. 32900 of 2020
SUBRAT KUMAR MOHANTY & ORS.
W.P.(C) No. 33346 of 2020 ……..Petitioners
RANJAN KUMAR PATTANAIK
W.P.(C) No. 33366 of 2020
JALENDRA NATH RANA .V.
STATE OF ODISHA & ORS. ……Opp.Parties

(A) ODISHA LABORATORY TECHNICIANS SERVICE (METHOD OF RECRUITMENT & CONDITIONS OF SERVICE) RULES, 2019 – Rule 4, 5, 9 & 20 – Regularization – Petitioners are contractual Laboratory Technicians – The authority rejected the claim of the petitioners for regularization on the

plea that they acquired qualification from private institutions, which have not been affiliated to All India Council of Technical Education (AICTE) – Whether such ground for rejection is sustainable? – Held, No – This Court comes to an irresistible conclusion that the petitioners, having got the requisite qualification and fulfilled the eligibility criteria by completing six years of contractual service and having otherwise satisfied the requirements as per 2019 Rules, cannot and should not be denied the benefit of regularization in service on completion of six years, merely because they do not satisfy the criteria of acquisition of qualification from the institutions approved by the AICTE – As such, the action of the authorities is arbitrary, unreasonable and contrary to the provisions of law, being violative of Article 14 of the Constitution. (Para 39)

(B) WORD AND PHRASES – "Or" "And" meaning and difference indicated – Discussed with case law. (Para 18)

Case Laws Relied on and Referred to :-

1. AIR 1990 SC 371 : Bhagwati Prasad v. Delhi State Mineral Development Corpn.
2. AIR 2001 SC 706 : Gujarat Agriculture University v. Rathod Labhu Bechar & Ors.
3. Special Leave to Appeal (C) No. 13077/2020 (disposed of 12.01.2021) : State of Odisha v. Amit Ku.Mishra.;
4. AIR 1998 SC 2812 : Ashok Ku. Uppal & Ors. v. State of J&K & Ors.
5. 129 (2020) CLT 56 : Gadei Swain v. State of Orissa & Ors.
6. 129 (2020) CLT 408 : Jema Topo & Ors. v. State of Orissa & Ors.
7. 2021 (II) OLR 109 : Manas Ranjan Pattnaik & Ors. v. State of Odisha & Ors.
8. 2009 (Supp- II) OLR 412 : Anil Kumar Das & Ors. v. State of Orissa & Ors.
9. (2006) 2 SCC 747 : State of Karnataka & Ors. v. C. Lalitha.
10. (2015) 1 SCC 347 : State of Uttar Pradesh & Ors. v. Arvind Ku.Srivastava & Ors.
11. 1952 AC 15 : [1951] 2 All ER 473 (HL) : St. Aubyn (L.M.) v. A.G.
12. AIR 1972 SC 2350 : Ramprakash v. S.A.F. Abbas.
13. AIR 1978 SC 215 : State of Karnataka v. Shri Ranganatha Reddy.
14. AIR 1980 SC 1468 : Consolidated Coffee Ltd v. Coffee Board.
15. (2000) 5 SCC 515 : Rishabh Agro Industries Ltd V. P.N.B Capital Services Ltd.
16. 2000 (1) SCC 426:AIR 2000 SC 314 : Hyderabad Asbestos Cement Product v. Union of India.
17. (1928) I KB 561 : Green v. Premier Glynrhonwy State Co.
18. (1975) 2 SCC 671:AIR 1976 SC 331 : Nasiruddin v. State Transport Appellate Tribunal.
19 (1980) 1 SCC 158:AIR 1980 SC 360 : Municipal Corpn. of Delhi v. Tek Chand Bhatia.
20. (1985) 2 SCC 589:AIR 1985 SC 741 : State (Delhi Administration) v. Puran Mal.
21. (1888)13 AC 595 : Mersey Docks and Harbour Board v. Henderson Bros.
22. (2012)12 SCC 787 : Union of India & Ors. v. Rabinder Singh.
23. W.P.(C) No.1353/2020 (disposed of date 03.02.2020) : Amit Ku.Mishra & Ors. V. State of Odisha & Ors.
24. 2001 (II) OLR 683 : Rajendra Prasad Singh V. State of Orissa.
25. (1996) 8 SCC 617 : A. Mahudeswaran v. Govt.of T.N.
26. (1998) 3 SCC 88 : Dr Meera Massey (Mrs) v. Dr Abha Malhotra.
27. (1998) 7 SCC 66 : National Buildings Constructions Corporation v. S. Raghunathan.

28. (2001) 2 SCC 326 : State of West Bengal v. Niranjan Singha.
29. (2002) 3 SCC 566 : State of Bihar v. S.A Hasan.
30. (2003) 3 SCC 485 : Dr. Chanchal Goyal (Mrs) v. State of Rajasthan.
31. (2003) 5 SCC 134 : J.P Bansal v. State of Rajasthan.
32. (2004) 6 SCC 765 : AIR 2004 SC 3649 : Hira Tikkoo v. Union Territory, Chandigarh.
33. (2006) 8 see 381 : Ram Pravesh Singh v. State of Bihar.
34. (2006) 8 SCC 399 : AIR 2006 SC 2945 : Confederation of Ex-Servicemen Association v. Union of India.
35. (2006) 4 SCC 1 : AIR 2006 SC 1806 : Secy.State of Karnataka v. Uma Devi.
36. (1993) 3 SCC 499 : AIR 1994 SC 988 : Union of India v. Hindustan Development Corporation.
37. (1999) 4 SCC 727 : Punjab Communications Ltd. v. Union of India.
38. (1997) 7 SCC 592 : M.P Oil Extraction v. State of Madhya Pradesh.
39. (1998) 7 SCC 66 : National Buildings Construction Corporation v. S. Raghunathan.
40. (2006) 5 SCC 702 : AIR 2006 SC 2652 : Kuldeep Singh v. Government of NCT of Delhi.
41. (2007) 2 SCC 640 : Ashok Smokeless Coal India (P) Ltd. v. Union of India.

For Petitioners : M/s. Krishna Ch. Sahu, B.S. Panigrahi & D.K.Mahalik.
(W.P.(C) 33301/2020)
M/s. Shasi Bhusan Jena, S. Behera, C.K. Sahoo & B.S. Patnaik.
(W.P.(C) 32900/2020)
M/s. Subrat Mishra, R.K. Pradhan and A.K. Nanda.
(W.P.(C) 33346/2020)
M/s. Purusottam Chuli and P. Nath.
(W.P.(C) 33366/2020)

For Opp.Parties : Mr. H.M. Dhal, A.G.A. (in all Cases)

JUDGMENT Date of Hearing : 30.11.2021: Date of Judgment: 11.12.2021

Dr. B.R.SARANGI, J.

1. All the above four writ petitions having common cause of action and the petitioners therein having sought similar relief, they are heard together and disposed of by this common judgment, which will govern in all the cases.

2. The petitioners in all the writ petitions are working as contractual Laboratory Technicians under different schemes/societies, being duly recruited through regular process of selection, pursuant to advertisements. By means of these writ petitions, they seek to quash the observation made in order dated 17.11.2020, so far as it relates to rejection of their cases for regularization on the plea that they have acquired qualification from private institutions, which have not been affiliated to All India Council of Technical Education (AICTE), whereby, their juniors have been regularized, by declaring such action taken by the authorities as arbitrary, unreasonable and contrary to the provisions of law. They further seek for direction to the opposite parties to regularize their services like other contractual paramedics as well as Laboratory Technicians, keeping in view the provisions contained in the statutory recruitment rule by invoking the relaxation clause from the date of notification of the rule, as has been done in case of similarly situated paramedic employees, and to extend all consequential service and financial benefits within a stipulated period.

3. For the sake of convenience, the factual matrix, as has been delineated in W.P.(C) No. 33301 of 2020, is referred to:-

3.1 The Director of Health Services, Odisha, vide letter dated 14.08.2005 under Annexure-9, intimated the Deputy Director General (TB), CTD, New Delhi by proposing the revised criteria for selection of Senior Tuberculosis Laboratory Supervisors (STLS) and Lab Technicians. In the said letter, it has been indicated that for the post of Laboratory Technicians, the candidates should have passed 10+2 Science with Diploma or Certificate course in Medical Laboratory Technology or its equivalent. In clause (C) it has been indicated that for the posts of STLS and Laboratory Technicians, the candidates who have completed DMLT course after Matriculation or equivalent may also be considered. Such a proposal for revised criteria has been made due to non availability of adequate number of institutions approved by the AICTE, as the State is having only three government medical colleges, which are AICTE approved institutions and required posts of STLS and Laboratory Technicians could not be filled up due to non availability of eligible candidates. In view of such proposal of the Director, Health Services, the Director General of Health Services, CTD, Government of India, New Delhi wrote a letter to the State TB Officer, Odisha on 19.08.2005 vide Annexure-10 approving the proposal of the Director in respect of the State of Odisha. As per the criteria of selection prescribed by the Director, Health Services, vide letter dated 14.08.2005 in Annexure-9, which was duly approved by the Director General of Health Services, CTD, Government of India, New Delhi, vide order dated 19.08.2005 under Annexure-10, the Director, Health Services, Odisha, vide letter dated 07.03.2006 under Annexure-11, wrote to Chief District Medical Officers of all the districts for issuing advertisement for selection and appointment of contractual Laboratory Technicians and STLS under RNTCP. In the said letter, the criteria as well as the qualification for the post of Laboratory Technicians was prescribed, according to which the candidates, having 10+2 in Science with Diploma or Certificate course in Medical Laboratory Technology or its equivalent, would be eligible to apply, and that even the candidates who completed DMLT course after matriculation or equivalent from three Medical Colleges of Odisha would also be considered for appointment. Consequently, the Mission Director, National Rural Health Mission (NRHM), Odisha issued an advertisement in December, 2006 under Annexure-1 for filling up of the post of Laboratory Technicians indicating therein that the candidates must have passed the Laboratory Technician course from any of 3 Medical Colleges of the State or from a recognized private institution to be eligible to apply for appointment with a consolidated pay of Rs. 5040/-. It was also mentioned that the appointment would be made purely on merit basis; and the candidates belonging to the same district would be given preference; and interested candidates fulfilling the eligibility were required to apply in the prescribed format in A/4 size paper; and the completely filled in application forms, along with other

documents, should reach the office of the CDMO of the concerned district on or before 05.01.2007. In the note of the advertisement, the documents which were to be produced by the candidates were indicated.

3.2 The petitioners, having requisite qualification of Diploma in Medical Laboratory Technology from the State Government recognized colleges/institutions applied for the post of Laboratory Technicians and by following due process of selection the petitioners were selected and issued with appointment orders and accordingly they joined the service on 11.09.2007, 12.09.2007 and 01.12.2012, respectively.

3.3. The Government of Odisha in Health and Family Welfare Department issued a resolution on 13.05.2013 by formulating a policy, for regularization of services of contractual Laboratory Technicians and STLS working under various projects/schemes for their absorption against the post of Laboratory Technicians under General Health Care on completion of six years of contractual service and the service rendered under different schemes shall be counted for the purpose of six years for such regular absorption.

3.4 The contractual Laboratory Technicians working under the CDMO, Nuapada approached the Odisha Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No. 4179(C) of 2014 and batch seeking regularization of their service, since their services had not been regularized by the High Power Committee of the Government on the plea that they had not possessed the requisite educational qualification from the government institute and had prosecuted such course in private institutions which had no AICTE approval. The Tribunal allowed all the cases, vide order dated 20.07.2016, by directing the Government to regularize the services of the petitioners therein. The CDMO, Nuapada, vide order dated 10.08.2016 under Annexure-13, implemented the order of the Tribunal by regularizing the services of these petitioners, who had completed six years of contractual service, by extending all financial benefits. Similarly, without interference of the Court, the services of Laboratory Technicians working under Chief District Medical Officer, Sambalpur were also regularized on 04.12.2019. Thereby, the petitioners, having stood in the same footing, their services should have been regularized, as has been done in case of Laboratory Technicians, who were having the same qualification as that of the petitioners and whose institutions were also not approval by the AICTE.

3.5 While the matter stood thus, in exercise of power conferred under proviso to Article 309 of the Constitution of India and in supersession of all orders and instructions issued in this regard, the Government of Odisha framed Odisha Laboratory Technicians Service (Method of Recruitment and Conditions of Service) Rules, 2019, (for short "2019 Rules") which came into force with effect from 08.03.2019, the date on which it was published in the Odisha Gazette. As per Rule-4

of the said 2019 Rules, which prescribes the conditions of taking over the existing Laboratory Technicians, on the date of commencement of these rules, all the contractual Laboratory Technicians, who have been duly recruited by concerned societies/schemes and have completed 6 (six) years of satisfactory contractual service, shall be deemed to be regular Government employee as one time measure subject to the eligibility criteria prescribed under Rule-5. Rule-5 prescribes the modalities for induction of Laboratory Technicians into the Cadre. Rule-9 of the said Rules prescribes the eligibility criteria for direct recruitment. Nothing has been prescribed about the qualification in respect of those contractual Laboratory Technicians/STLS, who had been continuing in different schemes/societies and were to be inducted/ regularized as per Rule-4.

3.6 In accordance with 2019 Rules, the Government issued letters on 20.03.2019 and 30.07.2019 to different Chief District Medical Officers of the State for submission of information of the paramedics, including the Laboratory Technicians, who were continuing under different schemes/societies of Health and Family Welfare Departments for their regular induction as per 2019 Rules. One Shri Narayan Sahu, who was working as Laboratory Technician under CDM & PHO, Angul, had approached the Odisha Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No. 3731 (C) of 2013, which was allowed in his favour vide order dated 09.01.2017. The State challenged the said order before this Court by filing W.P.(C) No. 14933 of 2017, which was dismissed on 18.01.2019 and against such dismissal order passed by this Court, the State approached the apex Court by filing Special Leave Petition (Civil) Diary No. 10687/2019, which was also dismissed vide order dated 07.05.2019. After dismissal of the SLP by the Apex Court, the CDM&PHO, Angul regularized the services of Shri Narayan Sahu, Laboratory Technician on completion of six years of service by extending all the benefits. Similarly, the CDM & PHO, Koraput vide memo dated 16.06.2020 under Anenxure-14 regularized one Jr. Laboratory Technician, namely, Prabhat Kiran Nayak,on completion of six years of contractual service, who had also passed from the private institution without having AICTE approval. The CDMO, Sundargarh had also recommended a list of Laboratory Technicians, who were working on contractual basis in Sundargarh district, to the Government for their regularization. Basing upon the proposal submitted by the CDMO, Sundargarh, the High Power Committee of the Government, vide order dated 17.11.2020 recommended the names of 11 candidates, who had only passed from the government medical colleges, and in the said recommended list the candidates who were even appointed in February, 2019 were also considered by declaring them as contractual government employee indicating their regularization in February, 2025 on completion of six years of service, whereas the name of the petitioners and others have been rejected on the ground that they have not passed from the AICTE approved institution, even though there are several vacancies available in respect of Sundargarh district. In

the HPC proceeding, instead of correctly mentioning the names of the petitioners so also the recommended candidates, different names have been wrongly mentioned, although serial numbers as per the gradation list/recommended list submitted by the CDMO, Sundargarh in respect of the petitioners as well as recommended candidates as per the document annexed under Annexure-8 to the writ petition, are correct. The CDMO, Sundargarh, vide letter dated 23.12.2020 Annexure-R/2 to the rejoinder, clarified such typographical error by correctly mentioning the names of the petitioners as well as the recommended persons by the HPC vide letter dated 17.11.2020.

3.7 The Government of Odisha in Housing and Family Welfare Department, vide order No. 9490 dated 02.04.2020, created 1000 posts in the Laboratory Technician cadre on regular basis in different Health institutions of General Health Care for different districts including seven Government Medical Colleges in the State of Odisha. Instead of regularizing/inducting the petitioners in service, the authority are going to fill up those 1000 number of vacant posts of Laboratory Technicians through open market by fresh candidates. Such action taken by the opposite parties is not only arbitrary, unreasonable and contrary to the provision of law, but also discriminatory and violative of Article 14 of the Constitution of India. Hence these writ petitions.

4. Mr. K.C. Sahu, learned counsel appearing for the petitioners in W.P.(C) No. 33301 of 2020 vehemently contended that the Director of Health Services, Orissa issued circular dated 24.09.2004 with regard to contractual engagement of STS/STLS/ADEO/TBHV/LT under RNTCP prescribing essential qualification under clasue-2 thereof that the candidates should have possessed 10+2 in Science with Diploma in Laboratory Technician course from the Medical Colleges of the State. As adequate number of candidates having Laboratory Technician course from the Medical Colleges of the State were not available, the Director of Health Services, Odisha issued a fresh circular on 14.08.2005 having essential qualification as 10+2 in Science with Diploma or Certificate course in Medical Laboratory Technology or its equivalent. Consequentially, the condition put in earlier notification dated 24.09.2004, that Laboratory Technician course from the Medical Colleges of the State, was given a go bye. As a result thereof, there was relaxation of essential qualification for the post of Laboratory Technicians. The Director of Health Services, Orissa on 07.03.2006 also issued another letter, wherein the essential qualification was fixed as 10+2 in Science with Diploma or Certificate course in Medial Laboratory Technology or its equivalent. In terms of the above circular, advertisements were issued, in pursuance of which, the petitioners applied for and got selected and engaged as Laboratory Technicians by following due procedure and have been discharging their duties. While the things stood thus, some of the similarly situated Laboratory Technicians approached the Odisha Administrative Tribunal by filing a batch of Original Applications, of which O.A.

No. 1066 (C) of 2015 (Subrat Kumar Mohanty v. State of Odisha) was the lead case. While disposing of the said batch of Original Applications, the Tribunal directed that opposite party no.1 shall take a policy decision for absorption of LT/STLS working under RNTCP in the post of contractual Laboratory Technician against regular vacancies of General Health Care and while formulating such policy the Government shall be free to reserve some percentage of post of contractual Laboratory Technician of General Health to be filled up from among the LT/STLS working under the RNTCP and may also formulate policy as to after how many years of service under the General Health Care or under RNTCP on contractual basis they will be regularized. As a consequence thereof, the Government of Orissa in Health and Family Welfare Department issued a notification on 8th March, 2019 formulating "The Odisha Laboratory Technician Service (Method of Recruitment and Condition of Service) Rules, 2019". Rule-4 of the 2019 Rules, prescribes the conditions for taking over of existing Laboratory Technicians. Under Rule-4(A) it is prescribed that on the date of commencement of these rules, all the contractual Laboratory Technicians, who have been duly recruited by concerned societies/ schemes and have completed 6 (six) years of satisfactory contractual service, shall be deemed to be regular government employees as one time measure subject to fulfillment of eligibility criteria as prescribed under Rule-5. Rule-5 envisages modalities for induction of Laboratory Technicians into the cadre, wherein it is specifically mentioned that all the contractual Laboratory Technicians and Senior TB Laboratory Supervisor who have completed or are yet to complete 6 years of satisfactory contractual service under the societies/schemes, shall be deemed to have been inducted into the cadre,subject to conditions prescribed in sub-rules (i) to (iii). Thereby, the petitioners, having already rendered service for more than 15 years, as a matter of course, have to be absorbed following Rules-4 and 5 of the 2019 Rules. But, when such a statutory rule was governing the field, on 16.11.2020 the members of the High Power Committee passed an order and the names of the present petitioners were not recommended for induction/regularization on the plea that they have acquired the qualification from the institutions which have not been duly approved by the AICTE and have acquired such qualification from a private institution recognized by the Government of Odisha.

4.1 It is further contended that the petitioners, having satisfied minimum requirement, as per notifications issued by the Government from time to time, and also satisfying the other condition having rendered satisfactorily contractual service for more than 15 years, now they cannot be denied induction into the cadre on the plea that they have acquired qualification from a private recognized institutions, which are not approved by the AICTE. When regularization has already been granted in favour of similarly situated Laboratory Technicians by the Government on completion of six years of service, in compliance to the direction given by the Tribunal in respect of Nuapada district, and also suo motu for Sambalpur district, the

petitioners though have completed more than 15 years, have not been regularized, which is arbitrary, unreasonable, discriminatory, contrary to the provisions of law and violative of Article 14 of the Constitution of India.

4.2 Mr. Sahu, learned counsel further contended that a similarly situated Laboratory Technician, namely, Narayan Sahu, had approached the Tribunal and succeeded in the said forum. The State, having preferred appeal both in the High Court as well as Supreme Court and having lost in both the forums, have regularized the services of Shri Sahu. The petitioners, having stood in the same footing, the benefits of regularization should have been extended to them without insisting upon approval from the AICTE, because by the time the petitioners entered into service, there was no requirement of approval of the institution by the AICTE. It is also contended that if the petitioners have acquired qualification from the institutions recognized by the State Government, merely because approval has not been given by the AICTE to those institutions, they should not be deprived of regularization as because when the petitioners were inducted, as has been mentioned in the circulars referred to above, the requirement of approval by AICTE was not the eligibility criteria for their induction. As such, having rendered more than 15 years of service, a right has been accrued in their favour for regularization, which has been taken care of in Rules-4 and 5 of 2019 Rules, as a consequence thereof, their services should have been regularized and they should have been extended with the financial benefit at par with the similarly situated persons, within a stipulated time.

5. Mr. S. Behera, learned counsel appearing for the petitioners in W.P.(C) No. 32900 of 2020, Mr. P. Chuli, learned counsel appearing for the petitioner in W.P.(C) No.33366 of 2020 and Mr. Subrat Mishra, learned counsel appearing for the petitioner in W.P.(C) no. 33346 of 2020 endorsed the argument advanced by Mr. K.C. Sahu, learned counsel for the petitioners in W.P.(C) No. 33301 of 2020.

6. Learned counsel for the petitioners relied upon the decisions rendered in the case of ***Bhagwati Prasad v. Delhi State Mineral Development Corporation***, AIR 1990 SC 371; ***Gujarat Agriculture University v. Rathod Labhu Bechar and others***, AIR 2001 SC 706; ***State of Odisha v. Amit Kumar Mishra***, Special Leave to Appeal (C) No.13077/2020 disposed of 12.01.2021; ***Ashok Kumar Uppal and others v. State of J& K and others***, AIR 1998 SC 2812; ***Gadei Swain v. State of Orissa and others***, 129 (2020) CLT 56; ***Jema Topo & others v. State of Orissa & Others***, 129 (2020) CLT 408; ***Manas Ranjan Pattnaik and others v. State of Odisha and others***, 2021(II) OLR 109; ***Anil Kumar Das and12 others v. State of Orissa & Others***, 2009 (Supp- II) OLR 412; ***State of Karnataka and others v. C. Lalitha***, (2006) 2 SCC 747; and ***State of Uttar Pradesh and others v. Arvind Kumar Srivastava and others***, (2015) 1 SCC 347.

7. Mr. H.M. Dhal, learned Additional Government appearing for the State does not dispute the factual matrix as discussed above, but contended that since the High Power Committee of the Government did not recommend the name of the petitioners, as they had acquired the qualification from the institutions not duly approved by the AICTE, therefore, their cases could not be taken into consideration for regularization. It is further contended that not only petitioners, but also all those,who had prosecuted their Laboratory Technicians course in the institutions, which are not approved by the AICTE nor by the Government of Orissa, their services were not regularized. So far as applicability of 2019 Rules is concerned, he laid emphasis on Rules-4 and 5 of the said Rules and contended that all contractual STLS and Laboratory Technicians, who have completed or yet to complete six years of satisfactory contractual service under the societies/schemes should be deemed to have been inducted into the cadre, subject to conditions inter alia that such Laboratory Technicians must have minimum educational qualification and other eligibility criteria as per Rule-9 of 2019 Rules at the time of engagement under the societies/schemes, since Rule-9 of the said 2019 Rules speaks about the eligibility criteria for direct recruitment. Sub-rule (v) of Rule-9 speaks about the minimum educational qualification for the post of Laboratory Technicians, as specified in column-4 of the Appendix, that one must have passed +2 Science Examination under Council of Higher Secondary Education Orissa/equivalent, and passed Diploma in Medical Laboratory Technology from Government Medical College & Hospital of the State/any other private institution recognized by Government of Odisha or All India Council of Technical Education. As the petitioners do not possess such qualification, their services are not to be regularized in terms of 2019 Rules. Thereby, he contended that the writ petitions merit no consideration and are to be dismissed.

8. This Court heard Mr. K.C. Sahu, learned counsel for the petitioners in W.P.(C) No. 33301 of 2020; Mr. S.Behera, learned counsel for the petitioners in W.P.(C) No. 32900 of 2020; Mr. S. Mishra, learned counsel for the petitioner in W.P.(C) No.33346 of 2020; Mr. P. Chuli, learned counsel for the petitioner in W.P.(C) No. 33366 of 2020; and Mr. H.M. Dhal, learned Additional Government Advocate by hybrid mode, and perused the record. Pleadings having been exchanged between the parties, with their consent, the writ petition is being disposed of finally at the stage of admission.

9. There is no dispute that all the petitioners in the above noted writ petitions have acquired their qualification from recognized institutions of the State of Odisha, which were not approved by the AICTE. But fact remains by the time they were recruited, such qualification had not been prescribed by the Government. The reason being, sufficient number of candidates having such technical qualification were not available at the relevant point of time. That is why, the Government, in supersession of the condition of approval from AICTE stipulated that the candidates having

passed 10+2 Science with Diploma or Certificate course in Medical Laboratory Technology or its equivalent, can apply for the post. All the petitioners have been selected by following due processes of selection pursuant to the advertisement issued by the Government. Thereby, once they have been selected by following due process of selection, pursuant to the advertisements and given contractual engagement with a consolidated salary of Rs. 5040/- per month, a right has already been accrued in their favour, after completion of six years of service, for regularization. Not only that some of the similarly situated Laboratory Technicians those who had acquired qualification from the institutions, without having approval from AICTE, had approached the Tribunal in O.A. No. 4179 (C) of 2014 and batch and pursuant to the order dated 20.07.2016 passed therein, their services were regularized on 10.08.2016, even without assailing the same before the higher forum. In respect of Sambalpur district, suo motu the services of similarly situated Laboratory Technicians were also regularized on 04.12.2019. In case of Narayan Sahu, the Tribunal had directed for regularization of his service in O.A. No. 3731 (C) of 2013 disposed of on 09.01.2017. The same having been affirmed by this Court in W.P.(C) No. 14933 of 2017, vide order dated 18.01.2019, by dismissing the writ petition, as well as by the Apex Court in SLP (Civil) Diary No. 10687 of 2019, vide order dated 07.05.2019, dismissing the SLP, he has also been extended with the benefit of promotion. The petitioners, being stood in the same footing with the Laboratory Technicians named above, their services should have been regularized without creating any hindrance but the High Power Committee, without application of mind, in its minutes of meeting held on 16.11.2020 did not recommend the name of the petitioners for induction as regular employee and, as such, has acted arbitrarily, unreasonably and in violation of Article 14 of the Constitution of India.

10. The Government of Orissa in Health and Family Welfare Department issued a Resolution on 13.05.2013 in Annexure-4 indicating therein that the Government was pleased to formulate a policy on regularization of services of contractual Laboratory Technicians working in General Health Care and communicated the same vide Resolution No. 28516-H dated 30.12.2008. In spite of above circular/resolution, there were still some doubts in certain quarters regarding regularization of Contractual Laboratory Technicians. Therefore, in supersession of the circular issued in this regard, Government after careful consideration was pleased to formulate a comprehensive policy on regularization of the Contractual Laboratory Technicians working under General Health Care to the following effect:-

> *1. With a view to regularizing Contractual Laboratory Technicians, regular post of Laboratory Technicians shall be created which were abolished earlier in lieu of contractual engagement. Such creation of regular posts, shall not be exceed the number of regular posts abolished earlier for contractual engagement.*
>
> *2. The revival of posts for regularization shall be limited strictly to the number of Contractual Laboratory Technicians actually available under the appointing authority.*

3. Regularization of Contractual Laboratory Technician should be made on the basis of their seniority/date of joining in respective establishment under General Health Care (i. e., against sanctioned post of Laboratory Technicians as Contractual Laboratory Technicians) subject to completion of six years of uninterrupted service. Their past service period under various schemes/ establishments can be counted towards their length of service at the time of regularization in the present establishment, but they cannot claim their seniority from the date of joining earlier in the previous establishment.

4. The number of Laboratory Technicians to be regularized will be subject to category wise number of sanctioned posts lying vacant under respective appointing authorities. In no case regularization should be effected beyond the number of sanctioned posts under the respective authorities.

5. During absorption of Laboratory Technicians from one scheme to another, there may be some interruptions in service due to closure of projects. Such interruptions up to maximum period of three months shall be condoned by the appointing authority after due verification of relevant documents for computation of six years of uninterrupted service which were not due to the fault of employees but due to closure of one project and absorption in another. But, interruptions period due to the fault of the employees and the period beyond three months of interruption shall not be considered for computation of six years uninterrupted service. The period of interruption that will be condoned is subject to concurrence of Administrative Department.

6. Regularization should be made in respect of those Laboratory Technicians only who have been recruited by following due and transparent procedure of recruitment, i. e., advertisement in newspaper, selection through a selection committee and following the provisions of reservation policy in order to maintain the required representation of reserve category candidates. A certificate to this effect shall be furnished by the appointing authority at the time of regularization.

7. The date of regularization of Contractual Laboratory Technicians should be made prospectively, i.e., from the date of actual regularization in the substantive post and not otherwise.

8. The past service of Contractual Laboratory Technicians and Senior Tuberculosis Laboratory Supervisor (STLS) having Diploma in Medical Laboratory Technician (DMLT) qualification working under Revised National Tuberculosis Control Programme (RNTCP) Scheme earlier under different Chief District Medical Officers (CDMOs) and subsequently absorbed under separate establishments shall also be considered for regularization after their absorption against the post of Contractual Laboratory Technicians under General Health Care subject to proper verification of documents by appointing authorities. The appointing authority should ensure one undertaking from the Contractual Laboratory Technician to the effect that any false/fabricated information in this regard will entail cancellation of regularization order.

9. The past services of Contractual Laboratory Technicians and Senior Tuberculosis Laboratory Supervisor (STLS) working under various Project/Schemes like Swasthya Bikash Samity, Rogi Kalyan Samity, Zilla Swasthya Samity, National Rural Health Mission, Re-Productive and Child Health, Revised National Tuberculosis Control Programme, Odisha Health System Development Project, Odisha State Aids Control Society shall also be counted for computation of six years at the time of regularization after their absorption against the post of Contractual Laboratory Technicians under General Health Care subject to proper verification of documents by appointing authorities.

10. In case any regularization is made in contravention to above terms and conditions, the appointing authority will be held responsible for such lapse and the regularization order shall be cancelled forthwith.

This has been concurred in by Finance Department vide their UOR No. 285-SS-III., dated the 21st December 2012."

11. If the aforesaid resolution is read carefully, it would be evident that the Government was conscious enough to regularize the services of the petitioners and, therefore, formulated such a policy, whereby it has been specifically provided that past services of contractual Laboratory Technicians working under different organizations would be counted for completion of six years at the time of regularization after their absorption against the post of contractual Laboratory Technicians under General Health Care, subject to proper verification of documents by the appointing authorities. It has also been provided that responsibility shall be fixed on the appointing authority for the lapses, if any regularization is done in contravention to the terms and conditions mentioned therein. As per Clause-5 and 6, whereby modalities have been prescribed for regularization, the regularization should be made in respect of those Laboratory Technicians only who have been recruited by following due and transparent procedure of recruitment, i.e., advertisement in newspaper, selection through a selection committee and following the provisions of reservation policy in order to maintain the required representation of reserve category candidates and a certificate to this effect shall be furnished by the appointing authority at the time of regularization. It has also been clarified that the date of regularization of Contractual Laboratory Technicians should be made prospectively, i.e., from the date of actual regularization in the substantive post and not otherwise.

12. In view of such position, it is apparently clear that even if the petitioners have acquired the requisite qualification from the institutions, which have not been duly approved by the AICTE, yet their services were to be regularized in terms of the resolution dated 13.05.2013. More so, if services of similarly situated Laboratory Technicians have already been regularized in terms of the direction given by the Tribunal, after the order of the Tribunal was confirmed by this Court as well as apex Court, as already mentioned herein before, the petitioners could not have been denied such benefits, since they stood at par with their counter parts whose services have already been regularized.

13. The Government of Odisha in Health and Family Welfare Department issued a notification on 08.03.2019, with regard to framing of Odisha Laboratory Technician Service (Method of Recruitment and Conditions of Service) Rules, 2019 in accordance with proviso to Article 309 of the Constitution of India. Rules-4, 5, 9 and 20 of 2019 Rules along with schedule attached thereto, being relevant for the purpose of this case, are quoted below:-

"xxx xxx xxx

*4. **Conditions of taking over of existing Laboratory Technicians**:— (A) (1) On the date of commencement of these rules , all the contractual Laboratory Technicians who have been duly recruited by concerned societies/Schemes and have completed 6 (six) years of*

satisfactory contractual service shall be deemed to be regular government employees as one time measure subject to fulfillment of eligibility criteria as prescribed under rule 5:

Provided that all the contractual Laboratory Technicians who are yet to complete six years of contractual service and having eligibility criteria as prescribed under rule 5 shall be deemed to be contractual government employees as one time measure and shall be regularized as and when they complete six years of satisfactory contractual service, including the service that has already been rendered in concerned scheme/society:

Provided further that those contractual Laboratory Technicians, who do not meet the eligibility criteria, as mentioned under rule 5 shall continue as such under the OSH&FW Society till closure of the project, retirement or disengagement, whichever is earlier:

(2) On their regularisation, such posts of contractual Laboratory Technicians of the OSH&FW Society as in sub- clause (1) shall be deemed to have been abolished from the date of such induction of contractual Laboratory Technicians into the Cadre. As these posts shall cease to exist, no further recruitment to fill up these posts shall be made by the OSH & FW Society other than by the Commission:

*5. **Modalities for Induction of Laboratory Technicians into the Cadre**:—All the contractual Laboratory Technicians and Senior TB Laboratory Supervisor who have completed or are yet to complete 6 years of satisfactory contractual service under the Society/ Scheme, shall be deemed to have been inducted into the Cadre, subject to following conditions;*

(i) Such Laboratory Technicians who have the minimum educational qualification & other eligibility criteria as per rule 9 at the time of engagement under the Society/Scheme;

(ii) who have been selected through an open & transparent recruitment process;

(iii) while inducting, the prevalent reservation principles as in rule 7 shall be followed

xxx xxx xxx

*9. **Eligibility Criteria for direct recruitment**:— In order to be eligible for direct recruitment to the post of Laboratory Technician, a candidate shall have to satisfy the following conditions namely:—*

*(i) **Nationality**: - He must be a citizen of India;*

*(ii) **Age limit**: - He must have attained the age of 21 years and must not be above the age of 32 years:*

Provided that the upper age limit in respect of the reserved categories of candidates referred to in rule 7 shall be relaxed in accordance with the provisions of the Act,rules, orders or instructions for the time being in force, for their respective categories.

Further provided that, the upper age limit for contractual Laboratory Technicians under OSH&FW Society/Scheme who shall take part in the recruitment process, if otherwise eligible, shall be 50 years as on the date of advertisement.

*(iii) **Knowledge in Odia**:- He must -(a) be able to read, write and speak Odia and*

(b) have passed middle school examination with Odia as language subject ; or

(c) have passed Matriculation or equivalent examination with Odia as medium of examination in non-language subject; or

(d) have passed in Odia as language subject in the final examination of Class-VII from a school or educational Institution recognized by the Government of Odisha or the Central Government; or

(e) have passed a test in Odia in Middle English School standard conducted by the School & Mass Education Department.

*(iv) **Marital status**: -lf married, he must not have more than one spouse living:*

Provided that the Government may, if satisfied that such marriage is permissible under the personal law applicable to such person or there are other specific grounds for doing so, exempt any person from the operation of this rule.

(v) ***Minimum Educational Qualification****:- The educational qualification of the candidate for the post of Laboratory Technician shall be as specified at column 4 of the Appendix.*

(vi) ***Physical Fitness****: - A candidate must be of good mental and physical health and free from any physical defects likely to make him incapable of discharging his normal duties in the Service.*

(vii) A candidate who after such medical examination as the Government may prescribe is not found to satisfy these requirements as specified in clause (VI) shall not be appointed to the Service.

(viii) He must have registered his name in Laboratory Technician Council in the State and have possessed valid registration certificates as on the date of the advertisement.

xxx xxx xxx

20. ***Relaxation****:— When it is considered by the Government that it is necessary or expedient to do so in the public interest, it may, by order, for reasons to be recorded in writing, relax any of the provisions of these rules in respect of any class or category of the employees.*

xxx xxx xxx

SCHEDULE

(See rules 3, 9 & 12)

SI. No	Name of the Post, Classification and cadre	Method of recruitment	Minimum qualification for direct recruitment	Eligibility Criteria for promotion
1	2	3	4	5
	Laboratory Technician (District Cadre)	Direct recruitment	Must have passed +2 Science Examination under Council of Higher Secondary Education, Odisha/ equivalent, and passed Diploma in Medical Laboratory Technology from Government Medical College & Hospitals of the State /any other private Institutions recognized by Government of Odisha or All India Council of Technical Education	
	Senior Laboratory Technician (State Cadre)	Promotion from Laboratory Technician		Completion of 10 (Ten), years of continuous services as Laboratory Technician

14. As per Rule-4(A)(1) of 2019 Rules, which is extracted above, on the date of commencement of these rules, all the contractual Laboratory Technicians, who have been duly recruited by concerned societies/schemes and have completed 6 (six) years of satisfactory contractual service shall be **deemed to be regular** government employees as **one time measure** subject to fulfillment of eligibility criteria as prescribed under Rule-5.

15. Rule-5 which deals with the Modalities for Induction of Laboratory Technicians into the Cadre, in sub-rule (i) stipulates that such Laboratory Technicians should have the minimum educational qualification & other eligibility criteria as per Rule-9 at the time of engagement under the society/scheme. Rule-9 prescribes the eligibility criteria for direct recruitment. Under sub-rule (v) thereof, which deals with minimum educational qualification, it is provided that the educational qualification of the candidate for the post of Laboratory Technician shall be as specified at column 4 of the Appendix. The minimum qualification for direct recruitment to the post of Laboratory Technicians, as prescribed in the schedule attached to Rules-3, 9 and 12, is that the candidate must have passed +2 Science Examination under Council of Higher Secondary Education, Odisha/equivalent, and passed Diploma in Medical Laboratory Technology from Government Medical College & Hospitals of the State/any other private institutions recognized by Government of Odisha or All India Council of Technical Education. Therefore, acquisition of qualification from an institution approved by All India Council of Technical Education is not mandatory. Therefore, the services of contractual Laboratory Technicians, who acquired qualification even from other private institutions recognized by the Government of Odisha and appointed on contractual basis, can also be regularized. By putting the word "or" in between the words "any other private Institutions recognized by Government of Odisha" and "All India Council of Technical Education", it would imply that those two conditions are disjunctive. Thereby, a candidate should have acquired the qualification either from any other private Institutions recognized by Government of Odisha "**or**" All India Council of Technical Education. In such view of the matter, acquisition of qualification from the institution approved by All India Council of Technical Education is not a condition precedent for regularization of all contractual Laboratory Technicians, those who have been appointed prior to the commencement of the 2019 Rules. More so, Rule 4-(A) (1) lays emphasis on the date of commencement of these rules and clearly envisages that all the contractual Laboratory Technicians who have been duly recruited by concerned societies/ schemes and have completed 6 (six) years of satisfactory contractual service shall be "**deemed to be regular**" government employees as "**one time measure**" subject to fulfillment of eligibility criteria as prescribed under Rule-5.

16. The very use of words "***deemed to be regular***" gives a prima facie view that those who are continuing in Government service on contractual basis, their services are deemed to be regularized.

In ***St. Aubyn (L.M.) v. A.G.***, 1952 AC 15 : [1951] 2 AII ER 473 (HL), the apex Court held as follows:-

> *"The word 'deemed' is used to impose an artificial construction of a word or phrase in a statute that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a*

comprehensive description that includes, what is obvious, what is uncertain and what is impossible."

The word '**Deemed**' as per **Worcester Dictionary**, is :

"The word 'deemed' is used in various senses. Sometimes it means 'generally regarded'. At other time it signifies "taken conclusively to be". Its various meanings are to been to be hold in belief, estimation, or opinion; to judge; adjudge; decide; consider to be; to have or to be of an opinion; to esteem; to suppose; to think, decide or believe on consideration; to account; to regard; to adjudge or decide; to conclude upon consideration.

In ***Ramprakash v. S.A.F. Abbas***, AIR 1972 SC 2350, the apex Court, while dealing with Rule-3(3)(b) of Indian Administrative Service (Regulation of Seniority) Rules, 1954, held as follows:-

"The use of word 'deemed' in the rule indicates that the Government has the power to make a retrospective declaration because, it is only after promotion that there is any occasion to consider whether the period of officiation prior to promotion will be counted for purpose of seniority."

In ***State of Karnataka v. Shri Ranganatha Reddy***, AIR 1978 SC 215, the apex Court held as follows:-

"The use of word "deemed" does not invariably and necessarily imply an introduction of a legal fixation but it has to be read and understood in the context of the whole statute."

In ***Consolidated Coffee Ltd v. Coffee Board***,AIR 1980 SC 1468, the apex Court held as follows:-

"A deemed provision might be made to include what is obvious or what is uncertain or to impose for the purpose of a statute an artificial construction of a word or phrase that would not otherwise prevail."

In ***Rishabh Agro Industries Ltd V. P.N.B Capital Services Ltd***, (2000) 5 SCC 515, the apex Court while considering the provisions contained in Section 441 of the Companies Act (1 of 1956) held as follows:-

"The word 'deemed' as used in Section 441 of the Act means "supposed', 'considered', 'construed', 'thought','taken to be' or 'presumed'."

17. Therefore, use of words ***"deemed to be regular"*** in Rule-4(A)(1) of 2019 Rules, clearly indicates that the Government has the power to make retrospective declaration that the contractual Laboratory Technicians who have been duly recruited by the concerned societies/schemes and have completed 6 (six) years of satisfactory contractual service, as a one time measure, they are to be regularized subject to fulfillment of eligibility criteria prescribed in Rule-5. Therefore, when Rule-5 (i) stipulated that contractual Laboratory Technicians shall be inducted into the cadre if they have the educational qualification and other eligibility criteria as per Rule-9, which speaks in sub-rule (iv) that educational qualification for the post of Laboratory Technicians shall be as specified at Column-4 of the Appendix. The petitioners having been selected by following due process of selection, pursuant to an advertisement, and having the requisite qualification from the private institutions

recognized by the State Government, their services are to be regularized, even though the institutions, wherefrom they have passed have not been approved by the AICTE. As per Column-4 of the Appendix to Rule-9, where qualification has been prescribed, approval of AICTE is not the mandatory requirement, because of use of the word "or" in between "any other private Institutions recognized by Government of Odisha" and "All India Council of Technical Education". The word "or" is a disjunctive one and, therefore, since the petitioners have acquired qualification from private institutions recognized by Government of Odisha, their cases can be considered for regularization.

18. The word "or" is normally disjunctive and 'and' is normally conjunctive. In ***Hyderabad Asbestos Cement Product v. Union of India***, 2000 (1) SCC 426: AIR 2000 SC 314, it has been held that 'or' in its natural sense denotes an 'alternative' and is not read as 'substitutive'.

In ***Green v. Premier Glynrhonwy State Co.***, (1928) I KB 561, it has been held that 'or' does not generally mean 'and' and 'and' does not generally mean 'or'. The same view has also been taken in ***Nasiruddin v. State Transport Appellate Tribunal***, (1975) 2 SCC 671:AIR 1976 SC 331 and ***Municipal Corporation of Delhi v. Tek Chand Bhatia***, (1980) 1 SCC 158 :AIR 1980 SC 360 and ***State (Delhi Administration) v. Puran Mal*** (1985) 2 SCC 589: AIR 1985 SC 741. In ***Mersey Docks and Harbour Board v. Henderson Bros***., (1888) 13 AC 595, it has been held that as pointed out by **LORD HALSBURY** the reading of 'or' and 'and' is not to be resorted to, "unless some other part of the same statute or the clear intention of it requires that to be done".

In ***Union of India & Ors. v. Rabinder Singh***, (2012) 12 SCC 787, the apex Court held that where provision is clear and unambiguous the word 'or' cannot be read as 'and' by applying the principle of reading down.

Applying the same principle to the case at hand, here the word 'or' used in between "any other private Institutions recognized by Government of Odisha" and "All India Council of Technical Education" is disjunctive one. Therefore, it cannot be read as 'and' as the provision is clear and unambiguous. Therefore, there is no necessary for applying the principle of read down to read 'or' as 'and'.

19. In view of such position, admittedly the petitioners have acquired qualification from private institutions recognized by the Government of Odisha and certainly not approved by the AICTE, which was also not the required condition at the time of their entry into service as per the advertisement issued. This apart, Rule-20 of 2019 Rules clearly stipulates that when it is considered by the Government that it is necessary or expedient in the public interest to relax such provisions of the Rules, it may relax the provisions in respect of any class or category of the employees. Accordingly, by invoking such power as stipulated under

Rule-20 of 2019 Rules, as it was deemed necessary and expedient, the State Government relaxed such acquisition of qualification from the institution duly approved by the AICTE by putting the word "or" in between the words "any other private Institutions recognized by Government of Odisha" and "All India Council of Technical Education", to make the petitioners eligible to be recruited and subsequently regularized in their services taking into consideration their past service rendered as they have been appointed by following due process of selection pursuant to the advertisement issued by the opposite parties. By the time the petitioners had been selected, they had got the requisite qualification, as per the advertisement issued at the relevant point of time. They having got the requisite qualification, now the State authorities cannot turn around and say that the petitioners have not passed from the institutions approved by the AICTE and deprive them the benefit of regularization. This itself amounts to arbitrary and unreasonable exercise of power and hits by Article 14 of the Constitution of India.

20. The initial minimum educational qualification prescribed for the post is undoubtedly a factor to be reckoned with, but it is so at the time of initial entry into service. Once appointments were made by following due process of selection, pursuant to advertisement having been issued, and petitioners were allowed to work for a considerable length of time, it would be hard and harsh to deny them the confirmation in the respective posts on the ground that they lack the prescribed educational qualifications. In ***Bhagwati Prasad*** (supra), the apex Court at paragraph-6 held as follows:-

> *"6. The main controversy centres round the question whether some petitioners are possessed of the requisite qualifications to hold the posts so as to entitle them to be confirmed in the respective posts held by them. The indisputable facts are that the petitioners were appointed between the period 1983 and 1986 and ever since, they have been working and have gained sufficient experience in the actual discharge of duties attached to the posts held by them. Practical experience would always aid the person to effectively discharge the duties and is a sure guide to assess the suitability. The initial minimum educational qualification prescribed for the different posts is undoubtedly a factor to be reckoned with, but it is so at the time of the initial entry into the service. Once the appointments were made as daily rated workers and they were allowed to work for a considerable length of time, it would be hard and harsh to deny them the confirmation in the respective posts on the ground that they lack the prescribed educational qualifications. In our view, three years' experience, ignoring artificial break in service for short period/periods created by the respondent, in the circumstances, would be sufficient for confirmation. If there is a gap of more than three months between the period of termination and re-appointment that period may be excluded in the computation of the three years period. Since the petitioners before us satisfy the requirement of three years' service as calculated above, we direct that 40 of the senior-most workmen should be regularised with immediate effect and the remaining 118 petitioners should be regularised in a phased manner, before April 1, 1991 and promoted to the next higher post according to the standing orders. Xxx xxx".*

21. In ***Gujarat Agriculture University*** (supra), at paragraph 26, the apex Court observed as follows:-

"26. In the light of the aforesaid decisions we now proceed to examine the proposed scheme. Under Clause 1 it is proposed that all daily wage workers, whether skilled, semi-skilled or unskilled who have completed 10 years or more of continuous service with a minimum of 240 days in each calendar year as on 31st December, 1999 is to be regularised and be put in the time scale of pay applicable to the corresponding lowest grade in the university. However, the said regularisation is subject to some conditions. Under Clause 1(a) such employee is eligible only if he possess the prescribed qualifications for the post at the time of their appointment. The strong objection has been raised to this eligibility clause. The submission is, those working for a period of 10 or more years without any complaint is by itself a sufficient requisite qualification and any other rider on the facts of this case would prejudice these workers. We find merit in this submission. We have perused the qualifications referred in the aforesaid recruitment rules according to which, qualification for Peon is that he should study up to 8th std., for Operator-cum-Mechanic, should have Diploma in Mechanic having sufficient knowledge of vehicle repairing experience in automobiles or tractors Dealers workshop for two years, for Chowkidar, he must be literate and have good physique. Literate is not defined. For Plumber to have I.T.I. Certificate.

We feel that daily rate workers who have been working on the aforesaid posts for such a long number of years without complaint on these posts is a ground by itself for the relaxation of the aforesaid eligibility condition. It would not be appropriate to disqualify them on this ground for their absorption, hence Clause 1(a) need modification to this effect."

In paragraph-27 of the said judgment, reference has also been made to the case of Bhagwati Prasad (supra) and in paragraph-29 it has been ruled that the decision to absorb some of the employees at one point of time or in a phased manner depends on facts and circumstances of each case.

22. In the instant case, Rule-4(A)(1) clearly specifies that all the contractual Laboratory Technicians who have been duly recruited by concerned societies/ Schemes and have completed 6 (six) years of satisfactory contractual service shall be deemed to be regular government employees as one time measure subject to fulfillment of eligibility criteria as prescribed under Rule-5. Thereby, all the petitioners, having completed six years of service on contractual basis on being recruited by following due process of selection pursuant to an advertisement, are deemed to be regular government employees as one time measure as per eligibility criteria prescribed under Rule-5.

23. A similar case had come up before this Court, in which absorption under Odisha Pharmacist Service (Methods of Recruitment & Conditions of Service) Rules, 2015 was under consideration. In that case, under Rule-6 of 2015 Rules, the mode of selection prescribed for Pharmacists was through a selection process and the claim of the Pharmacists employed on contractual basis under different schemes for regularization was denied. Since it was provided in Rule-4 of the very same Rules that for such contractual Pharmacists would be deemed to be absorbed, once they complete six years of satisfactory contractual service, this Court while considering the same, extended the benefit to the similar persons who were petitioners in W.P.(C) No. 1353 of 2020 (***Amit Kumar Mishra and others V. State***

of Odisha and others) disposed of vide judgment and order dated 03.02.2020. The said judgment and order passed by this Court was assailed by the State in Special Leave to Appeal (C) No. 13077/2020, which was disposed of by the apex Court vide order dated 12.01.2021 holding as follows:-

> *"xxx xxx xxx. In fact the pharmacists who are yet to complete six years for contractual service are to be deemed to be contractual Government employees and would be regularized as and when they complete six years of satisfactory service as per the proviso. In view of the aforesaid there is little doubt that as per the statutory Rules framed by the State of Odisha themselves they have provided for a deeming provision for such contractual employed Pharmacists and Rule 5 talks about modalities for induction of the Pharmacists in the cadre while Rule 6 mentions the method of recruitment. Their induction in the cadre is to based on a minimal educational qualification and other eligibility criteria as per Rule 10 and it is nobody's case that the respondent do not meet this requirement.*
>
> *Learned counsel for the petitioner(s) states that apparently the Rules are not very happily worded and what was envisaged was that even the contractual Pharmacists would have to go through an open selection process in view of Rule 5(ii). If it was so, in our view, that the Rule should have been so framed as Rule 4 introduces a deeming fiction for regular employees who have completed six years of service.*
>
> *In view of the aforesaid, we are not inclined to interfere with the impugned order."*

24. Pharmacist Service Rules, 2015 are akin to 2019 Rules meant for Laboratory Technicians. Therefore, by applying the said analogy to the present case, the petitioners, who have completed six years of contractual service, are deemed to be contractual Government employees and would be regularized as and when they complete six years of satisfactory service as per the statutory Rules framed by the State of Odisha which provided for a deeming provision for regularization of such contractual Laboratory Technicians.

25. Furthermore Rule-5 of 2019 Rules talks about modalities for induction of the Laboratory Technicians in the cadre. Their induction in the cadre is to be based on a minimal educational qualification and other eligibility criteria as per Rule-9 and as such it is nobody's case that the opposite parties do not meet this requirement, save and except the institution from which they have acquired the qualification has not been approved by the AICTE. As has been stated in Rule-5 (ii) of 2015 Rules for the pharmacists, that the contractual Pharmacists would have to go through an open selection process, the apex Court held, if that be so, the Rules should have been so framed as Rule-4 introduces a deeming fiction for regular employees who have completed six years of service on contractual basis. Applying the same analogy, here since the petitioners have been appointed by following due process of selection pursuant to advertisement and they were having the requisite qualification at the relevant point of time, by invoking the deeming provision as prescribed in Rule-4, their services have to be regularized. Now, their claim cannot be denied on the plea that they do not possess the qualification from the institution duly recognized by the AICTE rather the institution has been recognized by the State of Odisha. Apart from the above, after rendering services for so many years, a right

has been accrued in their favour to be regularly absorbed, as they have gained experience in the same line as has been held in ***Bhagawati Prasad*** (supra) and also in ***Gujarat Agriculture University*** (supra)

26. In ***Ashok Kumar Uppal*** (supra), the Government had promoted a candidate who has nearest to the prescribed standard and topped in the merit list by relaxing his standard prescribed for promotion. While dealing with that case, the apex Court even gone to the extent to observe that relaxation of rules is made to obviate the genuine hardship caused to a class of employees. Thereby, the action of the Government is neither arbitrary nor capricious and accordingly held promotion by relaxing the rules is proper. Applying the same analogy to the case at hand, since the petitioners have acquired the qualification from private institutions recognized by the State and by following due process of selection they were recruited and are continuing for more than 6 years on contractual basis, merely because their institutions are not approved by the AICTE, they cannot be denied regularization. Rather by applying the relaxation clause under Rule-20 if the services of the petitioners are regularized to obviate their genuine hardship that cannot be construed either arbitrary or capricious, and such absorption of the petitioners by relaxing the rules would be just and proper.

27. As a matter of fact, 2019 Rules cannot have a retrospective effect. Therefore, the eligibility qualification for direct recruitment, which has been prescribed under Rule-9 of 2019 Rules cannot be applied retrospectively in a capricious manner to deny the benefits to the petitioners, in view of the judgment of this Court in ***Rajendra Prasad Singh V. State of Orissa***, 2001(II) OLR 683, referred in the case of ***Gadei Swain*** (supra).

28. In ***Manas Ranjan Pattnaik*** (supra), the employment was given on contractual basis as Multipurpose Health Worker (Male), subject to condition that any claim to such post for regular appointment shall not be entertained. The petitioners therein had completed more than 15 years of services on such basis, but similarly placed contractual employees were absorbed on regular basis on completion of 6 years of service. Consequentially, the petitioners and similarly placed employees moved erstwhile State Administrative Tribunal. Accordingly, direction was given to the State Government to regularize their services, pursuant to which though their services were regularized, but subsequently the same was cancelled. This Court held that cancellation of such regularization is hit by principle of estoppels, as the Government was bound by its promise to regularize their services on completion of six years, and that when similarly situated employees were extended such benefit, there was no valid reason not to extend similar benefit to the petitioners. Therefore, the cancellation of regularization was set aside and the petitioners'services were directed to be regularized and consequentially the writ petition was allowed.

29. In ***Arvind Kumar Srivastava*** (supra), the apex Court at paragraph-22 held as follows:-

> *"22. The legal principles which emerge from the reading of the aforesaid judgments, cited both by the appellants as well as the respondents, can be summed up as under:*
>
> *22.1 The normal rule is that when a particular set of employees is given relief by the Court, all other identically situated persons need to be treated alike by extending that benefit. Not doing so would amount to discrimination and would be violative of Article 14 of the Constitution of India. This principle needs to be applied in service matters more emphatically as the service jurisprudence evolved by this Court from time to time postulates that all similarly situated persons should be treated similarly. Therefore, the normal rule would be that merely because other similarly situated persons did not approach the Court earlier, they are not to be treated differently.*
>
> *22.2 However, this principle is subject to well recognized exceptions in the form of laches and delays as well as acquiescence. Those persons who did not challenge the wrongful action in their cases and acquiesced into the same and woke up after long delay only because of the reason that their counterparts who had approached the Court earlier in time succeeded in their efforts, then such employees cannot claim that the benefit of the judgment rendered in the case of similarly situated persons be extended to them. They would be treated as fence-sitters and laches and delays, and/or the acquiescence, would be a valid ground to dismiss their claim.*
>
> *22.3. However, this exception may not apply in those cases where the judgment pronounced by the Court was judgment in rem with intention to give benefit to all similarly situated persons, whether they approached the Court or not. With such a pronouncement the obligation is cast upon the authorities to itself extend the benefit thereof to all similarly situated person. Such a situation can occur when the subject matter of the decision touches upon the policy matters, like scheme of regularisation and the like (see K.C. Sharma & Ors. v. Union of India (supra). On the other hand, if the judgment of the Court was in personam holding that benefit of the said judgment shall accrue to the parties before the Court and such an intention is stated expressly in the judgment or it can be impliedly found out from the tenor and language of the judgment, those who want to get the benefit of the said judgment extended to them shall have to satisfy that their petition does not suffer from either laches and delays or acquiescence."*

30. In ***C. Lalitha*** (supra), the apex Court at paragraph 29 held as follows:-

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

31. In ***Jema Toppo*** (supra), this Court at paragraph-7 observed as follows:-

> *"7. The petitioners belonged to S.C. and S.T. category. Having satisfied with the qualification acquired by the petitioners, pursuant to advertisement issued under Annexure-1, and on verification of documents, the petitioners were issued with engagement order, pursuant to*

which they joined in the post and were continuing. But, all on a sudden on 30.04.2010, they were terminated from service. Though representation was filed in Annexure-4 series immediately on 02.05.2010, the same was not considered, rather a fresh advertisement in the name of walk in interview was issued on 11.07.2011 vide Annexure-5 to fill up the vacancies with another set of contractual employee. Fact remains, by rendering services and discharging their duty as assigned to them from 07.12.2007 till the date of termination, i.e. 30.04.2010, the petitioners have gained experience. But subsequently, by filing counter affidavit, the opposite parties have stated the reasons for disengagement of the petitioners from service indicating that the institutions, from where they have acquired qualification, do not come under the approved training centre list, thereby the services of the petitioners were terminated. But, the order of termination does not reflect the said reason and for the first time in the counter affidavit, the aforesaid reason has been stated. Therefore, such reason is an afterthought and cannot be accepted at this stage, and thus the order of termination cannot sustain in the eye of law."

32. Considering from other angle, the petitioners, having requisite qualification and by following due process of selection having been appointed and continuing in the post, have got a legitimate expectation that their services would be regularized after completion of six years. The legal maxim "**salus populi est suprema lex**" (regard for public welfare is the highest law) comes to an aid in the instant case also in view of the judgments of the Apex Court in ***A. Mahudeswaran v. Govt. of T.N***, (1996) 8 SCC 617; ***Dr Meera Massey (Mrs) v. Dr Abha Malhotra***, (1998) 3 SCC 88; ***National Buildings Constructions Corporation v. S. Raghunathan***, (1998) 7 SCC 66; ***State of West Bengal v. Niranjan Singha***, (2001) 2 SCC 326; ***State of Bihar v. S.A Hasan***, (2002) 3 SCC 566; ***Dr.Chanchal Goyal (Mrs) v. State Of Rajasthan***, (2003) 3 SCC 485; ***J.P Bansal v. State of Rajasthan***, (2003) 5 SCC 134; ***Hira Tikkoo v. Union Territory***, Chandigarh, (2004) 6 SCC 765 : AIR 2004 SC 3649, ***Ram Pravesh Singh v. State of Bihar***, (2006) 8 see 381; ***Confederation of Ex-Servicemen Association v. Union of India***, (2006) 8 SCC 399 : AIR 2006 SC 2945; & ***Secy. State of Karnataka v. Uma Devi,*** (2006) 4 SCC 1 : AIR 2006 SC 1806.

In the above judgments, it has been laid down that the doctrine of legitimate expectation can be pressed if a person satisfies the Court that he has been deprived of some benefit or advantage which earlier he had in the past been permitted by the decision maker to enjoy or he has received the assurance from the decision maker that such benefit shall not be withdrawn without giving him an opportunity of advancing reasons for contending that it should not be withdrawn.

33. In ***Union of India v. Hindustan Development Corporation***, (1993) 3 SCC 499 : AIR 1994 SC 988, the supreme Court held as follows:

"On examination of some these important decisions it is generally agreed that legitimate expectation gives the applicant sufficient locus standi for judicial review & that the doctrine of legitimate expectation is to be confined mostly to right of a fair hearing before a decision which results in negativing a promise or withdrawing of an undertaking is taken. The doctrine does not give scope to claim relief straight way from the administrative authorities as no crystallized right as such is involved. The protection of such legitimate expectation does not require the fulfillment of the expectation where an overriding public interest

requires otherwise. In other words where a person's legitimate expectation is not fulfilled by taking a particular decision then decision-maker should justify the denial of such expectation by showing some overriding public interest."

34 In ***Punjab Communications Ltd. v. Union of India***, (1999) 4 SCC 727 : AIR 1999 SC 1801, the Supreme Court held as follows:

"…the doctrine of legitimate expectation in the substantive sense has been accepted as part of our law & that the decision-maker can normally be compelled to give effect to his representation in regard to the expectation based on previous practice or past conduct unless some overriding public interest comes in the way…"

35. In ***M.P Oil Extraction v. State of Madhya Pradesh***, (1997) 7 SCC 592 & ***National Buildings Construction Corporation v. S.Raghunathan***, (1998) 7 SCC 66, it has been held as follows:

"The doctrine of legitimate expectation has a meaning that the statements of policy or intention of the Government or, its Department in administering its affairs should be without abuse or discretion. The policy statement could not be disregarded unfairly or applied selectively for the reason that unfairness in the form of unreasonableness is akin of violation of natural justice. It means that said actions have to be in conformity of ***Article 14 of the Constitution****, of which non arbitrariness is a second facet. Public Authority cannot claim to have unfettered discretion in the public law as the authority is conferred with power only to use them for public good. Generally legitimate expectation has essentially procedural in character as it gives assurance of fair play in administrative action but it may in a given case be enforced as a substantive right. But a person claiming it has to satisfy the Court that his rights had been altered by enforcing a right in private law or he has been deprived of some benefit or advance which he was having in the past & which he could legitimately expect to be permitted to continue unless it is withdrawn on some rational ground or he has received assurance from the decision making Authority which is not fulfilled, i.e, the kind of promissory estoppel. Change of policy should not violate the substantive legitimate expectation & if it does so it must be as the change of policy which is necessary & such a change is not irrational or perverse. This doctrine being an aspect of* ***Article 14 of the Constitution*** *by itself does not give rise to enforceable right but it provides a reasonable test to determine as to whether action taken by the Government or authority is arbitrary or otherwise, rational & in accordance with law".*

36. In ***Kuldeep Singh v. Government of NCT of Delhi***, (2006) 5 SCC 702 : AIR 2006 SC 2652, the issue of legitimate expectation was considered observing that the State actions must be fair & reasonable. Non-arbitrariness on its part is significant in the field of governance. The discretion should not be exercised by the State instrumentality whimsically or capriciously but a change in policy decision, if found to be valid in law, any action taken pursuant thereto or in furtherance thereof should not be invalidated.

37. Similarly, in ***Ashok Smokeless Coal India (P) Ltd. v. Union of India***, (2007) 2 SCC 640, the apex Court held as under:

"Principles of natural justice will apply in cases where there is some right which is likely to be affected by an act of administration. Good administration, however, demands observance of doctrine of reasonableness in other situations also where the citizens may legitimately expect to be treated fairly. Doctrine of legitimate expectation has been developed in the context of principles of natural justice."

38. Applying the above principle and ratio laid down by the apex Court as well as by this Court, to the facts of the present case, this Court holds that the petitioners, having got the requisite qualification and having been recruited by following due process of selection pursuant to advertisement, and having completed six years of service on contractual basis, their services are to be regularized and non-extension of such benefit on the plea of not having passed from the institutions approved by the AICTE cannot have any justification and, as such, the same has resulted in unfairness, being not in conformity with the Article 14 of the Constitution of India. This view has also been taken by this Court in Anil Kumar Das (supra).

39. In view of the fact and law, as discussed above, this Court comes to an irresistible conclusion that the petitioners, having got the requisite qualification and fulfilled the eligibility criteria by completing six years of contractual service and having otherwise satisfied the 2019 Rules, cannot and should not be denied the benefit of regularization in service on completion of six years, merely because they do not satisfy the criteria of acquisition of qualification from the institutions approved by the AICTE. As such, the action of the authorities is arbitrary, unreasonable and contrary to the provisions of law, being violative of Article 14 of the Constitution of India. As a consequence thereof, the observation made in the minutes of meeting of the High Power Committee dated 16.11.2020 (appended to Annexure-8 dated 17.11.2020) as well as its consequential letter under Annexure-8 dated 17.11.2020, so far as it relates to non-regularization of services of the petitioners on the plea, that they have passed from non-AICTE approved institutions, cannot sustain in the eye of law. Accordingly, the same are liable to be quashed and hereby quashed.

40. Resultantly, this Court directs the opposite parties to take steps for regularization of service of the petitioners like other contractual paramedic employees in consonance with 2019 Rules, more specifically by applying Rule-20 thereof, within a period of three months from the date of communication of this judgment.

41. The writ petitions are accordingly allowed. No order as to costs.

—— o ——

2022 (II) ILR - CUT-928

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

W.P.(C) NO. 8044 OF 2021

Y. PABAN KUMAR ……..Petitioner

.V.

CENTRAL UNIVERSITY OF ODISHA, LANDIGUDA, KORAPUT & ORS. ……..Opp.Parties

(A) PRINCIPLES OF NATURAL JUSTICE – When warranted ? – Held, If there is no chance of change in the factual aspect, merely on the ground of not following the Principles of Natural Justice, the Order cannot be said to be illegal – Admittedly the present Petitioner is not fulfilling the eligibility criteria of securing minimum 60% to get himself admitted in MBA course, had he been noticed even before issuance of the Notice of cancellation it would have been a mere ritual of hearing without possibility of any change in the decision of the case on merits.

(B) FRAUD – Sympathy and sentiments by itself cannot be a ground for passing an order where the Petitioner has miserably failed to establish a legal right in his favour – The Petitioner not only tried to mislead this Court but also suppressed the material fact –The Writ Petition is dismissed.

Case Laws Relied on and Referred to :-

1. 2018 (II) ILR-CUT-380 : Nikita Sharma v. Ravenshaw University & Ors.
2. W.P.(C) No. 9178/2021 (decided on 04.06.2021) : Subash Chandra Sahoo v. Central University of Odisha & Ors.
3. (1971) 1 KB 486 : R. v. Kensington, Income Tax Commissioner.
4. AIR 1977 SC 781 : State of Haryana v. Karnal Distillery.
5. AIR 1994 SC 579 : Chancellor v. Bijayananda Kar.
6. 2018 (II) OLR 436 : Netrananda Mishra v. State of Orissa.
7. (2015) 8 SCC 519 : Dharampal Satyapal Ltd. v. Deputy Commissioner of Central Excise Gauhati.
8. (2004) SCC 281 : Escorts Farm Limited v. Commissioner, Kumaon Division, Naintal, U.P. & Ors.

For Petitioner : M/s S.K. Mishra, P.K. Rout, B.P. Pradhan
For Opp.Parties : M/s T.N. Murty, T.G.N. Murty, B. Udgata

JUDGMENT Date of Hearing : 26.07.2022 and Judgment : 03.08.2022

SANJAY KU.MISHRA, J.

1. The Petitioner has approached this Court challenging the Notice dated 25.02.2021 of the Registrar, Central University of Odisha (CUO), as at Annexure-8, vide which his provisional admission in the Department of Business Management was cancelled for not fulfilling eligibility criteria to take admission in Master Business Administration (MBA) in the Opposite Party-University. Apart from the same, it has been prayed to direct the Opposite Parties to allow the Petitioner to prosecute his studies in the MBA course and complete the same successfully without any difficulty as the Petitioner was allowed to take admission.

2. The brief background facts leading to filing of the present Writ Petition are that the Opposite Party No.1-University issued Advertisement for admission in different courses for the Session 2020-21, pursuant to which the Petitioner filled up the form to sit in the Central Universities Common Entrance Test, 2020 (CUCET) for admission in MBA course in the Opposite Party No.1-University. A selection test was conducted, and after due verification of the testimonials of the Petitioner, he was selected and accordingly, the merit list of the selected candidates was published and in the said merit list, the name of the Petitioner was found place with University Roll No.20/06/DBM/18 and the Petitioner also deposited the requisite fees, as prescribed by the University, towards admission on 30.10.2020.

Further case of the Petitioner is that on receipt of the fees deposited by him, the admission of the Petitioner in MBA course was accepted by the University on 03.11.2020 and due intimation was given to him with regard to starting of classes and he was allowed to attend classes with the aforesaid roll number.

While the matter stood thus and the Petitioner was prosecuting his studies, the Controller of Examination (I/C) of the University issued Notice on 04.01.2021 with regard to 1st Mid Semester Examination (Monsoon Session) of the 1st Semester scheduled to be held from January 11-18, 2021 and the Petitioner completed 1st Semester successfully. Then, on 28.01.2021, the 2nd Semester Notice was issued, and the Petitioner completed the 2nd Semester. While continuing as such, the Opposite Party No.1, vide its Notice dated 25.02.2021, cancelled the admission of the Petitioner on the ground of not fulfilling the eligibility criteria, which has been impugned in the present Writ Petition.

3. This Court, while issuing Notice in the Writ Petition, on 03.03.2021, passed the following Order:

> *"W.P.(C) No. 8044 of 2021*
> *and*
> *I.A. No. 3695 of 2021*
>
> *Issue notice through Speed Post to the opposite parties indicating therein that the matter shall be disposed of at the stage of admission, requisites for which shall be filed by 04.03.2021.*
>
> *As an interim measure, this Court directs that the petitioner be allowed to attend the online classes of MBA course since he has allowed to take admission in MBA course by depositing the requisite fees and in the meantime, he has already completed two Semesters andn further the order dated 25.02.2021 issued by the Registrar, Central University of Odisha under Annexure:8 cancelling the provisional admission of the petitioner without complying the principles of natural justice.*
>
> *Put up this case on 26.03.2021."*

4. When the matter was pending before this Court, a Notice was issued on 05.03.2021 by the Controller of Examinations, CUO, indicating therein that the students, who are not fulfilling the eligibility criteria for respective programme as mentioned in CUO Prospectus for academic Session 2020-21 and students who have not submitted their documents in support of their eligibility for verification yet, shall not be allowed to appear in End Semester Examination of Monsoon Session 2020-21 for 1st Semester, scheduled to be held in March 08-17, 2021. The present Petitioner filed I.A.No.4427 of 2021 annexing thereto the said Notice dated 05.03.2021, praying therein to direct the Opposite Parties to allow him to sit in the End Semester Examination of Session 2020-21 for 1st Semester to be held in March, 08-17, 2021 or through a special examination. In the said I.A. and the present Writ Petition, the following Order was passed on 16.03.2021:

> *"**I.A. No.4427 of 2021 & W.P.(C) No.8044 of 2021***
>
> *This matter is taken up through Hybrid Mode.*
>
> *Heard Mr. Sukanta Kumar Mishra, learned counsel for the sole petitioner.*
>
> *None appears on behalf of the Opp. Parties. Notice has been issued to the Opp. Parties fixing 24.03.2021 for their appearance.*
>
> *Learned counsel for the petitioner states that this Court vide order dated 03.03.2021, issued notice and posted the case to 26.03.2021and an order was passed for allowing the petitioner to attend online classes of MBA Course in the Central University, Koraput.*
>
> *However, learned counsel for the petitioner submits that the petitioner has been allowed to attend online classes but not allowed to appear in the examination even though a similarly situated students has been allowed to do so vide Notice dated 10.03.2021 of the Controller of the examination-Dr. Ram Shankar reference No.CUO/ Exam./2021/57 dated 10.03.2021 (Annexure B to this I.A.).*
>
> *Learned counsel for the petitioner further submits that although the link to appear in the examination was not made available to him, but he has appeared through the link of another student and submitted his answer sheets for the papers in which the examinations have already been conducted, but his answer sheets are not being sent to the concerned Department for evaluation.*
>
> *In view of the above developments, we direct the petitioner to bring these facts to the notice of the Opp. Party No.3, i.e. Controller Examination Central University of Odisha, Koraput requesting him allow the petitioner to appear in the rest of the paper (s) which are left.*
>
> *In such a situation, the Controller of Examination, Central University Opp.Party No.3 shall consider the grievance of the petitioner and pass appropriate order strictly in accordance with law. We are of the opinion that since the career of a student is very important, a liberal view/approach should be taken by the Opp. Party No.3 for allowing him to appear in the examination apart from forwarding the answer sheets of the papers already submitted by the petitioner, to the concerned Head of the Department through e-mail."*

We hope and trust that the Opp. Party No.3 shall consider and deal with the request/grievance of the petitioner dispassionately and compassionately. It is needless to say that any decision taken by the Opp. Party No.3 in favour of the petitioner and appearance of the petitioner in the examination shall be subject to further orders passed in this writ application." (emphasis supplied)

5. Pursuant to Notice issued in the present Writ Petition, a Counter Affidavit has been filed by the Opposite Parties on 26.03.2021. In the Counter Affidavit, it has been stated that the Opposite Party-University took part in Central University Common Entrance Test 2020-2021, shortly, CUCET, along with 11 other Central Universities established across the Country in different States and it sent its Prospectus as well as the programme-wise eligibility condition to CUCET, which uploaded the same on its website for holding the entrance test. Pursuant to the same, a common entrance test was held for all the participating Universities from 18th to 20th September, 2020. It has also been stated in the Counter Affidavit that the Academic Council of the Central University of Odisha has formulated conditions and eligibility criteria for taking admission in the Universities and the same was duly made known and published in its e-Prospectus hoisted on its website, i.e. www.cuo.ac.in. In terms of the said e-Prospectus, the eligibility for candidates seeking admission in MBA programme in the Central University, Odisha, should be Graduate with minimum 60% mark in aggregate from recognized University/Institution with 5% relaxation to SC/ST/PwD candidates and should not be more than 30 years of age and the candidates seeking admission in the University should have the requisite qualification and are required to submit document in support of their claim, lest their applications for admission shall be rejected.

6. The Petitioner applied for a seat in MBA programme for the Academic Year 2020-21, claiming that he fulfills all the eligibility criteria to take part in Entrance Examination, and appeared in the Entrance Test conducted by the CUCET on 19.09.2020. Pursuant to the same, the CUCET forwarded the result-cum-score card of the said examination to the University, in which the Petitioner's name finds place. Basing on the said result-cum-score card, the Petitioner came forward to take admission and online portal counseling was conducted by the Central University of Odisha on 19th and 20th October, 2020. On 21.10.2020, the Petitioner submitted an undertaking to submit all the relevant documents, including the Graduation Certificate and Graduation Mark Sheet by 31.03.2021, which has been annexed to the Counter Affidavit as at Annexure-C. Vide the said undertaking, the Petitioner further declared that:

*"**UNDERTAKING ABOUT NON-SUBMISSION OF DOCUMENTS FOR SEEKING ADMISSION FOR ACADEMIC YEAR 2020-21 IN CENTRAL UNVERSITY OF ODISHA***

> ***I***. *Y.Paban Kumar D/o/S/oShri/Smt. Y.Eswar Rao do hereby declare on oath as under:*
>
> *1. That I have applied for admission into MBA (Name of the Programme) at CUO. I fulfill all the eligibility conditions for admission to the Programme.*
>
> *2. That I will submit all the relevant documents of qualifying examination by 31.12.2020.*
>
> *3. That I will also submit the following documents as per the requisite format latest by 31.03.2021.*
>
> ***(List of documents to be submitted for which this undertaking is being given)***
> *a) Graduation Certificate*
> *b) Graduation Mark Sheet*
> *c) xxx…*
> *d) xxx…*
> *e) xxx…*
> *f) xxx…*
> *g) xxx…*
>
> *4. That failure to submit the requisite documents within the stipulated date shall result in automatic cancellation of my admission and the Central University of Odisha shall have no liability for the same."*

7. It is further stand of the Opposite Parties that due to Covid-19 Pandemic situation prevailing in the Country, causing much hardship to the students to get their testimonials from their previous / respective Institutions, which may ultimately adversely affect the students possessing the eligibility conditions, online counseling was conducted by the Central University of Odisha on 19th and 20th October, 2020. Since the Petitioner could not produce the certificates to substantiate his claim of fulfilling the eligibility conditions, he gave an undertaking as indicated above. Hence, the exercise of verification of documents could not take place at the time of giving provisional admissions to the candidates, including the Petitioner and physical verification of documents was deferred to a future date and was scheduled to be taken up in the middle of February, 2021. During the physical verification of the document, it came to the notice of the Authority of the University that the Petitioner does not possess the requisite minimum qualification and he, being fully aware of the eligibility criteria, had elected to apply and took provisional admission in the University, in spite of his ineligibility to take such admission,taking the risk of cancellation of such admission at any time. On scrutiny of documents, it was found that the Petitioner does not possess the requisite qualification to apply a seat in MBA in the Central University of Odisha and he being an OBC candidate, though was required to secure minimum 60% marks in aggregate in Graduation from any of the recognized University/Institution, he had secured only 54.3% in Graduation. The Petitioner deliberately did not produce his documents as per his declaration and undertaking. However, being physically present on 18.02.2021 in the University, he

produced the Mark Sheet and Graduation Certificate before the Authority, on which date it came to the knowledge of the University Authority about the disqualification of the Petitioner to take admission in MBA programme. Hence, immediately the Registrar of the University, vide Notice dated 25.02.2021, as at Annexure-8, cancelled the provisional admission of the Petitioner and intimated him about the same, which is impugned in the present Writ Petition, in terms of the provisions enshrined in Ordinance-4 [Clause 26(d)] of Academic Ordinance read with the information provided in the e-prospectus 2020-2021. That apart, the contention of the Petitioner as to completion of two semesters has been disputed and it has been stated that the Petitioner has only appeared in two internal tests conducted by the University and he did not take part in the 1st Semester Examination, which commenced from 8th March, 2021. It has also been contended in the Counter Affidavit that though the Degree Certificate and Academic Transcripts produced by the Petitioner, as at Annexure-2 Series, show that the result of the degree was published on 28.10.2020 and he has secured 54.3%, which is far less than the requisite percentage to entitle him to apply for a seat in MBA programme and take admission in the University, the Petitioner deliberately did not produce the same immediately on its receipt and after lapse of nearly 4 months, he personally produced the same on 18.02.2021 and the Petitioner has suppressed the said fact in the present Writ Petition, including the fact as to execution of an undertaking on 21.10.2020, as at Annexure-C, that if he failed to submit the requisite document i.e. Graduation Certificate and Graduation Mark Sheet, within the stipulated date, the same shall result in automatic cancellation of his admission and the Central University of Odisha shall have no liability for the same.

8. The Petitioner filed a Rejoinder Affidavit, in response to the Counter Affidavit filed by the Opposite Parties, on 20.02.2022. Though it has not been pleaded in the Writ Petition that soon after publication of his result on 28.10.2020, the Petitioner submitted the Certificate and Mark Sheet of the Graduation before the Authorities-Opposite Parties, apart from disputing other averments made in the Counter Affidavit filed by the Opposite Parties, without disclosing as to his mode of submission of the said Certificate and Mark Sheet so also date of such alleged submission of Mark Sheet of Graduation, for the first time, in the Rejoinder Affidavit filed by the Petitioner, it has been stated in Paragraph-7 as follows:

> *" 7. ... xxx It is needless to mention here that the graduation result of the petitioner was published on 28.10.2020 and the petitioner has secured 54.3% marks. Soon after the result was published, the petitioner submitted the certificate and mark sheet of the graduation before the authorities. Knowing fully well that the petitioner has secured 54.3% marks in the Graduation, the opposite party No.1 has instructed the petitioner to*

> *deposit the required fees. The petitioner submitted the fees on 30.10.2020 as per annexure-4, which was duly accepted by the opposite parties. On 03.11.2020 it was intimated to the petitioner that the class starts details will be intimated later on. Finally the classes were started and the petitioner prosecuted his studies in the said institution."*

9. We have heard Mr. Sukanta Kumar Mishra, learned Counsel for the Petitioner, and Mr. T.N. Murty, learned Counsel appearing for the Opposite Parties through virtual mode and perused the records. Pleadings between the parties have been exchanged and with consent of learned Counsel for the Parties so also in view of the Interim Order dated 03.03.2021, vide which it was ordered that matter shall be disposed of at the stage of admission, the Writ Petition is being disposed of at this stage.

10. It is contended by the learned Counsel for the Petitioner that the Petitioner had disclosed all the facts at the time of admission in MBA course and the Opposite Party-University, with due knowledge of his acquiring 54.3% marks in Graduation, permitted him to take admission in MBA course and directed the Petitioner to deposit the requisite fee, which was deposited on 30.10.2020 as per Annexure-4 and was duly accepted by the Opposite Parties and the Petitioner was intimated on 03.11.2020 with regard to commencement of class. Finally, the class was started and the Petitioner prosecuted his studies in the said institution and has successfully completed the same. Hence, the impugned Notice of cancellation of his provisional admission as a student in the Department of the Business Management dated 25.02.2011 deserves to be set aside and the Opposite Parties be directed to do further in the said regard and the Petitioner should not suffer for the laches of the Opposite Parties.

It is also contended by the learned Counsel for the Petitioner that before issuance of Notice dated 25.02.2021 under Annexure-8, vide which the admission of the Petitioner was cancelled, no opportunity has been given to the Petitioner to have his say in the matter and there is violation of Principles of Natural Justice and on that score alone, the impugned Notice of Cancellation dated 25.02.2021 deserves to be set aside.

11. Per contra, the learned Counsel for the Opposite Parties reiterated the stand taken in the Counter Affidavit and further submitted that apart from on merit as to non-fulfilling the minimum eligibility criteria of securing 60% marks in aggregate in Graduation from recognized University/Institution to take admission in MBA course, the Writ Petition also deserves to be dismissed with exemplary cost for misleading this Court so also for suppressing material fact of giving undertaking dated 21.10.2020, as at Annexure-C, to the Counter Affidavit filed by the Opposite Parties and also misleading this Court by falsely

stating in the Rejoinder Affidavit for the first time that the Petitioner submitted the Certificate and Mark Sheet of Graduate before the Authorities immediately after the same was being published on 20.10.2021 and knowing well that he has secured 54.3% in Graduation, the Opposite Party No.1 instructed the Petitioner to deposit the required fees.

Learned Counsel appearing for the Opposite Parties further submitted that no allegation of any action tainted with mala fide against the University or its staff has been made by the Petitioner. The decision to cancel the provisional admission of the Petitioner vide Notice dated 25.02.2021 is based on reasons with reference to the document submitted by the Petitioner and not arbitrary and based on the admitted fact that he is not possessing the requisite minimum qualification, entitling him to take admission in the MBA in the Central University of Odisha and this Court should refrain from introducing its notions in such academic matter to direct admissions, which would amount to ignoring the standards fixed by the University and the University has rightly cancelled the provisional admission of the Petitioner due to lack of eligibility criteria to take admission in the said course of MBA in University.

It was also contended by the learned Counsel for the Opposite Parties that since it is admitted by the Petitioner that he secured 54.3% mark in Graduation, which is below the minimum required percentage of mark in Graduate, and he was not fulfilling eligibility criteria of minimum 60% mark required for seeking admission into MBA programme, merely on the ground of not following the Principles of Natural Justice, the impugned Notice dated 25.02.2022, as at Annexure-8, cannot be said to be illegal and it would not have of any use, had the Petitioner been noticed to have his say before issuance of such Notice of cancellation, as at Annexure-8.

12. Learned Counsel for the Petitioner relies on the judgment of this Court in case of ***Nikita Sharma v. Ravenshaw University and others***, 2018(II) ILR-CUT-380, whereas learned Counsel for the Opposite Parties relies on the decision of ***Subash Chandra Sahoo v. Central University of Odisha and others***, (W.P.(C) No.9178, 2021, decided on 04.06.2021).

13. It is well evident from the Registration Slip dated 24.05.2020, as at Annexure-1, issued in favour of the Petitioner that though under the heading "**Academic Qualification Details**", which is in a tabular form, against Sl. No.3 i.e. Graduation, under the heading "**year of passing**", it has been indicated as "**Awaited**" and under the heading **"% of marks**", it has been indicated as **"0"**. Similarly, under the heading "**Declaration**", the Petitioner has undertaken that he will be abided by the Rules and Regulations of the CUCET, 2020 and PU's. Further, a declaration has been given by the Petitioner that he has gone through and understood the eligibility criteria and his admission is subject to the fulfilling

of eligibility criteria of the University/Programme, for which he is applying for and he will be solely responsible for his eligibility and he shall be denied admission if he is not found eligible at the time of admission. Similarly, the Petitioner gave an undertaking on 21.10.2020 as quoted above.

14. As it seems, the Petitioner was well aware since 28.10.2020 that he has secured only 54.3% marks in the Graduation, which is below the minimum required percentage of marks in aggregate i.e. 60%, required for a candidate seeking admission into MBA programme in the Central University of Orissa. Knowing fully well about such eligibility criteria and his non-possession of such minimum requirement to take admission into MBA programme so also his declaration dated 24.05.2020 submitted online, as at Annexure-1, as well as written declaration/undertaking dated 21.10.2022 as quoted above, the Petitioner took the risk of taking admission in MBA course by depositing the requisite fee on 30.10.2020 so also attending the online classes of MBA course, in view of the Interim Order dated 03.03.2021 passed by this Court and appeared in the Examination by virtue of Order dated 16.03.2021 passed by this Court, wherein it was clearly indicated that the Controller of Examination, Central University-Opposite Party No. 3, shall consider the grievance of the Petitioner and pass appropriate Order strictly in accordance with law and any decision by the Opposite Party No.3 in favour of the Petitioner and appearance of the Petitioner in the Examination shall be subject to further Orders passed in this Writ Petition. Since the Petitioner was well aware of the eligibility criteria for the MBA course in Central University of Odisha, Koraput, for such conduct he only has himself to blame, as the minimum qualifying percentage for eligibility to be admitted in the MBA course, being an essential condition, cannot be diluted. When the Petitioner was admittedly not fulfilling the said criteria, the question of permitting him to continue pursuing the MBA course in the University does not arise.

15. To substantiate the prayer made in the Writ Petition, the Petitioner has relied upon the judgment i.e. ***Nikita Sharma*** (supra). On examination of the said judgment, it is found that the facts and circumstances of the said case are different from the present case and the same is not applicable to the Petitioner's case.

16. Learned Counsel for the Opposite Parties has relied upon the judgment of this Court i.e. ***Subash Chandra Sahoo*** (supra) to substantiate the stand of the Opposite Parties. It is pertinent to mention that, vide Annexure-8 i.e. Notice dated 25.02.2021, the Registrar of the Central University of Odisha, cancelled the provisional admission of the present Petitioner so also another student/candidate, namely, Subash Chandra Sahoo, who was the Writ Petitioner

in W.P.(C) No.9178 of 2021, which was dismissed on 04.06.2021 with the following observations:

> *10. The above submissions have been considered. It is evident from the counter affidavit of Opposite Parties 1 to 3, which is not disputed by the Petitioner, that the CUO Admission Announcement, which was uploaded on its website, and the link for which was provided to the CUCET-2020, clearly spelt out the minimum eligibility condition for the MBA Course as 60% marks in the graduate degree. It was placed in the public domain, and was accessible to every candidate applying for courses in the CUO. It is, therefore, not possible to accept the contention of the Petitioner that he was unaware of the eligibility criteria specific to the MBA course in CUO.*
>
> *11. In any event in the declaration signed by him, which forms part of the CUCET 2020 Registration Slip dated 15th May 2020 issued to him, the Petitioner states that he has "gone through and understood the eligibility criteria" and further that: "I understood that my admission is subject to the fulfilling of eligibility criteria of the University/Program I am applying for." Lastly: "I will be solely responsible for my eligibility and I shall be denied admission if I am found not eligible at the time of admission."*
>
> *12. If despite the above, the petitioner failed to find out what the eligibility criteria for the MBA Course in CUO, Koraput was, then he only has himself to blame. The minimum qualifying percentage for eligibility to be admitted to the MBA course is an essential condition that cannot be diluted. With the Petitioner admittedly not fulfilling the said criteria, the question of permitting him to continue pursuing the MBA course in CUO, Koraput does not arise."*

17. It is well settled law that sympathy and sentiments by itself cannot be a ground for passing an Order in relation where to the Petitioner has miserably failed to establish a legal right in his favour. A legal right to admission arises only when the Petitioner establishes his entitlement to admission into the University complying with the conditions enumerated in the e-prospectus. So, the Petitioner has to face the consequences and no bonafide lies in his favour to seek any equity.

18. As regards expressing distorted facts before the Court and not approaching with clean hands, in ***R. v. Kensington, Income Tax Commissioner, (1971) 1 KB 486*** at page 506, it has been held as follows:

> *"The prerogative writ is not a matter of course; the applicant must come in the manner prescribed and must be perfectly frank and open with the Court."*

19. In ***State of Haryana v. Karnal Distillery***, AIR 1977 SC 781, the apex Court refused to grant relief on the ground that the applicant has misled the Court.

20. In ***Chancellor v. Bijayananda Kar***, AIR 1994 SC 579, the apex Court held that a writ petition is liable to be dismissed on the ground that the Petitioner did not approach the Court with clean hands.

21. Taking into consideration the above judgments, this Court, in ***Netrananda Mishra v. State of Orissa***, 2018 (II) OLR 436, came to a conclusion in paragraph-26 of the said judgment and held as under:-

> *".....For suppression of facts and having not approached this Court with a clean hand, the encroacher is not entitled to get any relief, particularly when the valuable right accrued in favour of the petitioner is being jeopardized for last 43 years for no fault of him, on which this Court takes a serious view....."*

22. It is well revealed from the pleadings of the Parties that the Petitioner not only tried to mislead this Court by subsequently pleadings in his Rejoinder Affidavit that soon after the result was published on 28.10.2020 he submitted the Graduation Certificate as well as the Mark Sheet before the Authorities but also suppressed the material fact as to his undertaking submitted before the Opposite Parties dated 21.10.2020, as at Annexure-C to the Counter Affidavit. Therefore, applying the above ratio to the present case, this Court is of the considered view that by giving distorted facts the Petitioner has tried to mislead this Court to obtain an Order in his favour.

23. So far as the contention of the learned Counsel for the Petitioner as to not according opportunity to have his say before issuance of Notice of cancellation dated 25.02.2021, as at Annexure-8, in ***Dharampal Satyapal Ltd. v. Deputy Commissioner of Central Excise Gauhati***, (2015) 8 SCC 519, the apex Court held that even if notice was issued, if there is no chance of change in the factual aspect, merely on the ground of not following the Principles of Natural Justice, the Order cannot be said to be illegal. Similarly, in case of ***Escorts Farm Limited v. Commissioner, Kumaon Division, Naintal U.P. & others***, (2004) SCC 281, the apex Court held that it would be of no use, if it amounts to completing a mere ritual of hearing without possibility of any change in the decision of the case on merit. As admittedly the present Petitioner is not fulfilling the eligibility criteria of securing minimum 60% to get himself admitted in MBA course, had he been noticed even before issuance of the Notice of cancellation, as at Annexure-8, it would have been a mere ritual of hearing without possibility of any change in the decision of the case on merits. Hence, the Opposite Parties are justified to issue the Notice of cancellation dated 25.02.2021, as at Annexure-8 and there is no illegality or infirmity in issuance of such Notice, which has been impugned in the present Writ Petition.

24. Apart from the same, as is ascertained from the Order of this Court in ***Subash Chandra Sahoo*** (supra) passed by a coordinate Bench, the same is identical to the case of the present Petitioner pertaining to the same University. Apart from that, the impugned Order in the present Writ Petition i.e. Notice dated 25.02.2021, as at Annexure-8, vide which the provisional admission of

both the present Writ Petitioner so also the Writ Petitioner in W.P.(C) No. 9178 of 2021, being a common notice, was being impugned in W.P.(C) No.9178 of 2021, which was dismissed on 04.06.2021 with the observations quoted above. Hence, we are not inclined to allow the present Writ Petition.

25. Accordingly, the Writ Petition is dismissed. The Interim Orders passed by this Court are hereby vacated. There shall be no order as to the costs.

—— o ——

2022 (II) ILR - CUT-940

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

W.P.(C) NO.14147 OF 2013

SANJAYA JAIN ……..Petitioner

.V.

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

TENDER – Differential wages – The Petitioner/Contractor submitted his tender basing upon the estimated cost of work, estimated by the Department and taking into consideration the rate of wages of labourers as prevailing on or before 25.07.2012 – The rate quoted by the Petitioner was accepted and thereafter, he was called upon to execute work – Pending execution of the work, the State of Odisha, vide Notification dated 06.10.2012, enhanced wages of skilled and unskilled labourers vide official Gazette on 09.10.2012 – Whether the employee/Labour employed by the contractor would eligible to the enhance wages and differential amount of enhance wages ?– Held, Yes – Petitioner is entitled to benefit of escalated labour cost/differential labour cost, as per the Notification dated 06.10.2012. (Para 13)

Case Laws Relied on and Referred to :-

1. 2012 (Supp.-I) OLR 1035 : Mahesh Prasad Mishra v. State of Orissa.
2. AIR 2005 Ori. 26 : 98 (2004) CLT 737 : Suryamani Nayak v. Orissa State Housing Board.

For Petitioner : M/s. Prabodh Ch. Nayak & D. Mohapatra.
For Opp.Parties : Mr. P.K. Muduli, Addl.Government Advocate

JUDGMENT Decided On : 11.08.2022

Dr. B.R. SARANGI, J.

The Petitioner, who is a Contractor, has filed this Writ Petition seeking direction to the Opposite Parties to pay the differential increase of wages of labourers, taking into consideration the voluminous work executed by the Petitioner in terms of the Contract, as per the rate of wages fixed for the labourers vide Notification dated 06.10.2012 issued by the Labour & ESI Department in Annexure-4.

2. The factual matrix of the case, in brief, is that Opposite Party No.2 floated a Tender Call Notice, pursuant to which the Petitioner participated and his bid being the lowest, was accepted and he was awarded with the work "Periodical Renewal (P.R.) in Km. 132/080 to Km.142/620 of NH-26 (erstwhile Km.176/660 to Km.187/200 of N.H.201) Bid No.CE NH-11/12-13, Job No.Th-026-ORS 2012-13.878". The Petitioner-Contractor submitted his tender basing upon the estimated cost of work. Initially, Opposite Party No.2 had floated Tender Call Notice fixing the date of submission of the tender to 25.07.2012. But, subsequently a Corrigendum was issued fixing 12.11.2012 as the date of submission of the tender. In pursuance thereof, the Petitioner submitted his bid basing upon the cost estimated by the Department and taking into consideration the rate of wages of labourers as prevailing on or before 25.07.2012. The concerned Department had estimated the cost of the work basing upon the rate of wages of labourers, as fixed by the Government of Odisha, prior to 25.07.2012. The rate quoted by the Petitioner was accepted and thereafter, he was called upon to execute the Agreement with Opposite Party No. 3 after necessary compliance as per the Tender Call Notice. After necessary compliance, Petitioner executed F2 Agreement No. 45, F2(P1) of 2012-13 with Opposite Party No. 3 on 04.01.2013 for execution of the work, as mentioned above.

2.1 Pending execution of the work, the State of Odisha, vide Notification dated 06.10.2012, enhanced wages of skilled and unskilled labourers, which was published in Odisha Official Gazette on 09.10.2012. Under Clause-3 of the Explanation to the said Notification, it was specifically mentioned that the minimum rates of wages are applicable to employees employed by the Contractors also. Therefore, the enhanced rate, which was fixed by the Government, is also applicable to the Petitioner, as he was continuing with the Agreement executed on 04.01.2013, according to which the date of commencement of the work was 04.01.2013 and the date of completion of the work was 03.06.2013. Therefore, the Notification issued on 06.10.2012 with regard to enhancement of wages of skilled and unskilled labourer, which was published in the Official Gazette on 09.10.2012, is applicable to the Petitioner. Opposite Party No.3, being the executing Agency of the work, paid the running

bills of the Petitioner from time to time, as per the rate quoted by him in the tender. When the Petitioner claimed the escalation price of the wages, as per the Notification dated 06.10.2012 issued by the Government, the same was denied. As a consequence thereof, the Petitioner approached this Court by filing this Writ Petition claiming differential enhanced minimum wages in terms of the Notification dated 06.10.2012.

3. Mr. P.C.Nayak, learned Counsel appearing for the Petitioner, vehemently contended that since the Agreement was executed after enhancement of the wages, pursuant to the Notification dated 06.10.2012, and the Petitioner, while submitting the tender, had quoted the price as on 25.07.2012, he is entitled to get differential enhanced wages in terms of the Notification issued and denial of such benefit to the Petitioner is arbitrary, unreasonable and contrary to the provisions of law. To substantiate his contentions, he has relied upon the judgment of this Court in ***Mahesh Prasad Mishra v. State of Orissa***, 2012 (Supp.-I) OLR 1035, which has been upheld by the Apex Court on 01.10.2012 in dismissing SLP(C)…CC No. 11256 of 2012 preferred by the State.

4. Mr. P.K. Muduli, learned Addl. Government Advocate appearing for the State-Opposite Parties, contended that since the Petitioner had entered into an agreement for execution of the work in question on the price quoted by him, which was prevailing on or before 25.07.2012, he is bound by the conditions stipulated in the contract itself. Thereby, the claim made by the Petitioner for enhanced wages is not admissible.Consequentially, the Authority is well justified in passing the Order impugned rejecting the claim of the Petitioner to release the differential wages in terms of the Notification dated 06.10.2012. Accordingly, it is contended that the Writ Petition should be dismissed on that score.

5. This Court heard Mr. P.C.Nayak, learned Counsel appearing for the Petitioner and Mr. P.K. Muduli, learned Addl. Government Advocate appearing for the State-Opposite Parties through hybrid mode. 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.

6. The undisputed facts are that the Petitioner entered into an Agreement on 04.01.2013 pursuant to the Notice issued on 30.06.2012 inviting tenders. He quoted the price, basing on the rate of Minimum Wages prevailing as on 25.07.2012, as a consequence of which his bid was accepted and he was declared as the lowest bidder. As such, the Agreement, which was executed on 04.01.2013, was based on the Minimum Wages as was prevailing on 25.07.2012

in terms of the Notification of the State Government. In the interregnum, when Notification was issued by the Government enhancing the rate of wages of labourers of different categories, the Petitioner was allowed to discharge his obligation to conclude the contract and his running bills were also paid. But fact remains, due to enhancement of wages, the Petitioner had to make payment to the labourers at such enhanced rates. Now, therefore, the Petitioner claims differential wages admissible to the Petitioner, pursuant to the Notification dated 06.10.2012, which was published in the official Gazette dated 09.10.2022.

7. At this juncture, it is of relevance to go through the F2 Agreement, Clause 31(b) & (e) whereof reads as follows:

> *"31. xxx xxx xxx*
>
> *(b) Similarly, if during the progress of work, the wages of labour increase as a result of increase in the Average Consumer's Price Index for Industrial Workers (wholesale price), and the contractor thereupon necessarily and properly pays in respect of labour engaged on execution of the work such increased or decreased wages, then he shall be entitled to reimbursement or liable to refund quarterly as the case may be, such as amount, as shall be equivalent to the plus or minus difference in between the Average Consumer's price Index for Industrial Workers (wholesale price) which is operating for the quarter under consideration and that operated for the quarter in which the tender was opened, as per the formula indicated below, provided that the work has been carried out within the stipulated time or extension, thereof as are or not attributable to him.*
>
> *xxx xxx xxx*
>
> *(e) Price adjustment and reimbursement of claim for escalation of labour under 31(b) will be applicable only. If there is any increase decrease in the minimum wage, fixed by the State Government"*

On perusal of the above clauses, it is evident that as per the Agreement executed between parties, the Contractor is entitled to get enhanced escalated labour cost. This fact has also been fortified under Clause-3 of the Explanation to the Notification dated 06.10.2012 issued by the Labour & E.S.I. Department of the Government of Odisha, which was published in the official Gazette on 09.10.2012. For better clarification, the said Clause-3 is quoted hereunder:

> *"3. The minimum rates of wages are applicable to employees employed by contractors also."*

8. In view of the terms and conditions contained in the Contract itself, the differential wages are admissible to the Petitioner, who has discharged his duty and responsibility as a Contractor, Therefore, the same should not have been denied by the Authority, particularly when the price quoted by the Petitioner in the bid was as per the wages prevailing prior to 25.07.2012 and the Notification enhancing the rate of wages had come on 06.10.2012, whereas the Agreement was executed on 04.01.2013.

9. While entertaining this Writ Petition, vide Order dated 26.03.2014, this matter was referred to the Larger Bench of this Court. On 28.06.2022, the Larger Bench has passed the following Order:

> *"1. It is seen that by the order dated 26th March,2014, the issue referred to this Larger Bench was "whether the clause in question can be declared void particularly when the Petitioner willingly executed and acted upon the same without any challenge till filing of this Petition?"*
>
> *2. It appears that there is actually no conflict of opinions among different co-ordinate Benches of two learned Judges of this Court that warrants consideration of the above question by a Larger Bench of this Court.*
>
> *3. Consequently, the matters are directed to be placed back before the regular Bench for consideration of the above question.*
>
> *4. List on 8th August 2022 along with the connected matters before the regular Bench."*

Thereby, the matter has been placed before this Bench for consideration of the grievance made by the Petitioner.

10. Admittedly, in this case while passing the Order dated 26.03.2014, the Judgment of this Court in ***Mahesh Prasad Mishra v. State of Orissa***, 2012 (Supp.I) OLR 1035 was not placed before the Court for consideration. The said order dated 26.03.2014 was passed relying on the Judgment of this Court in ***Suryamani Nayak v. Orissa State Housing Board***, AIR 2005 Ori.26 : 98 (2004) CLT 737. In ***Mahesh Prasad Mishra*** (supra), this Court, in Paragraphs 7 and 8, held as follows:

> *"7. The aforesaid point is required to be answered in favour of the petitioner for the following reasons. Learned counsel for the Petitioner submits that the ITB read with appendix to Part-I of General Condition of the contract at clause (f) mandates that the employer is today not less than the minimum wages fixed by the Government as per the provisions of Minimum Wages Act, 1948. It is an undisputed fact that under the agreement the Petitioner contractor was required to pay the statutory dues including the minimum wages to its workmen. That is the legal requirement. This relevant aspect of the matter must be kept in view to examine the claim of the Petitioner. The same is supported by the Division Bench decision of this Court in Suryamani Nayak's case (supra) upon which.the Petitioner has rightly placed reliance. In the said case at paragraph 7,the Division Bench held as under :-*
>
> *"The expression 'escalation' used in the agreement ordinarily means, an agreement allowing for adjustment up and down according to change in circumstances as in cost of material in a works contract or in cost of living in a wage agreement. The expression 'escalation' would not bring within its sweep higher rate of wage which a contractor is otherwise liable to pay in view of the notification issued by the State Government under the provisions of minimum wages act, failing which he may have to face criminal prosecution. .No equitable reason is also there to give extended meaning, to the expression and bring such enhanced rate of wage within the area of compensation since payment itself made to the workers at higher rate is pursuant to a statutory notification issued under the provisions, of the Minimum Wages Act and the claim of the contractor On. that score is not for his own enrichment ……"*

In the aforesaid paragraph, the Division Bench referred to the decision in Tarapore and Co.v. State of Madhya Pradesh (supra) wherein the apex Court has clearly held that the payment of wages as per the rate fixed under the Minimum Wages Act is a statutory obligation and although the terms of the contract is silent about payment of minimum wages, the contractor is statutorily bound to pay the minimum wages to the workers.

8. In view of the aforesaid statement of law which has been declared by the Supreme Court and followed by the Division Bench of this Court in Suryamani Nayak and another Division Bench in Surendranath Kanungo v. State of Orissa, and M/s. Niligri Corporation Society Ltd. (supra), the claim of the petitioner is covered by the decision of the Division Bench. Therefore, the same shall be applied to the fact situation and relief be granted. In view of the clear pronouncement of the Supreme Court which has been followed by this Court in the aforesaid cases, the stand taken by the State justifying the impugned order cannot be accepted. Accordingly, the impugned or4ders rejecting the petitioner's prayer for payment of price escalation/enhancement of rate of wages of labour and materials vide Annexure-5 is liable to be quashed and is accordingly quashed. The writ petition is accordingly allowed. Direction is given to the opposite parties to pay the enhanced rate of wages of labour component under the agreement as per Government Notification dated 13.07.2009 under Annexure-2."

11. If we revert-back to the judgment passed in Suryamani Nayak (supra), the question raised herein was also considered and in Paragraphs 8, 9 and 10 of the said judgment this Court held as follows:

"8. In the present case, it is not disputed that the minimum wage of unskilled workers was Rs.12.83 when the contract between the petitioner and Opp. Party No.1 was executed. It is also not disputed that during pendency of that contract, the minimum wages of unskilled workers was raised from Rs.12.83 to Rs.25/- per day with effect from 1.7.1990 by virtue of the notification of the State Government in Labour Department. It is further available from the Letter No.882 dated 10.1.1994 (Annexure-2) issued by the Chief Engineer, Opp. Party No.1 that payments to the unskilled labourers were made at the rate of enhanced minimum wage directly by Opp. Party No.2, the Project Engineer and such extra payments were adjusted from bills of the petitioner. If the contractor is made bound under law to pay higher wages to the labourers on account of the notification issued by the State Government, there will be no justification to deny proportionate compensation to the contractor on tht score. We are, therefore, of the considered opinion that such extra demand has to be reimbursed by the contractor and endorsement made by the contractor-petitioner while seeking extension of time for completion of the work to the effect that he will not claim any compensation on account of escalation and the order of Opp. Party No.1 while extending time with stipulations that no compensation on account of escalation would be paid, will not debar the petitioner-contractor from claiming higher amount of wages which he has been made liable to pay because of the statutory notification of the State Government enhancing minimum rage of wages.

9. Regarding the claim relating to escalation of price index of the materials and POL etc., the plea of the petitioner is that when the Chairman, OSHB had approved escalation of price in respect of the work executed during the period 1.7.1990 to 31.12.1991 there is no good reason to refuse approval of such price escalation of the material and POL etc. for the period 31.5.1991 to 30.9.1994. The reply of the opposite

parties in this regard is that since the dead line for completion of the work had been fixed to 31.5.1992 the escalation of the price in respect of the work executed by the petitioner up to that date was approved by the Chairman, OSHB. But such escalation cannot be approved beyond 31.5.1992 as delay in completion of the work is attributable to the latches/inaction of the petitioner. It is the admitted case of the parties that when the contract was revived after discussion between the petitioner and the Chief Engineer, it was stipulated that the petitioner would complete the work by 31.5.1992 and accordingly, the Chairman, OSHB approved escalation of price in respect of the work executed up to 31.5.1992. Such escalation was refused beyond 31.5.1992 on the plea that delay occurred due to the latches on the part of the petitioner. The petitioner, on the other hand, has averred that due to non-clearance of site, erroneous estimation of the schedule item of work, non-supply of materials and irregular payments, the progress of the work was slowed down and so the allegation that delay occurred due to his latches is not acceptable.

10. The letter of the authorities to resume the work clearly stipulated that the work should be completed by 31.05.1992 letter dated 5.2.1993 the escalation clause was not allowed. In spite of absence of the escalation clause, the petitioner is now demanding the escalation price of the materials and POL on the plea that delay in completion of the work was not due to his fault, but due to the fault of the opposite parties and to substantiate this stand, he has placed reliance on Annexure-E, which is the recommendation of the Project Engineer-III. The opposite parties, on the other hand, have countered this plea by stating that prompt action was always there from the side of the contractor and the fault was always with the contractor-petitioner. In order to find out who was at fault and for whose lapses delay occurred, facts, evidence and circumstances are to be analysed. Ordinarily a Writ Court in exercise of extraordinary jurisdiction under Article 226 of the Constitution cannot entertain and issue a direction for enforcement of as claim, where the claim is based on disputed questions of fact. In ABL International Ltd. v. Export Credit Guarantee Corporation of India Ltd. and Ors. Cited by Mr. Patnaik, Learned Counsel for the petitioner, the Supreme Court held that in appropriate cases, a Writ Petition as against the State or the instrumentality of the State arising out of contractual obligation is maintainable and merely because some disputed questions of fact arise for consideration, the same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule. It was further held that writ petition involving consequential relief of monetary claim is also maintainable. However, the principle that the writ petition involving serious disputed questions of fact which requires consideration of evidence which is not on record will not normally be entertained by a Court in exercise of its jurisdiction under Article 226 of the Constitution was not denied. I the instant case, the petitioner claims that due to non-clearance of site, non-supply of materials, non-payment of dues in time and erroneous estimation of scheduled items of work, the work under the contract could not be completed in time. The opposite parties have denied these allegations in their counter affidavit. So, serious disputed questions of fact require adjudication and consideration of evidence, which are not record will be necessary. In such a situation, the claim of the petitioner cannot be entertained and direction cannot be issued under extraordinary writ jurisdiction under Article 226 of the Constitution."

12. It is not to be lost sight of that the case of ***Mahesh Prasad Mishra*** (supra) was challenged before the apex Court by the State in preferring SLP (C)

CC No. 11256 of 2012 and the Apex Court dismissed the said SLP. Thereafter, the judgment of this Court in ***Mahesh Prasad Mishra*** (supra) has reached its finality.

13. In view of such position, the action of the Authorities in refusing to grant the benefit of escalated labour cost to the Petitioner cannot have any justification and, as such, the Petitioner is entitled to get the differential labour cost, as per the Notification dated 06.10.2012 in Annexure-4. Therefore, the Opposite Parties are directed to calculate the differential labour cost and pay the same to the Petitioner as expeditiously as possible, preferably within a period of four months from the date of communication of this Judgment.

14. In the result, the Writ Petition is allowed. There shall be no Order as to costs.

—— o ——

2022 (II) ILR - CUT-947

ARINDAM SINHA, J.

W.P.(C) NO. 4700 OF 2019

NATIONAL INSURANCE COMPANY LTD. & ANR. …….. Petitioners

.V.

G. DILESU PATRA & ORS. ……..Opp.Parties

(A) MOTOR ACCIDENT CLAIM – Whether a driver, who is having a licence to drive LMV and is driving transport vehicle of that class is required additionally to obtain an endorsement to drive a transport vehicle? – Held, Not required. (Para 6)

(B) INTERPRETATION OF STATUTE – Whether a declaration of law/ judicial decision can cover the incident happened before the date of the judgment is concerned? – Held, Yes – As per the decision of Apex Court in *(2008) 14 SCC 171* that judicial decision acts retrospectively on subsequent discovery of the correct principle of law. (Para 7)

Case Laws Relied on and Referred to :-

1. Civil Appeal No. 5826 of 2011 (dated 3rd July, 2017) : Mukund Dewangan vs. Oriental Insurance Co.Ltd.
2. (2008) 14 SCC 171 : Assistant Commissioner, Income Tax,Rajkot Vs. Saurashtra Kutch Stock Exchange Ltd.
3. (2000) 10 SCC 19 : United India Insurance Co.Ltd. Vs. Roshan Lal Oil Mils Ltd.

For Petitioners : Ms. N Mohanty
For Opp.Parties : Mr. R. K. Sahu (O.P.1) & Mr. A. R. Sethy (O.P.2)

ORDER Date of Order : 12.08.2022

ARINDAM SINHA, J.

1. Ms. Mohanty, learned advocate appears on behalf of petitioner-insurance company. She submits, impugned is award dated 7th February, 2018 made by the Permanent Lok Adalat (PLA). In spite of her client having repudiated the claim on basis of the driver not holding a valid licence, the PLA proceeded to adjudicate and made award.

2. She submits, the vehicle being driven was a Tata Magic. It was carrying passengers. The driver had licence permitting him to drive transport vehicle M/HMV. On query from Court regarding judgment of the Supreme Court, referred in the award and particularly judgment dated 3rd July, 2017 in ***Mukund Dewangan vs. Oriental Insurance Company Limited*** passed in ***Civil Appeal no. 5826 of 2011***, she submits, said judgment came after the repudiation.

3. Mr. R.K.Sahu, learned advocate appears on behalf of opposite party no.1 while Mr. A.R.Sethy, learned advocate, for opposite party no. 2.

4. Exhibit-B before the PLA was the driving licence. It authorized the driver to drive light motor vehicle (LMV) (non-transport), transport vehicle (Medium and Heavy Motor Vehicle) and motor cycle with gear. Exhibit-C before the PLA was the permit contract carriage in respect of the vehicle. Spot survey said, inter alia, unladen weight of the vehicle is 1000 Kgs. and registered laden weight 1600Kgs. That points to the vehicle being LMV. It further appears that the vehicle, while carrying passengers and driven by the driver holding aforesaid licence, suffered a mechanical failure, of the left hand side (LHS) front spring leaf breaking, causing the vehicle veer off the road and over turn, sustaining damage, giving rise to the claim.

5. Court is satisfied that the vehicle is a light motor vehicle (LMV) going by particulars of unladen and laden weight given in the spot survey report. The dispute raised by petitioner was in repudiating the claim on basis of the driver holding licence to drive LMV non-transport vehicle. The vehicle in question had a contract carriage permit. That appears to be different from category transport or non-transport.

6. The Supreme Court in ***Mukund Dewangan*** (Supra) answered the question on whether a driver, who is having a licence to drive LMV and is driving

transport vehicle of that class is required additionally to obtain an endorsement to drive a transport vehicle. The Court answered in the negative. The PLA relying on the judgment rejected contention put forward by the insurance company.

7. Law declared appears to be that no separate endorsement was necessary for the driver to drive the contract carriage of LMV class since he was holding licence to drive LMV non-transport. So far as the declaration of law on whether it can cover the incident happened before date of the judgment is concerned, the Supreme Court also declared in ***Assistant Commissioner, Income Tax, Rajkot Vs. Saurashtra Kutch Stock Exchange Limited,*** reported in ***(2008) 14 SCC 171*** that judicial decision acts retrospectively on subsequent discovery of the correct principle of law.

8. Without prejudice, Ms. Mohanty submits further, final survey assessed damage cost at Rs. 20,000/- (Rupees twenty thousand only) but by impugned award the PLA directed payment of Rs.79,983/- (Rupees seventy-nine thousand nine hundred eighty three only) along with interest and cost. This could not have been done. She relies on judgment of the Supreme Court in ***United India Insurance Company Limited Vs. Roshan Lal Oil Mils Limited, reported in (2000) 10 SCC 19*** paragraph 7, reproduced below.

> *"7. The appellant had appointed joint surveyors in terms of Section 64-UM(2) of the Insurance Act, 1938. Their report has been placed on the record in which a detailed account of the factors on the basis of which the joint surveyors had come to the conclusion that there was no loss or damage caused on account of fire, was given and it was on this basis that the claim was not found entertainable. This is an important document which was placed before the Commission but the Commission, curiously, has not considered the report. Since the claim of the respondent was repudiated by the appellant on the basis of the joint survey report, the Commission was not justified in awarding the insurance amount to the respondent without adverting itself to the contents of the joint survey report specially the factors enumerated therein. In our opinion, non-consideration of this important document has resulted in serious miscarriage of justice and vitiates the judgment passed by the Commission. The case has, therefore, to be sent back to the Commission for a fresh hearing."*

9. Regarding award on direction to pay, inter alia, Rs. 79,983/- (Rupees seventy nine thousand nine hundred eighty three only), it appears that though the final survey assessed the damage to extent of Rs.20,000/- (Rupees twenty thousand only), the PLA found the investigator had certified in its spot verification report (Exhibit-A) that repairs undertaken by M/s. S.S.Automobiles, hence satisfactory. In the circumstances, the PLA had no reason to doubt bill dated 17thJune, 2014 raised by the garage/workshop, for Rs. 64,000/- (Rupees sixty four thousand), another person for repairing seats at Rs. 8,500/- (Rupees eight thousand five hundred only) and other incidental expenditure sustained at

aggregate Rs.2,463/- (Rupees two thousand four hundred sixty three only) adding up to the figure Rs. 79,983/- (Rupee seventy nine thousand nine hundred eighty three only). The PLA disregarded the estimate of repair cost at Rs. 81,220/- (Rupees eighty one thousand two hundred twenty only) to award aforesaid sum of Rs. 79,983/- (Rupees seventy nine thousand nine hundred eighty three only) on verification of the bills.

10. In ***United India Insurance Company Limited Vs. Roshan Lal Oil Mils Limited*** (supra) the Commission had directed payment on the policy disregarding the joint survey report saying that there was no damage caused. The Supreme Court found non-consideration of the joint survey report, to set aside judgment of the Commission. Said case is distinguishable on facts inasmuch as the final survey report assessing damage at Rs.20,000/- (Rupees twenty thousand only) was considered by the PLA against, the surveyor also saying that the repair job was satisfactory and on verification of the bills. On the happening of contingency insured against, where there is necessity for survey, the survey is for purpose of reporting on whether or not there is damage and, if so, to what extent. Particulars of damage caused should be the survey report. The surveyor is the expert to assess the extent of damage, not the cost of it. The cost of repairs are specifically provided in the schedule of rates for spares and labour, maintained by the workshops. Once the survey report reveals there has been damage sustained, there is then the next step of causing repairs, as covered by the policy. Commenting on costs of repairs is not in the domain of the surveyor. The surveyor, on pain of repetition, is to report on whether or not damage has been caused and, if so, to what extent and with particulars of it. Any further comment on the cost of repairs of damage sustained is additional information that cannot stand in the face of actual costs incurred for the repair.

11. In view of aforesaid no merit is found in the writ petition. It is dismissed.

—— o ——

2022 (II) ILR - CUT-950

ARINDAM SINHA, J.

W.P.(C) NO. 8808 OF 2020

THE DIVISIONAL MANAGER, NIC, LTD. …….. Petitioner

.V.

ASHISH KUMAR KANTHA & ANR. ……..Opp.Parties

LEGAL SERVICES AUTHORITIES ACT, 1987 – The preamble and section 12 of the Act – Whether a company with authorized capital of Rs. 2 crores and paid-up capital of Rs. 1.76 crores is eligible to seek alternate dispute resolution from the Permanent Lok Adalat?– Held, No.

Case Laws Relied on and Referred to :-

1. Civil Appeal No.3872 of 2022 (dated 19th May,2022) : Canara Bank v. G.S.Jayarama.
2. (2012) 8 SCC 553 : Rajoo v. State of MP

For Petitioners : Mr. N.K. Mishra
For Opp.Parties : Mr. A.K. Roy

ORDER Date of Order : 29.08.2022

ARINDAM SINHA, J.

1. Mr. Mishra, learned senior advocate appears on behalf of petitioner insurance company. He submits, the insured was not a person eligible to seek alternate dispute resolution from the Permanent Lok Adalat (PLA). He refers to, inter alia, the preamble and section 12 in Legal Services Authorities Act, 1987 to submit, the alternate dispute resolution forum was established to provide justice to weaker sections of the society. He draws attention to impugned award dated 31st October, 2019 made by the PLA in favour of the insured, being a company with authorized capital of Rs.2 crores and paid up capital of Rs. 1.76 crores. Such a party went to the PLA and said that there should be adjudication on repudiation of the claim. The PLA, without following procedure provided for adjudication by Courts, passed impugned award.

2. In keeping with object of the Act, organization and establishment of Lok Adalats and Permanent Lok Adalats, he submits with reference to section 12 and rule 16 in Orissa State Legal Services Authority Rules, 1996, it is legal services offered by State to every person, whose annual income from all sources does not exceed three lakhs rupees. That is why, inter alia, Permanent Lok Adalats were established. He lays emphasis on term 'Lok' to submit, it must be a person entitled to legal services, being member of weaker sections of the society, who is entitled to approach the PLA. Opposite parties may be corporations or banks but a corporation with substantial financial presence cannot take advantage of provisions in the Act to bypass adjudication in Court. He submits, it is irrelevant that value of the property has been increased to Rs.1 crore, from initially legislated value of Rs.10 lakhs.

3. Mr. Roy, learned advocate appears on behalf of opposite party no.1 and relies on ***judgment dated 19th May, 2022*** of the Supreme Court in ***Civil Appeal no. 3872 of 2022 (Canara Bank v. G.S. Jayarama),*** paragraphs-18, 24 and 30.

On query from Court Mr. Roy submits, in the case, neither the preamble nor section 12 was under consideration by the Supreme Court.

4. He submits, his client is not entitled to and did not seek legal aid. That is not a bar for his client to have moved the PLA. It did so with a claim within increased property value of Rs.1 crore and has obtained impugned award. He submits, the Supreme Court in ***Rajoo v. State of MP*** reported in ***(2012) 8 SCC 553***, in paragraph-10 had noticed that section 12 of the Act lays down criteria for providing legal services.

5. Preamble of Legal Services Authorities Act, 1987 is reproduced below.

> "An Act to constitute legal services authorities to provide free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities, and to organize Lok Adalats to secure that the operation of the legal system promotes justice on a basis of equal opportunity."

6. Court required production of the policy and petitioner filed additional affidavit disclosing it. Insured, named in the policy, is a private limited company. Court has ascertained that the company was petitioner in the PLA. Its pleading was signed by a Director. Procedure required by rule 1 in order XXIX of the Code of Civil Procedure appears to have been satisfied. The point for adjudication is, however, whether the company could have been petitioner before the PLA. More so because, by section 22-E every award of the PLA, either on merits or on terms of settlement, is mandated to be final and binding on all parties, deemed to be decree of civil Court, as cannot be called in question in any original suit, application or execution proceeding and capable of execution. No appeal is provided. Impugned award is for payment of Rs. 42,64,051/- along with accrued interest. Since the company approached the PLA before either party had moved Court, impugned award was made by the PLA, on deciding the dispute.

7. The insured is a corporation. It is not a citizen, who might face denial by reason of economic or other disability, of securing justice. Though only specific provisions in the Code are made applicable to both Lok Adalats and Permanent Lok Adalats, regarding summoning and enforcing attendance of witnesses, discovery and production of documents, reception of evidence on affidavits, requisition of public record or document from any Court or office and such other matter as may be prescribed, rest of procedure provided by the Code may not be followed by either or both. It is noticed that in fulfilling object of the Act, while Lok Adalats are organized consisting of serving or retired judicial officers and other persons, having same specific power under the Code as Permanent Lok

Adalats, they cannot adjudicate. Permanent Lok Adalats consisting, inter alia, of a person, who has held office of District Judge or higher rank and two others, can. Section 22-C (1) provides for value of the property in dispute to not exceed Rs.10 lakhs with proviso also that the Central Government may, by notification, increase the limit in consultation with the Central Authority. It was increased to one crore rupees by notification dated 20th March, 2015 but corresponding amendment not yet made to second proviso under the section.

8. Apart from section 12 and rule 16, there is no specific provision, pursuant to the preamble, as to who can approach the Lok Adalats or Permanent Lok Adalats. Sections 12 and 13 mention persons entitled to legal services. Sections 19 and 20 mention parties to a dispute before or after approach to Court and section 22C mentions parties to a dispute before approach to Court. It is clear from mention of persons in sections 12 and 13 and of parties in sections 19, 20 and 22-C, the latter can include juristic persons like corporations and banks. For purpose of interpretation, as to who can approach the PLA, there has to be reliance, therefore, on the preamble. It cannot be denied that under the Act, Lok Adalats are to be organized and Permanent Lok Adalats established, to secure that operation of the legal system promotes justice of equal opportunity. A corporation such as the insured cannot claim equality with any member of weaker sections in the society. It has moved the PLA to obtain award in summary procedure, when it cannot be said that it could not have obtained or secured justice in a Court of law, by reason of financial constraint. At instance of the insured, on repudiation of claim under the policy, where aggregate sum insured was Rs.70,79,176/- on machinery requiring aggregate premium (with tax etc.) at Rs. 89,162/- for period of one year, the PLA adjudicated since, value of property conferring jurisdiction on it stood increased, by notification dated 20th March, 2015, to Rs.1 crore.

9. It is true that law declared in ***Canara Bank*** (supra) was, observation made by the Single and Division Benches of the Karnataka High Court that, Permanent Lok Adalats cannot act as a regular civil Court in adjudicating dispute between the parties, were clearly incorrect. Nevertheless, section 22-C enables any party to a dispute, before it is brought before any Court, to make an application to a Permanent Lok Adalat, for settlement of the dispute. The PLA stands moved for that purpose. Up to sub-section (7) in said section, emphasis is on settlement. It is only in sub-section (8), where, on parties' failure to reach at an agreement under sub-section (7), the PLA shall decide the dispute. This provision was enacted by Parliament, it must be remembered, on provision of pecuniary limit of property value below Rs.10 lakhs. Here, once again looking at provisions in sections 12, 13 and rule 16, it is to be seen that legal services

eligibility and entitlement are both, for prosecuting and defending. Hence, in prosecuting, the Adalats are approach friendly to the weaker sections and per rule 16, legal services available are provided for litigation in Courts, other than the Supreme Court.

10. The writ Court is confronted with impugned award, which may have been on good adjudication but denies remedy of appeal to petitioner, against it, though deemed as a decree. Judicial review is limited in scope, as not possible on merits. This appears to militate against the object of securing justice to all since, had the matter been adjudicated in any other forum, there would have been built in statutory remedy of appeal. This Bench in discharging function under assignment entry "writ petitions under the Legal Services Authorities Act", had to and will surely be required to deal with large number of writ petitions challenging awards made by the PLA. Lok Adalats cannot adjudicate, as declared by **Canara Bank** (supra), its awards based on settlement, to result in closure on those disputes, with section 21 providing for refund of Court fees. Awards on adjudication by the PLA give rise to writ petitions challenging them, which goes against object of the Act in providing for resolution of disputes through alternate forum.

11. In view of aforesaid, the insured corporation could not have moved the PLA to use the alternate dispute resolution forum, established to secure operation of the legal system to promote justice on a basis of equal opportunity, inasmuch as it cannot say it is unequal or at a disadvantage in obtaining adjudication under general law. In adjudicating cause of such a party the PLA was drawn into illegality. Impugned award is set aside and quashed.

12. Mr. Roy again relies on **Canara Bank** (supra) to point out that the bank had moved the Lok Adalat and the matter reached the Supreme Court to result in the judgment. Facts recited in the judgment show that private respondent in the PLA did not participate in conciliation at instance of it. The PLA proceeded to adjudicate and pass award. The bank initiated execution proceedings, while award debtor moved the writ Court and had the award set aside and quashed. The bank preferred appeal unsuccessfully and thereupon the civil appeal before the Supreme Court. In this connection, a passage from the judgment is extracted and reproduced below.

> "Thus, the Division Bench dismissed the writ appeal on two grounds: first, that the procedure for conciliation under Section 22-C of the LSA Act was not followed, and hence, the award under Section 22-C(8) was a nullity; and second, the Permanent Lok Adalat could not have acted as a regular Civil Court in adjudicating the proceedings"

Point taken in this writ petition and dealt with as above was neither taken nor considered by the Supreme Court in Canara Bank (supra). Needless to mention

the insured will be entitled to exclusion of time provided under Limitation Act, 1963, in event it wishes to institute legal proceeding, on its cause, before appropriate forum.

13. Mr. Mishra submits, by order dated 18th August, 2020 his client was directed to deposit 30% of impugned award. His client had deposited Rs. 10,24,216/- in the Registry on 11th September, 2020. He prays for direction of refund, with accrued interest. The Registry will refund the same to petitioner in event, within four weeks from date, suit or other proceeding has not been filed by the insured. Otherwise, the security be transferred to the forum of that proceeding, to be held in favour of it. This is because there already has been an adjudication, wherein petitioner's liability has been pronounced.

14. The writ petition is disposed of.

—— o ——

2022 (II) ILR - CUT-955

D. DASH, J.

SA NO. 82 OF 1986

RAGHUNATH MOHAPATRA ……..Appellant

.V.

KHALI RANA (SINCE DEAD) THROUGH HIS LRs. & ORS. ……..Respondents

PROPERTY LAW – Suit for declaration of title over the suit land with restoration of possession and permanent injunction as against the Defendants – Trial Court has decreed the suit in part – The Trial Court, while declaring the title of the Plaintiff over the suit land, his prayers for restoration of possession and permanent injunction as against the Defendants have been declined – When there is finding of the Trial Court that there is no adverse possession, the Defendants are trespassers – Whether the Courts below is justified in refusing to grant relief of recovery of possession and permanent injunction to the Plaintiff as prayed for ? – Held, No – The Courts below ought not to have refused to grant the relief of the possession and permanent injunction as prayed for by the Plaintiff in so far as the suit land is concerned as against these Defendants whose claim over the suit property as to have been so acquired by way of adverse possession as asserted has been repelled. (Para 14)

For Appellant : Mr. D.N. Mohapatra, M.R. Pradhan, J. Barik, P.K. Singhdeo
For Respondents: Miss Samapika Mishra, ASC, Mr. B.C. Mohanty.

JUDGMENT Date of Hearing : 01.08.2022 : Date of Judgment : 08.08.2022

D. DASH, J.

The Appellant, by filing this Appeal, under Section-100 of the Code of Civil Procedure, 1908 (for short, 'the Code') has assailed the judgment and decree 18.02.1986 and 03.03.1986 respectively passed by the learned Sub-Ordinate Judge, Khurdha in Title Appeal No. 02 of 1985.

By the same the Appeal filed by the present Appellant (Plaintiff) under Section 96 of the code has been dismissed and thereby, the judgment and decree dated 15.03.1985 and 28.03.1985 respectively passed by the learned Munsif, Khurdha in O.S. No.102 of 1982 have stood confirmed.

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 he is the owner in possession of the suit property which is the subject matter of the suit.

The Plaintiff having applied for lease of the suit land which was lying fallow was so granted by the Tahasildar, Banapur in Lease Case No. 647 of 1975. It is stated that such lease had been granted by the Competent Authority by observing all the required legal formalities. After the grant of such lease the records were accordingly corrected. The Plaintiff got the possession of the suit land. It is pleaded that the Plaintiff has thus the right, title and interest over the suit land and has been paying the rent being recorded as Sthitiban Raiyat over the same. It is also stated that he has been paying the rent as to the State as has been assessed. The Defendants being envious of such grant of lease of the suit land in favour of the Plaintiff created disturbance in his peaceful possession over the suit land. It is stated that the Defendants mischievously filed an Application before the Divisional Officer, Khurda for cancellation of lease by making some false and frivolous allegation against the Plaintiff. It is stated that the Plaintiff having thus got the occupancy the right over the property in question; the Defendants have nothing to do with the same. Alleging that on 01.09.1982, the Defendants came and damaged the crop raised by the Plaintiff over the suit land, when that invited strong apprehension in the mind of the Plaintiff that the Defendants would be again proceeding in the matter by taking law into their own hands, the suit has come to be filed. It maybe stated here that the Plaintiff besides arraigning those persons creating disturbance in possession of the property

as Defendants has also impleaded the State of Orissa (Respondent No.11) as Defendant No.11.

4. The Defendants Nos. 1 to 10 in their written statement have questioned the right, title and interest of the Plaintiff over the suit property. They claim that they are in possession over the suit property since the time of their ancestors for more than 30 years prior to suit and as such they have acquired title over the said property by way of adverse possession. The Defendants thus, state that the Plaintiff is not entitled to the reliefs claimed. It has been further stated that the lease in question which is projected by the Plaintiff to be the source of his right, title and interest over the property is the outcome of the fraudulent activities at his part in collusion for other Authorities of the State. They have stated that the suit land originally was waste land belonging to the State and the ancestors of the Defendants had reclaimed it by converting it fit for cultivation and they having amalgamated the suit land with their own Raiyati land have been in occupation of the same. The lease is said to be invalid and inoperative in the eye of law. It is further stated that the Defendant Nos.1 to 5 and 8 to 10 along with their other brothers belong to one family and during the time of their ancestors they had divided and now they constitute two families. According to them, the Defendant No.6 is in possession of Ac. 0.272 decimals of land from this suit plot under one Kita since the time of his ancestors and Defendant Nos.5 and 8 along with their brothers Ravi and Dhoba are in possession of Ac.0.380 decimals of land from the middle of the suit plot making it five Kitas. Out of these five Kitas, two are amalgamated with the western portion of plot No.689 which they could not divide and partition made by their ancestors. Similarly, the Defendant Nos. 1, 2, 3, 4, 9 and 10 along with their brothers, namely, Godavari, Pabana, and Laxmidhara are possessing the rest Ac.0.525 of decimals of the suit land from the west by making into six Kitas out of which, the western Kita is amalgamated with their plot No. 531 and another Kita has been amalgamated with the western portion of plot No. 689 for last 30 years prior to the suit land. They state that the Plaintiff had never come to possess the suit land at any point of time. The Defendants have stated they have been also acquired title over the suit property as against the Plaintiff as well as the State of Orissa by virtue of their long possession.

5. The State of Orissa being Defendant No.11 has not contested the suit by filing the written statement.

6. On the above rival pleadings, the Trial Court framed 10 issues. Proceeding rightly to first answer issue No.7 which concerns with the validity of the lease, the Trial Court having gone through the record as well as the evidence has found the same in favour of the Plaintiff holding the Plaintiff to be the lease

holder in respect of the said land and as such to have acquired right, title and interest over the property. Then going to answer the issue relating to the possession of the property as claimed by the Plaintiff and refuted by the Defendants, who claim that unto themselves; it has been said that the evidence on record are not sufficient to conclude that the Plaintiff is in possession of the suit property. The other issue i.e. issue No.8 concerning the amalgamation of the suit by the Plaintiff with their other lands, it has been held that the evidence on record lead to answer on that score against the Plaintiff.Having said as above, the issue relating to the claim of the Defendants as to have acquired title over the suit property by way of adverse possession has been returned against them.

With the above findings, the Trial Court has decreed the suit in part. The Trial Court, while declaring the title of the Plaintiff over the suit land, his prayers for restoration of possession and permanent injunction as against the Defendants have been declined.

7. The Plaintiff being aggrieved by the aforesaid decision of the Trial Court having carried the First Appeal has been unsuccessful.

8. The present appeal has been admitted by an order dated 24.06.1986 to answer the substantial question of law, as stated hereunder.

On the finding, there is no adverse possession, the Defendants are trespassers. Their claim is that they are in possession of specific portions of the suit land, where all the trespassers of the other portions of the suit land are necessary parties to the suit.

9. Mr. D.Mohapatra, learned counsel for the Appellant submitted that when the Courts below have concurrently found that the Plaintiff is the lawful owner of the suit land having right, title and interest over the same by virtue of the lease granted to him by the State and when the claim of the Defendants as to have acquired title over the suit land by way of adverse possession has been held in the negative merely basing upon the pleading in the written statement, the Courts below are not right in refusing to grant relief of recovery of possession and permanent injunction to the Plaintiff as prayed for. In this connection, he has invited the attention of the Court to the relevant averments taken by the Defendants in their written statement. He therefore, submitted that the Courts below ought to have decreed the suit granting all the reliefs to the Plaintiff as prayed for.

10. None appeared on behalf of the Defendants despite service of notice and repeated opportunity.

11. Learned counsel for the State submitted that in this suit the Defendants-state has advanced in competing claim over the suit property and it was also not so contended before the First Appellate Court.

12. Keeping in view the submission made, I have carefully read the judgments passed by the Courts below. I have also perused the plaint and the written statement as well as the evidence on record.

The position emerges that here the Trial Court as well as the First Appellate Court have concurrently held the Plaintiff to have obtained the suit land by virtue of the lease granted by the Competent Authority of the State-Defendant No.11. It is thus been held that the Plaintiff has the right, title and interest over the suit land. This obviously means that the Plaintiff on the basis of that has the right to possess the suit land. The Plaintiff in the pleadings has sought for the relief of declaration of his title and permanent injunction; in the alteration for recovery of possession if found to be not in possession of the suit property.

The Defendants specific case in the written statement is that they are in possession over the suit property since the time of their ancestors for more than 30 years prior to the suit and as such they have acquired title over the said property against the Plaintiff as well as the Defendant No. 11 (State) by way of adverse possession. It is next stated that the Defendants being the members of the family have divided the suit property into different parts and are in possession of the same. It is pertinent to state here that during suit, an Amin Commissioner has been examined as D.W.1. His report has been admitted in evidence and marked as Ext.3. It has been indicated in the report that the Defendants have amalgamated some portion of the suit land with other plots of their land adjoining to it.

13. The findings with regard to the right, title and interest over the suit property and as such the right to the possess the same as has been rendered by the Trial Court has not been questioned by the Defendants in the First appeal. The said First Appeal had been filed by the Plaintiff in challenging the denial of the relief of possession and permanent injunction. To be more specific, Defendants had neither filed cross objection nor cross appeal nor even have raised any contention in questioning the concurrent finding of the Trial Court on that issue which has gone in favour of the Plaintiff. The First Appellate Court having taken a cue from the evidence adduced by the Defendants that they with their brothers are in possession of the suit land, has held that those brothers being necessary parties to the suit have not been so impleaded/arraigned. Therefore, it has said that in their absence, the relief of recovery of possession and permanent injunction as prayed for by the Plaintiff cannot be granted.

14. The conclusion as aforesaid appears to have been rendered without taking into account the averment taken by the Defendants in their written statement. It is their specific case that since the time of their ancestors, they have been possessing the suit land and later on they have divided it and have been possessing the same by amalgamating those with their own land adjoining the suit land. The fact remains here that the Defendants have not proved any such document in establishing the fact that they had partitioned their ancestral joint family properties in metes and bounds. In that view of the matter, the possession of separate portion of ancestral joint family property by the Defendants has to be taken as merely for convenience and nothing more. So the Defendants having stated that with them their other brothers namely, Rabi, Dhoba, Halu, Laxmidhar and Paban are also possessing the properties, the same makes no such difference and is of no such legal significance in saying that they are independently possessing those portion of land from out of the suit land. Be that as it may if those persons are not the parties to the suit, their right over the property are not going to be affected in any way and even though the decree for possession is passed in favour of the Plaintiff, they can very well raise their claim as per law when the very decree for possession and permanent injunction are put for execution. In that view of the matter, in my considered view, the Courts below ought not to have refused to grant the relief of the possession and permanent injunction as prayed for by the Plaintiff in so far as the suit land is concerned as against these Defendants whose claim over the suit property as to have been so acquired by way of adverse possession as asserted has been repelled.

15. The aforesaid discussion and reasons thus provide the answer to the substantial question of law that the Plaintiffs suit ought to have been decreed granting him all the reliefs which he had prayed for. Accordingly, the suit filed by the Plaintiff is hereby decreed in declaring his right, title and interest over the suit property and holding him to be entitled to possess the same in getting the possession of the suit land recovered from the Defendants and those Defendants are also permanent restrained from creating any disturbance in the possession of the Plaintiffs over the suit property.

16. In the result, the Appeal stands allowed. There shall, however, be no order as to cost.

—— o ——

2022 (II) ILR - CUT-961

D. DASH, J.

R.S.A. NO.161 OF 2002

SAUKILAL CHHURIA (SINCE DEAD) BY HIS LRs. ……..Appellants

.V.

RAM GOPAL MEHER & ANR. ……..Respondents

PROPERTY LAW – Whether the suit for permanent injunction simpliciter is maintainable in the absence of any prayer for declaration of right, title and interest? – Held, Yes. (Para-11)

For Appellants : Mr.Budhiram Das

For Respondents: M/s. S.N.Mohapatra, S.Ghosh & S. Mishra.

JUDGMENT Date of Hearing : 03.08.2022 : Date of Judgment : 08.08.2022

D. DASH , J.

1. The Appellants, by filing this Appeal under Section-100 of the Code of Civil Procedure, 1908 (for short, 'the Code'), have assailed the judgment and decree dated 16.07.2002 and 22.07.2002 respectively passed by the learned Additional District Judge (FTC), Bargarh in Title Appeal No.36/38 of 1995-01.

By the same, the Appeal filed by the original Appellant under section 96 of the Code has been dismissed and thereby the judgment and decree dated 19.03.1991 and 26.03.1991 respectively passed by the learned Munsif, Bargarh in T.S. No.7 of 1990 have been confirmed. The suit filed by the Respondents, as the Plaintiffs, has been decreed issuing permanent injunction against the Appellant (Defendant) from obstructing the passage running on Schedule-B land in any manner and also to remove the obstruction caused by him by fixing the one leafed door thereon.The original Appellant (Defendant) having died during pendency of this Appeal, his legal representatives are now pursuing this Appeal on being substituted.

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

3. The Plaintiffs' case is that they being the husband and wife, had purchased Ac.0.05 ¾ decimals of land under registered sale deed dated 5.8.1987. It is stated that the suit passage is the only passage available for them to approach their said purchased land from the Municipal road to the west. The Plaintiffs purchased the land from the wife of Gunanidhi Naik by registered

sale deed dated 14.4.1976 whereby she had sold 2½ decimals of land in favour of the Defendant. The suit passage is said to be of 7 feet width towards north and it is stated that the same had been left for use of the Defendant as well as the vendor. After the death of Gunanidhi, the Plaintiffs purchased the land as described in Schedule-A of the plaint and were using the suit passage to come over the Municipal road. It is further stated that on 14.10.1989, the Defendant fitted an one leafed temporary door made of tin on the said suit passage near the municipal road on the west. This caused obstruction of the passage and the same was thus closed for the Plaintiffs as to approach their land. Protest being made by the Plaintiffs, the Defendant did not pay any heed to that. So, the suit came to be filed.

4. The Defendant claims to have purchased his land from the original owner Gunanidhi by registered sale deed 16.04.1976. It is stated that Gunanidhi transferred the suit passage of seven feet width to the Defendant, who since the date of his purchase is in possession of the suit land as well as the passage by constructing house and putting boundary over the same. It is denied that the vendor had left the suit passage for use of the Defendant. It is rather the specific case of the Defendant that the vendor had transferred the passage to the Defendant for his use and occupation by way of sale. On the very day of execution of the sale deed, Gunanidhi entered into an agreement with the Defendant to sell and delivered possession of entire Ac.0.06 decimals of land to the Defendant, who is accordingly continuing to possess the same. It is further stated that after the death of Gunanidhi, his wife and daughters had full knowledge regarding the agreement as they had the notice to that effect. The Defendant thus alternatively claims to have perfected his title by way of adverse possession.

5. The Trial Court, on the above rival claims, in total has framed five issues. The Trial Court, upon examination of evidence and their evaluation, has said that Schedule-B land used as passage is the only passage from Schedule-A land to the Municipal road. It is further stated that the Defendant has put obstruction and, therefore, the Plaintiffs are entitled to the relief of injunction while at the same time, the claim of adverse possession as advanced by the Defendant has been rejected.

6. The First Appellate Court, having taken up the exercise of re-appreciation of evidence as the final Court of fact, has found no such justification/reason to tinker with the findings of the Courts below and so also to reverse the decree of permanent injunction as passed by the Trial Court.

7. The Appeal has been admitted on 8.5.2003 to answer the substantial questions of law as indicated in Ground Nos.1, 3 and 4 of the Memorandum of Appeal, which read as under:-

> "A. Whether the judgment and decree of the lower Appellate Court is vitiated by rejecting the application under Order 41 Rule 27 to admit the agreement to sale execute by the common vendor of both the parties and existence of which was very much pleaded in the written statement filed by the defendant as well as evidence was lead to that effect coupled with the fact that said piece of evidence would certainly directed for adjudication of the real dispute between the parties?;
>
> B. Whether the finding of both the Courts below to the effect that the agreement to sale confers no title or possession upon the defendant till finalization of the matter in a separate suit for specific performance of contract filed by the defendants is sustainable in the eye of law when the recital of the said agreement clearly shows that a portion of the suit land was sold to the defendant by virtue of a sale deed and rest portions were intended to be sold and consideration money was paid as well as possession of the entire land was delivered to the defendant in pursuance to those instruments?; and
>
> C. Whether the suit for permanent injunction simpliciter is maintainable in the absence of any prayer for declaration of right, title and interest?"

8. Learned counsel for the Appellants submitted that the First Appellate Court has erred in law by not granting the leave to the Defendant to adduce additional evidence in terms of the provision under Order 41 Rule 27 of the code. According to him, the Judgment and decree passed by it are liable to be set aside when the document sought to be proved through additional evidence were to enable the First Appellate Court to pronounce the judgment in ruling upon the consensus issue as the denial to admit additional evidence and consequently its non-consideration has impacted the finding on the crucial issue. He further submitted that the Courts below, without any justification and by not providing any reason, have erroneously rejected the claim of the Defendant that he has perfected title by way of adverse possession.

9. Learned counsel for the Respondents submitted that all in favour of the judgments and decrees passed by the Courts below. According to him, when the Defendant's suit for specific performance of contract, i.e., agreement for sale is still pending and that would decide the fate of the title of the Plaintiffs over the suit land now when their case is based on possession of the property in question on the strength of the registered sale deed, the Courts below have rightly issued the permanent injunction as against the Defendant.

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

11. It reveals that the sale deed admitted in evidence and marked Ext.A from the side of the Defendant is wholly silent with regard to sale of road to the

Defendant when the northern boundary of the land purchased by the Defendant is stated to be road even the agreement for sale which is an unregistered one of the year 1976 does not mention anything about the sale of passage to the Defendant. The agreement thus reveals simply leaving of a road which too is not specific. In view of the above, the First Appellate Court is found to be right in saying that even accepting that the said road, i.e, is the suit passage till a decree for specific performance in the suit at the instance of the Defendant is passed, the Plaintiffs being the purchaser, their right of enjoyment of said property cannot be denied and the Defendant cannot claim any benefit thereunder. On the admitted factual settings of the case and in the absence of drawal of any presumption as to delivery of possession of that land which is to be thrashed out in the other suit; the above view being found to be absolutely correct; the prayer of the Defendant to admit the agreement for sale as additional evidence is held to have been rightly rejected as that would have served no better purpose for the Plaintiff.

The Defendant, in his evidence, has stated that the suit passage is the only approach to his land, which he purchased from the Plaintiff to come over the Municipal road. The sketch map appended to the sale deed standing in favour of the Defendant clearly shows the extent of passage from his purchased land towards further east. These features which are glaring in evidence nullify the claim of the Defendant as regards his purchase of the said passage, moreso then in that case a passage could not have been mentioned as to be running on the northern boundary of the sold land.

The aforesaid discussion and reasons accordingly provide answers to the substantial questions of law running against the case/claim of the Defendant, which in turn, leads to confirm the judgments and decrees passed by the Courts below.

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

—— o ——

2022 (II) ILR - CUT-964

S. PUJAHARI , J.

CRLMC NO. 1713 OF 2018

CHANDAN KU. PANDA ……..Petitioner

.V.

ANNAPURNA PANDA ……..Opp.Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Quashing of the Proceeding – Offence U/s.138 of the N.I. Act – Proceeding challenged on the ground of improper demand notice – In the present case, in the demand notice dishonour amount was over written and the amount written in words was not tallied to the amount written in letters – Prayer to quash the proceeding in view of such impropriety in the demand notice – Prayer of the petitioner acceded – Held, the notice tendered as a condition precedent for giving rising to the cause of action for a prosecution U/s. 138 of N.I. Act being defective and improper one, the prosecution launched thereafter for non-payment of the amount demanded, is incompetent – Hence, the same stands quashed.

Case Laws Relied on and Referred to :-

1. AIR 2003 SC 4689 : K.R. Indira Vrs. Dr. G. Adinarayana.
2. (2008) 2 SCC 321 : Rahul Builders Vrs. Arihant Fertilizers & Chemicals & Anr.

For Petitioner : M/s.Pravat Ku.Muduli, C.K.Rout, M.K.Mohanty
For Opp.Party : M/s. Sharmistha Samal, S. Samal

ORDER Date of Order: 29.07.2022

S. PUJAHARI, J.

1. This matter is taken up through Hybrid mode.

2. Heard the learned counsel for the Petitioner and the learned counsel for the Opposite Party-complainant.

3. Petitioner sought for quashment of the criminal proceeding in 1.C.C. Case No. 83 of 2017, pending in the court of S.D.J.M., Udala, on the ground that there was improper notice.

4. On perusal of the notice, it is seen that there was improper notice to make payment as required under Section 138(b) of the N.I. Act, which is a condition precedent to lodge a complaint. Admittedly three cheques, total of Rs. 4,15,000/- were issued but the same were dishonored and when given Demand notice, the complainant appears to have made claim of Rs. 2,05,000/- which was over written as Rs. 4,06,000/- and in the words the amount remains "two lakhs". Therefore, there appears to be improper notice. In the case of ***K.R. Indira Vrs. Dr. G. Adinarayana***, reported in ***AIR 2003 SC 4689***, wherein the Apex Court has held as under:

> "In a given case if the consolidated notice is found to provide sufficient information envisaged by the statutory provision and there was a specific demand for the payment of the sum covered by the cheque dishonoured, mere fact that it was a consolidated notice,

> and/or that further demands in addition to the statutorily envisaged demand was also found to have been made may not invalidate the same. In the present case, consolidated notice of demand for dishonor of four cheques was made and the contents of notice in question showing that not only the cheque amounts were different from the alleged loan amounts but the demand was made not of the cheque amounts, but only the loan amount as though it is a demand for the loan amount and not the demand for payment of the cheque amount nor could it be said that it was a demand for payment of the cheque amount and in addition thereto made further demands as well. Thus, the notice in question is imperfect in present case not because it had any further or additional claims as well but it did not specifically contain any demand for the payment of the cheque amount, the non-compliance with such a demand only being the incriminating circumstance which expose the drawer for being proceeded against under Section 138 of the Act. Hence order of acquittal of accused cannot be interfered with."

So also in the case of ***Rahul Builders Vrs. Arihant Fertilizers & Chemicals and another***, reported in ***(2008) 2 SCC 321***, wherein it has been held as follows:

> "Service of a notice, it is trite, is imperative in character for maintaining a complaint. It creates a legal fiction Operation of Section 138 of the Act is limited by the proviso. When the proviso applies, the main section would not. Unless a notice is served in conformity with proviso (b) appended to Section 138 of the Act, the complaint petition would not be maintainable. Parliament while enacting the said provision consciously imposed certain conditions. Once of the conditions was service of a notice making demand of the payment of the amount of cheque as is evident from the use of the phraseology "payment of the said amount of money", Such a notice has to be issued within a period of 15 days from the date of receipt of information from the bank in regard to the return of the cheque as unpaid. The statute envisages application of the penal provisions. A penal provision should be construed strictly; the condition precedent wherefor is service of notice. It is only thing to say that the demand may not only represent the unpaid amount under cheque but also other incidental expenses like costs and interests, but the same would not mean that the notice would be vague and capable of two interpretations. An omnibus notice without specifying as to what was the amount due under the dishonoured cheque would not subserve the requirement of law."

The Petitioner has averred in Paragraph-10 of the application (CRLMC) as under:

> "That, it is submitted that the Cheque in question was never issued towards discharge of any debt or liability. The three amounts i.e. Rs. 4,00,000/-, Rs. 4,15,000/- (Rs. 2,10,000/- + Rs. 1,05,000/- + Rs. 1,00,000/-) & Rs. 4,06,000/- as mentioned in the so called Demand Notice dtd. 31.07.2017 clearly proves the malafide intention of the Opp. Party-Complainant.

5. Learned counsel for the Opposite Party submits that there being a typographical error and demand having been made for all the cheque amounts even though in summing up the amounts there was a mistake, the Petitioner cannot be stated to have been mislead by the same, and the notice can not be construed as improper and hence, this Court should not quash the proceeding.

6. This Court is of the view that the notice tendered as a condition precedent for giving rise to the cause of action for a prosecution under Section 138 of the N.I. Act being defective and improper one, the prosecution lunched thereafter for non- payment of the amount demanded, is incompetent. Hence, the same stands quashed.

7. Accordingly, this CRLMC is allowed.

—— o ——

2022 (II) ILR - CUT-967

S. PUJAHARI , J.

CRLMC NO.1688 OF 2020

SUBRAT DAS ……..Petitioner

.V.

STATE OF ODISHA (VIGILANCE) ……..Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Prayer for quashing of the criminal proceeding – Charged U/Ss. 13(2), 13(1)(c)(d) of the Prevention of Corruption Act and Sections 409, 408, 471, 420 and 120-B of IPC – A common proceeding was initiated on administrative side by the Water Resources Department on the same set of charges – State Government exonerated the petitioner from the charges levelled against him – Whether exoneration in departmental proceeding *ipso facto* lead to exoneration or acquittal in a criminal case? – Held, No – This Court is not inclined to quash the criminal proceeding against the petitioner. (Para 15)

Case Laws Relied on and Referred to :-

1. (2020) 9 SCC 636 : Ashoo Surendranath Tiwari vrs. The Deputy Superintendent of Police, EOW, CBI & Anr.
2. (2020) 2 SCC 768 : M.E. Shivalinga Murthy vrs. C.B.I., Bengaluru
3. (2012) 9 SCC 685 : State (NCT Delhi) vrs. Ajay Kumar Tyagi
4. (2011) 3 SCC 581 : Radheshyam Kejriwal vrs. State of West Bengal & Anr.
5. AIR 2005 S.C. 752 : Central Board of Dawoodi Bohra Community & Anr. vrs. State of Maharashtra & Anr.
6. (2014) 9 SCC 457 : Union of India through C.B.I. v. Nirala Yadav @Raja Ram Yadav @Deepak Yadav.
7. (2019) 75 OCR 349 : Pandia Gouda vrs. State of Orissa.

For Petitioner : M/s. Ramakanta Mohanty, Sr. Advocate, S.R. Patnaik, Imrean Khan, P.K.Mohanty, S.Mohanty & M.Kar

For Opp.Party : Mr. Niranjan Moharana (A.S.C., Vigilance)

ORDER Date of Order : 05.08.2022

S. PUJAHARI, J.

1. The petitioner who is charge-sheeted as a co-accused in Vigilance Case No.5 of 2007 corresponding to T.R. No.1 of 2013 in the court of the Special Judge (Vigilance), Bhubaneswar, has filed this application under Section 482 of Cr.P.C. seeking for quashing of the said criminal proceeding.

2. Heard the learned counsel for the petitioner and the learned counsel appearing for the Vigilance Department, and perused the relevant papers on record vis-à-vis the contentions raised by the rival sides.

3. At the relevant time the petitioner was working as Asst. Engineer (Civil) in the erstwhile department of Irrigation and Power under the Chief Engineer, Potteru Irrigation Project, and the Vigilance police drew up/registered FIR vide Bhubaneswar Vigilance P.S.Case No.5 of 2007 against the petitioner and other co-accused persons, alleging, inter-alia, that in connection with the irrigation repairing work during the year 2003 under the Food for work programme at Pratap Ramchandrapur Irrigation Section although 319.7733 MT of rice was shown to have been received and handed over to the contractors for being distributed to the labourers, and though distribution was shown to have been made vide Utilisation Certificate, on verification of records, due procedure was found to have not been adopted in the process of tender, maintenance of record, allotment of work,execution of agreement, distribution of rice etc. It is alleged that the officials including the petitioner in connivance with the contractors misappropriated public money to the tune of Rs. 33,41,630.90 paise.

4. After investigation, charge-sheet was submitted on 29.08.2012 against the petitioner and the co-accused under Sections 13(2), 13(1)(c)(d) of the Prevention of Corruption Act and Sections 409, 408,471, 420 and 120-B of IPC with specific allegation that there was criminal misappropriation of rice to the tune of 198.7733 MT worth Rs.20,77,180.98 paise by forging the account register, indent forms and work file. The learned Special Court, Vigilance took cognizance of the said offences on 21.01.2013, and charge has also been framed against the petitioner and the co-accused persons by the trial Court as per the order dated 04.05.2018. The petition filed by the present petitioner for discharge was rejected by the trial Court on 11.04.2018.

5. It may also be stated here that on 01.09.2012, i.e., in the aftermath of submission of the charge-sheet by the Vigilance Department, a common proceeding was initiated on administrative side by the Water Resources Department

against the accused-officers including the petitioner under the Services Rules, on the same set of charges, and on the basis of the findings rendered by the Enquiring Officer and report submitted, the State Government exonerated the petitioner alone from the charges levelled against him.

6. It further appears that since the petitioner was not given promotion, he approached the Odisha Administrative Tribunal and thereafter this Court in W.P.(C) No. 25713 of 2019, and in pursuance of the order passed by the said Tribunal in O.A. No.116 of 2018 and this Court in the writ petition referred to above, the State Government have given promotion to the petitioner on adhoc basis to the rank of SE (C), Level-I as per the Notification dated 11.06.2020 of the Department of Water Resources.

7. In the factual scenario as above, the learned counsel for the petitioner submits that since the petitioner has already been exonerated from the same set of charges, in the Disciplinary Proceeding on the finding that there was no loss to the Government by any act of the petitioner, continuance of the criminal proceeding against him will be a clear abuse of the process of the Court, inasmuch as the standard of proof required to establish the guilt in a criminal case is far higher than the standard of proof required to establish the guilt in the departmental proceedings. According to him, there is bleak chance of conviction of the petitioner in the Vigilance cases where acquittal is a mere fait accompli. In support of his contention, the learned counsel for the petitioner has placed reliance on the decision of a Single Bench of this Court in CRLMC No.658 of 2018, and also on the decision of the Apex Court in ***Ashoo Surendranath Tiwari vrs. The Deputy Superintendent of Police, EOW, CBI and another***, reported in **(2020) 9 SCC 636**.

8. Per contra, it is the submission of the learned counsel appearing for the Vigilance Department that the trial Court having already framed charge against the petitioner and the co-accused persons on forming an opinion regarding existence of prima-facie case against them to proceed with the trial, and the said opinion being on the basis of the materials produced by the prosecution on record, the finding rendered in the Disciplinary proceeding in the aftermath of the completion of the investigation by the statutory agency or the consequence of the said proceeding can not come in the way of continuance of the criminal proceeding against the accused-petitioner, especially after framing of charge against him by the trial Court. Relying on ***M.E. Shivalinga Murthy vrs. C.B.I., Benguluru***, reported in **(2020) 2 SCC 768**, he submits that at the stage of framing of charge the accused can not rely on any external materials by way of defence to persuade the Court to discharge him. The learned counsel further submits that although the Departmental proceeding was initiated for the same

set of allegations, in course of the enquiry all the incriminating materials collected during investigation have not been taken into consideration. The contention of the Vigilance Department vide paragraph-10 of the objection affidavit dated 25.06.2021 is extracted here below for ready reference:-

> "10. Xxxxxx The Marshalling Officer could be not able to produce Tender files, Tender opening register to justify the drawal of agreements in respect of the alleged work. The Enquiry Officer also inferred that the agreement register has been manufactured at a later date and planted in place of original one, and attributed the said act to the Executive Engineer. The opinion/observations of the Enquiry Officer, cannot be accepted to the effect that "he has put all the blames on the head of the Executive Engineer and stated that the petitioner is a sub-ordinate Officer in the rank of Asst. Engineer who works directly under the nose of the Divisional Officer, and treated him innocent". The Enquiry Officer has exonerated the accused-petitioner along with other delinquent officers (i.e., other accused persons) relying on the statements drawn during Enquiry of the said accused persons citing them as witnesses. On the other hand the Vigilance investigation shows the illegalities as pointed out in Para-9 above to the effect that the accused persons have conspired with each other, abused their official position, created forged documents, manipulated the records, cheated the Govt. and misappropriated the rice without executing the works, and caused loss of Rs.20,77,181/- in terms of rice by not executing the agreement as well as the alleged works. However, the Enquiry Officer conducted enquiry after completion of investigation and treated the same as the procedural irregularities and opined that work has been executed, which is contrary to the findings of the Vigilance investigation. The Departmental Enquiry, though admitted the forgery, manipulation of documents/registers and active participation of the petitioner in the alleged act, however treated the said illegalities and conspiracy as irregularities by drawing self inferences or assumptions or presumptions etc. The alleged offences can be well proved or disproved on proper appreciation of evidences during trial. Furthermore, the Enquiry Officer exonerated the petitioner from the alleged crime, who has played a key role in joint conspiracy with the other accused persons, taking various technical pleas like presumptions and assumptions. In this backdrop it cannot be said that the petitioner has been exonerated on merit.xxxxxx"

9. The learned counsel for the Vigilance Department further submits that the judgment of the Apex Court in the case of ***Ashoo Surendranath Tewari*** (supra) as cited by the petitioner is per incuriam, inasmuch as it has not taken note of the decision in the case of a three Judge Bench of the Apex Court in ***State (NCT Delhi) vrs. Ajay Kumar Tyagi***, reported in **(2012) 9 SCC 685**. He has placed emphasis on the paragraph nos.24 and 25 of the said judgment which are quoted here below:-

> "24. Therefore, in our opinion, the High Court quashed the prosecution on total misreading of the judgment in the case of P.S. Rajya (Supra). In fact, there are precedents, to which we have referred to above speak eloquently a contrary view i.e. exoneration in departmental proceeding ipso facto would not lead to exoneration or acquittal in a criminal case. On principle also, this view commends us. It is well settled that the standard of proof in department proceeding is lower than that of criminal

> prosecution. It is equally well settled that the departmental proceeding or for that matter criminal cases have to be decided only on the basis of evidence adduced therein. Truthfulness of the evidence in the criminal case can be judged only after the evidence is adduced therein and the criminal case can not be rejected on the basis of the evidence in the departmental proceeding or the report of the Inquiry Officer based on those evidence.
>
> 25. We are, therefore, of the opinion that the exoneration in the departmental proceeding *ipso facto* would not result into the quashing of the criminal prosecution. We hasten to add, however, that if the prosecution against an accused is solely based on a finding in a proceeding and that finding is set aside by the superior authority in the hierarchy, the very foundation goes and the prosecution may be quashed. But that principle will not apply in the case of the departmental proceeding as the criminal trial and the departmental proceeding are held by two different entities. Further they are not in the same hierarchy."

10. I have considered the rival contentions of the parties keeping in mind the facts involved in the case at hand as well as the principles settled. Admittedly, the Departmental proceeding was initiated against the petitioner and other officers involved, and the enquiry conducted in the aftermath of completion of the investigation by the Vigilance police, a statutory investigating agency, and the enquiry report in the said departmental proceeding was submitted by the enquiring officer subsequent to the order of cognizance was passed by the Special Judge (Vigilance) on finding a prima-facie case on the basis of the materials produced before him, to proceed against the petitioner and the co-accused for the offences alleged. Hence, it cannot be said that the Departmental proceeding that was started against the petitioner was parallel to the initiation of vigilance case/investigation. That apart, a perusal of the enquiry report vide Annexure-4/A would reveal, inter-alia, that during the Departmental enquiry the Tender opening Register, Work registers etc. were not produced before the enquiry officer, and the Agreement register produced before him was found to be a manufactured one. The Enquiring Officer appears to have formed his opinion on many important aspects, on the mere basis of his assumption or presumption in absence of evidence. That apart, while affirming procedural irregularities and while attributing the same to the then Executive Engineer (co-accused), he gave a clean chit to the petitioner who was working then as the Asst. Engineer. In view of the above depiction, this Court finds merit in the contention of the learned counsel for the Vigilance Department that the exoneration of the petitioner in the Departmental proceeding was not on merit.

11. From the aforesaid two decisions, there appears to be division of opinion. Prior to the case of ***Ashoo Surendranath Tewari*** (supra), a decision was also rendered by the Apex Court in the case of ***Radheshyam Kejriwal vrs. State of West Bengal and another***, reported in **(2011) 3 SCC 581** wherein in paragraph-38 it has been held as follows;

> "38. The ratio which can be culled out from these decisions can broadly be stated as follows :-
>
> (i) Adjudication proceeding and criminal prosecution can be launched simultaneously;
> (ii) Decision in adjudication proceeding is not necessary before initiating criminal prosecution;
> (iii) Adjudication proceeding and criminal proceeding are independent in nature to each other;
> (iv) The finding against the person facing prosecution in the adjudication proceeding is not binding on the proceeding for criminal prosecution;
> (v) Adjudication proceeding by the Enforcement Directorate is not prosecution by a competent court of law to attract the provisions of Article 20 (2) of the Constitution or Section 300 of the Code of Criminal Procedure;
> (vi)The finding in the adjudication proceeding in favour of the person facing trial for identical violation will depend upon the nature of finding. If the exoneration in adjudication proceeding is on technical ground and not on merit, prosecution may continue; and
> (vii) In case of exoneration, however, on merits where allegation is found to be not sustainable at all and person held innocent, criminal prosecution on the same set of facts and circumstances can not be allowed to continue underlying principle being the higher standard of proof in criminal cases."

Placing reliance on the decision of ***Radheshyam Kejriwal*** (supra) the Apex Court reiterated the case of ***Ashoo Surendranath Tewari*** (supra). But, in the decision cited by the learned counsel for the Vigilance Department, the law laid down in the case of ***Radheshyam Kejriwal*** (supra) has not been taken note of.

12. Learned counsel for the Vigilance Department would submit that in the case of ***Radheshyam Kejriwal (supra)*** the decision rendered being a decision of two Judge Bench, inasmuch as one of the Judge, dissented, the law laid down in the case of ***Ajay Kumar Tyagi (supra)*** can be said to be holding the field, even if the same has not taken note of the case of ***Radheshyam Kejriwal*** (supra). In view of the law laid down in the case of ***Ajay Kumar Tyagi*** (supra), the subsequent decision also is of no assistance to the petitioner as the same has a precedence value being a decision rendered earlier.

13. However, the Apex Court in the case of ***Central Board of Dawoodi Bohra Community and another vrs. State of Maharashtra and another, reported in AIR 2005 S.C. 752***, have held as follows:-

> "Having carefully considered the submissions made by the learned senior counsel for the parties and having examined the law laid down by the Constitution Benches in the above said decisions, we would like to sum up the legal position in the following terms :-
>
> (1) The law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or co-equal strength.

> (2) A Bench of lesser quorum cannot doubt the correctness of the view of the law taken by a Bench of larger quorum. In case of doubt all that the Bench of lesser quorum can do is to invite the attention of the Chief Justice and request for the matter being placed for hearing before a Bench of larger quorum than the Bench whose decision has come up for consideration. It will be open only for a Bench of co- equal strength to express an opinion doubting the correctness of the view taken by the earlier Bench of co-equal strength, whereupon the matter may be placed for hearing before a Bench consisting of a quorum larger than the one which pronounced the decision laying down the law the correctness of which is doubted.
>
> (3) The above rules are subject to two exceptions : (i) The abovesaid rules do not bind the discretion of the Chief Justice in whom vests the power of framing the roster and who can direct any particular matter to be placed for hearing before any particular Bench of any strength; and
>
> (ii) In spite of the rules laid down hereinabove, if the matter has already come up for hearing before a Bench of larger quorum and that Bench itself feels that the view of the law taken by a Bench of lesser quorum, which view is in doubt, needs correction or reconsideration then by way of exception (and not as a rule) and for reasons it may proceed to hear the case and examine the correctness of the previous decision in question dispensing with the need of a specific reference or the order of Chief Justice constituting the Bench and such listing. Such was the situation in Raghubir Singh & Ors. and Hansoli Devi & Ors.(supra)."

14. Therefore, a decision rendered by a Coordinate Bench earlier has the precedence value than a decision rendered by a later Bench. But, here in this case, the only question that has arisen is, whether the decision rendered in the case of ***Radheshyam Kejriwal*** (supra) can be said to be a decision of a strength of a co-equal Bench. No doubt, there was division of opinion by the Judges, but for all purposes the same can be a decision rendered by a Bench of three Judges. So, it was a decision of a co-equal Bench earlier to the decision rendered in the case of ***Ajay Kumar Tyagi*** (supra). Therefore, the same has also binding effect. If the subsequent decision disputes such decision, even if the same is a decision on majority, it has no alternative but to refer the same to a larger Bench. Neither the same appears to have been done nor the case of ***Radheshyam Kejriwal*** (supra) has been taken note of in the case of Ajay Kumar Tyagi (supra). Therefore, the decision rendered in the case of ***Radheshyam Kejriwal*** (supra) still holds the field, notwithstanding the same being a decision on majority, and subsequently the Bench of co-equal strength in an Unity has taken a different view. Hence, the decision rendered in the case of ***Ashoo Surendranath Tewari*** (supra) which has relied upon the case of ***Radheshyam Kejriwal*** (supra) can not be said to be per-incuriam for having not taken note of Ajay Kumar Tyagi (supra). The Apex Court also while dealing with the question of precedence in the case of ***Union of India through C.B.I. v. Nirala Yadav @ Raja Ram Yadav @ Deepak Yadav, reported in (2014) 9 SCC 457*** have taken the aforesaid view. This Court also in the case of ***Pandia Gouda vrs. State of Orissa***, reported in

(2019) 75 OCR 349, placing reliance on the decision in the case of ***Nirala Yadav @ Raja Ram Yadav (supra)*** held the same.

15. Reverting back to the case at hand, while not accepting the submission of the learned counsel for the Vigilance Department that the law laid down in the case of ***Ashoo Surendranath Tewari (supra)*** is per-incuriam, this Court is of the view that in this case the exoneration of the petitioner in the departmental proceeding being not on merit, notwithstanding the fact that the law laid down in the case of Ashoo Surendranath Tewari (supra) reiterating the principle settled in the case of Radheshyam Kejriwal (supra) reiterated holding is the field, this Court is not inclined to quash the criminal proceeding against the petitioner in view of his exoneration in the departmental proceeding, inasmuch as it has been held in the case of Radheshyam Kejriwal (supra) that the finding in the adjudication proceeding in favour of a person facing trial for identical violation will depend upon the nature of finding and if the exoneration in adjudication proceeding is on technical ground and not on merit, prosecution may continue.

16. In the facts and circumstances of the case, and for the discussion made hereinabove, this Court finds no merit in the application of the petitioner. Hence,the CRLMC stands dismissed.

—— o ——

2022 (II) ILR - CUT-974

BISWANATH RATH, J.

W.P.(C) NO. 6332 OF 2003

BANSIDHAR JENA …….. Petitioner

.V.

LAND REFORMS COMMISSIONER & ORS. ……..Opp.Party

ODISHA CONSOLIDATION OF HOLDINGS AND PREVENTION OF FRAGMENTATION OF LAND ACT, 1972 – Section 36,37(2) – The Deputy Director authorized by way of notification to discharge the power of the Director – Whether the Deputy Director in the capacity of Director once decide the Appeal, can exercise revisional power under Section 37(2) of the Act? – Held, No – The power exercised of by the Director involving in impugned order is without jurisdiction hence set-aside.

For Petitioner : Mr.P.K.Routray

For Opp.Party : Mr.S.Mishra, A.S.C.

ORDER Date of Order : 23.08.2022

BISWANATH RATH , J.

1. Heard learned counsel for the Parties.

2. Background involving the case is that the Petitioner preferring Revision Case No. 2856 of 2001 came to be allowed vide Annexure-1. Private parties being aggrieved by the order allowing the said objection case preferred Appeal Case No.55 of 2002. The appeal having been rejected by the Appellate Authority, a revision has been preferred under Section 37(2) of the O.C.H. & P.F.L Act. Again at the instance of the private Opposite Parties. Referring to the Provision of Section of the Act at Section 2(l) and 37(2) read together with Section 36 of the Act, learned counsel appearing for the Petitioner contested the order vide Annexure-3 on the premises that once the party was availing the Appeal provision nothing prevented the party in preferring the statutory revision prescribed under Section 36 of the Act. It is contended that once a party has abandoned the revision scope has no authority to bring the revision under Section 37(2) of the Act. It is in this view of the matter learned counsel appearing for the Petitioner opposes the order at Annexure-3.

3. Mr.Mishra, learned Additional Standing Counsel in his attempt to justify the impugned order takes this Court to the Provision of Section 37(2) of the Act and reading through the same attempted to justify the entertainability of the application herein decided under the provision of Section 37(2) of the Act. It is on the above view of the matter, Mr. Mishra, learned Additional Standing Counsel opposes the entertainability of the Writ Petition. Mr. Mishra, learned Additional Standing Counsel however has no dispute on the allegation of competency of the Director in undertaking the challenge involving exercise under Section 37(2) of the Act.

4. Considering the rival contentions of the Parties, this Court finds the provision under Section 36 & 37 of the O.C.H. & P.F.L Act reads as follows:-

> "**36. Revision** – (1) The Consolidation Commissioner may, on an application by any person aggrieved by any decision of the Director of Consolidation within ninety days from the date of the decision, revise such decision and for the said purpose, he may call for and examine the records :
>
> Provided that no such order shall be passed without giving the parties concerned a reasonable opportunity of being heard.
>
> (2) All orders passed under this section shall be final and shall not be void in question in any Court of law."
>
> "**37. Power to call for records**- (1) The Consolidation Commissioner may call for and examine the records of any case decided or proceedings taken up by any subordinate

> authority for the purpose of satisfying himself as to the regularity of the proceedings or as to the correctness, legality or propriety of any order passed by such authority in the case or proceedings and may, after allowing the parties concerned a reasonable opportunity of being heard make such order as he thinks fit.
>
> (2) The power under Sub-section (1) may be exercised by the Director of Consolidation in respect of authorities subordinate to him."

No doubt Section 36 of the Act provides a revision scope after a party admittedly availed the Section 9 and Section 20 of the Act. For Appeal stage here over, undisputedly Petitioner abandoned the revision scope under Section 36 of the Act.

Reading through the provision at Section 37(1) this Court finds this is a provision enabling the aggrieved party to bring to the notice of the Consolidation Commissioner for his examining the order passed by the subordinate authorities. This provision also enables the Consolidation Commissioner to sou motu initiation of revisions but there is no applying of above provision to the case at hand, keeping in view that the Petitioner claimed provision at Section 37(2) of the Act and disposed by the impugned order.

Section 37(2) of the Act empowers the Director Consolidation to have revision exercise, when such orders are passed by the authority subordinate to him. Further question involved herein if the Director for there is already disposal of Appeal is justified in entertaining the 37(2) of the Act Proceeding?

5. For relevancy of definition at Section(2)(l), this Court takes into account the definition chapter of Odisha Consolidation Manual as provided in Section (2)(l) of the Act which reads as follows:-

> (l) "**Director of Consolidation**" means a person notified as such by the State Government to exercise the powers and to perform the duties of the Director of Consolidation under this Act and the rules made thereunder and shall include an Additional Director of Consolidation, a Joint Director of Consolidation and a Deputy Director of Consolidation appointed by the State Government to discharge any of the functions of the Director under this Act."

Reading the aforesaid provision, this Court finds the Deputy Director since authorized by way of notification to discharge the power of the Director and the Deputy Director deciding the Appeal in the capacity of Director herein in such event there can be no revision again before the Director to exercise his power under Section 37(2) of the Act.

6. In the circumstance, this Court finds exercise of power by the Director involving order at Annexure-3 is without jurisdiction. This Court thus interferes in Annexure-3 on the premises the revision remain not maintainable and sets aside the order at Annexure-3.

7. The Writ Petition succeeds. No order as to cost.

—— o ——

2022 (II) ILR - CUT-977

BISWANATH RATH, J.

W.P. (C) NO. 25049 OF 2013

DEBAJANI DALEI ……..Petitioner

.V.

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

ODISHA SURVEY & SETTLEMENT ACT, 1958 – Section 22(1), 22(2), 22(2)(a) – Once there is entertainment of an Appeal under Section 22 of the Act and the Appeal decided in favour of the Petitioner – Whether again Sou Motu Appeal under the provision of Section 22(2) of the Act is maintainable? – Held, No – When Appeal instituted earlier already involved an exercise of power under Section 22(2)(a) of the Act and a Sou Motu Appeal since was not involved an order passed in 21(1) of the Act, there was no question of initiating a Sou Motu Appeal proceeding. (Para-8)

For Petitioner : Mr. B.H.Mohanty, Sr. Adv, Mr.S.Mishra
For Opp.Parties : Mr. S.Ghose, AGA, Mr. U.K.Sahoo, ASC

JUDGMENT Date of Hearing and Judgment : 25.08.2022

BISWANATH RATH , J.

The Writ Petition involves a challenge to the order dated 26.08.2013 passed by the Additional Settlement Officer, Puri in exercise of Sou Motu power involving Sou Motu Badar Case No. 212 of 2013 involving an exercise of power under Section 22(1) of the Odisha Survey & Settlement Act, 1958 vide Annexure-6.

2. Background involving the case is one Khetrabasi Jalli of village Satapada in the district of Puri since filed an application for lease of Ac.0.120 dec of Khas Mahal land out of Plot No.1070 in Khas Mahal Block No. 11 of Puri Town. This lease case was registered as Lease Case No. 88 of 1963-64. On the application being sent by the Tahasildar to the concerned Revenue Officer with necessary inputs in a subsequent development on 12.05.1967, the Revenue Divisional Commissioner was pleased to sanction the lease of an area of Ac.0.060 dec. only out of Plot No. 1070 of Balukhand Khas Mahal on payment of usual salami and rent. It appears on 19.03.1969, a lease deed was executed by the Governor of Odisha in favour of the Applicant Khetrabasi Jalli. The lease deed appears to have been registered as lease deed bearing registration No. 2796 dated 19.03.1969. Petitioner got a copy of lease deed after it is duly registered by the Collector. Consequence upon execution of lease deed, there was delivery of

possession of the lease hold land to the lessee on 26.06.1969.It appears after the death of the lessee Khetrabasi, his successors transferred the lands to one Debajani Dalei (daughter-in-law) vide Registered Sale Deed No. 3353 dated 13.07.2001. Since the settlement operation had already commenced and proceeded to a considerable extent, Debajani, the purchaser moved the Settlement Commissioner in R.P. Case No.7451 of 2001 under the provision of Section 32 of the Odisha Survey and Settlement Act. The matter was sent to the Settlement Officer to treat the same as an Appel under Section 22 of the Act. In a further development the Appeal was allowed vide Annexure-3 on 14.03.2003.

3. While the matter stood thus it appears, a Sou Motu Appeal under the provision of Section 22(2) of the Act was initiated and disposed of against the Petitioner vide Annexure-6 resulting filing of the Writ Petition.

4. Mr. Mishra, learned counsel for the Petitioner advancing his submission taking this Court to the above background bringing to the notice of the provision at Section 22(2)(a) together with 2(b) of the Act contended once there is entertainment of an Appeal under Section 22 of the Act and the Appeal decided in favour of the Petitioner, a party if aggrieved by such Appeal order particularly the order at Annexure-3 could have challenged the same in higher forum. It is in the above circumstances Mr.Mishra, learned counsel for the Petitioner while resisting even initiation of the Sou Motu Appeal proceeding pending also challenging the order therein and requests this Court for interfering in the impugned order and setting aside the same for not being maintainable.

5. Learned counsel appearing for the State in their objection to the entertainabililty of the Writ Petition and their submission in support of the impugned order vide Annexure-6, taking this Court to the conditions in the lease deed in between the State and the lease holder particularly taking this Court to the condition at paragraph-10 therein contended for there is restriction in further transfer of the land by the lessee, the registered sale deed became void.

It is taking this Court to the ground raised by the Petitioner in challenging the impugned order, learned State Counsel urged that it is only in the above circumstance there was requirement for initiating the Sou Motu Appeal. The Appellate Authority in the consideration of Sou Motu Appeal and the result in the Sou Motu Appeal moves through paragraph-10 of the lease deed. Learned State Counsel thus contended that there is no illegality in the impugned order requiring to be interfered with.

6. Considering the rival contentions of the Parties, this Court finds moot question to be decided herein, once there is exercise of Appeal power in the

process of decision through Annexure-3, undisputedly under Section 22 of the Act, if there is possibility of permission for initiation of Sou Motu Appeal in exercise of power under Section 22(2)(a) of the Act valid?

7. Keeping in view the background indicated hereinabove, this Court finds, there is no dispute that the order vide Annexure-3 already involved a proceeding under Section 22 of the Act. This Court here takes into account the provision at Section 22 as a whole which reads as follows:-

> "22. **Sanction of settled rent and modification of orders passed on objection** – (1) When all such objections have been disposed of, the Assistant Settlement Officer shall submit the Settlement Rent Roll to the Settlement Officer with a full statement of the grounds of his proposals and a summary of the objections, if any, received by him.
>
> (2) The Settlement Officer shall-
> (a) of his own motion; or
> (b) on application without thirty days from the order passed on an objection preferred under Sub-section (1) of Section 21, have power to modify any such order.
>
> (3) The Settlement Officer may sanction the said roll with or without amendment or any return the same for revision by the Assistant Settlement Officer.
>
> (4) No modification or amendment or revision shall be made under Sub-section 920 or, as the case may be, Sub-section (3) until reasonable opportunity has been given to the parties concerned to appear and be heard in the matter."

8. Looking to the proceeding in Annexure-6, this Court finds, this proceeding appears to be under Section 22(a) of the Act. For the opinion of this Court and reading the provision at Section 22, the Appellate Authority has two powers, either undertaking such exercise on his own motion under the provision of Section 22(2)(a) or entering into an Appeal exercising on an application being filed within thirty days against the order passed on an objection preferred under sub-Section (1) of 21 of the Act. For there is no dispute that the proceeding under Annexure-3 already involved an exercise of power under Section 22(2)(a), this Court finds, there was no occasion in again having an exercise under Section 22 of the Act.

It is at this stage of the matter looking to the undisputed factual background, the Appeal instituted earlier already involved an exercise of power under Section 22(2)(a) of the Act and a Sou Motu Appeal was since not involved an order passed in 21(1) of the Act, there was no question of initiating a Sou Motu Appeal proceeding.

9. In the process, this Court finds proceeding vide Annexure-6 is bad in law, as an outcome the impugned order is also not sustainable since involved an illegal proceeding, this Court accordingly sets aside the impugned order at Annexure-6. It is at this stage of the matter, this Court cannot lose sight of

the restriction in the lease deed being raised by the learned State Counsel reading through the paragraph-10 of the lease deed while allowing the Writ.

This Court observes in the event the State is aggrieved by any transaction involving such sale deed, nothing prevents the State Authority to act in accordance with law keeping in view the restriction in paragraph-10 of Annexure-1.

10. The Writ Petition succeeds but however with the above observations. No costs in the circumstance.

—— o ——

2022 (II) ILR - CUT-980

S.K. SAHOO, J.

CRLA NO. 217 OF 2020

RAMESH CHANDRA SAHU .....Appellant

.V.

STATE OF ODISHA (OPID) .....Respondent

ODISHA PROTECTION OF INTERESTS OF DEPOSITORS (IN FINANCIAL ESTABLISHMENTS) ACT, 2011 – Sections 13,16 – Offences U/ss. 420/468/465/294/506 of the I.P.C. r/w Sections 4/5/6 of the Prize Chits and Money Circulation Scheme (Banning) Act, 1978 and Section 6 of the O.P.I.D. Act – Petition under Section 239 of Cr.P.C was rejected by Presiding Officer, Designated Court under the OPID Act – Hence the present appeal – The appellant contended that the framing of charge U/s. 6 of the O.P.I.D. Act against the appellant is not sustainable as one of the necessary ingredients of the offence under Section 6 of the O.P.I.D. Act, i.e., the person concerned must be responsible for the management of the affairs of Financial Establishment is conspicuously absent in the case – Held, the framing of charge under Section 6 of the O.P.I.D. Act is not sustainable in the eyes of law and the same is hereby quashed. (Para 8)

Case Law Relied on and Referred to :-

1. (2020) 79 O.C.R.284 : Prasan Ku.Patra & Anr. -Vrs.- State of Odisha.

For Appellant : Mr. Sirish Chandra Tripathy

For Respondent: Mr. Bibekananda Bhuyan, Mr. J.P.Patra, Special Counsel

JUDGMENT Date of Hearing & Judgment: 01.08.2022

S.K. SAHOO, J.

1. The appellant Ramesh Chandra Sahu has filed this criminal appeal under section 13 of the Odisha Protection of Interests of Depositors (in Financial Establishments) Act, 2011 (hereafter 'O.P.I.D. Act') challenging the impugned order dated 24.01.2020 passed by the learned Presiding Officer, Designated Court, OPID Act, Balasore in C.T. No. 8(C) of 2016 in rejecting the petition filed by the appellant under section 239 of Cr.P.C. for discharge. The appellant has also challenged the order dated 01.11.2021 of the learned trial Court in framing charges against him for commission of offences under sections 420/ 468/465/294/506 of the Indian Penal Code, sections 4/5/6 of the Prize Chits and Money Circulation Scheme (Banning) Act, 1978 and section 6 of the O.P.I.D. Act.

2. On the basis of the complaint petition filed by one Ashesh Kumar Parida before the learned S.D.J.M., Nilgiri, 1.C.C. Case No.124 of 2015 was registered and the said complaint petition was forwarded under section 156(3) of Cr.P.C. to the Inspector in-charge of Berhampur police station and accordingly, Berhampur P.S.Case No.56 of 2015 was registered under sections 420/468/465/ 294/506 of the Indian Penal Code, sections 4/5/6 of the Prize Chits and Money Circulation Scheme (Banning) Act, 1978 and section 6 of the O.P.I.D. Act.

It is the prosecution case as per the complaint petition that the appellant was the co-villager of the complainant who impersonated himself as the Zonal Director of Nilgiri Zone of Rose Valley Company and showed papers of the Company to the complainant and apprised him about different schemes of the Company and at last the complainant being convinced deposited money with the appellant in two schemes i.e. one at the rate of Rs. 840/- (rupees eight hundred forty) per month and another scheme at the rate of Rs.1,000/- (rupees one thousand) per month. In this process, the complainant continued to deposit money for five years and collected receipts and two certificates were issued in favour of the complainant, one amounting to Rs. 88,120/- (rupees eighty eight thousand one hundred twenty) and other amounting to Rs.1,05,744/- (rupees one lakh five thousand seven hundred forty four). When the complainant on completion of the period of five years came to the office at Nilgiri, he found the same to be locked and there was no employee present there. The complainant contacted the appellant over telephone, who told him that the office was shifted to his house and asked the complainant to meet him in his house. The complainant met the appellant in his house, who told him that the deposit has already been matured and he would get entire money within a month but thereafter, in spite of repeated approach of the complainant, the appellant did not refund back any money. On suspicion, the complainant approached the main

office of Rose Valley at Bhubaneswar and he showed the maturity certificate issued by the appellant in his favour and he came to know that the maturity certificate so also money receipts were forged by the appellant and the same has got no connection with the Rose Valley Company and no documents of the complainant was available in the Rose Valley Company. When the complainant confronted the appellant about his conduct in duping him in issuing fake certificates and receipts and asked him to refund the money immediately,the appellant abused the complainant in filthy language and admitted that he has not deposited any money taken by him from the complainant in the Rose Valley and issued fake certificates and he threatened the complainant with dire consequence. The complainant came to know that the appellant was a school teacher and he used to cheat people in this manner and misappropriated huge public money impersonating himself as the agent of different banks and that he has purchased costly cars and lands.

3. During course of investigation, the witnesses were examined, material documents were collected and the Investigating Officer found prima facie case against the appellant and accordingly, submitted charge sheet under sections 420/468/465/294/506 of the Indian Penal Code, sections 4/5/6 of the Prize Chits and Money Circulation Scheme (Banning) Act, 1978 and section 6 of the O.P.I.D. Act.

4. The appellant filed a petition for discharge under section 239 of Cr.P.C. before the learned trial Court. However, the learned trial Court after perusal of the first information report and the statements of the witnesses and the fact that the appellant posed himself as the Director of Rose Valley Company, Nilgiri Zone came to hold that the prima facie case is established relating to the commission of the offence under which charge sheet has been submitted and accordingly, rejected the petition for discharge as per the order dated 24.01.2020 and framed charges against the appellant under sections 420/468/465/294/506 of the Indian Penal Code, sections 4/5/6 of the Prize Chits and Money Circulation Scheme (Banning) Act, 1978 and section 6 of the O.P.I.D. Act.

5. When the matter was taken up for admission on 14.02.2022, the learned counsel for the appellant contended that the framing of charge under section 6 of the O.P.I.D. Act against the appellant is not sustainable in the eye of law as the same is applicable to a person, who is responsible for the management of the affairs of the Financial Establishment and neither there is any document nor any oral evidence available on record to show that the appellant is in any way connected with the management of the affairs of the Financial Establishment. Notice was issued to the respondent and the case was adjourned from time to time in order to enable the learned counsel for the respondent to obtain instruction

in terms of the order dated 14.02.2022 as to whether the appellant is in any way connected with the management of the affairs of Rose Valley or not. On 04.07.2022, when the matter was taken up, a submission was made on behalf of the learned Special Counsel appearing for the State of Odisha that prima facie it appears that the appellant posed himself as a Director of Rose Valley Company and collected huge amount from the depositors and again time was sought for to verify whether as there is any material either oral or documentary to show that the appellant was in any way responsible for the management of the affairs of the financial establishment i.e. Rose Valley Company. Today, learned Special Counsel for the State of Odisha has produced the enquiry report received from the Officer in-charge of Berhampur police station which indicates that on examination of the complainant and witnesses, it was ascertained that the then Investigating Officer, S.I. Gopal Singh seized Rose Valley agent register 2007/2008 (98 agents) and the same left in zima to Ramesh Chandra Sahu after executing proper zimanama. Similarly the then Investigating Officer seized Rose Valley acknowledgment slips-14 sheets from the complainant which were issued by the appellant and during enquiry, the complainant produced a Xerox copy of undertaking dated 18.09.2015 given before Gram Sabha, Naranpur in which the appellant had mentioned that after December, 2015, he would refund back the deposited money slowly to the depositors. Similarly, it is mentioned that the appellant absconded from the locality after registration of the case at Berhampur police station. The enquiry report is taken on record.

6. Section 6 of the O.P.I.D. Act deals with punishment for default in repayment of deposits and interests honouring the commitment. In order to attract the ingredients of the offence, the following aspects are to be proved:-

> (i) Default in returning the deposit by any Financial Establishment; or
> (ii) Default in payment of interest on the deposit or failure to return in any kind by any Financial Establishment; or
> (iii) Failure to render service by any Financial Establishment for which the deposits have been made.

In the event any of the aforesaid aspects is proved, every person responsible for the management of the affairs of the Financial Establishment shall be held guilty. 'Financial Establishment' has been defined under section 2(d) of the O.P.I.D. Act and 'deposit' has been defined under section 2(b) of the O.P.I.D. Act. The word 'default' in section 6 of the O.P.I.D. Act has been used in conjunction with honouring the commitment and therefore, it depends upon the reciprocal promises.

7. Mr. Bibekananda Bhuyan, learned Special Counsel appearing for the State of Odisha in O.P.I.D. Act matters fairly submitted that nothing has been

seized during course of investigation to show that the appellant was in any way responsible for the management of the affairs of the Rose Valley, however even though the appellant was not in the management of the affairs of Rose Valley but he posed himself as the Director of Rose Valley of Nilgiri Branch and collected deposits from different persons. He placed reliance in the case of **Prasan Kumar Patra and another -Vrs.- State of Odisha reported in (2020) 79 Orissa Criminal Reports 284** but the factual scenario of that case is quite distinguishable as the appellants of the said case were the Managing Director and Director of M/s. Z-Infra Construction Pvt. Ltd., Bhubaneswar, which is not the case here.

8. In view of the submissions made by the learned counsel for the respective parties and the materials available on record, I am of the humble view that one of the necessary ingredients of the offence under section 6 of the O.P.I.D. Act i.e. the person concerned must be responsible for the management of the affairs of Financial Establishment is conspicuously absent in the case. Therefore, the framing of charge under section 6 of the O.P.I.D. Act is not sustainable in the eye of law and the same is hereby quashed. However, I am of the humble view that there are sufficient materials on record for framing of charges under sections 420/468/465/294/506 of the Indian Penal Code and sections 4/5/6 of the Prize Chits and Money Circulation Scheme (Banning) Act, 1978 and as such impugned order dated 01.11.2021 of the learned trial Court in framing of charges for such offences is quite justified and upheld. The appellant is now to face trial before the appropriate Court and not before the Presiding Officer, Designated Court, OPID, Balasore.

Accordingly, the Criminal Appeal is partly allowed.

—— o ——

2022 (II) ILR - CUT-984

S.K. SAHOO, J.

CRLA NOs. 535 & 572 OF 2016

PRAMOD DAS .....Appellant

.V.

STATE OF ODISHA .....Respondent

CRLA NO. 572 OF 2016

1. PRADEEP PARIDA
2. BABAJI SAHU .....Appellants

.V.

STATE OF ODISHA .....Respondent

CRIMINAL TRIAL – Narcotic Drugs and Psychotropic Substances Act, 1985 – Offences punishable U/ss. 20(b)(ii)(C)/25/29 of the Act – Independent witnesses not being declared hostile by prosecution – There is doubt that, the sample packets were kept in safe custody before its production in Court – Neither the brass seal, nor the paper slip containing seal impression was produced before the Court at the time of production of the bulk quantity of ganja and also the sample packets for its comparison – No explanation has been offered as to why there was delayed production of the sample packets before the Chemical Examiner – Effect of – Held, in my humble view, the conviction of the appellants under section 20(b)(ii)(C) and section 25 of the N.D.P.S. Act is not sustainable in the eye of law. (Para 12)

Case Laws Relied on and Referred to :-

1. (2019) 74 OCR 848 : Sumit Ku.Behera -Vrs- State of Odisha
2. A.I.R. 2000 S.C 821 : Abdul Rashid Ibrahim Mansuri -Vrs- State of Gujarat
3. (2008) 16 S.C.C417 : Noor Aga -Vrs.- State of Punjab

For Appellants : Mr. Soura Ch. Mohapatra, Mr. Satya Mohapatra, Mr. Puspamitra Mohapatra, Mr. Sambit Biswal.

For Respondent: Mr. Manoranjan Mishra, ASC

JUDGMENT Date of Hearing and Judgment : 04.08.2022

S.K. SAHOO, J.

1. The appellant Pramod Das in CRLA No. 535 of 2016 and the appellants Pradeep Parida and Babaji Sahu in CRLA No. 572 of 2016 faced trial in the Court of learned Special Judge, Gajapati, Parlakhemundi in G.R. Case No.31 of 2013 (T.R. No.14 of 2014) for offences punishable under sections 20(b)(ii)(C) /25/29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereafter 'N.D.P.S. Act') on the accusation that on 08.10.2013 at about 11.30 a.m. at Chaptapanka chowk, they were found transporting 71 kgs.60 grams of contraband ganja in three jari bags through a white colour Indica car bearing registration No. OR-05-Z-9076 without having any licence or authority and they were knowingly using the said car for transportation of ganja and were party to criminal conspiracy.

The learned trial Court vide impugned judgment and order dated 24.09.2016 held the appellants not guilty of the offence under section 29 of the N.D.P.S. Act but found them guilty under sections 20(b)(ii)(C)/25 of the N.D.P.S. Act and sentenced each of them to undergo rigorous imprisonment for a period of ten years each and to pay a fine of Rs. 1,00,000/- (rupees one lakh) each, in default, to undergo further rigorous imprisonment for a period of one

year for the offence on each count and the sentences were directed to run concurrently.

Since both the criminal appeals arise out of same judgment, with the consent of learned counsel for the respective parties, those were heard analogously and disposed of by this common judgment.

2. The prosecution case, in short, is that on 08.10.2013, as per the direction of the Inspector in-charge of Mohana police station Sri B.P. Minj (P.W.14), Sri Mrunal Kalo (P.W.13), the S.I. of Police of the said police station along with other police staffs, namely, Sri Jagadish Panda (P.W.1), the A.S.I. of Police, constable Rajib Sabar (P.W.10), constable Ramakanta Sabar (P.W.3) and two home guards were performing patrolling duty at Chapatapanka area and at about 11.30 a.m., they found that one white colour Indica car bearing registration No.OR-05-Z-9076 was coming from Adava side in a high speed. They intercepted the said vehicle and found that the appellants were the occupants of the said vehicle. They also found the smell of ganja was coming out of the vehicle. P.W.13 interrogated the occupants who revealed their names and the appellant Pramod Das was the driver of the vehicle, the appellant Pradeep Parida was sitting on the front seat and the appellant Babaji Sahu was sitting in the back side of the vehicle. The appellants confessed before P.W.13 that they were transporting the ganja in the vehicle to Berhampur for sale. The driver appellant Pramod Das opened the dickey of the vehicle and two jari packets containing ganja was found in it and another jari packet was also found on the back seat of the vehicle by the side of appellant Babaji Sahu. P.W.13 immediately informed about the detection to the Inspector in-charge of Mohana police station Sri B.P. Minj (P.W.14) and also to the Superintendent of Police, Gajapati over phone. The appellants further revealed that they collected the ganja from Raygada area and they were transporting the ganja at the instance of the owner of the vehicle to Paradeep. P.W.13 issued a single notice to all the appellants to give their options about their right to be searched in presence of a gazetted officer or a Magistrate and the appellants opted to be searched in presence of a gazetted officer. P.W.13 informed P.W.14 about the option given by the appellants and requested him to send a gazetted officer to the spot. P.W.13 directed P.W.10 to bring a weighman along with weighing machine and P.W.13 called the two independent witnesses, who were passing on the road to be present at the time of search and seizure. At 2.50 p.m., the S.D.P.O. R.Udayagiri Sri Rabindra Kumar Sethi (P.W.11) arrived at the spot to act as gazetted officer and the weighman Sri Simanchal Sahu (P.W.7) also arrived. P.W.11 gave his identity to the appellants and the police party gave their personal search to the appellants and then the appellants individually gave their search to the raiding

party and no such incriminating material was found from the personal search of the appellants. Then they searched the vehicle and recovered three jari packets containing ganja and with the help of P.W.7, they weighed the three packets which came to 20 kg. 590 grams, 20 kg. 390 grams and 30 kg. 080 grams approximately and the entire seized ganja was around 71 kg. 60 grams. P.W.13 drew the samples at the spot i.e. 50 grams from each bag and marked as A1, A2, B1, B2, C1, C2 and then he mixed the contraband ganja of all the three jari bags homogeneously and drew two sample packets of 50 grams each from the homogeneous mixed ganja and marked as 'S1' and 'S2'. Then the sample ganja and bulk ganja packets were sealed properly by P.W.13 by using his personal brass seal in presence of the gazetted officer and independent witnesses and then the seizure list (Ext.5/2) was prepared. P.W.13 seized the weighing machine on the production of P.W.7 and prepared the seizure list (Ext.7/3) and left the weighing machine and his personal brass seal in the zima of P.W.7 as per zimanama (Ext.12). P.W.13 seized the vehicle from the possession of the appellants as per the seizure list (Ext.6/2). P.W.13 prepared the specimen seal impression slip (Ext.15) and also prepared the F.I.R. (Ext.16) at the spot and then he and the other police staff returned to Mohana police station along with the seized articles and the appellants and P.W.13 presented the written report before the P.W.14 and handed over the seized articles to him.

On the basis of such first information report, Mohana P.S. Case No.81 dated 08.10.2013 was registered under sections 20(b)(ii)(C)/25/29 of the N.D.P.S. Act against the appellants and also against the owner of the vehicle bearing registration No.OR-05-Z-9076 so also against one Manoj Nayak and Salil Majhi.

P.W.14 took up investigation of the case and received the seized articles from P.W.13 which the latter had seized from the appellants and prepared another seizure list (Ext.1). During course of investigation, P.W.14 examined P.W.13 and other witnesses like seizure witnesses, visited the spot,prepared the spot map (Ext.18). P.W.14 kept the seized mal item in the P.S. Malkhana and arrested the appellants and he submitted the detailed report to the D.P.O., Gajapati and forwarded the appellants to the Court. P.W.14 sent the samples being collected by P.W.13 to R.F.S.L., Berhampur through the Special Court and the Court received the chemical examination report (Ext.19). P.W.14 ascertained the name of the owner of the vehicle as Kishore Chandra Dash and the appellants confessed before him that they procured ganja nearly 71 kgs. and 60 grams from one Saila Majhi @Ramesh Majhi. Consequent upon his transfer, P.W.14 handed over the charge to P.W.15 on 22.03.2014. On 27.03.2014 at about 10.00 a.m., P.W.15 seized the Malkhana register and station

diary entry of Mohana police station on the production of P.W.13 in presence of the witnesses and prepared a seizure list (Ext.13). On 30.03.2014, P.W.15 seized the detailed report from the Head Moharir, D.C.R.B., D.D.O., Gajapati in presence of witnesses and prepared the seizure list (Ext.14). P.W.15 obtained the N.B.W. in respect of accused persons Kishore Chandra Dash, Manoj Naik and Salil Majhi @Ramesh Majhi. On 05.04.2014, on completion of investigation, P.W.15 submitted charge sheet against the appellants under sections 20(b)(ii)(C)/25/29 of the N.D.P.S. Act.

3. The appellants were charged under sections 20(b)(ii)(C)/25/29 of the N.D.P.S. Act for illegal transportation of 71 kgs. 60 grams of contraband ganja contained in three jari bags in a white colour Indica car bearing registration No.OR-05-Z-9076 without having any licence or authority and they knowingly used the said Indica car for transportation of ganja and were party to criminal conspiracy, which they refuted, pleaded not guilty and claimed to be tried.

4. During the course of trial, in order to prove its case, the prosecution examined fifteen witnesses.

P.W.1 Jagadish Panda who was the A.S.I. of police attached to Mohana police station was one of the members of the patrolling party and he stated about the detention of the vehicle, presence of the appellants in the said vehicle and seizure of contraband ganja from the vehicle.

P.W.2 Purna Chandra Behera was the constable attached to Mohana police station and he is also a witness to the seizure of ganja as per seizure list vide Ext.1.

P.W.3 Ramakanta Sabar was the constable attached to Mohana police station and he was a member of the patrolling party. He stated about the detention of the vehicle, presence of the appellants in the said vehicle and seizure of contraband ganja from the vehicle.

P.W.4 Saroj Kumar Patnaik and P.W.5 Anuja Kumar Bisoi are the two independent witnesses and also witnesses to the seizure but they have not supported the prosecution witnesses. They stated that they put their signatures at the police station at the instance of the police but the prosecution has not declared them hostile.

P.W.6 Susanta Pal did not support the prosecution case.

P.W.7 Simanchal Sahu who was the weighman did not support the prosecution case. He proved his signature on the zimanama (Ext.12).

P.W.8 Krushna Chandra Jamadar was the Head Moharir at D.P.O., Paralakhemundi. He stated that the Inspector in-charge of Mohana police station

(P.W.15) seized the detailed report from him in connection with the case and prepared the seizure list (Ext.14).

P.W.9 Ludinga Jambu was the constable attached to Mohana police station and he stated about the seizure of malkhana register of Mohana police station and one original station diary from P.W.13 under seizure list (Ext.13) and also seizure of detailed report from P.W.8 as per seizure list (Ext.14).

P.W.10 Rajib Sabar who was the constable attached to Mohana police station was one of the members of the patrolling party and he stated about the detention of the vehicle, recovery of three bags of ganja from the vehicle. He was sent to Mohana village to bring weighing apparatus and he stated that P.W.7 weighed the contraband articles in presence of the S.D.P.O. (P.W.11).

P.W.11 Rabindra Kumar Sethi was the S.D.P.O.,R.Udayagiri, in whose presence, the weighment was made and samples were drawn.

P.W.12 Dillip Kumar Pradhan was the constable attached to Mohana police station and he stated about the seizure of malkhana register and station diary on production of P.W.13 under seizure list Ext.13 and also seizure of detailed report on production of P.W.8 under seizure list Ext.14.

P.W.13 Mrunal Kalo who was the S.I. of Police attached to Mohana police station is also the informant in the case. He stated that on the date of occurrence, as per the direction of the then I.I.C. (P.W.14), he along with P.W.1, P.W.3,P.W.10 and two home guards went to Chapatapanka area on patrolling duty. He further stated that at about 11.30 a.m., they intercepted one white colour car bearing registration No.OR-05-9076 in which the appellants were the occupants and three jari packets containing contraband ganja was found in the vehicle. He stated about the weighment of the contraband ganja taken by P.W.7 and drawal of sample packets and its seizure and also about the seizure of the vehicle. He further stated that they brought the seized articles and the appellants to the police station and he lodged the first information report before the Inspector in-charge of Mohana police station.P.W.14 Binaya Prakash Minj was the Inspector in-charge attached to Mohana police station who registered the case on the report of P.W.13, took up investigation, kept the seized mal items in the P.S. Malkhana and arrested the appellants. He submitted the detailed report to the D.P.O., Gajapati and forwarded the appellants to the Court and made prayer before the Court to send the samples to R.F.S.L., Berhampur for chemical examination and ascertained the name of owner of the vehicle to be Kishore Chandra Dash and on his transfer, he handed over the charge to P.W.15.

P.W.15 Ashok Kumar Parida was the Inspector in-charge of Mohana police station. He seized the Malkhana register and station diary of Mohana police station and also seized the detailed report from P.W.8 and on completion of investigation, he submitted the charge sheet on 05.04.2014.

5. The prosecution exhibited twenty two documents. Ext.1 is the seizure list dated 08.10.2013 prepared by P.W.14 on receiving seized articles from P.W.13, Exts.2, 3 and 4 are the personal search lists dated 08.10.2013 of appellants Pramod Das, Pradeep Parida and Babaji Sahu respectively, Ext.5/2 is the seizure list dated 08.10.2013 of the seized ganja packets so also sample packets, Ext.6/2 is the seizure list dated 08.10.2013 of Indica car, Ext.7/3 is the seizure list dated 08.10.2013 of weighing machine, Ext.8/2 is the search notice to the appellants, Ext.9/2 is the personal search slip of the appellants, Exts.10/2 and 1/2 are the personal search slips of the officials and witnesses, Ext.12 is the zimanama dated 08.10.2013 of the weighing machine and brass seal given to P.W.7, Ext.13 is the seizure list dated 27.03.2014 of Original Malkhana Register and Station Diary, Ext.14 is the seizure list dated 30.03.2014 of detailed report, Ext.15 is the specimen seal impression slip, Ext.16 is the plain paper F.I.R., Ext.17 is the zimanama of Original Malkhana Register and Station Diary, Ext.18 is the spot map, Ext.19 is the chemical examination report, Ext.20 is the true copy of Malkhana register showing the entry regarding the keeping of seized articles in the malkhana, Ext.21 is the page no.167 of the station diary book maintained from 29.09.2013 to 28.10.2013, Ext.21/1 is the entry regarding the case matter made on dated 08.10.2013, Ext.21/2 is the entry Sl. No.181 regarding the case matter on dated 08.10.2013 and Ext.22 is the detailed report dated 09.10.2013 submitted by P.W.14 to the Superintendent of Police, Gajapati.

The prosecution also proved four material objects. M.O.I to M.O.IV are the sample packets.

No witness was examined on behalf of the defence.

6. The defence plea of the appellants was one of complete denial. It is further pleaded by the appellant Pramod Das that while he was returning after visiting Majhigharani temple of Rayagada, police detained him and falsely entangled in the case.

7. The learned trial Court after assessing the oral as well as documentary evidence on record has been pleased to hold that the evidence of the informant (P.W.13) is found corroborated by the gazetted officer (P.W.11), P.W.3 and P.W.10. It is further held that the evidence of the informant and other official witnesses is found to be clear, cogent and clinching in material particulars regarding seizure of the white colour Indica car with huge quantity of ganja from

the possession of the appellants, who were found inside the car. It is further held that the evidence of P.Ws.1, 3, 10, 11 and 13 cannot be disbelieved on the point of search and seizure of contraband ganja from the possession of the appellants merely because some independent witnesses have not supported their testimonies. It is further held that the first part of the prosecution case regarding exclusive and conscious possession of ganja by the appellants on the relevant date, time and place is well proved and basing upon suspicion only and without any rebuttal evidence, the evidence of the official witnesses cannot be discarded which is otherwise clear, cogent, trustworthy and believable. It is further held that there is no infraction of section 55 of the N.D.P.S. Act merely because the Inspector in-charge of Mohana police station did not put his personal seal upon the seized articles and there is also sufficient compliance of the provision under section 57 of the N.D.P.S. Act. It is further held that the action taken by the informant at the spot and the subsequent two I.Os. indicate that the provisions under sections 43, 50, 52-A, 55 and 57 of the N.D.P.S. Act have been complied with. It is further held that there is no evidence that transportation of illegal ganja was made in pursuance of criminal conspiracy of the appellants with each other and as such the learned trial Court acquitted the appellants of the charge under section 29 of the N.D.P.S. Act, however found all of them guilty under sections 20(b)(ii)(C) and 25 of the N.D.P.S. Act.

8. Mr. Soura Chandra Mohapatra, learned counsel being ably assisted by Mr. Satya Mohapatra, Mr. Puspamitra Mohapatra and Mr. Sambit Biswal, Advocates appearing for the appellants in CRLA No.572 of 2016, namely, Pradeep Parida and Babaji Sahu contended that the evidence of the official witnesses to the search and seizure, the manner of collection of sample and sealing of the articles are discrepant and when independent witnesses have not supported the prosecution case, it would be very risky to convict the appellants on the basis of the evidence of the official witnesses only in a case of this nature. It is argued that the independent witnesses like P.Ws.4, 5 and 7 have not been declared hostile by the prosecution and since their version has remained unchallenged, it gives a death knell to the prosecution case. Reliance was placed in the case of ***Sumit Kumar Behera -Vrs.- State of Odisha*** reported in ***(2019) 74 Orissa Criminal Reports 848*** on this point. According to Mr. Mohapatra, learned trial Court has not given any reasons as to why the evidence of the aforesaid three independent witnesses are not acceptable particularly when the prosecution has not challenged their version. He argued that when in view of the unchallenged testimony of the independent witnesses, two different versions are coming forth, the appellants are entitled to get benefit of doubt. He further argued that some of the official witnesses have not stated at all about the sealing of the seized articles including the sample packets at the spot much less about the

use of any paper slips to seal it, there are discrepancies in the manner in which the gunny bags were found inside the car and even the presence of the appellants inside the car. It is argued that when the seized articles were produced before the Inspector in-charge of Mohana police station, there is no evidence that it was resealed by the Inspector in-charge. The evidence of P.W.14, the Inspector in-charge is totally silent that the seized articles were produced before him in sealed condition with paper slips. The seizure list Ext.1 is also silent in that respect and thus, there is no evidence regarding compliance of section 55 of the N.D.P.S. Act. It is argued that the Malkhana register entry does not indicate that the sample packets were kept in police Malkhana with the bulk quantity of ganja in three jari bags and there is no evidence as to where those sample packets were kept after its production in police station and before those were dispatched to the Court and thus, in view of the Malkhana register entry, the keeping of seized articles in safe custody is a doubtful feature. It is argued that neither the brass seal, which was used for sealing nor the specimen seal impression on paper was produced at the time of production of seized articles i.e. bulk quantity of ganja in three bags so also the sample packets in the Court for comparison. Learned counsel submitted that the order sheet of the learned Magistrate indicates that the sample packets were handed over to P.W.13 Mrunal Kalo for its production before the Chemical Examiner but the evidence of P.W.13 is completely silent on this aspect. The Chemical Examination Report indicates that the sample packets were produced by the constable C/48 G.K. Panda, who has not been examined in the case. Learned S.D.J.M. handed over the sample packets to P.W.13 as per the order sheet on 09.10.2013 for its production before the Chemical Examiner but it was received in the office of the Chemical Examiner on 15.10.2013 which would be evident from the C.E. Report. No explanation has been offered by the prosecution about such delay and who kept the sample packets during that intervening period and in what condition and where. In the C.E. Report also there is nothing to show that the sample packets were having paper slips when those were received. The Investigating Officer (P.W.14) stated that he came to know about the detection at 5.25 p.m. on 08.10.2013 and therefore, the evidence of the other witnesses that P.W.14 arranged the weighman (P.W.7) and gave intimation to the S.D.P.O. (P.W.11) to visit the spot and to remain present at the time of search and seizure is doubtful. It is further argued that the ingredients of the offence under section 25 of the N.D.P.S. Act are not made out and when the evidence adduced by the prosecution relating to the search and seizure, sealing of the articles, its production in Court are discrepant in nature, it is a fit case where benefit of doubt should be extended in favour of the appellants.

Mr. B.R. Tripathy, learned counsel appearing for the appellant Pramod Das in CRLA No.535 of 2016 adopted the argument of Mr. Soura Chandra Mohapatra, Advocate and contended that the appellant may be given benefit of doubt.

Mr. Manoranjan Mishra, learned Additional Standing Counsel, on the other hand, submitted that lacunas, if any, in the prosecution case and the inconsistencies do not go to the root of the matter to discard the entire prosecution case. The law is well settled that even on the evidence of official witnesses, conviction can be sustained and when the contraband articles were recovered from a car in which the appellants were found and they have not adduced any rebuttal evidence, it can be said that they had the culpable state of mind, which can be presumed under section 35 of the N.D.P.S. Act and presumption of commission of offence can be drawn under section 54 of the N.D.P.S. Act on account of their failure to account the possession satisfactorily. Learned counsel further submitted that it is a usual feature that the independent witnesses do not support the prosecution case in such cases but the learned trial Court has accepted the version of the official witnesses rightly and the C.E. Report confirms that whatever was seized from the possession of the appellants was nothing but ganja and as such there is no illegality or infirmity in the impugned judgment and therefore, the appeal should be dismissed.

9. Law is well settled that even though the independent witnesses have not supported the prosecution case which is usual feature in a case of N.D.P.S. Act, the same cannot be a ground to discard the entire prosecution case, if on the basis of the evidence of the official witnesses, the Court comes to a finding that the accusations that has been levelled against the accused is proved beyond all reasonable doubt. Before accepting the evidence of the official witnesses only and convicting the accused on the basis of such evidence, the Court must be satisfied that the same is clear, cogent, trustworthy and reliable. If the evidence is discrepant in nature and it creates doubt in the mind of the Court regarding the implication of the accused persons, then benefit of doubt is to be extended in their favour.

Effect of independent witnesses not being declared hostile by prosecution:

The submission regarding the unchallenged testimony of three independent witnesses raised by the learned counsel for the appellants is to be discussed first. P.W.4 has stated that he did not know the appellants and he put his signatures shown to him at the police station at the instance of the police and his signatures have been marked as Exts.2, 3, 4,5, 6 and 7. He specifically stated in the chief examination that nothing was written on the papers when he signed the same and he further stated that nothing was written on

the papers in which his other signatures i.e. Exts.8, 9 and 11 are appearing. P.W.4 has not been declared hostile by the prosecution.

P.W.5 has also stated similarly that he has put his signatures on plain papers at the police station at the instance of the police and he has also not been declared hostile by the prosecution.

P.W.7 as per the prosecution case is the weighman but he stated that the papers were blank when he signed the documents and put his signature as Ext.7/2. He specifically stated that he has not seen weighing of sample and collection of sample. This witness has also not been declared hostile by the prosecution.

In the case of **Sumit Kumar Behera** (supra), it has been held as follows:

> "9. Two independent witnesses have been examined in the case and they are P.W.1 and P.W.2. Both the witnesses have not stated anything against the appellants. P.W.1 has stated that the spot is about 1 km. away from Iswari Dhaba and the spot was P.W.D. Bunglow Chowk of Podamari. He further stated that the bags were kept in front of P.W.D. I.B., which were seized and carried to Berhampur. P.W.2 has also stated that ten bags of contraband ganja were seized in front of P.W.D. I.B., Podamari. None of these witnesses have stated anything regarding the seizure of ten jerry bags containing contraband ganja from a car in front of Iswari Dhaba. They have not been declared hostile by the prosecution. If a witness resiles from his earlier statement given either to police or before the Magistrate, the Public Prosecutor can declare him as a hostile witness and with the permission of the Court, can put any questions to him which might be put in the cross-examination by the defence counsel in view of section 154 of the Evidence Act. If the Public Prosecutor fails to do so, the defence can take advantage from such unchallenged testimony to strengthen the defence plea. Of course, the Public Prosecutor can advance his argument that even though a particular prosecution witness has not been declared hostile but his evidence is not otherwise trustworthy and should be discarded and then it is for the Court to decide the acceptability of such argument. In case of **Raja Ram** (supra), it has been held that when P.W.8 has not been declared hostile by the Public Prosecutor for reasons only known to him, the evidence of P.W.8 is binding on the prosecution and such testimony cannot be sidelined. Basing on the ratio laid down in the aforesaid Supreme Court judgment, I am of the humble view that the evidence of P.W.1 and P.W.2 cannot be totally sidelined and their evidence creates doubt with regard to the prosecution case that the contraband ganja was seized in front of Iswari Dhaba from a car and the appellants were found in the car."

If the Public Prosecutor is not prepared to own the testimony of the witness examined by him, he can seek the permission of the Court as envisaged in section 154 of the Evidence Act at any stage of the examination, nonetheless a discretion is vested with the Court whether to grant the permission or not. Section 154 does not in terms, or by necessary implication confine the exercise of the power by the Court before the examination-in-chief is concluded or to any

particular stage of the examination of the witness. It is wide in scope and discretion is entirely left to the Court to exercise the power when the circumstances demand. Therefore, by not declaring the aforesaid three independent witnesses hostile and not seeking permission of the Court as per section 154 of the Evidence Act, the prosecution has left their evidence unchallenged and uncontroverted and therefore, such evidence cannot be totally ignored and it would be difficult not to accept their statements made in Court during trial and it cannot be said at the outset that whatever they have stated in Court are false statements.

Discussion on the version of official witnesses to the search and seizure:

The evidence of P.W.1, the A.S.I. of Police indicates that while he was performing M.V. duty along with others as per the instruction of the Inspector in-charge of Mohana police station, they detained one white colour Indica car in which the appellants were there and on the rear seat, he found three plastic bags were kept. He has not stated about the sealing of either ganja packets in which bulk quantity were there or the sample packets. He has also not stated that seal impression was given on the paper slips which were pasted on the batch.

The next official witness P.W.3 is a constable and he has stated that one jari bag was kept near the person, who was sitting in the rear seat and two jari bags were there in the dickey of the car. This statement runs contrary to the evidence of P.W.1 as to where the jari bags were found. Though P.W.3 has stated about the weighing of the seized articles and particularly the collection of the samples therefrom but his evidence is also silent regarding sealing of either the bulk quantity of ganja or the sample packets. His evidence is also silent about any paper slip impression given on the packets.

The evidence of P.W.10, the constable is completely silent that the appellants were present inside the car and his evidence is also silent about the sealing of the seized articles at the spot.

P.W.11 was the S.D.P.O., R.Udayagiri in whose presence the weighment was made and samples were drawn but his evidence is also silent regarding sealing of bulk quantity or the sample packets with the personal brass seal of the informant (P.W.13).

When the sample packets were produced before the learned S.D.J.M., Paralakhemundi in sealed condition, in the order sheet, it has not been mentioned that paper slips with seal were found in it. Therefore, the evidence of the official witnesses regarding the sealing of the seized articles and the manner in which it was sealed and the exact place where the ganja packets were found inside the car are discrepant.

P.W.13, the informant has stated that he not only weighed the three packets of ganja but also drew samples in duplicate from each of the packets. He also stated that he left his personal brass seal in the zima of Simanchal Sahu (P.W.7), the weighman but his evidence is also silent that the bulk quantity of ganja and the sample packets were sealed at the spot and that his own brass seal was used for sealing the articles and in the preparation of paper slips.

The evidence of P.W.13 indicates that he returned to Mohana police station along with the seized articles and the appellants and presented the written report before the Inspector in-charge Sri Binay Prakash Minz (P.W.14), who re-seized the seized articles as per the seizure list Ext.1 but the evidence of P.W.14 is silent that when the seized articles were produced, those were in sealed condition. Though it is the prosecution case that the seized articles along with the sample packets were kept in police Malkhana on 08.10.2013 and it was produced in Court on the next day i.e. on 09.10.2013 but the Malkhana register entry, which has been marked as Ext.20 only indicates that three bulk quantity of ganja packets were kept in the Malkhana. Therefore, there is no evidence as to where the sample packets were kept before its production in Court.

Law is well settled that the prosecution has to adduce cogent, reliable and unimpeachable evidence to substantiate that the seized articles were properly sealed and there was no chance of tampering with the packets during its retention at the police station and that the seized articles were the very articles produced before the Magistrate for sending the same to the Chemical Examiner. When in view of the entry in the Malkhana register, the prosecution is not offering any explanation as to where sample packets were kept if not kept in P.S. Malkhana and with whom, the safe custody of the seized articles becomes doubtful.

Admittedly, the personal brass seal of P.W.13 which is stated to have been used for sealing the bulk quantity of ganja so also the sample packets was not produced in Court either at the time of production of the articles at the first instance or during trial. Though specimen seal impression of P.W.13 vide Ext.15 was prepared but the same was not produced on 09.10.2013 either before the learned Special Judge, Paralakhemundi or before the learned S.D.J.M., Paralakhemundi for making necessary comparison with the seal impression, which was appearing in the sample packets or the bulk quantity of ganja kept in three packets. Handing over the brass seal to a reliable person and asking him to produce it before the Court at the time of production of the seized articles in Court for verification are not empty formalities or rituals but is a necessity to eliminate the chance of tampering with the articles while in police custody.

The order sheet of the learned S.D.J.M., Paralakhemundi indicates that P.W.13 was present and he produced four sealed envelopes which were marked as Exts.A1,B1, C1 and S1 and the learned Magistrate kept the sample packets in a paper cartoon, which was kept in a white cloth bag and stitched and the personal seal impression of the learned Magistrate was given on it. The copy of the forwarding report was handed over to P.W.13 and he was asked to produce the paper cartoon before the Deputy Director, R.F.S.L., Berhampur at an earliest with an intimation to the Court but most peculiarly the evidence of P.W.13 is completely silent that he produced the sample packets before the learned S.D.J.M., Paralakhemundi or he was handed over the paper cartoon containing the sample packets in a sealed condition to be produced before the Chemical Examiner. The Chemical Examination Report, which has been marked as Ext.19 indicates that one parcel was received in the Office on 15.10.2013 through C/48 G.K. Panda. Admittedly, the said constable G.K. Panda has not been examined in the case and no evidence has been adduced by the prosecution as to why there was such an inordinate delay in producing the sample packets before the Chemical Examiner and where the paper cartoon was kept from 09.10.2013 till 15.10.2013. The Chemical Examination Report further indicates that there are four numbers of sealed paper packets marked as Exts.A1, B1, C1 and S1 were found inside the parcel but it is not mentioned that any paper slips containing any seal was there in those sample packets.

The evidence of P.W.3, the constable indicates that the Inspector in-charge (P.W.14) had sent the weighman with the weighing machine and he was Simanchal Sahu (P.W.7). P.W.11, the S.D.P.O., R.Udayagiri has stated that on receipt of the information from the Inspector in-charge of Mohana police station i.e. P.W.14 over phone about the detection of the N.D.P.S. Act case, he proceeded to the spot. It is the prosecution case that both the weighman (P.W.7) and the S.D.P.O. (P.W.11) were present at the time of weighment of the seized articles and preparation of the seizure list Ext.5/2. The seizure list was prepared on 10.10.2013 at 3.30 p.m., but most peculiarly the I.O. (P.W.14) has stated that at about 5.35 p.m. on 08.10.2013, he came to know about the detection of the case. If at that point of time according to P.W.14, for the first time, he came to know about the detection of the case, then question of arranging a weighman by him or giving intimation to the S.D.P.O. at a prior point of time does not arise.

Section 55 of the N.D.P.S. Act deals with police to take charge of articles seized and delivered and it states, inter alia, that an officer-in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area

of that police station and which may be delivered to him and to affix his seal to such articles but the evidence of P.W.14 is totally silent on this vital aspect rather he has stated that he has not mentioned the Malkhana sl. no. in the sample packets vide M.O.I to M.O.IV which were sent to R.F.S.L., Berhampur.

Charge under section 25 of the N.D.P.S. Act:

10. Now, coming to the conviction of the appellants under section 25 of the N.D.P.S. Act and the points raised by the learned counsel for the appellants, the ingredients of section 25 of the N.D.P.S. Act appear to be as follows:

> (i) The accused must be either the owner or occupier or he must be having the control or use of any house, room, enclosure, space, place, animal or conveyance;
>
> (ii) He must have knowingly permitted such house, conveyance etc. to be used for the commission of an offence punishable under any provision of N.D.P.S. Act by any other person.

There is no evidence that any of the appellants was the owner of the car. Though P.W.14 has stated that he ascertained the owner of the vehicle is one Kishore Chandra Dash but no documentary evidence has been produced in that respect. Mere ownership of the vehicle in which transportation of contraband articles was found is by itself not an offence. The words 'knowingly permits' are significant. Thus, it is for the prosecution to establish that with the owner's or driver's knowledge, the vehicle was used for commission of an offence under the N.D.P.S. Act by another person. However, once the prosecution establishes the ownership as well as grant of permission by the accused to use his house or vehicle etc. by another person for commission of any offence under the N.D.P.S. Act, the burden shifts to the accused and he has to give rebuttal evidence to disprove such aspects. In the case in hand, even if the prosecution case is that the appellants were the occupiers of the vehicle is taken into account, but there is absence of material that they permitted the vehicle to be used for the commission of the offence under the N.D.P.S. Act by any other person.

In view of the foregoing discussions, I am of the humble view that the prosecution woefully failed to bring home the charge against the appellants under section 25 of the N.D.P.S. Act.

Applicability of sections 35 and 54 of the N.D.P.S. Act:

11. Adverting to the contention of the learned counsel for the State regarding applicability of sections 35 and 54 of the N.D.P.S. Act, section 35 of the N.D.P.S. Act deals with presumption of 'culpable mental state' and it provides that in any prosecution for an offence under N.D.P.S. Act which requires a culpable mental state of the accused, the Court shall presume the existence of

such mental state. 'Culpable mental state' as per the explanation to section 35 includes intention, motive, knowledge of a fact and belief in or reason to believe, a fact. Culpable mental state of an accused has to be proved as a fact beyond reasonable doubt and not merely when its existence is established by a preponderance of probabilities. The accused is to prove that he was not in conscious possession of the contraband, if it is proved by the prosecution that he was in possession thereof and he is also to prove that he has no such mental state with respect to the act charged as an offence.

In the case of ***Abdul Rashid Ibrahim Mansuri -Vrs.- State of Gujarat*** *reported in* ***A.I.R. 2000 Supreme Court 821***, it is held as follows:-

> "22. The burden of proof cast on the accused under section 35 can be discharged through different modes. One is that, he can rely on the materials available in the prosecution evidence. Next is, in addition to that he can elicit answers from prosecution witnesses through cross- examination to dispel any such doubt. He may also adduce other evidence when he is called upon to enter on his defence. In other words, if circumstances appearing in prosecution case or in the prosecution evidence are such as to give reasonable assurance to the court that appellant could not have had the knowledge or the required intention, the burden cast on him under Section 35 of the Act would stand discharged even if he has not adduced any other evidence of his own when he is called upon to enter on his defence."

In the case of ***Noor Aga -Vrs.- State of Punjab*** reported in ***(2008) 16 Supreme Court Cases 417***, it is held as follows:-

> "58. Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place the burden of proof in this behalf on the accused; but a bare perusal of the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of the accused on the prosecution is 'beyond all reasonable doubt' but it is 'preponderance of probability' on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.
>
> 59. With a view to bring within its purview the requirements of section 54 of the Act, element of possession of the contraband was essential so as to shift the burden on the accused. The provision being exceptions to the general rule, the generality thereof would continue to be operative, namely, the element of possession will have to be proved beyond reasonable doubt."

The appellants have taken a plea of denial and they have not admitted that either they were present in the car or carrying any contraband articles. The prosecution has failed to prove the foundational facts so as to attract the

ingredients of the offences and therefore, sections 35 and 54 of the N.D.P.S.Act will no way be helpful to the prosecution.

12. In view of the foregoing discussions, when there are glaring discrepancies in the evidence of official witnesses relating to the manner of collection of samples, seizure and sealing of the articles, when the independent witnesses have given a total different version and their evidence has remained unchallenged and uncontroverted, when there is doubt that the sample packets were kept in safe custody before its production in Court, when neither the brass seal nor the paper slip containing seal impression was produced before the Court at the time of production of the bulk quantity of ganja so also the sample packets for its comparison, when no explanation has been offered as to why there was delayed production of the sample packets before the Chemical Examiner and in whose custody, the sample packets were kept and the evidence is lacking relating to compliance of section 55 of the N.D.P.S. Act, in my humble view, the conviction of the appellants under section 20(b)(ii)(C) so also section 25 of the N.D.P.S. Act is also not sustainable in the eye of law.

Accordingly, both the Criminal Appeals are allowed. The impugned judgment and order of conviction and sentence passed by the learned trial Court is hereby set aside. The appellants are acquitted of the charges under sections 20(b)(ii)(C) and 25 of the N.D.P.S. Act. The appellants who are in jail custody shall be released forthwith if their detention is otherwise not required in any other case.

The trial Court records with a copy of this judgment be sent down to the concerned Court forthwith for information and necessary action.

—— o ——

2022 (II) ILR - CUT-1000

K.R. MOHAPATRA, J & M. S. RAMAN, J.

W.P.(C) NO. 14163 OF 2022

M/s. ATLAS PVC PIPES LTD. .....Petitioner

.V.

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

ODISHA GOODS AND SERVICES TAX ACT, 2017 – Section 107 r/w Odisha Goods and Services Tax Rules, 2017 – Rule 108(3) – The petitioner filed the appeal memorandum along with impugned order available on the GST portal instead of certified copy within the time

before the Appellate Authority – Whether the Appellate Authority under the OGST Act, 2017, was justified in dismissing the Petitioner's appeal on the grounds that, the appeal was not presented within the time prescribed under law? – Held, No – On default in compliance of such a procedural requirement, merit of the matter in appeal should not have been sacrificed – Since the Petitioner has enclosed the copy of impugned order as made available to it in the GST portal while filing the Memo of Appeal, non-submission of certified copy is to be treated as mere technical defect.

Case Laws Relied on and Referred to :-

1. W.P.(C) No.15061 of 2021 (dated 07.06.2021) : Shree Jagannath Traders Vrs. Commissioner of State Tax, Odisha, Cuttack
2. W.P.(C) No.14887 of 2021(dated 10.06.2021) : Shree Udyog Vrs. Commissioner of State Tax
3. W.P.(C) No. 7490 of 2021 (dated 11.03.2022) : Smt. Basanti Shial Vrs. The Proper Officer, Additional CT&GST Officer, CT&GST Circle, Balasore.
4. Suo Motu W.P.(C) No.3/2020 (dated 10.01.22) : (2022) 3 SCC 117 = (2022) 1 SCC (Cri) 580 = 2022 SCC OnLine SC 27.
5. AIR 2015 Ori 49 (FB) = 2015 SCC OnLine Ori 22 : Akshaya Kumar Parida Vrs. Union of India
6. (1995) 5 SCC 5 : Mukri Gopalan Vrs. Cheppilat Puthanpurayil Aboobacker.
7. (2020) 17 SCC 692 = 2019 SCC OnLine SC 1400 : Superintending Engineer Dehar Power House Circle Bhakra Beas Management Board v. Excise & Taxation Officer.
8. (2017) 2 SCC 350 : Patel Brothers Vrs. State of Assam.
9. (2009) 5 SCC 791 : Commissioner of Customs and Central Excise Vrs. Hongo India Private Limited.

For Petitioner : Mr. Sudeepta Kumar Singh
For Opp.Parties: Mr. Sunil Mishra, A.S.C. (CT & GST Organisation)

JUDGMENT Date of Hearing & Judgment : 29.06.2022

BY THE COURT

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

2. Questioning the propriety of the Order dated 23.05.2022 whereby the Joint Commissioner of CT&GST, Cuttack-I Central Circle, Cuttack (opposite party No.2) rejected the Appeal bearing ARN#AD210421003076Y, filed on 21.04.2021 vide Reference No.ZD210522012469R, assailing the Order dated 20.01.2021 passed by the CT&GST Officer, Cuttack-I Central Circle, Cuttack (Opposite Party No.3) under Section 74 of the Odisha Goods and Services Tax Act, 2017 (for brevity hereinafter referred to as "the OGST Act"), the Petitioner has filed this writ application with a prayer to set aside the impugned order and sought for a direction to the Appellate Authority (opposite party No.2) to entertain the appeal on merit.

3. The Petitioner, M/s. ATLAS PVC PIPES LTD, a Company incorporated under the provisions of the Companies Act, 1956, deals in supply of pipes. It claims to have participated in the proceeding under Section 74 of the OGST Act. Ultimately, the CT&GST Officer of Cuttack-I Central Circle-Opposite Party No. 3 by order dated 20.01.2021 raised a demand to the tune of Rs.8,20,042/- (comprising tax of Rs. 3,99,630/-, interest of Rs. 53,212/- and penalty of Rs. 3,67,200/-) pertaining to the tax periods from 1st April, 2019 to 31st March, 2020. Being aggrieved, on 21.04.2021 the Petitioner filed an appeal under Section 107 of the OGST Act. It is asserted by the Petitioner that in order to comply with the condition for filing of the appeal, although it deposited an amount of Rs. 39,964/- being 10% of the tax in dispute in terms of sub-section (6) of Section 107, but could not submit the certified copy of the impugned order along with the appeal memo.

3.1. It is submitted by Mr. Singh, learned Advocate for the Petitioner that in addition to filing of the appeal by electronic mode, self-attested hardcopies of the documents including copy of the impugned order as made available to it in the GST web portal were furnished to the Appellate Authority-Opposite Party No.2. Nonetheless, the Petitioner received notice dated 13.05.2022 vide ARN/Appeal Case No. AD210421003076Y (Annexure-3 series), wherein it was indicated that the tax payer-Appellant was required to submit the certified copies within seven days of filing of the appeal. However, the Appellate Authority directed the Petitioner to submit the certified copy of the said document on or before 21.05.2022.

3.2. Mr. Singh with humility submitted that the Appellate Authority by issue of notice dated 13.05.2022 impliedly extended the period for submission of certified copy of order appealed against. In order to comply with the direction contained in said notice dated 13.05.2022, which was served on 20.05.2022, the Petitioner applied for and obtained certified copy of the required document on 21.05.2022 from the Office of Opposite Party No.3. Since the office of the Opposite Party No. 2 was closed on 22.05.2022, being Sunday, step could only be taken on 23.05.2022 to comply with the terms of notice dated 13.05.2022. Although the Petitioner offered to submit the certified copy on 23.05.2022, the Opposite Party No.2 refused to receive the same on the plea that he had already passed the order of rejection of appeal and uploaded the same in the GST portal on 23.05.2022.

3.3. It is submitted by learned counsel that hyper-technical approach of the Appellate Authority rendered the Petitioner remediless inasmuch as there is no scope for approaching the Appellate Tribunal under Section 112 in view of the fact that as yet said Tribunal has not been constituted.

3.4. Learned counsel for Petitioner to buttress his argument placed reliance on the decision of this Court vide Order dated 07.06.2021 rendered in the case of Shree Jagannath Traders Vrs. Commissioner of State Tax, Odisha, Cuttack (W.P.(C) No.15061 of 2021). He further submitted that instead of showing pedantic approach, the Appellate Authority ought to have been pragmatic by taking into consideration the COVID-19 pandemic situation that persisted during the relevant period.

4. Mr. Mishra, learned Additional Standing Counsel (CT&GST) on the other hand, without objecting to the factual position, as stated above, urged that having filed the appeal in Form GST APL-01 as prescribed under sub-rule (1) on 21.04.2021, the Petitioner was required to furnish the certified copy of the impugned order dated 20.01.2021 within seven days of filing of said appeal in terms of sub-rule (3) of Rule 108 of the OGST Rules. As is apparent from the contents of the writ petition, the Petitioner took step to obtain certified copy only on 21.05.2022, i.e., the last date for complying with the direction contained in the notice dated 13.05.2022. It is, therefore, urged by Mr. Mishra that in such view of the matter, the Appellate Authority has committed no illegality in passing the impugned order rejecting the appeal, after adhering to the principles of natural justice by affording opportunity specifying date for compliance. Mr. Mishra further submitted that the requirement of sub-rule (3) of Rule 108 remained unsatisfied for more than one year of the filing of appeal, and as a consequence therefor, the matter does not warrant indulgence.

5. Fact available on record reveals that copy of the impugned order as made available to the Petitioner formed part of the Memo of Appeal. It is also apparent from the pleading that the Petitioner had only one day left for compliance from the date of service of the said notice. Accordingly, the Petitioner applied for certified copy of the impugned order on the very next day of receipt of aforesaid notice. Thus, it would have been better on the part of the Appellate Authority to verify the date of service of notice dated 13.05.2022 on the Petitioner (which was issued around one year from the date of filing of Memo of Appeal, i.e., 21.04.2021), before passing order dated 23.05.2022 rejecting the Memo of Appeal.

5.1. Further, it is not clear from the material on record as to whether the Authority had ever informed the noticee-appellant/assessee and/or his counsel, about the next date of proceeding. This obligation is sine qua non for compliance of the rules of natural justice.

6. This Court finds it apt to refer to the following provisions so far as relevant for the present purpose:

The OGST Act, 2017	The OGST Rules, 2017
107. Appeals to Appellate Authority.— *(1) Any person aggrieved by any decision or order passed under this Act or the Central Goods and Services Tax Act by an adjudicating authority may appeal to such Appellate Authority as may be prescribed within three months from the date on which the said decision or order is communicated to such person.* *(2) * * ** *(3) * * ** *(4) The Appellate Authority may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of three months * * * allow it to be presented within a further period of one month.* *(5) Every appeal under this section shall be in such form and shall be verified in such manner as may be prescribed.* *(6) No appeal shall be filed under sub-section (1), unless the appellant has paid—* *(a) in full, such part of the amount of tax, interest, fine, fee and penalty arising from the impugned order, as is admitted by him; and* *(b) a sum equal to ten per cent. of the remaining amount of tax in dispute arising from the said order, subject to a maximum of twenty-five crore rupees, in relation to which the appeal has been filed.* *Provided that no appeal shall be filed against an order under sub-section (3) of Section 129, unless a sum equal to twenty-five per cent. of the penalty has been paid by the appellant.* *(7) Where the appellant has paid the amount under sub-section (6), the recovery proceedings for the balance amount shall be deemed to be stayed.* *(8) The Appellate Authority shall give an opportunity to the appellant of being heard.* *(9) The Appellate Authority may, if sufficient cause is shown at any stage of hearing of an appeal, grant time to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing:* *Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal.* *(10) * * ** *(11) * * ** *(12) The order of the Appellate Authority disposing of the appeal shall be in writing and shall state the points for determination, the decision thereon and the reasons for such decision.* *(13) The Appellate Authority shall, where it is possible to do so, hear and decide every appeal within a period of one year from the date on which it is filed:* *Provided that where the issuance of order is stayed by an order of a court or Tribunal, the period of such stay shall be excluded in computing the period of one year.* *(14) On disposal of the appeal, the Appellate Authority shall communicate the order passed by it to the appellant, respondent and to the adjudicating authority.* *(15) A copy of the order passed by the Appellate Authority shall also be sent to the Commissioner or the authority designated by him in this behalf and the jurisdictional Commissioner of central tax or an authority designated by him in this behalf.* *(16) Every order passed under this section shall, subject to the provisions of Section 108 or Section 113 or Section 117 or Section 118 be final and binding on the parties.*	*108. Appeal to the Appellate Authority.—* *(1) An appeal to the Appellate Authority under sub-section (1) of Section 107 shall be filed in FormGST APL-01, along with the relevant documents, either electronically or otherwise as may be notified by the Commissioner, and a provisional acknowledgement shall be issued to the appellant immediately.* *(2) The grounds of appeal and the form of verification as contained in Form GST APL-01 shall be signed in the manner specified in Rule 26.* *(3) A certified copy of the decision or order appealed against shall be submitted within seven days of filing the appeal under sub-rule (1) and a final acknowledgement, indicating appeal number shall be issued thereafter in Form GST APL-02 by the Appellate Authority or an officer authorised by him in this behalf:* *Provided that where the certified copy of the decision or order is submitted within seven days from the date of filing the Form GST APL-01, the date of filing of the appeal shall be the date of issue of Provisional acknowledgement and where the said copy is submitted after seven days, the date of filing of the appeal shall be the date of submission of such copy.* *EXPLANATION.—* *For the provisions of this rule, the appeal shall be treated as filed only when the final acknowledgement, indicating the appeal number is issued.*

6.1. The provisions of Section 107 suggest that the appeal is required to be filed within stipulated period as envisaged under sub-section (1) and the filing of such appeal is hedged with conditions inter alia that besides admitted tax, interest, fine, fee and penalty, a sum equal to ten per cent of the remaining amount of tax in dispute arising from order challenged in appeal is required to be deposited. As is required under sub-section (5) ibid. read with the definition of the term "prescribed" in Section 2(87), the appeal is to be filed in the form along with verification in the manner prescribed. It is understood by having a glance at notice dated 13.05.2022 that but for the defect in terms of sub-rule (3) of Rule 108, there is no deficiency in filing the appeal as required under Section 107.

6.2. Accepting notice on behalf of the Opposite Parties, namely the Commissioner of CT&GST, the Joint Commissioner of State Tax (Appeal), CT&GST Territorial Range, Cuttack-I and CT&GST Officer, Cuttack-I Central Circle, Mr. Mishra, learned Additional Standing Counsel, therefore, has made fair admission of the fact that the defect as pointed out by the CT&GST Organisation, being technical, the pedantic reason ascribed by the Appellate Authority cannot be countenanced on the face of decision of this Court vide Order dated 07.06.2021 rendered in the case of ***Shree Jagannath Traders Vrs. Commissioner of State Tax,Odisha,Cuttack***, (***W.P.(C) No.15061 of 2021)***, wherein identical issue as that of the present case fell for consideration. This Court framed the following question for adjudication:

> *"The short point for determination in the present writ petition is whether the Appellate Authority under the OGST Act, 2017, was justified in dismissing the Petitioner's appeal, by the impugned order dated 10th March, 2021, on the grounds that the appeal was not presented within the time prescribed under law?"*

6.3. Answering the said question in the negative against the Revenue and in favour of the petitioner-appellant, this Court has made the following observation:

> *"12. Considering that the explanation offered by the petitioner is a plausible and not an unreasonable one, especially in these Covid times, and further considering that a downloaded copy thereof was in fact submitted along with the appeal which was otherwise filed within time, this Court is of the view that the mere delay in enclosing a certified copy of orderappealed against along with the appeal should not come in the way of the Petitioner's appeal for being considered on merits by the Appellate Authority. This is a case of substantial compliance and the interests of justice ought not to be constrained by a hyper technical view of the requirement that a certified copy of the order appealed against should be submitted within one week of the filing of the appeal. To repeat, in these Covid times when there is a restricted functioning of Courts and Tribunals in general, a more liberal approach is warranted in matters of condonation of delay, which cannot be said to be extraordinary."*

6.4. In this context this Court also takes note of the decision vide Order dated 10.06.2021 passed in Shree ***Udyog Vrs. Commissioner of State Tax, (W.P.(C)***

No.14887 of 2021), which is in similitude with that of ***Shree Jagannath Traders*** (supra).

6.5. It is ex facie clear from the copy of Memo of Appeal in Form GST APL-01 vide Annexure-2 series to the writ petition that having received the Order passed under Section 74 of the OGST Act on 20.01.2021, the Petitioner filed the appeal invoking Section 107 on 21.04.2021. The statutory prescribed period for preferring appeal fell within the extended period in consonance with Finance Department Notification bearing No.13898-FIN-CT1-TAX-0002/2020 [SRO No. 129/2021], dated 07.05.2021 issued in exercise of powers under Section 168A of the OGST Act read with Judgment(s)/Order(s) of Hon'ble Supreme Court rendered in the case of In Re: Cognizance For Extension of Limitation, SMW(C) No. 3 of 2020.

6.6. It may be worthwhile to reiterate what has been noticed in the case of ***Smt. Basanti Shial Vrs. The Proper Officer, Additional CT&GST Officer, CT&GST Circle, Balasore***, W.P.(C) No. 7490 of 2021 in connection with extension of period of limitation envisaged under Section 107. Vide Order dated 11.03.2022, a co- ordinate Bench of this Court made the following observation:

> *"* * *
>
> *8. From the above narration of facts, it is apparent that the period of three months from the date of communication of order sought to be appealed against got lapsed during period when the effect of COVID-19 virus was at its peak. Noteworthy here to refresh that the lock-down was imposed on 24.03.2020 and there was impediment for the petitioner to file the appeal on or before 05.06.2020.*
>
> *9. The Hon'ble Supreme Court of India In re: Cognizance for Extension of Limitation, Suo Motu Writ Petition (Civil) No. 3/2020 [2020 SCC OnLine SC 343 = (2020) 19 SCC 10] vide Order dated 23.03.2020 considering the challenge faced by the country on account of COVID-19 Virus and resultant difficulties that would be faced by litigants across the country in filing their petitions/ applications/ suits/ appeals/all other proceedings within the period of limitation prescribed under the general law of limitation or under Special Law (both Central and/or State), directed as follows:*
>
> *"To obviate such difficulties and to ensure that lawyers/litigants do not have to come physically to file such proceedings in respective Courts/Tribunals across the country including this Court, it is hereby ordered that a period of limitation in all such proceedings, irrespective of the limitation prescribed under the general law or Special Laws whether condonable or not shall stand extended w.e.f. 15th March 2020 till further order/s to be passed by this Court in present proceedings.*
>
> *We are exercising this power under Article 142 read with Article 141 of the Constitution of India and declare that this order is a binding order within the meaning of Article 141 on all Courts/Tribunals and authorities.*
>
> *This order may be brought to the notice of all High Courts for being communicated to all subordinate Courts/Tribunals within their respective jurisdiction."*

6.7. The Hon'ble Supreme Court of India in the case of In Re: Cognizance For Extension Of Limitation being Miscellaneous Application No. 21 of 2022 : In Miscellaneous Application No. 665 of 2021 in Suo Motu Writ Petition (C) No. 3 of 2020 with Miscellaneous Application No.29 of 2022 in Miscellaneous Application No.665 of 2021 in Suo Motu Writ Petition (C) No. 3 of 2020. Vide Order dated 10.01.2022 [reported in (2022) 3 SCC 117 = (2022) 1 SCC (Cri) 580 = 2022 SCC OnLine SC 27] pronounced as follows:

> *"1. In March, 2020, this Court took Suo Motu cognizance of the difficulties that might be faced by the litigants in filing petitions/ applications/ suits/ appeals/ all other quasi proceedings within the period of limitation prescribed under the general law of limitation or under any special laws (both Central and/or State) due to the outbreak of the COVID19 pandemic.*
>
> *2. On 23.03.2020, this Court directed extension of the period of limitation in all proceedings before Courts/Tribunals including this Court w.e.f. 15.03.2020 till further orders. On 08.03.2021, the order dated 23.03.2020 was brought to an end, permitting the relaxation of period of limitation between 15.03.2020 and 14.03.2021. While doing so, it was made clear that the period of limitation would start from 15.03.2021.*
>
> *3. Thereafter, due to a second surge in COVID-19 cases, the Supreme Court Advocates on Record Association (SCAORA) intervened in the Suo Motu proceedings by filing Miscellaneous Application No. 665 of 2021 seeking restoration of the order dated 23.03.2020 relaxing limitation. The aforesaid Miscellaneous Application No.665 of 2021 was disposed of by this Court vide Order dated 23.09.2021, wherein this Court extended the period of limitation in all proceedings before the Courts/Tribunals including this Court w.e.f 15.03.2020 till 02.10.2021.*
>
> *4. The present Miscellaneous Application has been filed by the Supreme Court Advocates-onRecord Association in the context of the spread of the new variant of the COVID-19 and the drastic surge in the number of COVID cases country. Considering the prevailing conditions, the applicants are seeking the following:*
>
> *i. allow the present application by restoring the order dated 23.03.2020 passed by this Hon'ble Court in Suo Motu Writ Petition (C) No. 3 of 2020; and*
>
> *ii. allow the present application by restoring the order dated 27.04.2021 passed by this Hon'ble Court in M.A. No. 665 of 2021 in Suo Motu Writ Petition (C) No. 3 of 2020; and*
>
> *iii. pass such other order or orders as this Hon'ble Court may deem fit and proper.*
>
> *5. Taking into consideration the arguments advanced by learned counsel and the impact of the surge of the virus on public health and adversities faced by litigants in the prevailing conditions, we deem it appropriate to dispose of the M.A. No.21 of 2022 with the following directions:*
>
> *I. The order dated 23.03.2020 is restored and in continuation of the subsequent orders dated 08.03.2021, 27.04.2021 and 23.09.2021 it is directed that the period from 15.03.2020 till 28.02.2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings.*

II. Consequently, the balance period of limitation remaining as on 03.10.2021, if any, shall become available with effect from 01.03.2022.

III. In cases where the limitation would have expired during the period between 15.03.2020 till 28.02.2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 01.03.2022. In the event the actual balance period of limitation remaining, with effect from 01.03.2022 is greater than 90 days, that longer period shall apply.

IV. It is further clarified that the period from 15.03.2020 till 28.02.2022 shall also stand excluded in computing the periods prescribed under Sections 23(4) and 29A of the Arbitration and Conciliation Act, 1996, Section 12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings.

6. As prayed for by learned Senior Counsel, M.A. No. 29 of 2022 is dismissed as withdrawn."

6.8. If present case is considered in the light of aforesaid Order dated 10.01.2022 of the Hon'ble Apex Court, the petitioner is entitled to the benefit of exclusion of limitation of 7 days as stipulated in Rule 108(3) of the OGST Rules inasmuch as the certified copy of the Order dated 20.01.2021 being obtained on 21.05.2022 and offered to the Appellate Authority on 23.05.2022 for consideration in connection with the defect pointed out vide notice dated 13.05.2022, the same fell well within the 90 days period granted by the Hon'ble Supreme Court in the Order dated 10.01.2022.

6.9. Support can also be derived from the Full Bench decision of this Court rendered in the matter of ***Akshaya Kumar Parida Vrs. Union of India, AIR 2015 Ori 49 (FB) = 2015 SCC OnLine Ori 22***. This Court in no uncertain terms held as follows:

"20. In view of the authoritative pronouncement of the Apex Court in the case of Mukri Gopalan [Mukri Gopalan Vrs. Cheppilat Puthanpurayil Aboobacker, (1995) 5 SCC 5], a situation wherein a period of limitation is prescribed by a special or local law for an application of review and for which no provision is made in the Schedule to the Act, the second condition for attracting Section 29(2) of the Act is attracted. From the enunciation of law laid down in Mukri Gopalan (supra), it must be held that in view of Section 29(2) of the Limitation Act, the Tribunal has the jurisdiction to entertain and dispose of the application under Section 5 of the Limitation Act, since applicability of Section 5 of the Limitation Act has not been expressly excluded thereby."

6.10. It may be pertinent to refer to a decision of the Hon'ble Supreme Court in the case of ***Superintending Engineer Dehar Power House Circle Bhakra Beas Management Board v. Excise & Taxation Officer, (2020) 17 SCC 692 = 2019 SCC OnLine SC 1400*** wherein the context of absence of specific provision contained in the special or local law excluding applicability of Section

5 of the Limitation Act, 1963, has been discussed and the said Hon'ble Court held as follows:

> *"29. The High Court has relied upon the decision of this Court in Patel Brothers (Patel Brothers Vrs. State of Assam, (2017) 2 SCC 350) in the context of the Assam VAT Act in which the abovementioned provision of section 84 made the difference, which makes specific provision that only sections 4 and 12 of the Limitation Act are applicable. Consequently, it follows that other provisions are not applicable. The decision in Hongo India Private Limited (Commissioner of Customs and Central Excise Vrs. Hongo India Private Limited, (2009) 5 SCC 791) also turned on the scheme of the Excise Act. The scheme of the Excise Act is materially different than that of the Himachal Pradesh VAT Act. Thus, the decision in Hongo India Private Limited (supra) also cannot be said to be applicable to interpret the Himachal Pradesh VAT Act. As the revision under the Act of 2005 lies to the High Court, the provisions of Section 5 of the Limitation Act are applicable, and there is no express exclusion of the provisions of Section 5 and as per Section 29(2), unless a special law expressly excludes the provision, Sections 4 to 24 of the Limitation Act are applicable. When we consider the scheme of the Himachal Pradesh VAT Act, 2005, it is apparent that its scheme is not ousting the provisions of the Limitation Act from its ken which makes principles of Section 5 applicable even to an authority in the matter of filing an appeal but for the said provision the authority would not have the power to condone the delay. By implication also, it is apparent that the provisions of Section 5 of the Limitation Act have not been ousted; they have the play for condoning the limitation under Section 48 of the Act of 2005. Suo motu provision of revisional power is also provided to the Commissioner within 5 years. Thus, the intendment is not to exclude the Limitation Act. We condone the delay in filing of revision."*

6.11. Investigating further into the instant matter, this Court finds that Rule 108(3) has not prescribed for condonation of delay in the event where the Petitioner would fail to submit certified copy of the order impugned in the appeal nor is there any provision restricting application of Section 5 of the Limitation Act, 1963, in the context of supply of certified copy within period stipulated in sub-rule (3) ibid.

6.12. The requirement to furnish certified copy of the impugned order within seven days of filing of appeal is provided as a procedural requirement.

6.13. On the altar of default in compliance of such a procedural requirement, merit of the matter in appeal should not have been sacrificed. Since the Petitioner has enclosed the copy of impugned order as made available to it in the GST portal while filing the Memo of Appeal, non-submission of certified copy, as has rightly been conceded by the Additional Standing Counsel appearing on behalf of CT&GST Organisation, is to be treated as mere technical defect.

6.14. Keeping in view the concern and context reflected in the Judgments, amendments to the statute and executive instruction/clarification during the COVID-19 pandemic period, and the decisions rendered by the Courts as referred

to above, it is apt to say that the Appellate Authority has not exercised its power in proper perspective and the Petitioner cannot be said to be indolent, rather he it has pursued its matter diligently.

6.15. In view of the above, the writ petition deserves to succeed.

7. In the above perspective, the impugned Order dated 23.05.2022contained in Form GST APL-02 vide Annexure-5 issued by the Joint Commissioner of State Tax (Appeal), CT&GST Territorial Range, Cuttack-I, Cuttack rejecting the appeal on the ground of non-submission of certified copy of the impugned order dated 20.01.2021 passed by the CT&GST Officer, Cuttack-I Central Circle under Section 74 of the OGST Act is hereby set aside. The appeal bearing ARN#AD210421003076Y is restored to file of the Joint Commissioner of State Tax (Appeal), CT&GST Territorial Range, Cuttack-I, Cuttack.

8. It is further directed that the Petitioner shall appear before the Joint Commissioner of State Tax (Appeal), CT&GST Territorial Range, Cuttack-I, Cuttack on or before 11.07.2022 along with the certified copy of this order and submit the certified copy of the Order dated 20.01.2021 passed by the CT&GST Officer, Cuttack-I Central Circle as claimed to have been obtained on 21.05.2022 and in that event the Appellate Authority shall proceed to decide the appeal on merits and make endeavor to dispose of the same by a reasoned order in accordance with law.

9. The writ petition is allowed to the extent as indicated hereinabove. Nothing stated in this writ application shall affect the merits of the case. However, before parting, anxious consideration is posed by reiterating the following words which have already been indicated by co-ordinate Bench of this Court in the case of ***Shree Jagannath Traders Vrs. Commissioner of State Tax, Odisha, Cuttack, W.P.(C) No. 15061 of 2021***, vide Order dated 07.06.2021:

> *"14. Before parting with the case, this Court must note that it was brought to its attention that in other similar matters, the Appellate Authority has declined to condone the delay in the appellants filing a certified copy of the order appealed against. It is clarified that the Appellate Authority may adopt a liberal approach considering that these are times of restricted functioning of Courts and tribunals due to the COVID pandemic. As long as the appeal is accompanied by an ordinary downloaded copy of the order appealed against, verified as a true copy by the Advocate for the Appellant, the delay in filing such certified copy, subject to it not being extraordinary, the Appellate Authority may, as long as the restricted functioning of the Court and Tribunals due to the COVID pandemic continues, be condoned."*

10. With the above observations and directions, the present writ petition stands disposed of. No costs.

—— o ——

2022 (II) ILR - CUT-1011

K.R. MOHAPATRA, J.

TRP(C) NO. 242 OF 2020

PRATIVA MANJARI DASH@SARANGI ……Petitioner

.V.

LEELABATI MOHANTY & ANR. ……..Opp.Parties

CODE OF CIVIL PROCEDURE, 1908 – Section 24 – Transfer of suit – Discretionary power of the High Court – When can be granted? – Held, Court while granting/refusing such relief must exercise its discretion judicially keeping abreast the facts and circumstances of the case – A suit can be transferred if it is imperative for the ends of justice – As the Petitioner is a destitute lady, the Opp.Party demolished the residential house during subsistence of order of status quo and thereby making the Petitioner homeless at Baripada – Thus, in my considered opinion, the inconvenience will be more for the Petitioner, if the suit is not transferred to Balasore – Accordingly, the TRP(C) is allowed. (Para 8)

Case Laws Relied on and Referred to :-

1. 94 (2002) CLT 168 : Deepika Maharana Vs. Prasanna Maharana@Prasanna Kumar Maharana.
2. AIR 1990 SC 113 : Dr. Subramaniam Swamy Vs. Ramakrishna Hegde.
3. 2014 SCC OnLine Ori 121 : Dr. Brajabandhu Mishra Vs. Dr. Gopikrushna Panda.

For Petitioner : In person

For Opp.Parties : Mr. Prafulla Kumar Rath (O.P.Nos. 1 & 2)

ORDER Date of Order: 26.07.2022

K.R. MOHAPATRA, J.

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

2. This application under Section 24 of the Code of Civil Procedure,1908 has been filed for transfer of CS No. 97 of 2015 pending before learned Senior Civil Judge (LR), Baripada to the Court of learned Civil Judge (Senior Division), Balasore for adjudication.

3. Petitioner, who appeared in person, submitted that the suit property stood recorded in the name of her father, namely, late Ratnakar Sarangi. After death of her husband, she left the Government Quarters and started residing in the said house situated at Ward No.19, Balarampur, Baghara Road in Baripada town along with her widowed mother. Due to a dispute in respect of the title of the property, she filed CS No.97 of 2015, which is pending before Senior Civil Judge (LR), Baripada. Taking advantage of the recording of the property in his

name, her elder brother created disturbance in her peaceful possession in the residential house. Hence, she was constrained to file the aforesaid suit. Learned Senior Civil Judge also finding a fair case in favour of the Petitioner passed an order of status quo in IA No.17 of 2015 in the aforesaid suit. When the matter stood thus, the Petitioner had been to Dehradun on 21st March, 2020 to attend her son, who was hospitalized, keeping the portion she was residing under lock and key. But taking advantage of her absence, the Opposite Party No. 2 with the help of his brother-in-law initially demolished the first floor of the house and thereafter demolished the entire building, when the order of status quo was in force. On her return from Dehradun, the Petitioner finding no residential accommodation and constant threat of the husband of Opposite Party No.1 along with their henchmen had to leave Baripada and stayed at her cousin's residence at Balasore. The Petitioner does not have any residential accommodation at Baripada. She does not have any sufficient means to take on rent a house and also does not feel safe to stay there alone due to constant threat of Opposite Party No.1 and her husband.

4. It is her submission that the Defendants to the suit are influential persons of Baripada and are not allowing the Petitioner to take steps for early disposal of the suit. In view of the above, interest of justice will be best served if the suit is transferred to any competent Court situated in Balasore town. In support of her case, she relied upon a decision in the case of ***Deepika Maharana Vs. Prasanna Maharana @Prasanna Kumar Maharana***, reported in ***94 (2002) CLT 168*** in which it is held as under:

> *"….The Code of Civil Procedure has, therefore, vested a discretionary power on the High Court to transfer the case from one court to another, if that is considered expedient to meet the ends of justice. Thus, the paramount consideration while dealing with a petition under Section 24 of the Code of Civil Procedure must be to see that justice according to law is done. If for achieving that objective the transfer of a case is imperative, there should be no hesitation to transfer the case even if it is likely to cause some inconvenience to the plaintiff."*

4.1. She further relied upon the case of ***Dr. Subramaniam Swamy Vs. Ramakrishna Hegde***, reported in ***AIR 1990 SC 113***, wherein the Hon'ble Supreme Court held as under:-

> *"….If the ends of justice so demand, the case may be transferred under this provision notwithstanding the right of dominus litis to choose the forum and considerations of plaintiff's convenience, etc., cannot eclipse the requirement of justice. Justice must be done at all costs, if necessary by the transfer of the case from one Court to another…."*

4.2. She also relied upon voluminous documents to show that she has been constantly deprived of her legal right. It is her submission that even though Opposite Party No.1 is a lady, but she has sufficient means and persons to support

her both physically and financially. The Petitioner is a destitute lady. Unless the suit is transferred to any competent Court situated at Balasore town, she will not be in a position to contest the suit filed to establish her legal right over the property.

5. Mr. Rath, learned counsel by filing counter affidavit on behalf of Opposite Party No.1, refuted the submission made by the Petitioner. It is his submission that the petition under Section 24 CPC has been filed to drag the litigation and to harass the Opposite Party No.1. He further submitted that on an application made by the Petitioner before learned District Judge, Mayurbhanj at Baripada, the suit was once transferred from Additional Senior Civil Judge, Baripada vide order dated 13thNovember, 2020 to the Court of learned Senior Civil Judge (LR), Baripada. He refuted the submission that the Opposite Parties entered into the house of the Petitioner on 17th August, 2020. The FIR stated to have been lodged (Annexure-2) does not whisper a single allegation against the Opposite Party No.1. It is his contention that the Petitioner is being represented by her learned counsel, who is diligently taking step on her behalf. Hence, she is not required to attend the Court on each date of posting of the suit. She need not also come to Court to lead evidence as she could be examined by deputing a Commissioner at the cost of Opposite Party No.1. Inconvenience, if any, of the Petitioner can not entitle her to seek for transfer of the suit to her place of convenience by putting others in inconvenience. The Petitioner of her own choice filed the suit, i.e., CS No. 97 of 2015 at Baripada. She has also filed different proceedings at Baripada and is pursuing the same diligently. Thus, the suit should not be transferred to suit the convenience of the Petitioner putting other Defendants/Opposite Parties including the Defendant/Opposite Party No.1 into inconvenience, who is also a lady. Property in question situates at Baripada and the Defendants are residing at Baripada.

5.1 Mr. Rath, learned counsel for the Opposite Parties also made elaborate submission as to how the Opposite Party No.1 acquired title over the property. It is his submission that the order of status quo passed in IA No.17 of 2015 was challenged in FAO No.17 of 2015. In that view of the matter, the mutation case, i.e., Mutation Case No.1732 of 2014 filed by Opposite Party No.1 was dropped. However, the Opposite Party No.1 again applied for mutation of the suit land in her name in Mutation Case No.2442 of 2019 and the Tahasildar, Baripada following due procedure of law has directed to mutate the land in her name. Accordingly, ROR has already been published in the name of Opposite Party No.1 (Annexure-H/1 to the counter). However, the said order passed by Tahasildar, Baripada was assailed by Opposite Party No.3, namely, Sunil Kumar Sarangi in Mutation Appeal No. 21 of 2020 after lapse of period of limitation.

The Appellate Authority, without considering the issue of limitation, allowed the appeal and directed to correct the ROR accordingly. Assailing the said order, Opposite Party No.1 filed W.P.(C) No.34692 of 2020, which was disposed of vide order dated 11th December, 2020 with the following observation:-

> *"In course of hearing, Mr. Rath, learned counsel for the petitioner submits that the petitioner has a statutory remedy under Section 32 of the Orissa Survey & Settlement Act, 1958 (for short 'the Act') to assail the said order. Hence, he prays for withdrawal of the writ petition seeking liberty to assail the impugned order before the revisional authority under Section 32 of the Act.*
>
> *Granting such liberty, this writ petition is disposed of as withdrawn.*
>
> *However, it is directed that the impugned order shall be kept in abeyance for a period of fifteen days, in order to enable Mr. Rath, learned counsel for the petitioner to file the revision".*

5.2 He further submits that due to pendency of the suit filed by the Petitioner, Opposite Party No.1, who has valid title over the property in question, is being deprived to enjoy the same independently. He therefore submits that the TRP(C) as laid down, is not maintainable and is liable to be dismissed.

5.3 In support of his case, Mr. Rath placed reliance upon a decision in the case of ***Dr. Brajabandhu Mishra Vs. Dr.Gopikrushna Panda***, reported in ***2014 SCC OnLine Ori 121***, this Court observed as follows:-

> *"6. In the case of Benudhar Swain v. Nilamani Swain, 2005 (II) OLR - 509, transfer of case under Section 24 of the C.P.C was sought for from the Court of Civil Judge (Sr. Division), Puri to the Court of Civil Judge (Sr. Division), Angul on the ground that bulk of properties are situated at Angul and the petitioners being old retired persons, it is inconvenient on their part to travel to Puri and contest the lis. This Court relying on Om Prakash Agarwala's case (supra) negatived the prayer for transfer on the ground that only to suit the convenience of a party, the other party should not be put to inconvenience. It was further held that the Court, while considering a petition for transfer, should always keep in mind that the plaintiff has the choice of his forum so long as the suit is not subject to the defect of want of local jurisdiction. Regarding inability of a party to travel to the Court for adducing his evidence, this Court further held that such a person can be examined on Commission, if so required".*

6. Heard learned counsel for the parties; perused the materials on record including the case laws cited.

7. Admittedly CS No.97 of 2015 is pending for adjudication in the Court of learned Senior Civil Judge (LR), Baripada. The suit has been filed for title and consequential relief. It also appears that an order of status quo has been passed in the said suit in IA No.17 of 2015, which is in force till today. Learned counsel for the Petitioner, however, submitted that during continuance of the order of status quo, the Opposite Party No. 1, taking advantage of her (Petitioner's) absence

at Baripada, entered upon the suit land on 17th August, 2020 and caused damage to the building by breaking open the main gate and subsequently they demolished the house. The said allegation was, however, refuted by Mr. Rath, learned counsel for the Opposite Party No.1. It is also alleged that a FIR was also lodged. It is also not disputed that before demolition of the house, the Petitioner was staying in the said residential house (suit property) along with her widowed mother and children. After death of her mother also she was staying in that house alone, as her son is serving at Dehradun. From the above, it is however not clear as to how the suit house was demolished during subsistence of order of status quo. That is of course, a matter to be considered by the learned trial Court, if an application to that effect is filed. But the fact remains that the residential house of the Petitioner has already been demolished and it is not disputed that the Petitioner is staying at Balasore in her cousin's house. The allegation and counter-allegation makes it amply clear that there is a serious dispute with regard to title over the property between the siblings including the present Petitioner. It also appears from the case record that the Petitioner had in recent past pursued matters in different Courts and authorities at Baripada, but the fact remains that the Petitioner could not have raised those disputes and/or lodged FIR at any place other than Baripada in view of the nature of allegations/disputes involved therein. There is no material on record to show that the Petitioner has any residential accommodation at Baripada. Fact remains that she is a destitute lady and is residing at Balasore with her cousin. There is also allegation that she is receiving constant threat from the side of Defendant No.1 and her henchmen. That is of course, the matter of investigation by a competent authority.

8. As discussed earlier, law is well-settled that a suit/proceeding cannot be transferred on the ground of inconvenience to a party putting the other into inconvenience. In the instant case also, the Petitioner by choice has filed the suit at Baripada, but at that juncture the Petitioner might not have any idea about her being homeless. It is also apparent that the Defendants/Opposite Parties have their respective residence at Baripada save and except the Petitioner.

8.1. In view of ratio in the case of ***Dr. Subramaniam Swamy*** (supra) there remains no iota of doubt that Section 24 CPC is a discretionary relief. Court while granting/refusing such relief must exercise its discretion judicially keeping abreast the facts and circumstances of the case. A suit can be transferred if it is imperative for the ends of justice. Mr. Rath, learned counsel for the Opposite Party Nos. 1 and 2 in course of his argument submitted that Opposite Party No.1 is also a lady and it will be difficult on her part to go to Balasore and contest the suit, in the event the suit is transferred. This submission although sounds reasonable, but in the instant case, there is no allegation of threat on Opposite

Party No.1 by the Petitioner save and except the allegation that the Petitioner has filed the litigation to harass Opposite Party No.1. Threat of life and limb, although a matter of investigation, is a ground for consideration, while exercising discretion under Section 24 CPC. In the instant case, the residential house (suit house) in which the Petitioner was residing was demolished apparently during subsistence of order of status quo and thereby making the Petitioner homeless at Baripada. Adding to it, the Petitioner is a destitute lady. Thus, in my considered opinion, the inconvenience will be more for the Petitioner, if the suit is not transferred to Balasore. In the facts and circumstances of the case, the ratio of ***Dr. Brajabandhu Mishra*** (supra) has no application to the case at hand. The contention of Mr. Rath, learned counsel for Opposite Party No.1 that the Petitioner could be examined by deputing a Commissioner is also equally applicable to Opposite Party No.1, if the suit is transferred to any competent Court at Balasore.

9. In view of the above, this Court feels that it is a fit case where the judicial discretion should be exercised to transfer the suit from Baripada to a competent Court at Balasore town, which would meet the ends of justice. Accordingly, the TRP(C) is allowed. CS No. 97 of 2015 is hereby directed to be transferred to a competent Court at Balasore town to be determined by learned District Judge, Balasore.

10. In the event an application is filed by the Petitioner within a period of fifteen days hence along with certified copy of the impugned order, learned District Judge, Balasore shall do well to consider the same and consign the case record to a competent Court for adjudication.

—— o ——

2022 (II) ILR - CUT-1016

B.P. ROUTRAY, J.

MACA NOS. 905, 907, 908, 909, 910, 723, 722, 724, 725 & 726 OF 2018

MACA No. 905 & 907 of 2018

NATIONAL INSURANCE COMPANY LTD. .....Appellant

.V.

GOBARDHAN CH. PATTANAYAK & ORS. .....Respondents

MACA No. 908 & 909 of 2018

NATIONAL INSURANCE COMPANY LTD. .....Appellant

.V.

SHARADA CHARAN MOHANTY & ORS. .....Respondents

MACA No. 910 of 2018
NATIONAL INSURANCE COMPANY LTD. .....Appellant
.V.
PRAVEEN MOHANTY & ANR. .....Respondents

MACA No. 722 & 723 of 2018
GOBARDHAN CH. PATTANAYAK & ANR. ..... Appellants
.V.
RAJNI KAUR JOGINDER SINGH MULTANI & ANR. .....Respondents

MACA No.724 & 725 of 2018
SHARADA CHARAN MOHANTY & ORS. ..... Appellants
.V.
RAJNI KAUR JOGINDER SINGH MULTANI & ANR. ..... Respondents

MACA No. 726 of 2018
PRAVEEN MOHANTY ..... Appellants
.V.
RAJNI KAUR JOGINDER SINGH MULTANI & ANR. .....Respondents

COMPENSATION – The deceased was aged about 38 years 6 months 26 days and the learned Tribunal took her income at Rs. 8,000/- per month notionally and further added 40% towards future prospects – Whether Justified? – Held, Yes – In view of the law settled in the case of Kirti and another vs. Oriental Insurance Company Limited, (2021) 2 SCC 166 addition of 40 % of such notional income of the deceased is justified.

Case Laws Relied on and Referred to :-

1. (2017) 16 SCC 680 : National Insurance Company Limited vs. Pranay Sethi & Ors.
2. (2021) 2 SCC 166 : Kirti and another vs. Oriental Insurance Company Limited.
3. (2008) 12 SCC 165 : Laxmi Devi and others vs. Mohammad Tabbar and another.

For Appellant : Mr. K. Panigrahi.
For Respondents: Mr. Gautam Mishra

JUDGMENT Date of Judgment : 22.8.2022

B.P. ROUTRAY, J.

1. All the appeals are arising out of the common judgment/award dated 9th April, 2018 passed by learned 1st M.A.C.T., Cuttack in five claim applications.

2. MACA Nos. 905, 907, 908, 909 and 910 of 2018 have been preferred by the insurer and rest of the appeals are preferred by the respective claimants. The chart below is prepared showing those appeals with corresponding claim applications and awards passed therein.

Sl. No.	MACA No.	Claim Case Number before the Tribunal	Amount awarded
A	722/2018 (By the Claimant) 905/2018 (By the Claimant)	MAC No. 101/2011 Regarding Death of Sailendra Pattanayak	Rs. 1,51,66,960.00

B	723/2018 (By the Claimant) 907/2018 (By the Claimant)	MAC No. 102/2011 Regarding Death of Vijaya@Bijaya Nayak @Bijaya Pattanayak	Rs. 14,14,000.00
C	724/2018 (By the Claimant) 908/2018 (By the Claimant)	MAC No. 103/2011 Regarding Death of Sanjukta Mohanty	Rs. 4,90,000.00
D	725/2018 (By the Claimant) 909/2018 (By the Claimant)	MAC No. 104/2011 Regarding Injury to Sharada Charan Mohanty	Rs. 2,00,000.00
E	726/2018 (By the Claimant) 910/2018 (By the Claimant)	MAC No. 105/2011 Regarding Injury to Praveen Mohanty Mohanty	Rs. 10,000.00

3. The common case of the claimants is that on 2.11.2010 three deceased persons along with the injured were coming in a Tavera vehicle bearing Registration No. OR-02-BF-3691 from Kolkata to Bhubaneswar. At around 4.30 a.m., said Tavera vehicle dashed against the truck bearing Registration No.MH-31-CB-1359 (hereinafter referred as "offending truck") from behind. As a result of this, three persons died and two persons were injured. It is submitted by the claimants that when the Tavera was coming near Bonth Chhaka, Bhadrak, the offending truck overtook it with high speed and applied sudden brake on the road for which the driver of the Tavera dashed behind it losing his control. Bhadrak Town Police Case No.197 dated 2.11.2010 was registered on the complaint lodged by Sharada Charan Mohanty, who is the injured-claimant in MAC No. 104/2011. Upon completion of investigation, the Police submitted charge-sheet against the driver of the offending truck for alleged commission of offences under Sections 279/337/338/304-A of the Indian Penal Code.

4. The claimants examined 11 witnesses on their part and marked 52 documents as Ext. 1 to 52. The insurer, i.e. M/s. National Insurance Co. Ltd. examined two witnesses from their side and filed 10 documents which are marked as Ext. A to K.

5. The learned Tribunal upon adjudication held entire negligence on the driver of the offending truck for cause of the accident and accordingly granted compensation of respective amounts in each case as stated above.

6. The common challenge of the Insurance Company in all the appeals is regarding attribution of contributory negligence on the part of the driver of the Tavera vehicle. It is contended that since the Tavera dashed behind the truck, major part of negligence should be on the driver of the Tavera vehicle. But no claim has been raised against the owner of the Tavera vehicle and even he was not made a party in the claim applications. It is further submitted that the prayer to add the owner of the Tavera vehicle as a party to the claim applications was rejected by the learned Tribunal and not only this, but the prayer of the insurer to examine the Police Investigating Officer was also rejected by the learned Tribunal. It is therefore submitted that in such scenario, the scope of proving contributory negligence on the part of the driver of the Tavera vehicle was closed.

7. In addition to the above, the insurer has also questioned the quantum of compensation in each case which will be dealt subsequently at the relevant paragraphs.

8. The respective claimants have come up in appeal praying for enhancement of the quantum of compensation in each case on separate grounds, which will be dealt in subsequent paragraphs.

9. As stated above, the contributory negligence on the part of the Tavera vehicle is the most contentious issue raised by the insurer. In this regard, it is seen from the discussions of the learned Tribunal that based on the evidence of Sharada Charan Mohanty (P.W.2) – the injured eye-witness and the FIR as well as the charge-sheet submitted by the Police, the learned Tribunal has fixed the negligence on the part of the driver of the offending truck. Admittedly P.W.2 is the informant in Police case and the recitals of the FIR under Ext.1 as well as the charge-sheet under Ext.2 are found in support of the ocular evidence adduced by P.W.2 and P.W.9, the eye-witnesses of the accident. OPW-1 and 2, who are the investigator and administrative officer of the Insurance Company, are not the eye-witnesses. The basis of contention of the insurer to contribute negligence on the part of the driver of the Tavera vehicle is the inquest reports prepared by the Police under Ext.E, F and G. In those inquest reports, this P.W.2 has endorsed at column 9 that the accident took place due to un-mindfulness of the driver of the Tavera vehicle. This endorsement of P.W.2 made in the inquest report is the basis of reliance of the insurer to contribute negligence on the part of the driver of the Tavera vehicle.

10. Before looking to the inquest reports, it is important to peruse the evidence of P.W.2, P.W.9 and the contents of the FIR as well as the charge-sheet. As per the evidence of P.W.2 & 9, the offending truck overtook the Tavera vehicle and suddenly stopped by swerving to its left. In the FIR which was lodged immediately after the accident, P.W.2 has stated that the accident took place because of the negligent driving of the driver of the truck which stops suddenly on the road. The Police in course of investigation examined different other witnesses and submitted the charge-sheet against the driver of the truck alone. As such the statement mentioned by P.W.2 in the inquest reports does not have any impact unless such endorsement made by the P.W.2 is confronted to him in the cross-examination. Now looking to the cross-examination of P.W.2, it is found that no such confrontation has been made by the insurer to him. No question with regard to such endorsement made by him in the inquest report was put to him except one mere denial suggestion that the accident occurred due to the negligence of the driver of the Tavera vehicle. Rather said P.W.2 has confirmed

his stand that the accident took place due to negligence on the part of the driver of the truck as he applied sudden brake just in front of the Tavera vehicle. Therefore,the evidence of P.W.2 which is clear and cogent to suggest negligence entirely on the driver of the offending truck is found supported from the contents of the FIR as well as charge-sheet. Such evidence of P.W.2 is also corroborated by the evidence of P.W.9, another injured-claimant and eye-witness to the accident. Against such concrete evidence adduced from the side of the claimant, the mere endorsement of P.W.2 made in the inquest report has no impact and the probability of negligent driving on the part of the driver of the offending truck is preponderant. Therefore, upon scrutiny of the entire evidence brought on record, the sole negligence concluded on the part of the driver of the truck by the learned Tribunal is found supported with established principles of evidence and hence confirmed. The contention of the insurer against the same is thus rejected.

11. Now coming to the quantum of compensation granted in each cases, first coming in respect of MAC No.101/2011, the deceased there was aged about 39 years 8 months 19 days and he was serving as Zonal Manager in Reliance Life Insurance Company Limited at Kolkata and getting monthly remuneration of Rs. 2,10,837/- that includes basic pay of Rs. 67,400/- and HRA of Rs. 40,440/-. The learned Tribunal while determining the income of the deceased took the basic pay and HRA only for calculation and after deducting 20% towards income tax and required amount for professional tax, that comes to Rs.83,872/-.Adding 50% thereto towards future prospects and applying multiplier‘15’ with deduction of 1/3rd towards personal expenses, the total loss of dependency is determined to Rs.1,50,96,960/-.

12. Here it is submitted by the insurer that addition of 50% towards future prospects is not permissible since the deceased was an employee of a private company. At the same time, the claimants contend that non-counting of other allowances from the salary by the learned Tribunal without any reason is violative of the settled principles.

13. First of all, the contention of the insurer about impressibility of addition of 50%towards future prospects has no merit for consideration in view of the principles settled in the case of ***National Insurance Company Limited vs. Pranay Sethi & Ors, (2017) 16 SCC 680***. A detailed discussion on the same is not required. So far as the claim for addition of other allowances towards income as submitted by the claimants, the same is also found without merit for the reason that other allowances which are not counted by the learned Tribunal are only incentives and perks. The learned Tribunal for this purpose has counted the basic pay along with the HRA. Therefore, no illegality is seen in determination of the monthly income of the deceased at such rate.

14. Next coming to the respective appeals arising out of MAC No.102/2011, here the deceased was aged about 38 years 6 months 26 days and the learned Tribunal took her income at Rs.8,000/- per month notionally against the claim of the applicants of Rs.15,000/-. The learned Tribunal in absence of any material proved in support of such contention has rightly approached to fix such notional income of the deceased and further added 40% towards future prospects thereto. The contention of the insurer not to add future prospects to the income of the deceased whose notional income has been counted, is found without merit in view of the law settled in the case of ***Kirti and another vs. Oriental Insurance Company Limited, (2021) 2 SCC 166***. Similarly the claim of the applicants to enhance the same to Rs.15,000/- is also rejected when they have admittedly failed to bring any such proof regarding specific income of the deceased on record.

15. In respect of MAC Nos.101/2011 and 102/2011, the further contention raised by the insurer is that, claimant no.1 being the father of Sailendra (deceased in MAC No.101/2011) and father-in-law of the deceased Vijaya (deceased in MAC No.102/2011) is not their dependant since he being a retired Government servant is getting pension. But the insurer is forgetting the fact that along with claimant no.1, the minor daughter of both the deceased is also claimant no.2 whose dependency certainly cannot be questioned. However, since the learned Tribunal has directed for payment of major portion of the compensation to the minor daughter of the deceased persons, who is staying with claimant no.1, no point is made out to disturb any such direction of the learned Tribunal made in favour of claimant no.1. Otherwise also claimant no.1 cannot be totally discarded out as a dependant of the deceased persons.

16. Next coming to MAC No.103/2011, the deceased there was aged about 38 years within the age group of 41-45 years and the learned Tribunal assessed her monthly income at Rs.3,000/- notionally against the claim of the applicants to Rs.7,000/- per month. The learned Tribunal further added 25% towards future prospects. No flaw is seen in such approach of the learned Tribunal and it has rightly accepted the deceased as non-earning person and fixed her notional income in terms of the decision rendered in the case of ***Laxmi Devi and others vs. Mohammad Tabbar & another, (2008)12 SCC 165***. The respective contentions of the claimants as well as the insurer against determination of such compensation by the learned Tribunal are rejected without any supporting material.

17. Similarly in respect of other two cases, i.e. MAC Nos.104 & 105 of 2011 which are injury cases, it is contended on behalf of the insurer that the injured

Sharada Charan Mohanty being an employee of Orissa University of, Agricultural Technology has reimbursed the medical expenses and has not sustained any loss of earning capacity. It is seen from the impugned judgment that the learned Tribunal has not granted any compensation for loss of earning or earning capacity. The Tribunal has granted consolidated sum of Rs. 2,00,000/- keeping in view the nature of injuries and the period of treatment. Admittedly no material has been brought on record to reveal anything that the injured-claimant has reimbursed the medical expenses. Since the Tribunal has granted consolidated compensation of Rs.2,00,000/-, no merit is found in the contention raised by either parties to disturb the same which in opinion of this Court is reasonable keeping in view the nature of injuries sustained and treatment undertaken.

18. Considering the amount granted by the Tribunal in MAC No.105/2011 and in absence of any material with regard to nature of injuries sustained by him, this Court finds no reason to interfere with the same.

19. In view of the discussions made above, all the appeals are dismissed being without merit.

20. The insurer is directed to deposit the respective amounts granted by the Tribunal in each case including interest within a period of two months from today, which shall be disbursed in favour of the respective claimants in terms of the direction of the learned Tribunal contained in the impugned judgment. Subject to deposit of the amounts within a period of two months, the payment of any penal interest as directed by the Tribunal is waived.

21. On deposit of the award amount before the learned Tribunal and filing of a receipt evidencing the deposit with refund applications before this Court, the statutory deposit made by the insurer in their appeals before this Court with accrued interest thereon shall be refunded to the Insurance Company.

—— o ——

2022 (II) ILR - CUT- 1022

S.K. PANIGRAHI,J.

W.P.(C) NO. 33961 OF 2021

RABINDRA PANIGRAHI …….. Petitioner

.V.

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

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Evaluation of answer sheet – Interference of the Writ Court – Petitioner assails the evaluation method and preparation of question-cum-answer sheet in the Computer Based Test (CBT) for appointment of Contractual Teachers in Govt. Secondary School – Held, it would not be proper for the Court to interfere. (Paras 12,13)

Case Laws Relied on and Referred to :-

1. 1974 AIR 87 : Union of India v. M.L. Kapur.
2. 1984 AIR 1543 : Maharashtra State Board of Secondary and Higher Secondary Education and Anr. v. Paritosh Bhupesh Kurmarsheth.
3. 1996 I OLR 134 : Bismaya Mohanty and Ors. vs Board of Secondary Education.
4. (2010) 6 SCC 759 : H.P Public Service Commission v. Mukesh Thakur & Anr.

For Petitioner : Mr. Ramakanta Sahoo
For Opp.Parties : Mr. S. Mishra, S.C. (For S & ME Deptt.)

ORDER Date of Order : 20.05.2022

S.K. PANIGRAHI, J.

1. This matter is taken up by hybrid mode.

2. Heard learned counsel for the petitioner and learned counsel for the State.

3. The present petition has been directed against the improper evaluation and preparation of question cum answer sheet in the Computer Based Test (CBT) for the recruitment of Contractual Teachers in Govt. Secondary School, pursuant to Advertisement dated 13.08.2021; whereby the Petitioner assails the evaluation method and has preferred an application under Articles 226 and 227 of the Constitution of India.

4. Shorn of unnecessary details, the substratum of the matter presented before us remain that the petitioner is a resident of Bandhagaon, P.S - Bhadrak, Dist - Bhadrak. The Petitioner, pursuant to Advertisement dated 13.08.2021, applied for the post of Hindi Teacher and appeared for the designated Computer Based Test (CBT) at upper floor of Bansal Classes, Jaydev Vihar, Bhubaneswar on 04.10.2021.

5. The petitioner was quite hopeful and confident of getting qualified owing to his satisfactory performance in the CBT. However, to his dismay, he had scored 21.75 marks out of 90, falling short of only 0.75 marks from the qualifying marks (22.5) by less than one mark.

6. Further, the learned Counsel for petitioner has contended that Q.63 is out of syllabus and therefore, constitutes a plausible ground for awarding grace marks

to the petitioner. Moreover, the Ld. counsel submits that the petitioner being 32-year-old would be barred by age and rendered ineligible to appear for examinations of similar kind in future.

7. However, it is to be noted that the petitioner had alleged discrepancies in relation to three questions i.e., Q.63, 64 and 89. In the rejoinder affidavit, the petitioner having been satisfied by the explanation provided by the expert committee, retracted his claim in relation to Q. 64 and 89. It is also pertinent to mention that the petitioner had previously alleged Q. 63 and Q. 89 to be out of syllabus.

8. In the counter-affidavit filed by the opposite party, Merit Trac Services Pvt. Ltd., through the letter dated 17.02.2022, has systematically explained as to how Q.63 is a part of "Child Development-Process of growing up" and "Learning Process-understanding Learning Process/Learning as a Process and outcome". Moreover, the scheme & syllabus for Computer Based Recruitment Examination (CBRE) published by the Directorate of Secondary Education, Odisha also includes "Information Processing Approach- Sternberg" under the heading "Approaches to Understanding the Nature of Intelligence" in Section-IV of the syllabus.

9. It appears that if the petitioner had grievance of the questions being out of syllabus, such a discrepancy could've been addressed in the stipulated time frame i.e., 06.10.2021-08.10.2021 (3 days). Moreover, the opposite party in the counter-affidavit has categorically stated that they disposed off 577 representations in respect of 76 questions, out of which two questions i.e., Q. 126 & 149 were nullified for having wrong answers and grace marks were provided to all candidates in that respect. It can be ascertained from the petitioner's rejoinder affidavit that he was providing medical attention to his relatives on the designated dates for addressing discrepancy in relation to the question paper and hence, was unable to make his representation. The court needs to see what is legally possible and not what possibly dehors the legal process. A thing that may seem plausible on the grounds of natural justice, may not be possible legally. As succinctly put by Mathew, J. in his judgment in the ***Union of India v. M.L. Kapur***[1], "it is not expedient to extend the horizon of natural justice involved in the *Audi alteram partem* rule to the twilight zone of mere expectations, however great they might be".

10. The prayer of the petitioner to re-evaluate the answer script is also unsustainable as the candidates selected for the concerned examination have been engaged since 15.12.2021. Moreover, the Supreme Court in the case of

1. 1974 AIR 87

Maharashtra State Board of Secondary and Higher Secondary Education and Anr. v. Paritosh Bhupesh Kurmarsheth[2] had opined that:

> *"It is in the public interest that the results of public examinations when published should have some finality attached to them. If inspection, verification in the presence of the candidates and revaluation are to be allowed as of right it may lead to gross and indefinite uncertainty, particularly in regard to the relative ranking etc.ofthe candidates, besides leading to utter confusion on account of the enormity of the labour and time involved in the process. The Court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those formulated by professional men possessing technical expertise and rich experience of actual day-to-day working of educational institutions and the departments controlling them. It would be wholly wrong for the Court to make a pedantic and purely idealistic approach to the problems of this nature, isolated from the actual realities and grass root problems involved in the working of the system and unmindful of the consequences which would emanate if a purely idealistic view as opposed to a pragmatic one were to be propounded, in the above premises, it is to be considered how far the Board has assured a zero defect system of evaluation, or a system which is almost fool-proof."*

11. Further, In the case of ***Bismaya Mohanty and Ors. vs Board of Secondary Education***[3], the court observed that it is not in dispute that the Regulations of the Board do not permit review, and as such no review of the answer-script can be done. It cannot be denied that an examiner has a right to fair-play and get appropriate marks according to his performance. What constitutes fair-play depends upon the facts and circumstances relating to each particular given situation. If it is found that every possible precaution has been taken and all necessary safeguards provided to ensure that the answer scripts inclusive of supplements are kept in safe custody so as to eliminate the danger of their being tampered with and that the evaluation is done by the examiners applying uniform standards with checks and cross-checks at different stages, and that measures for detection of malpractice has also been effectively adopted in such cases it would not be proper for the Court to interfere.

12. Since the present set of facts suggest that the examination was a computer-based test, it eliminates any possibility for human intervention in both examination and evaluation phase. Due to lack of evidence suggesting possible malpractice, it is imperative that the due process involved in evaluation of answer scripts be followed without hinderance from courts. In the case of ***H.P Public Service Commission v. Mukesh Thakur & Anr***[4], the Supreme Court held that it was not permissible for the High Court to examine the question paper and answer sheets itself, particularly, when the Commission had assessed the inter-se merit of the candidates. If there was a discrepancy in framing the

2. 1984 AIR 1543 **3.** 1996 I OLR 134 **4**. (2010) 6 SCC 759

question or evaluation of the answer, it could be for all the candidates appearing for the examination and not for respondent no.1 only. It is a matter of chance that the High Court was examining the answer sheets relating to law. Had it been other subjects like physics, chemistry and mathematics, we are unable to understand as to whether such a course could have been adopted by the High Court.

13. Having considered the matter in the aforesaid perspective and guided by the precedents cited hereinabove, this Court allows and upholds the defence of the Opposite Party No.2 and rejects the prayer of the petitioner.

14. The W.P.(C) is, accordingly, disposed of being dismissed.

15. The sealed cover answer sheet of the petitioner be returned back to the learned Standing Counsel for the Department of School and Mass Education.

—— o ——

2022 (II) ILR - CUT-1026

S.K. PANIGRAHI, J.

WPC (OAC) NO. 2822 OF 2014

BASANTA KUMAR SAHOO …….. Petitioner

.V.

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

ORISSA CIVIL SERVICES (PENSION) RULES, 1992 – Rule 47(2)(b) – Qualifying service period for pension, i.e, 10 years – Petitioner rendered 9 years and 10 months of service as a regular Primary School Teacher for which he has not been granted pension – Action of authorities challenged – Held, when a few months shortage of the minimum years of service to be reckoned for completion of the minimum service period, the said shortage period can be rounded off and the benefits can be granted in favour of the employee. (Para 14)

Case Laws Relied on and Referred to :-

1. (2014)13 SCC 474 : State Bank of Patiala vs. Pritam Singh Bedi & Ors.
2. (2008) SCC 711 : Indian Bank vs. G.Ramachandran.

For Petitioner : Mr. K.K. Swain

For Opp.Parties : Mr. Biswajit Mohanty, S.C (for S & ME Deptt.)

JUDGMENT Date of Hearing : 13.05.2022 : Date of Judgment : 27.05.2022

S.K. PANIGRAHI, J.

1. This matter is taken up through hybrid mode.

2. In this writ petition, the petitioner has prayed for a direction from this Court to the opposite parties to sanction and grant pensionary benefits and other retiral benefits i.e.gratuity, leave salary to him taking into account his Non-Formal period of service as qualifying service.

3. The facts of the case are that the petitioner was initially appointed as a Non-Formal Facilitator vide order dated 17.02.1982 of the District Inspector of Schools, Jagatsinghpur and he is continuing as such and discharging his duties to the satisfaction of all concerned. The petitioner while continuing as such, as per the Scheme/circular issued by the State Government to absorb all Non Formal Facilitators having three years of service and having C.T. qualification as regular Primary School Teachers, the petitioner accordingly was absorbed as regular Primary School Teacher by virtue of order dated 19.07.1997 issued by the District Inspector of Schools, Jagatsinghpur. Pursuant to the aforesaid order dated 19.07.1997 of the District Inspector of Schools, Jagatsinghpur, the Block Development Officer, Jagatisnghpur vide his office order No.1913 dated 26.7.1997 issued appointment order in favour of the petitioner.

4. Pursuant to the said order of appointment, he joined as an Assistant Teacher on 24.07.1997 which is evident from the relevant pages of the Service Book. However, while the petitioner was serving as Assistant Teacher, his services were terminated abruptly with effect from 30.11.2006 vide order dated 30.11.2006 passed by the District Inspector of Schools, Jagatsinghpur. The petitioner challenged the said order dated 30.11.2006 by filing an O.A. No.2764 (C) of 2006 before the State Administrative Tribunal, Cuttack Bench, Cuttack (hereinafter referred to as "the Tribunal" for brevity). The Tribunal vide order dated 14.12.2006 passed in batch of cases including the O.A. No. 2764(C) of 2006 filed by the petitioner and stayed order of termination dated 30.11.2006 and directed to restore of status of the petitioners therein as on 30.11.2006. The relevant portion of the order dated 14.12.2006 passed by the Tribunal in the aforesaid batch of cases is as follows:

> *"In the meantime, the order of termination dated 30.11.2006 is stayed until 18.11.2007 and the applicant be restored back to the status as on 30.11.2006 and if the post is already occupied, then she be shown against supernumerary post created specifically for this purpose in compliance of the orders of the Tribunal. The opposite parties would also be competent to relocate the vacancies wherever they can to adjust those persons whose service have been terminated by the order dated 30.11.2006. We also clarify that no one who is recruited in pursuance of the recruitment process initiated in March,1996 will in any manner be affected by the location of the vacancies for the*

applicants i.e. NFE Instructors/Supervisors. Any direct recruit of NFE Instructor/ Supervisor who does not conform to the qualification prescribed would not be covered by these orders."

5. Pursuant to the aforesaid order dated 14.12.2006 passed in O.A. No. 2764 (C) of 2006, the petitioner was reinstated in service and he was allowed to retire from service with effect from 31.05.2007 on attaining the age of superannuation.

6. Learned counsel for the petitioner submitted that even though the petitioner was allowed to retire from service with effect from 31.05.2007, he was not provided with pension and other retiral benefits on the ground that he has not completed 10 years of qualifying service as a Primary School Teacher. It was further submitted that admittedly the petitioner had rendered 9 years and 10 months of service as a regular Primary School Teacher for which he has not been granted pension.

7. Learned counsel for the petitioner further contended that since the petitioner has rendered 14 years of service as a Non-Formal Facilitator and as per the Government circular governing the field, he being a trained Non-Formal Facilitator, he was absorbed as a regular Primary School Teacher. His qualifying service ought to have been taken into consideration by adding the service period rendered by him as Non-Formal Facilitator. Curiously, the authorities have failed to take into consideration the service period rendered by him as Non-Formal Facilitator and have also rounded of the qualifying service bereft of Non-Formal period to 10 years although he has rendered 9 years and 10 months of service exclusively as a regular Primary School Teacher. Therefore, it is imperative that the Opposite Parties should count the service rendered by the petitioner as Non-Formal Facilitator and by adding the same to his qualifying service, his pension and other retiral benefits should have been paid.

8. On the contrary, learned Standing Counsel for the Department of School and Education submitted that the averment made by the petitioner in the writ petition is that the order of termination dated 30.112006 has been quashed by the Tribunal vide order dated 14.12.2006 passed in O.A. 2764(C) of 2006 is not correct. In fact, the Tribunal has admitted the O.A. 2764 (C) of 2006 filed by the petitioner along with other batch of cases and issued notice to the opposite parties, as would be evident from the order dated 14.12.2006. There was to file their reply by fixing the next date of hearing to 18.01.2007. The said order does not reveal that the order of termination of the petitioner has been quashed and further no direction whatsoever has been passed to reinstate the petitioner. Rather, an interim order has been passed to maintain status of the petitioner as on 30.11.2006 subject to condition that if the post occupied by the petitioner is not

already occupied and if occupied he be shown against supernumerary post in the event he conforms to the qualification prescribed for absorption of N.F.Es. in the post of Primary School Teacher.

9. As a matter of fact the petitioner had already been relieved from service with effect from 30.11.2006 and no supernumerary post was created for his adjustment and he was not allowed to continue after 30.11.2006 in compliance of the interim order dated 14.12.2006 of the Tribunal. Since he did not satisfy other conditions stipulated therein, hence it is not correct to say that the petitioner was re-instated is service and was allowed to retire from service with effect from 31.05.2007.

10. Moreover, the petitioner has not filed the document/order purportedly under which he was allowed to retire on 31.05.2007. He, further, submitted that when the petitioner has been terminated from service on 30.11.2006 and he has neither been re-instated nor allowed to retire with effect from 31.05.2007, the petitioner has only qualifying period of service for 9 years 4 months and 6 days to his credit. Since the petitioner has not served for 10 years of minimum qualifying period of service, as per Rule 47(2)(b) of the Orissa Civil Services (Pension) Rules, 1992 (hereinafter referred to as "the Rules" for brevity"), he is not entitled to any pension or other pensionary benefits. He further submitted that the Rules do not provide any provision to count the period of service rendered as N.F.E. towards qualification service. Moreover, the post of N.F.E. Instructor is not a civil post, rather it is a centrally sponsored schematic post. Therefore, in no circumstances, the period of service rendered as N.F.E can be taken as service period in pensionable establishment.

11. A rejoinder affidavit to the counter has been filed by petitioner. In his rejoinder affidavit the petitioner stated that he being a Non-Formal Facilitator was appointed as a Primary School Teacher by virtue of the order dated 19.07.1997 of the District Inspector of Schools, Jagatsinghpur. Accordingly, the petitioner joined the said post on 24.07.1997 and continued to discharge his duties.

12. The petitioner while continuing as such, his services were terminated by virtue of the order dated 30.11.2006 of the District Inspector of Schools, Jagatsinghpur with effect from 30.11.2006. Thereafter, the petitioner filed O.A. No. 2764 (C) of 2006 along with other similarly situated teachers whose services were terminated. Pursuant to the order dated 14.12.2006 passed in O.A. No. 2764(C) of 2006 and a batch of cases, 122 numbers of Ex-Non-formal Instructors under Jagatsinghpur and Tirtol Education District were reinstated in service by virtue of the office order dated 04.05.2009 of the District Inspector of

Schools, Jagatsinghpur. Similarly situated Assistant Teachers who were terminated from service with effect from 30.11.2006 were reinstated in service by virtue of the order dated 04.05.2009 of the District Inspector of Schools, Jagatsinghpur. Since the petitioner retired from service on attaining the age of superannuation with effect from 31.05.2007, he is also entitled to get the same benefit on the basis of the order passed by the Tribunal.

13. The petitioner has completed 9 years and 10 months of qualifying service, he is entitled to get pension and if, at all, there is any short fall, the same is to be adjusted from the service rendered by the petitioner in the capacity of non-formal Facilitator. Therefore, the plea taken in the counter affidavit that the petitioner was not reinstated in service nor allowed to retire from service with effect from 31.05.2007 is not at all correct particularly when similarly situated Assistant Teachers who were terminated from service with effect from 30.11.2006 were taken back to the service, which is evident from the order dated 04.05.2009 passed in favour of one Smt. Bijayalaxmi Mohapatra, who was one out of 122 numbers of teachers who was terminated from service with effect from 30.11.2006 as per Annexure-8. Besides, in the case of Grama Panchayat Secretary, who was appointed/promoted to the post of V.L.W., her services in the capacity of Grama Panchayat Secretary were taken into consideration for the purpose of grant of pension. Therefore, applying the same logic, the service rendered by the petitioner during the period of Non-Formal Facilitator should have been taken into consideration for the purpose of counting the qualifying service period for grant of pension.

14. Similar facts have been quite well articulated in the case of ***State Bank of Patiala vs. Pritam Singh Bedi & Ors.***[1] and ***Indian Bank vs. G. Ramachandran***[2] and a few months shortage of the minimum years of service to be reckoned for completion of the minimum service period, the said shortage period can be rounded off and the benefits can be granted in favour of the employees.

15. In view of the finding recorded above, the Writ Petition is allowed.

16. The Opposite Parties are directed to take immediate steps for releasing the pension to the petitioner as per procedure preferably within three months from the date of receipt of the copy of this order. No order as to costs.

17. As a sequel, Miscellaneous Petitions, if any pending, shall stand disposed of.

1. (2014)13 SCC 474 **2**. (2008) SCC 711

—— o ——

2022 (II) ILR - CUT-1031

MISS. SAVITRI RATHO, J.

CRLREV NO. 651 OF 2005

ULAKA RAISULU …….. Petitioner

.V.

STATE OF ODISHA …….. Opp.Party

BIHAR AND ORISSA EXCISE ACT, 1915 – Conviction order passed against the petitioner under Section 47(A) by the learned S.D.J.M. – The seized liquor has not been chemically examined – Effect of – Held, as the seized liquor has not been chemically examined, P.W 2 the S.I. of Excise has stated that he has undergone distillery training, in the absence of supporting documents, it would be unsafe to convict the petitioner by relying on his opinion which is on the basis of blue litmus paper, hydrometer tests, smell and colour of the liquid that it was I.D. liquor – The conviction of the petitioner under Section 47(A) is set aside. (Para 9)

Case Laws Relied on and Referred to :-

1. 1998 (II)OLR 315 : 2000 (19) OCR SC 688 : S. Dasarathi Reddy vrs. State.
2. 2005 (II) OLR 401 : Simanchal Choudhury vrs. State of Orissa.
3. (2002) 22 OCR SC 778 : Kantaru Sethy vs State of Orissa.
4. 2002 (I) OLR (NOC) 68 : Subash Ch Sahu vs State of Orissa.
5. 1993 (II) OLR 392 : 1993 (6) OCR 612 : Suma Das v. State of Orissa.
6. 1994 (I) OLR 516 : 77 (1994) CLT 944 : Bisam Harijan v. State of Orissa.
7. 2002 (I) OLR 316 : 93 (2002) CLT 327 : Biswanath Sahoo v. State.
8. (2020) 1 SCC 120 : Mukesh Singh vs State (NCT of Delhi).

For Petitioner : Mr. J.R. Dash

For Opp. Party : Mr. S.S. Pradhan, A.G.A

JUDGMENT Date of Judgment : 10.08.2022

SAVITRI RATHO, J.

The petitioner-Ulaka Raisulu has filed this Criminal Revision challenging the judgment and order dated 17.08.2005 passed by the learned Additional Sessions Judge, Rayagada in Criminal Appeal No. 39 of 2004 confirming the judgment passed by learned S.D.J.M., Gunupur in 2(a) C.C. Case No. 36 of 2001/T.R.Case No. 125 of 2001, convicting him for commission of the offence under Section 47(a) of the Bihar and Orissa Excise Act and sentencing him to undergo R.I. for two years and to pay a fine of Rs. 5000/-, in default to undergo R.I. for six months, subject to set off.

2. The prosecution case in short is that on 09.11.2000 at 8 A.M., the S.I. of Excise Gunupur along with his staff had been to Ramanaguda on patrol duty. At

Parikhiti chhaka, they noticed that the accused was holding a plastic jerrican. On suspicion, they detained him and recovered the plastic jerrican from the exclusive possession of accused and found it contained 7 litres of liquor in presence of available witnesses. The S.I. tested the liquor by means of blue litmus paper and hydrometer and ascertained that the said liquor was I.D. liquor. Since the accused did not possess any licence or authority for such possession, the S.I. seized the plastic jerrican with the I.D. liquor and prepared the seizure list at the spot and served a copy of it on the accused. After completion of investigation, he submitted prosecution report.

3. In order to prove its case, prosecution has examined three witnesses. P.W.1 Santosh Kumar Sethi is the Excise Constable, P.W.2 Narayana Bisoi is the S.I. of Excise and P.W.3 Padmanava Behera is an independent witness. The defence did not examine any witness.

4. P.W. 1 has stated that on 09.11.2000 at about 8.00 A.M., he along with P.W.2 had been to village Ramanaguda for performing patrol duty. At Parikhiti junction, they found the accused was coming with a plastic jerrican containing 7 litres of I.D. liquor. So the S.I. of Excise seized the same from the possession of the accused in his presence as per the seizure list, Ext.1. He proved his signature Ext.1/1. The S.I. of Excise tested the seized liquor by means of blue litmus paper and hydrometer and arrested the accused and released him on bail.

P.W.2-Narayana Bisoi, who is the S.I. of Excise and the complainant and I.O. has stated that on 09.11.2000, while he along with his staff had been to village Ramanaguda for performing patrol duty, they found the accused was standing at Parikhiti junction near Ramanaguda village. He detained the accused on suspicion and on search, he recovered one plastic jerrican containing 7 litres of I.D.liquor from his possession. Since the accused failed to produce any licence or authority to support such possession, he seized the same from the possession of the accused in presence of the witnesses as per the seizure list Ext.1. He proved his signature Ext.1/2. He stated that he tested the seized liquid by means of blue litmus paper which turned into red colour. By hydrometer test, he determined its strength as 79.6 degree U.P. From the above tests, smell, colour and his departmental service experience and as he had undergone training in distilley, he came to know it to be I.D. liquor. He handed over a copy of the seizure list to the accused. He arrested the accused and released him on bail. After completion of enquiry, he submitted P.R. against the accused. M.O.I. is the seized plastic jerrican which contained the I.D. liquor.

P.W.3-Padmanava Behera, who is an independent witness who has not supported the prosecution case and has stated that the Excise babu seized nothing

in his presence. But on the direction of the Excise babu, he put his signature on the seizure list. He has admitted his signature in the seizure list, which is marked as Ext.1/3.

5. The learned trial court held there was no reason to disbelieve the official witnesses as it found no inconsistency in their evidence and as they had no hostility with the accused so as to falsely implicate him and the seized jerrican had been produced in Court. The learned Court accepted the claim of the P.W.2 that he had undergone distilling training as he has stated that on oath and held that his opinion was final as he had conducted litmus paper test and hydrometer test and smell test and convicted the accused under Section 47 (a) of the Bihar and Orissa Excise Act and sentenced him to undergo R.I. for two years and to pay a fine of Rs. 5,000/- in default to undergo R.I. for six months holding that he is not entitled to the benefit under the P.O. Act.

6. Criminal Appeal No.39 of 2004 was filed by the petitioner in the Court of Session challenging his conviction and sentence. The learned Addl. Sessions Judge, Rayagada vide judgment and order dated 17.08.2005 dismissed the appeal and confirmed the judgment and order of the learned trial court .

7. Mr. J.R. Dash, learned counsel for the petitioner has challenged the impugned judgements and orders on the following grounds

(a) P.W 2 is the complainant as well as the investigating officer in the case for which prejudice has been caused to the petitioner.

(b) The seized liquor has not been chemically examined . P.W 2 has assumed the role of an expert. By conducting litmus paper and hydrometer test, he has decided that the seized liquid was I.D. liquor. He has claimed that he has undergone distillery training, but no materials have been produced in the court to support such claim. In the absence of chemical examination and production of documents in support of distillery training by P.W 2 the I.O, his opinion that it was I.D. liquor is not acceptable. He relies on the decisions of this Court in the cases of ***S. Dasarathi Reddy vrs. State : 1998 (II) OLR 315 : 2000 (19) OCR SC 688*** and ***Simanchal Choudhury vrs. State of Orissa : 2005 (II) OLR 401*** , in support of such submission.

(c) The seizure should be disbelieved as P.W.3 the sole independent witness did not support the prosecution case. As he has not been declared hostile nor cross-examined by the prosecution , his evidence can be taken into consideration.

(d) In case, this Court thinks it proper to confirm the conviction, in view of the fact that about 22 years have elapsed since the date of occurrence, a lenient view be taken and the petitioner may not be sent back to custody after so many years and the sentence may be confined to the period undergone and/or fine. He relies on the decisions of the Apex Court and this court in the cases of ***Kantaru Sethy vs State of Orissa*** reported in ***(2002) 22 OCR SC 778 , Subash Ch Sahu vs State of Orissa : 2002 (I) OLR (NOC) 68.***

8. This Court in the case of ***S.Dasarathi Reddy*** (supra) has held as follows :

…."5. Here in this case, it is not disputed that no chemical analysis was done. What was done by the Excise Sub-Inspector was litmus paper test and hydrometer test. It is not explained as to why the seized liquor was not sent to the Chemical Examiner for examination. He, however, claims that he had training in distillery and he had 11 years experience at his credit in the Department. Besides this bald statement there is nothing to show that he had actually received training in a Branch of the Excise Department which is directly connected with the testing of liquor. Such a bald statement without any particulars of training or type of service does not make him an expert witness. It may be observed that in case of this nature, where substantive sentence of imprisonment is compulsory after conviction, a heavy duty is cast upon the prosecution to establish beyond any reasonable doubt that what was recovered from the accused was illicit liquor. Here in this case, the evidence is lacking with regard to it. This being the position, it seems that the order of conviction and sentence passed by the trial Court and affirmed by the Superior Court cannot be sustained."…

In the case of ***Simanchal Choudhury*** (supra), this Court has held as follows :-

*…"5. I have perused the judgments of both the Courts below and the evidence adduced by the prosecution witnesses. I find that even though the prosecution has alleged that the petitioner was selling I.D.liquor when the seizure was effected, strangely, no independent witnesses to the search and seizure have been produced by the prosecution. If the allegation of the prosecution regarding the act of selling I.D. liquor is accepted, the same would presuppose that some person or persons was/were either purchasing or purchasing and consuming the liquor sold by the accused. But, neither statement of any such person has been recorded nor any such person has been produced as prosecution witness. It is no doubt true that the evidence of official witness can be relied upon in a given case. As because P.W.1 was working as a constable in the Excise Department, the same is not a ground to disbelieve his testimony. It is revealed from the record that the liquid seized was never subjected to chemical test. Except the bare statement of P.W.2 that he tested the seized liquid by litmus paper which turned red and also measured the density of the said liquid by hydrometer test, that does not prove conclusively that the liquid seized was I.D. liquor. Blue litmus turning red on being introduced to a liquid only goes to show that the nature of liquid is acidic and no more. So far as the hydrometer test is concerned, it is a test to measure the density of liquid and possibility of any other liquid (solution) having the same density cannot be ruled out. The evidence of P.W.2 that by his experience of long twenty years of service in the department, he has acquired an expert knowledge in identifying liquor, is of no help to the prosecution. As already held by this Court in various decisions, an Excise Officer bearing some experience due to his long service cannot be termed as an expert in terms of Section 45 of the Evidence Act. Further, in the instant case, identification of the liquid seized by P.W.2 as I.D. liquor does not confirm to the test as required to be proved to bring a case under Section 47(a) of the Bihar and Orissa Excise Act, 1915. (See **Suma Das v. State of Orissa,** 1993 (II) OLR 392 : 1993 (6) OCR 612**, Bisam Harijan v. State of Orissa,** 1994 (I) OLR 516 : 77 (1994) CLT 944 and **Biswanath Sahoo v. State,** 2002 (I) OLR 316 : 93 (2002) CLT 327), I find, in the present case that the seized liquor was never produced before the trial Court which is another aspect, which goes against the case of the prosecution."…*

9. Contention of the learned counsel that his conviction is liable to be set aside as the sole independent witness did not support the prosecution is not acceptable as

P.W.1 the Excise Constable has supported the prosecution case and P.W 3, the independent witness has only stated that nothing has been seized in his presence which by itself is not fatal to the case of the prosecution.

Similarly, the contention of the learned counsel that the prosecution case is vitiated as because P.W 2, the S.I of Excise who had lodged the complaint has himself investigated into the case, has no force as he has not shown what prejudice and as why he would falsely implicate the petitioner. Moreover, this point has been set at rest by larger (5 Judges) Bench of the Supreme Court in the case of ***Mukesh Singh vs State (NCT of Delhi)*** reported in ***(2020) 1 SCC 120*** which has decided the reference holding that –

> *....."In a case where the informant himself is the investigator, by that itself cannot be said that the investigation is vitiated on the ground of bias or the like 61 factor. The question of bias or prejudice would depend upon the facts and circumstances of each case. Therefore merely because the informant is the investigator, by that itself the investigation would not suffer the vice of unfairness or bias and therefore on the sole ground that informant is the investigator, the accused is not entitled to acquittal. The matter has to be decided on a case to case basis."*

But after careful perusal of the deposition of the three prosecution witnesses, I find force in the submission of the learned counsel, that the seized liquor has not been chemically examined and even though P.W. 2 the S.I. of Excise has stated that he has undergone distillery training, in the absence of supporting documents it would be unsafe to convict the petitioner by relying on his opinion which is on the basis of blue litmus paper, hydrometer tests, smell and colour of the liquid that it was I.D. liquor . The conviction of the petitioner under Section 47(A) of the Bihar and Orissa Excise Act by the learned S.D.J.M., Gunupur and learned Additional Sessions Judge, Rayagada is therefore set aside.

10. The Criminal Revision is accordingly allowed. As the petitioner is stated to be on bail, his bail bonds stand discharged.

11. The Lower Court records be returned forthwith.

—— o ——

2022 (II) ILR - CUT-1035

R.K. PATTANAIK, J.

CRLMC NO. 888 OF 2012

GANESWAR NAIK …….. Petitioner

.V.

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

NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138, 142(b) – Complainant/O.P. No. 2 issued two demand notice – The complaint was not filed within the stipulated time after the first demand notice – Whether it was beyond the period of limitation in view of Section 142(b) N.I.Act and not maintainable? – Held, the second demand notice was to be held as maintainable notwithstanding the fact that after the first notice subsequent to the dishonour of cheque, no complaint was filed within the stipulated time. (Para 5)

Case Laws Relied on and Referred to :-

1. (2005) 4 SCC 417 : Prem Chand Vijay Kumar Vrs. Yashpal Singh & Anr.
2. (2013) 1 SCC 177 : MSR Leathers Vrs. S. Palaniappan.

For Petitioner : Ms. Sarada Dash

For Opp.Parties: Mr. P.K. Mohanty, ASC, Mr. P.S. Das.

JUDGMENT Date of Judgment : 04.07.2022

R.K. PATTANAIK, J.

1. Instant petition under Section 482 Cr.P.C. is filed by the petitioner challenging the order of cognizance dated 30th November, 2011 passed in 1CC Case No.140 of 2011 by the learned S.D.J.M. Keonjhar on the grounds *inter alia* that the same is not tenable in law as barred by limitation having been filed long after the first demand notice dated 29th August, 2011 and hence, it is liable to be quashed.

2. The petitioner contends that the learned court below notwithstanding the fact that the complaint was not maintainable, in an illegal manner, took cognizance of the offence under Section 138 N.I.Act and issued process to him, which is arbitrary and wholly unjustified.

3. O.P. No.2 is the complainant, who instituted the complaint i.e. 1CC Case No.140 of 2011 alleging therein that on 1st March, 2011, the petitioner had taken a private loan of Rs. 3.5 lac from him with an assurance to repay the same by 19th June, 2011 and had also issued a post-dated cheque and as the amount was not refunded, the cheque was presented in the bank for encashment but was dishonored for insufficient funds. Accordingly, after the complaint was filed, the learned court below recorded the initial statement of O.P.No.2 and finally took cognizance of the alleged offence and summoned the petitioner by passing the impugned order under Annexure-2.

4. Heard Ms. Sarada Dash, learned counsel for the petitioner, Mr. P.K.Mohanty, learned ASC for O.P. No.1 State and Mr.P.S. Das, learned counsel appearing for O.P.No.2.

5. As pleaded by the petitioner, O.P.No. 2 issued demand notice twice once on 29thAugust, 2011 and thereafter on 28thOctober, 2011 claiming payment of the amount

alleged to have been received by him by a hand loan. The copies of the notices have been marked as Annexres-3 & 4 respectively. The petitioner claims that O.P.No.2 by using a blank cheque during the time of their partnership business filed the complaint in order to harass and put him to trouble. The principal ground of challenge is that after the first demand notice dated 29th August, 2011 calling upon the petitioner to pay the amount within fifteen days and when it was not obliged, O.P.No.2 was required to file the complaint within one month from the date of cause of action but instead, a second demand notice was issued under Annexure-4 and then, the complaint case was filed which is clearly barred by limitation. Ms. Dash, while advancing her argument in support of the contention of the petitioner, relied upon a decision of the Supreme Court in the case of ***Prem Chand Vijay Kumar Vrs. Yashpal Singh and another*** **(2005) 4 SCC 417**. It is contended that in view of the above decision, since the complaint was filed not within the stipulated time after the fist demand notice under Annexure-3, it was beyond the period of limitation in view of Section 142(b) NI Act. In the decision (supra), the Apex Court held that a cheque may be presented repeatedly within its validity period but once notice has been issued and payment not received within fifteen days of the receipt of such notice, payee has to avail the very cause of action arising thereupon and file the complaint. The aforesaid decision was referring to the provisions of Section 142(b) NI Act and it has been observed therein that dishonour of cheque on each presentation gives a fresh right to present it again during the validity period but does not give rise to a fresh cause of action. In respond to the above, Mr. Das, learned counsel for O.P.No.2 cited a decision of the Supreme Court rendered in M*/s. Sicagen India Ltd. Vrs. Mahindra Vadineni and others* decided on 8th January, 2019 which has referred to a three Judge Bench decision in ***MSR Leathers Vrs. S. Palaniappan (2013) 1 SCC 177***. It is contended that a criminal liability may be levied even after a second demand notice which is what has been observed in the decision of *M/s. Sicagen India Ltd*. (supra). In the aforesaid case, two demand notices were issued and no complaint was filed even after the first demand notice and under the above circumstances, the Apex Court concluded that such a complaint after issuance of second demand notice is clearly maintainable. In that case, the complainant had in fact issued first notice demanding repayment of the amount and thereafter, the cheques were again presented and returned with the endorsement 'insufficient funds' and since the amount was not paid, the complaint under Section 138 N.I. Act was filed based on the second statutory notice and in the aforesaid background of facts, the Supreme Court in *M/s. Sicagen India Ltd.* (supra) held that the complaint can be entertained. The decision of **MSR Leathers** (supra) was examined by the Supreme Court, wherein, it was observed that the object underlying Section 138 N.I. Act is to promote and inculcate faith in the efficacy of banking system and its operations giving credibility to negotiable instruments in business transactions and to create an atmosphere of faith and reliance by discouraging people from dishonouring commitments which are implicit when they

Pay their dues through cheques and the provision was intended to punish unscrupulous persons who issued cheques for discharging their liabilities without really intending to honour the promise that goes with the drawing up of such a negotiable instrument; it was also intended to enhance the acceptability of cheques in settlement of liabilities and to safeguard and prevent harassment of honest drawers, lastly while concluding that there is nothing in Section 138 N.I. Act that forbids the holder of the cheque to make successive presentation of the cheque and institute the criminal complaint on the strength of second or successive dishonour of cheque. Having regard to the above settled position of law enunciated in *M/s. Sicagen India Ltd.* (supra), there is no escape from the conclusion that the complaint filed by OP No.2 in the present case after issuance of second demand notice has to be held as maintainable notwithstanding the fact that after the first notice subsequent to the dishonour of cheque, no complaint was filed within the stipulated time. In such view of the matter, the contention of Ms. Dash, learned counsel for the petitioner challenging the entertainability of the complaint on such ground cannot be sustained.

6. Accordingly, it is ordered.

7. In the result, petition under Section 482 Cr.P.C. filed at the behest of the petitioner sans merit and therefore, dismissed for the reasons discussed herein above.

—— o ——

2022 (II) ILR - CUT-1038

R.K. PATTANAIK,J.

CRLMC NO.1745 OF 2012

SWARNALATA ACHARYA & ORS. ……..Petitioners

.V.

STATE OF ORISSA ……..Opp.Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Offences under Section 306 r/w 34 of IPC – Scope of inherent power of the High Court in interfering with the investigation by the police – Held, the Court arrives at a logical conclusion that the criminal proceeding and its continuation cannot be scuttled in exercise of the inherent jurisdiction of the Court. (Para 6)

Case Laws Relied on and Referred to :-

1. 2011 (1) CJD (SC) 161 : M.Mohan Vrs.The State (Represented by Deputy Superintendent of Police).
2. (1992) Supp.1 SCC 335 : State of Haryana & Ors. Vrs. Bhajan Lal & Ors.

3. (2004) 6 SCC 522 : State of A.P. Vrs. Golconda Linga Swamy & Anr.
4. AIR 2009 SC 923 : Sonti Rama Krishna Vrs. Sonti Shanti Sree & Anr.

For Petitioners : Mr. D.R. Swain
For Opp.Party : Mr. A.P. Das, ASC

JUDGMENT Date of Judgment : 04.07.2022

R.K. PATTANAIK, J.

1. Instant petition under Section 482 Cr.P.C. filed by the petitioners assailing the order of cognizance dated 12thApril, 2012 passed in C.T.Case No. 244 of 2012 arising out of Khunta P.S.Case No.75 of 2011 on the grounds inter alia that the offence of abating to commit suicide punishable under Section 306 read with 34 IPC for which the charge sheet has been filed against them to be unsustainable in law and therefore, liable to be quashed.

2. As revealed from the charge sheet, it is made to understand that petitioner No.1 developed illicit relation with accused No.1 which was when protested by the former's husband,he was mentally and physically tortured by both besides petitioner Nos.2 and 3, who are his parents-in-law, whereafter, he committed suicide. It is further revealed that the victim husband left a suicidal note fixing the responsibility on all the accused persons for his death. Subsequent to the FIR being lodged, the petitioners and the other accused were charge sheeted under Section 306 read with 34 IPC.

3. Heard Mr. D.R. Swain, learned counsel for the petitioners and Mr. A.P. Das, learned ASC for the State.

4. It is contended by Mr. Swain that the petitioners did not commit any act as a result of which the death of the deceased by suicide took place. In other words, it is contended that in abetting suicide of the deceased, the petitioners did not play any role. It is also contended that the suicidal note does not attribute any such abetment or the circumstances to suggest that the victim was forced to commit suicide. In support of such a contention, a decision of the Supreme Court in ***M.Mohan Vrs.The State*** represented by Deputy Superintendent of Police etc. ***2011 (1) CJD (SC) 161*** is relied upon by Mr. Swain.

5. On the contrary, learned ASC Mr. Das submits that all the aspects with regard to the abetment and the genuineness of the suicidal note may have to be examined during trial and therefore, the order of cognizance under Annexure-1 against the petitioners is justified in law considering the nature of allegations and materials collected during the investigation which prima facie established that the deceased committed suicide after being subjected to mental and physical torture.

6. In ***State of Haryana and others Vrs. Bhajan Lal and others (1992) Supp.1 SCC 335***, the Apex Court had the occasion to examine the scope of inherent power

of the High Court in interfering with the investigation by the police and laid down certain guidelines and enunciated that the investigation of an offence is the domain of the police having the power to investigate as per the provisions of Chapter-XII of the Cr.P.C. and the Courts are not justified in obliterating the track of investigation and further observed that if the allegation made in the FIR do not disclose or constitute any cognizable offence or the allegations are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused, under such circumstances, inherent power may be exercised. In ***State of A.P. Vrs. Golconda Linga Swamy and another (2004) 6 SCC 522,*** the Supreme Court highlighted upon the circumstances under which jurisdiction under Section 482 Cr.P.C.could be exercised (a) to give effect to an order under the Cr.P.C.,(b) to prevent abuse of process of the Court; and (c) to otherwise secure the ends of justice reiterating the principles delineated in ***Bhajan Lal*** case (supra).

7. In ***M. Mohan*** case (supra), the Supreme Court held and observed that in order to convict a person under Section 306 IPC, there has to be a clear mens rea to commit the offence; it also requires an active or direct act which led the deceased to commit suicide finding no option and the alleged act must have been intended to push the deceased into such a position that he or she committed suicide. It is further observed therein that abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing and without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained. However, the above decision was rendered while disposing of the appeals filed by the accused persons challenging the order of conviction confirmed by the High Court of Madras. The present case is at the stage of enquiry post taking cognizance of the offence, which means, the trial has not yet commenced. The only test which is to be applied at this point of time is, whether, considering the materials on record with the charge sheet, a prima facie case is made out against the petitioners for having abetted in the suicidal death of the victim, namely, the husband of petitioner No.1 and if at all, inherent jurisdiction may be invoked in the facts and circumstances of the case.

8. As discussed herein above, under the situations described in ***Bhajan Lal*** case (supra), inherent jurisdiction of the High Court could be exercised and not otherwise. It is not that while exercising such power under Section 482 Cr.P.C., the Court is to conduct a roving enquiry as to the truthfulness of the allegations in the FIR and for that matter, in the charge sheet, wherein, the final opinion of the police is revealed. A great amount of caution is required to be observed while interfering with the investigation or enquiry as the case may be, while exercising powers under Section 482 Cr.P.C. In ***Golconda Linga Swamy*** case (supra), such jurisdiction by the High Court, as held by the Apex Court, should be exercised sparingly only in order to prevent abuse of process of law or to secure the ends of justice.

9. In the present case, a suicidal note has been left behind by the deceased, the contents of which have been translated in English vernacular and made a part of the record. It is being alleged in the suicidal note that the victim's wife, namely, petitioner No.1 developed illicit affair with accused No.1 and narrated the other facts relating to the ill-treatment which was meted out to him stating that all the accused persons to be responsible for his death. Even though the genuineness of the above suicidal note has been questioned but in course of argument, the primary contention was that even accepting the same at its face value along with other materials, no prima facie case appears to have been made out.

10. Mr. Swain cited one more decision of the Supreme Court in the case of ***Sonti Rama Krishna Vrs. Sonti Shanti Sree and another AIR 2009 SC 923***, wherein, the proceeding was quashed as against the fact that the accused wife alleged to have openly insulted her husband by calling him ugly looking and impotent, where after, the latter committed suicide but without leaving any suicidal note and again when it was held to be without the requisite intention. However, in the instant case, the facts are slightly different as the deceased husband left a suicidal note alleging the overt acts of all the accused persons claiming them to be responsible for his death.As it appears, the victim committed suicide after having objected the illicit relationship developed by his wife and the other accused and in the process was subjected to mental stress and physical torture. Whether the petitioners did the acts or continued to involve themselves in such manner which compelled the deceased to commit suicide is a fact which is to be finally examined and adjudicated upon during trial. The charge sheet and the connected materials, such as, the statements of witnesses recorded under Section 161 Cr.P.C. besides the suicidal note prima facie indicate that the victim was mentally and physically tortured on number of occasions which left him with no option but to end his life. Each and every connecting circumstance is to be examined before fixing any responsibility vis-à-vis the petitioners for having abetted commission of suicide by the deceased with the requisite mens rea which can only be ensured at the end of the trial. It might as well be a case that the victim out of despair or frustration committed suicide after having failed in his attempt to prevent the continuance of the illicit relation between his wife and accused No.1 which can be elicited after evaluation of the entire evidence.

11. From the materials collected during investigation, it is made to suggest that not only petitioner No.1 did have the illicit relation with the other accused, petitioner Nos. 2 and 3 alleged to have supported their daughter and in the process misbehaved and ill-treated the deceased driving him to commit suicide which may be a conclusion possibly be drawn therefrom. Of course, the suicidal note with all other evidence shall have to be examined for fastening the responsibility on the petitioners which is to happen at the end of the trial. In great detail, the evidence cannot be subjected to scrutiny at this stage even before the commencement of trial. Applying

the settled principles of law in ***Bhajan Lal*** and also ***Golconda Linga Swamy*** (supra) and having regard to the fact that mental and physical torture has been alleged against the petitioners and the fact that for the illicit relation between petitioner No.1 and accused No.1, which appears to be the reason behind the death, a prima facie case can be said to have been made out for the purpose of trial.

12. For the reasons stated above, the Court arrives at a logical conclusion that the criminal proceeding and its continuation cannot be scuttled in exercise of the inherent jurisdiction of the Court having regard to the peculiar facts and circumstances of the case.

13. Accordingly, it is ordered.

14. In the result, the petition under Section 482 Cr.P.C. filed by the petitioners stands dismissed.

—— o ——

2022 (II) ILR - CUT-1042

SASHIKANTA MISHRA, J.

W.P.(C) NO. 6523 OF 2018

NARAHARI SWAIN ……..Petitioner

.V.

STATE OF ODISHA & ORS. ……Opp.Parties

ODISHA AIDED EDUCATIONAL INSTITUTIONS' EMPLOYEES' RETIREMENT BENEFIT RULES, 1981 – Rule 4 r/w OCS (Pension) Rules, 1992 – Claim of pension – Opposite party rejected the claim basically on the ground that he had abandoned the service and therefore was not entitled to any pension – Whether such rejection sustainable ? – Held, No – As the petitioner had rendered 15 years of service prior to availing leave on medical grounds and clause-1 of Rule 4 of 1981 squarely applies to him cannot be deprived of the pensionary benefit – Writ petition allowed. (Paras 15,16)

Case Laws Relied on and Referred to :-

1. (1979) 1 SCC 590 : G.T. Lad v. Chemical and Fibres of India Ltd.
2. (1993) 3 SCC 259 : D.K.Yadav v. J.M.A. Industries Ltd.

For Petitioner : M/s. Sameer Ku.Das, S.K. Mishra & P.K. Behera
For Opp.Parties : Mr.R.N. Acharya,Standing Counsel (S.&M.E.Deptt)

JUDGMENT Date of Judgment : 27.07.2022

SASHIKANTA MISHRA, J.

The petitioner joined service as Headmaster of Nilakantheswar M.E. School on 31.03.1961. While working as such he suffered from depressive psychosis and remained under treatment from 01.07.1976 continuously. After his recovery, he became physically fit to discharge duties on 02.07.1981 and accordingly he wanted to resume his duties. But the Managing Committee of the School had by then posted another Headmaster in his place, for which the petitioner reported the matter to the District Inspector of Schools, Puri on 02.07.1981, who in turn directed the Managing Committee of the School to accept the joining report of the petitioner. However, no action whosoever was taken by the Managing Committee on such instructions. In the meantime the School was taken over by the State Government in the year 1990-91 and renamed as Nilakantheswar Nodal U.P. School. While the matter stood thus the petitioner attained the age of superannuation on 13.10.1997 and as such, was due to retire from service w.e.f. 31.10.1997. The order of retirement was not issued by the opposite parties in favour of the petitioner. However, the petitioner submitted his pension papers with request to release his retirement benefits pending final decision on regularization of his service. The petitioner was regularly contributing to the contributory provident fund and after the School was taken over by the State Government, to the Teachers Provident Fund and General Provident Fund. The petitioner had completed the qualifying period of service and was thus eligible to get pension. By letter dated 22.08.2008, the opposite party no. 4 also directed the petitioner to furnish the necessary documents along with an affidavit, which the petitioner immediately complied. The opposite party no. 4 again on 07.11.2008 asked the petitioner to submit further documents on the ground that no relevant records as per the petitioner's affidavit could be collected from the Headmaster of the School. According to the petitioner, he had submitted whatever documents were available with him. On the representation of the petitioner the opposite party no. 2 by letter dated 09.04.2009 directed the opposite party no.4 to furnish the records/documents mentioned therein for consideration of the grievance of the petitioner. Being aggrieved by the inaction of the opposite parties in the matter of payment of pension, the petitioner approached the erstwhile Odisha Administrative Tribunal Cuttack Bench, Cuttack in O.A. No.1507(C) of 2009, which was transferred to the Principal Bench Bhubaneswar and renumbered as O.A. No. 1130 of 2013. The said O.A. was disposed of by the learned Tribunal by directing the Director to take a decision in the matter within a period of three moths from the date of receipt of such order. Pursuant to such order, the opposite party no. 4 submitted a factual report along with the service book of the petitioner to the Director for sanction of pension and other benefits vide letter dated 26.10.2017. On receipt of the report from the opposite party no. 4, the Director vide Office Order dated 04.12.2017 rejected the claim of the petitioner for pension basically on the ground that he had abandoned the service and therefore was not entitled to any pension. It was further held that the petitioner was not coming within the term

"retiring pension" under the Odisha Aided Educational Institutions' Employees' Retirement Benefit Rules,1981 (in short "1981 Rules") framed for the aided staff or the OCS (Pension) Rules, 1992 (in short "1992 Rules"). It is stated that the petitioner had never abandoned the service but only because of his illness he had remained absent for a long period but even before such absence, the petitioner had already completed15 years of service and is therefore, entitled to be paid pension. Thus, challenging the order dated 04.12.2017 (Annexure-10) passed by the Director, the petitioner has filed the present writ petition with prayer to direct the opposite parties to regularize his service and to release his pension and other retirement benefits.

2. A counter affidavit has been filed by the Director of Elementary Education (opposite party no. 2). It is specifically stated in the said counter that the petitioner remained on medical leave from 01.07.1976 to 02.07.1981 i.e., for a period of 5 years and 2 days and that in support of such medical leave he had submitted a medical certificate issued by Dr. Bansidhar Ram on 02.07.1981 regarding his fitness to resume his duties. It is further stated that due to long absence of the petitioner in his duty the then Managing Committee of the School adjusted another teacher, namely, Sri Nanda Kishore Nayak against the post of Headmaster of the School without terminating the petitioner from service. It is further stated that as per Rule-4 of 1981 Rules, the petitioner shall be entitled to pension only on the satisfaction of one among the five conditions mentioned therein. It is stated that the petitioner's case does not fulfill any of the said conditions as per the provision of Rule-4 of the 1981 Rules or Rules-5, 10 and 41 of the 1992 Rules. It is also submitted that the petitioner's absence from service or interruption of service has not been condoned as per Rule-36 of the 1992 Rules. Since the pension sanctioning authority, i.e. Block Education Officer of Nimapada or appointing authority cannot condone the break of service in favour of the petitioner as qualifying service counted towards pension from 01.07.1976 to 02.07.1981, i.e. the period of absence, he will not be eligible for pension. The period of absence as above requires regularization by the competent authority. Since the petitioner did not work in the School till the age of his superannuation he cannot be held to have retired on attaining the age of superannuation rather he must be held to have voluntarily abandoned the service. It is further stated that in view of the law laid down by the by the Supreme Court in the case of ***Aligarh Muslim University and others vs. Mansoor Ali Khan*** rendered on 28.08.2000, an employee who has abandoned his service is not entitled to pension.

3. Heard Mr. Sameer Kumar Das, learned counsel for the petitioner and Mr. R.N. Acharya, learned Standing Counsel for the School and Mass Education Department.

4. It is contended by Mr. Das that the petitioner having admittedly completed 15 years of uninterrupted service is entitled to pension since the qualifying service is

10 years. He further contends that his absence from service from 1976 to 1981 was for reasons beyond his control as he was suffering from a serious medical ailment. Even though he wanted to resume his duties after being medically fit, the authorities did not allow him to do so and instead, adjusted another person in his place despite the fact that he had not been terminated from service. Therefore, the petitioner's lien on his service had remained intact for all the years. The authorities, instead of regularizing the break period, did not take any action in the matter till the petitioner attained the age of superannuation in 1997. Thus, the petitioner must be deemed to have been validly retired from government service and having rendered 15 years of service, must also be held to be entitled to pension as per the rules and therefore, the impugned order under Annexure-10 is bad in law.

5. Per contra, Mr. R.N. Acharya contends that it is a case of voluntary abandonment of service and the break period was never regularized by the competent authority prior to the age of his retirement. Such being the case, the petitioner is not entitled to pension as per the rules. It is further contended that a case of voluntary abandonment of employment can by no stretch of imagination be treated as retirement on attaining the age of superannuation so as to make him eligible to receive pension and other retirement dues. Therefore, according to Mr. Acharya, the order under Annexure-10 has been rightly passed.

6. From the rival pleadings and contentions put forth on behalf of the parties before this Court, it is evident that the fact that the petitioner joined in service on 31.03.1961 and worked uninterruptedly till 01.07.1976 is not disputed. Further, the fact that the petitioner remained on leave from 01.07.1976 till 02.07.1981 is also not disputed. It is also not disputed that the petitioner did not actually resume duties thereafter though he submitted an application with such prayer accompanied by a certificate from the doctor regarding his medical fitness. In the counter affidavit filed by opposite party no.2 it is stated under paragraph-4 as follows:

> *"4. That, it is humbly submitted that the petitioner remained on medical leave from 01.07.76 to 02.07.81 i.e. for a period of 05 years and 02 days and in support of his medical leave Sri Swain had submitted a medical certificate issued by Dr. Bansidhar Ram, MBBS dtd:02.07.1981 regarding his fitness to resume his duties. But it is a fact that the original service book of Sri Swain is completely silent over the matter."*

From the above it is clear that even according to the opposite party no. 2, the petitioner was on medical leave from 01.07.1976 to 02.07.1981, i.e., for a period of five years and two days. Of course it is stated that the original service book of the petitioner is completely silent over the matter but then the petitioner can hardly be blamed for the same. Surprisingly, after having stated as above under paragraph-4 it is again stated under paragraph-12 as follows:

> *"xxxxxx On that date the applicant was not in service but absconded without informing the competent authority violating Rule 72(2) of Orissa Service Code. As per Rule-36 of OCS (Pension) Rules, 1992 the interruption period of the applicant cannot be condoned."*

7. In paragraph-13 it is stated that the pension sanctioning authority, i.e., the Block Education Officer or appropriate authority cannot condone the break of service in favour of the petitioner as qualifying service counted towards pension from 01.07.1976 to 31.10.1997 (absconded period) to make it qualifying service contrary to the above provisions, i.e., Explanation (2) of Rule 36 of OCS (Pension) Rules, 1992.

8. In paragraph-15 of the counter it is stated that the type of retirement on 31.10.1997 may not be treated as "retiring pension" and that in case it is treated as retiring/superannuation pension, the date of superannuation would be 31.10.1997 and taking into consideration the date of birth of the petitioner as 13.10.1939, the period of absence from 01.07.1976 to 31.10.1997 requires regularization by the competent authority. It is also stated that the petitioner does not satisfy any of the conditions stipulated in Rule 4 of the 1981 Rules. The above pleas have been taken, more or less in the impugned order under Annexure-10.

9. From the above narration, it is evident that the opposite parties have not taken a consistent stand in the matter rather the same appear to be prevaricating in nature. On one hand it is admitted that the petitioner was on medical leave and was not allowed to resume his duty as another teacher had been adjusted in his place yet on the other hand, it is stated that the petitioner had abandoned the service. It goes without saying that law prescribes a procedure to be adopted in case of voluntary abandonment of service by the government servant as contemplated under Rule72(2 of the Odisha Service Code, which is as follows:

> *"**72. Removal of government servant after remaining leave for a continuous period exceeding five years**.*
> *Xx xx xx*
> *(2) Where a Government servant does not resume duty after remaining on leave for continuous period of five years, or where a government servant after the expiry of his leave remains absent from duty otherwise than on foreign service or on account of suspension, for any period which together with the period of the leave granted to him exceeds five years, he shall unless Government in view of the exceptional circumstances of the case otherwise determine, be removed from service after following the procedure laid down in the Odessa Civil Services (Classifications, Control and Appeal) Rules 1962."*

Such procedure was admittedly not followed in the case of the petitioner. A formal order of termination of service was never issued by the appropriate authority against the petitioner. Such being the factual position, the only inference available to be drawn is that the petitioner must be deemed to have been in employment during the entire period till the date of his retirement on superannuation. Of course no formal order of retirement has also been passed but having regard to his date of birth it is evident that he would have retired on 31.10.1997.

10. As regards voluntary abandonment of service, admittedly, the term "abandonment of service" has not been defined as such either in the Service Code or in the 1992 Rules or in the 1981 Rules.

The following observations of the Supreme Court of India in the case of ***G.T. Lad v. Chemical and Fibres of India Ltd.***, reported in **(1979) 1 SCC 590** are highly relevant.

> *"In the Act, we do not find any definition of the expression "abandonment of service". In the absence of any clue as to the meaning of the said expression, we have to depend on meaning assigned to it in the dictionary of English language. In the unabridged edition of the Random House Dictionary, the word "abandon" has been explained as meaning "to leave completely and finally; forsake utterly; to relinquish, renounce; to give up all concern in something". According to the Dictionary of English Law by Earl Jowitt (1959 Edn.) "abandonment" means "relinquishment of an interest or claim". According to Black's Law Dictionary "abandonment" when used in relation to an office means"voluntary relinquishment". It must be total and under such circumstances as clearly to indicate an absolute relinquishment. The failure to perform the duties pertaining to the office must be with actual or imputed intention, on the part of the officer to abandon and relinquish the office. The intention may be inferred from the acts and conduct of the party, and is a question of fact. Temporary absence is not ordinarily sufficient to constitute an "abandonment of office".*
>
> *From the connotations reproduced above it clearly follows that to constitute abandonment, there must be total or complete giving up of duties so as to indicate an intention not to resume the same. In Buckingham & Carnatic Co. v. Venkatiah [AIR 1964 SC 1272 : (1964) 4 SCR 265 : (1963) 2 LLJ 638 : (1963-64) 25 FJR 25] it was observed by this Court that under common law an inference that an employee has abandoned or relinquished service is not easily drawn unless from the length of absence and from other surrounding circumstances an inference to that effect can be legitimately drawn and it can be assumed that the employee intended to abandon service. Abandonment or relinquishment of service is always a question of intention, and normally, such an intention cannot be attributed to a employee without adequate evidence in that behalf. Thus, whether there has been a voluntary abandonment of service or not is a question of fact which has to be determined in the light of the surrounding circumstances of each case."*

Thus it is a matter of inference to be drawn from the facts and surrounding circumstances of the case as to whether there has been a voluntary relinquishment on the part of the employee.

11. In the case of ***D.K.Yadav v.J.M.A. Industries Ltd.,*** reported in **(1993) 3 SCC 259** it was held that since right to life enshrined in Article 21 of the Constitution includes the right to livelihood, the inference of abandonment of service and the consequent termination must be drawn consistent with the principles of natural justice or fair play.

12. In the instant case, there is nothing on record to even remotely suggest that the petitioner had intended to abandon his service. On the contrary, it is borne out from the records that after recovering from his illness and being declared medically fit, the petitioner approached the authorities for permission to resume his

duties but he was not allowed to do so. Neither any disciplinary proceeding was initiated against him nor any action was taken in the matter for as long as 16 years, i.e., from 1981 to 1997 when the petitioner attained the age of superannuation. Therefore, it is not open to the opposite party authorities to contend that the petitioner had voluntarily abandoned his service.

13. The Odisha Service Code, under Rule 72 provides the procedure to be adopted in case of unauthorized leave for more than five years. As already stated, such a procedure has not been followed in the instant case. Thus, in the absence of any rules, or action taken under Rule-72, break in service obviously cannot be simply inferred.

14. The above being the factual scenario of the case, there is no way by which the authorities could have inferred voluntary abandonment of service by the petitioner, rather he having made all attempts to resume his duties and being unsuccessful only because of inaction of the authorities, must be deemed to have been in employment all through till the date of his retirement on attaining the age of superannuation. Significantly, the petitioner had already rendered more than the qualifying service, i.e., 15 years even prior to the so-called break in service which makes him entitled to pension under the rules. The responsibility of condoning the so-called break in service or regularization of such period rests with the concerned authorities and not with the petitioner and therefore, for the inaction of the authorities in this regard the petitioner cannot be deprived of his legitimate dues. In fact, Rule 36 of the 1992 Rules provides for condonation of interruption in service and reads as under:

> *"**36. Condonation of interruption in service**- (a) Upon such conditions as it may think fit in each case to impose, the authority competent to fill the appointment held by a Government servant at the time condonation is applied for, may condone all interruptions in his service.*
>
> *(b) In the absence of a specific indication to the contrary in the service book, an interruption between two spells of civil service rendered by a Government servant under Government shall be treated as automatically condoned and the pre- interruption service treated as qualifying service. The period of interruptions itself shall not count as qualifying service.*
>
> *(c) Nothing in clause (a) and (b) shall apply to interruption caused by resignation, dismissal or removal from service."*

Therefore, it is for the concerned authorities to pass necessary orders to condone the interruption in the of service and to regularize such period.

15. Coming to the relevant rules, it is seen that Rule 4 of the 1981 rules provides as under:

> *4. Subject to the conditions in other rules under the chapter, an employee shall be eligible for pension or gratuity, as the case may be:*
>
> *(1) On retirement by reason of his attending the age of superannuation; or*

(2) On voluntary retirement or retirement by the appointing authority after completion of thirty years of qualifying service or the age of fifty years; or

(3) On retirement before the superannuation on medical certificate of Permanent incapacity for further service; or

(4) On termination of service due to the abolition of the post; or

(5) On closer of the college or school, as the case may be, due to withdrawal of recognition of the said college or school or other causes.

In view of the discussion made hereinbefore it is evident that clause-1 of Rule 4 squarely applies to the case of the petitioner.

16. It must be kept in mind that pension or retirement benefit is not a bounty or favour to be given to the government servant but is his rightful due upon rendering the required length of service. As already stated, the petitioner had rendered 15 years of service prior to his availing leave on medical grounds. In view of the foregoing discussion, the petitioner cannot be blamed for the inaction of the authorities in regularizing the so-called break in service. This leads to the natural inference that the petitioner must be deemed to have been in service all through till he attained the age of superannuation. Of course, the petitioner would not be entitled to any salary or other financial benefits for the period during which he had not performed any work but insofar as pension is concerned, he having rendered qualifying service, cannot be deprived of the same. For the above reason, the impugned order under Annexure-10 cannot be sustained in the eye of law.

17. For the foregoing reasons, therefore, the writ application is allowed. The office order dated 04.12.2017 under Annexure-10 is hereby quashed. The opposite party authorities are directed to regularize the service of the petitioner as per Rules and to release his pension and other retirement benefits without any further delay and in any case, not later than three months from the date of communication of this order or on production of certified copy thereof by the petitioner.

—— o ——

2022 (II) ILR - CUT-1049

A.K. MOHAPATRA ,J.

CRLREV NO.213 OF 2022

K.SUKHJIT SINGH @SUKJIT SINGH ……..Petitioner

.V.

STATE OF ODISHA ……..Opp.Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 102 r/w Section 68(B)(g), 68(F) of the N.D.P.S. Act – Offence U/ss. 20(b)(ii)(C)/25/27-A/29 of the N.D.P.S. Act – Whether the police officer has power and authority

to freeze a Bank account of an accused in course of investigation? – Held, Yes – Any officer during investigation or while conducting an enquiry, if satisfied with the fact that the Bank accounts have a direct nexus with the commission of the alleged offence and such property is likely to be concealed, transferred or dealt with in any manner which will result in frustrating the proceeding relating to forfeiture under this Chapter, he may make an order in seizing such property. (Para13)

Case Laws Relied on and Referred to :-

1. (2002)10 SCC 283 : Sundarbhai Ambalal Desai vrs. State of Gujarat.
2. (1999) 7 SCC 685 : State of Maharashtra vrs. Tapas D. Neogy.
3. 2021(II) OLR 233 L: Maa Kuanri Transport & Ors. vrs. State of Orissa & Ors.
4. (2018) 2 SCC 372 : Teesta Atul Setalvad vrs. The State of Gujarat.

For Petitioner : Mr. J.K. Panda, S.S. Dash & B. Karna
For Opp.Party : Mr. M.K. Mohanty, A.S.C

JUDGMENT Date of Hearing : 07.07.2022 : Date of Judgment : 24.08.2022

A.K. MOHAPATRA , J.

1. This criminal revision has been filed at the instance of the accused petitioner in Special G.R. Case No.22 of 2021 pending in the court of learned Sessions Judge-cum-Special Judge, Malkangiri arising out of M.V.79 P.S. Case No. 09 of 2021, challenging the impugned order dated 18.01.2022 passed by the learned Sessions Judge-cum-Special Judge, Malkangiri in Misc.Case No. 01 of 2022 arising out of above noted Special G.R. Case. By virtue of the impugned order, learned Sessions Judge-cum-Special Judge, Malkangiri, while considering the application of the accused petitioner, which has been filed with a prayer for a direction to the Investigating Officer to reactivate the Bank account No. 6376457670 at Indian Bank, Rajamundir Branch and Bank account No. 98390100002370 at Rajamundir Branch has rejected such application.

2. The prosecution case, in gist, is that at about 2.00 A.M. on 31.01.2021, the informant found one Red coloured Tractor and trolly without registration and one motorcycle and one Red coloured Creta Car parked in a suspicious manner on the road leading to Shanti Nagar from M.V.-72. On search, the police party detected with contraband ganja measuring 1411 Kgs. were kept in such vehicles. It is further alleged that on seeing the police party, the accused persons fled away from the spot taking advantage of the darkness of the night. However, the police party could manage to apprehend six accused persons, namely, Gopal Ray, Bikram Mandal, Mahananda Haldar, Mohammed Gulrez, Surjit Singh and Rajesh Mandal. It is further alleged that the aforesaid contraband ganja was recovered from the exclusive and conscious possession of the above named accused persons. It is further alleged that in course of investigation, it was found that Bank accounts have been used in the alleged crime and further two numbers of Musk Deer were found in the house of

the accused, which was subsequently seized by the police. Subsequently, the police has also arrested the accused Mrinal Mandal and accused Krishan Kanta Ballav. On search, the police recovered one VIVO 1818 Mobile Phone, one I-Tel 2163 Mobile phone and cash of Rs. 2,00,000/- (rupees two lakhs) from the possession of accused, namely, Krishan Kanta Ballav. It is further stated that on being asked, the said accused Krishan Kanta Ballav stated before the police that he was carrying the aforesaid cash amount for purchase of contraband ganja from the remote areas of Chitrakonda for sell in Andhra Pradesh. Accordingly, the said Krishan Kanta Ballav arrested for the alleged commission of offence under Sections 20(b)(ii)(C)/25/27-A/29 of the N.D.P.S. Act.

3. Heard Mr. J.K. Panda, learned counsel appearing for the Petitioner and Mr. M.K. Mohanty, learned Additional Standing Counsel appearing for the State.

4. It is submitted by learned counsel for the petitioner that during investigation of the case, the Bank account of the accused has been seized by the Investigating Officer bearing No. 98390100002370 Bank of Baroda and Account No. 6376457670 Bank of India both are kept at Rajmundir Branch. It is also alleged that the Hyundai Creta car bearing Registration No. AP-05-ES-4646 was also seized by the police in connection with the present case.

5. It is further submitted by learned counsel for the petitioner that so far as the Bank accounts which have been seized by the Investigating Officer are concerned, it is stated that the same have no nexus with the alleged crime. However, for reasons best known to the Investigating Officer, such Bank accounts have been freezed in connection with the present case. He further contends that the petitioner had independent business like running Hotel and Dhaba at Ramundir. Therefore, freezed business accounts have no nexus with the present crime. He further submits that since Bank accounts pertaining to his business transactions have been seized by the police, the petitioner is unable to run his Hotel and Dhaba business smoothly. The income from the aforesaid Hotel and Dhaba business is the only source of income of the petitioner.

6. On the ground that the freezed Bank accounts have no nexus with the alleged crime, the petitioner moved an application under Section 457, Cr.P.C. before the learned Sessions Judge-cum-Special Judge,Malkangiri on 05.01.2022. Learned counsel for the petitioner at this juncture submits that the Special Public Prosecutor had no specific objection to the de-freezing of the Bank accounts as has been brought out by the petitioner, at least no such petition was filed before the learned Sessions Judge-cum-Special Judge, Malkangiri while considering the petitioner's application under Section 457, Cr.P.C. However, learned Sessions Judge-cum-Special Judge, Malkangiri by order dated 08.01.2022 rejected the petition filed by the petitioner under Section 457, Cr.P.C.

7. In assailing the impugned order dated 18.01.2022 under Annexure-3, learned counsel for the petitioner has taken the ground that the Bank accounts which have been freezed by the Investigating Officer has no nexus with the present crime and the money deposited in the aforesaid two Bank accounts are exclusively out of business income of the petitioner from his Hotel and Dhaba business. In course of his argument, learned counsel for the petitioner relying upon the judgment of the Hon'ble Supreme Court of India in ***Sundarbhai Ambalal Desai vrs. State of Gujarat*** : reported in **(2002) 10 SCC 283** tried to impress upon this court that there is no bar in law in releasing the properties seized by the police in course of investigation. However, on careful scrutiny, this Court is of the considered view that the judgment referred to by learned counsel for the petitioner involves two vehicles seized by the police in course of investigation and for interim release of such vehicles. The above referred judgment does not specifically deal with re-activating Bank accounts which have been freezed by the Investigating Officer while investigating into the alleged crime. In such view of the matter, the judgment referred to by the learned counsel for the petitioner may not squarely apply to the fact of the present case.

8. Further, learned counsel for the petitioner questioned the power and authority of the police officer to freeze the Bank accounts in course of investigation. However, this Court on a careful analysis of the provision contained in Section 102, Cr.P.C, which has been quoted herein below is of the considered view that it would be misconception and mis-interpretation of law to say that the police officer does not have power to seize the Bank account in the event the ingredients as has been mentioned in Section 102 Cr.P.C are found in the allegation and subject to satisfaction of the police officer, the Bank accounts can also be seized/freeezed by the Investigating Officer for better appreciation the provisions contained in Section 102, Cr.P.C. is quoted herein below:-

> "**102. Power of police officer to seize certain property**.
> (1) Any police officer, may seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the commission of any offence.
>
> (2) Such police officer, if subordinate to the officer in charge of a police station, shall forthwith report the seizure to that officer.
>
> (3) Every police officer acting under sub- section (1) shall forthwith report the seizure to the Magistrate having jurisdiction and where the property seized is such that it cannot be conveniently transported to the Court, or where there is difficulty in securing proper accommodation for the custody of such property or where the continued retention of the property in police custody may not be considered necessary for the purpose of investigation, he may give custody thereof to any person on his executing a bond undertaking to produce the property before the Court as and when required and to give effect to the further orders of the Court as to the disposal of the same.]"

On a plain reading of the provisions contained in Section 102, Cr.P.C., this Court is of the considered view that the Bank accounts of the accused petitioner or any of his relatives, friends/associates, who have nexus with the alleged crime can

very well be construed as "property" within the meaning of Section 102, Cr.P.C. and therefore, the police officer in course of investigation can cease the operation of such Bank accounts in the event the police officer conducting the investigation is satisfied with the fact that the Bank accounts have a direct nexus with the commission of the alleged offence for which the Investigating Officer is conducting an enquiry or looking into the allegation. Such interpretation and analysis of Section 102, Cr.P.C. gets support from the decision of the Hon'ble Supreme Court in ***State of Maharashtra vrs. Tapas D. Neogy*** : reported in (1999) 7 SCC 685.

9. So far as provisions contained in N.D.P.S. Act, 1985 are concerned, Section 51 of the said Act provides that the provision of the Code of Criminal Procedure, 1973 are applicable to warrant, to search and seizure. Further Section 52 provides, the mechanism for disposal of the articles seized. Sub-section (4) of Section 52 which is relevant for the purpose of the present case is quoted herein below :-

> "**52(4) Disposal of persons arrested and articles seized**
>
> (4) The authority or officer to whom any person or article is forwarded under sub-section (2) or sub-section (3) shall, with all convenient despatch, take such measures as may be necessary for the disposal according to law of such person or article."

On plain reading of Sub-section (4) of Section 52, this Court has no hesitation to hold that the authority or officer to whom any person or article is forwarded under Sub-section (2) or Sub-section (3) shall have power to deal with the person arrested or articles seized during search and seizure. Further the said authority of the concerned officer is also invested with power to take such measures as may be necessary for the disposal accordingly of such person or article.

10. Section 52(a) of the N.D.P.S. Act, 1985 has laid down a clear and specific procedure with regard to disposal of seized Narcotic Drugs and Psychotropic Substances. In the context of the present case, the provision of Section 52(a) is not required to be discussed elaborately. The provision contained in Section 55 of the N.D.P.S Act provides that the Officer In-Charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local areas of that police station and which may be delivered to him.

11. So far as confiscation of illicit drugs, substances, plants, articles and conveyance are concerned, Sections 60 and 63 of the N.D.P.S. Act, 1985, lays down the mechanism and the manner in which the confiscation of such articles are to be dealt with. Similarly, Section 62 of the N.D.P.S. Act deals with confiscation of sale proceeds of illicit drugs and substances. It provides that wherein Narcotic Drugs and Psychotropic Substances is sold by a person having knowledge or reason to believe that the drugs and psychotropic substances are liable to confiscation under this Act, the sale proceed thereof shall also be liable to confiscation. On a careful analysis of the issue involved in the present revision petition, this Court is of the considered

view that the same falls within the purview of Sections 62 and 63 of the N.D.P.S. Act i.e. while Section 62 deals with confiscation of sale proceeds, Section 63 lays down procedure for such confiscation.

12. Section 63 of the N.D.P.S. Act which lays down the procedure in making confiscation, provides that in the trial of offences under N.D.P.S. Act., whether the accused is convicted or acquitted or discharged, the Court shall decide whether any article or thing seized under this Act is liable to confiscation under Section 60 or 61, if he decides the article so liable, it may order for confiscation accordingly. In such view of the matter, this Court is of the considered view that confiscation of the money kept in the Bank account can only be done after the trial is over. Therefore, even assuming that the money which was kept in the Bank account are the sale proceed of illicit drugs or substances, the learned trial court indubitably has power to confiscate the same after conclusion of the trial. Therefore, the Court is duty bound to protect the alleged sale proceed that were kept in the Bank account till conclusion of the trial and till the confiscation proceeding is commenced. However, this Court is of the considered view that the Bank Account apart from the money deposited need not be freezed and the operation of such account need not be ceased till conclusion of the trial. Learned trial court is under a legal obligation to ensure that the alleged sale proceeds of the contraband articles are preserved till the confiscation proceeding is commenced.

13. On perusal of the impugned order dated 08.01.2022, it is observed that the learned Sessions Judge-cum-Special Judge, Malkangiri while considering the application of the petitioner has extensively referred to the provisions contained in Section 68(B)(g) of the N.D.P.S. Act and Section 68(F) of the N.D.P.S. Act. However, on careful scrutiny of the aforesaid two provisions this Court is of the considered view that there is no dispute with regard to the law laid down in the aforesaid to provisions. While Section 68(B)(g) defines the word "illegally acquired property" which obviously means the property acquired and possessed by the accused and solely attributable to the contravention of any provisions under the N.D.P.S. Act. Further clause-(i) to Sub-section(g) of Section 68(B) provides that "illegally acquired property" means any income, earning or profit derived or obtained are attributable to sale/transaction in contraband articles. Whereas Section 68(F) provides that the seizure and freezing of illegal property. Section 68(F) further lays down any officer while conducting an enquiry or investigation under Section 68(E) has reasons to believe that any property in relation to which such enquiry or investigation is being conducted is an illegal acquired property and such property is likely to be concealed, transferred or dealt with in any manner which will result in frustrating the proceeding relating to forfeiture under this Chapter, he may make an order in seizing such property and where it is not practicable to seize said property, make such an order that said property shall not be transferred or otherwise dealt with, except with the prior permission of the Officer making such order or the

competent authority and a copy of such order shall be served on the person concerned. Further Sub-section (2) of Section 68(F) provides that any such order passed under Sub-section(1) shall have no effect unless the said order is confirmed by an order of the competent authority within a period of 30 days of which it is being made. In this context, the word competent authority has also been defined in Section 68(D) to mean any authority like the Commissioner Customs or Commissioner of Central Excise or Commissioner of Income Tax or any other Central Government Officer, who has been invested with such power under any official gazette published by the Central Government. However, on a close scrutiny of the impugned order, it is found that the leaned Sessions Judge-cum-Special Judge while upholding the action of the Investigating Officer under Section 68(B)(g) and Section 68(F) of the N.D.P.S. Act has neither referred to Section 68(2) nor he has examined the fact as to whether the action of the Investigating Officer in freezing the Bank account has been confirmed by the competent authority within the period prescribed in Sub-section (2) of Section 68(A).

14. At this juncture, learned counsel for the petitioner referring to the judgment of this Court in ***Maa Kuanri Transport and others vrs. State of Orissa and others*** ; reported in ***2021(II) OLR 233*** submits that the provisions contained in Section 102, Cr.P.C. has been vividly discussed by this Court in the above noted judgment and after considering the law contained in Section 102, Cr.P.C. and further by taking into consideration several judgments of this Court as well as of various other High Courts and the Hon'ble Supreme Court of India in the matter of ***Teesta Atul Setalvad vrs. The State of Gujarat*** : reported in (**2018**) 2 SCC 372 has come to a definite conclusion. However, it is relevant to refer to the judgment of this court, in the concluding paragraph, in ***Maa Kuanri Transport and others vrs. State of Orissa and others*** (supra) this Court has arrived at the following conclusion:-

> "Considering the facts and circumstances in its entirety and on cumulative appreciation of the discussion of the Hon'ble Apex Court in the case of Teesta Atul Setalvad (supra). While not entertaining these applications, this Court is of the considered opinion that it would be appropriate for petitioner to approach the Investigating Officer or opposite party no.4 for defreezing of all the accounts. In the event, relief sought for by the petitioners is not acceded to either by the I.O. or by the opposite party no.4, it would be open to the petitioners to approach the jurisdictional Magistrate by filing appropriate application with same/identical prayer. However, it is made clear that this Court has not gone into the merits of the case raised by the contesting parties in the aforesaid applications. Resultantly, all the CRLMPs stand disposed of."

15. Having heard learned counsel for the parties, upon careful examination of the provisions contained in Cr.P.C. as well as N.D.P.S. Act, this Court is of the considered view that the Investigating Officer while conducting an investigation and enquiry under the provisions of the N.D.P.S. Act has power and authority to freeze a Bank account of an accused on the ground that the said Bank account has nexus with the alleged crime. On further scrutiny of the impugned order, this court is also of the considered view that the learned court below while considering the application

of the petitioner, has not considered the case of the petitioner from the aforesaid view point and the principles of law. Therefore, this Court upon a careful scrutiny of the facts of the present case disposes of the present criminal revision directing the petitioner to approach the Investigating Officer to de-freeze the Bank account and in such eventuality it is open for the Investigating Officer to pass necessary orders by taking into consideration the analysis of law made hereinabove and pass necessary orders thereon within a period of thirty days from the date the petitioner approaches the Investigating Officer in this case. In the event the relief sought for by the petitioner is not acceded by the Investigating Officer, it would be open for the petitioner to approach the court in seisin over the matter by filing appropriate application challenging the decision of the Investigating Officer. In the event such an application is filed before the court in seisin over the matter, the learned court below shall do well to dispose of the application of the petitioner in the light of the analysis made hereinabove and shall dispose of the matter within a period of two months from the date of such application is filed before the learned court below.

16. With the aforesaid observation and direction, the present criminal revision is disposed of.

—— o ——

2022 (II) ILR - CUT-1056

A.K. MOHAPATRA, J.

CRLREV NO. 220 OF 2022

RAJAT KUMAR RATHA & ANR. …….. Petitioners

.V.

STATE OF ODISHA ……..Opp.Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 227 – Framing of charge – Alleged commission of offence punishable U/ss. 341/323/ 325/294/307/34 of the Indian Penal Code – The Plea of the petitioner that the nature of injury as has been described in the injury report does not support to framing of charge under Section 307, I.P.C. – Held, to frame the charge under Section 307 I.P.C and to attract the punishment, it is not necessary that injury caused by the accused is always capable of causing death or should have been inflicted on the person of the injured, what is relevant for consideration is, to attract the provisions of Section 307, I.P.C., the intention and knowledge of the accused that by his conduct, it would in all probability cause death of a person irrespective of the actual result of the assault. (Para 11)

For Petitioners : Mr. Arijeet Mishra, S.K. Jena, S.Biswal & R. Mahato
For Opp.Party : Mr. M.K. Mohanty, ASC

JUDGMENT Date of Hearing : 30.06.2022: Date of Judgment : 24.08.2022

A.K. MOHAPATRA, J.

1. The present revision petition preferred by the accused petitioners by invoking jurisdiction of this Court under Sections 401 and 397 of the Code of Criminal Procedure (in short 'the Cr.P.C.') against the order dated 18.05.2022 rejecting the petition filed by the petitioners under Section 227, Cr.P.C. by the learned A.S.J.-cum-A.C.J.M., Berhampur, in Sessions Trial No. 149 of 2021 corresponding to Pattapur P.S. Case No. 68 of 2021 for the alleged commission of offence punishable under Sections 341/323/325/294/307/34 of the Indian Penal Code (in short 'the I.P.C.').

2. The prosecution case, in gist, is that one Satyanarayan Rath lodged the F.I.R. on 10.03.2021 before the Pattapur Police Station, Ganjam inter alia alleging that on 10.03.2021 at about 1.30 P.M., the sister of the informant was taking bath in the bath room situated backyard of the house of the informant. The accused-petitioner, namely, petitioner no.1-Rajat Kumar Ratha came close with the wall of the bath room and was watching her sister while she was taking bath in the bath room. When the informant asked the said accused petitioner no.1, as to why he is doing so, the petitioner accompanied by Khali Ratha and Sarojini Ratha abused the informant by filthy languages. However, the informant made an attempt to pacify them and tried to make them understand the seriousness of the issue. Thereafter the petitioner got enraged and further abused him in filthy languages. It is also further alleged that while abusing him, the petitioners picked up iron rod and wooden plank were lying nearby and assaulted the informant and dealt blows on the head of the informant and his brother as a result of which both of them sustained head injuries. Thereafter the petitioners left the spot under impression the informant and his brother have died at the spot. While leaving the place, the petitioners were also threatening the informant and his family members and thereafter the injured persons were shifted to the hospital for their treatment.

On the basis of the allegations made in the F.I.R., Pattapur police registered the P.S. case for alleging the offences punishable under Sections 341/323/325/ 294/307/34, I.P.C. against the petitioners. Thereafter, the investigation was conducted and after completion of investigation, the Investigating Officer has submitted the charge-sheet in the aforesaid Sections on 29.04.2021. Thereafter the case was committed to the court of Sessions for trial. Learned trial court commenced the trial by framing the charge against the petitioners under Sections 341/323/325/ 294/307/34, I.P.C.

3. After framing of the charge as narrated hereinabove, the petitioners challenged the framing of charge by filing a petition under Section 227, Cr.P.C. After hearing learned counsel for both the sides, learned A.S.J.-cum-A.C.J.M., Berhampur vide order dated 18.05.2022 passed in S.T. No.149 of 2021 rejected the

petition filed by the petitioner under Section 227, Cr.P.C. Challenging the said order, the present revision petition has been preferred by the accused petitioners.

4. Heard Mr. Arijeet Mishra, learned counsel appearing for the petitioners and Mr. M.K. Mohanty, learned Additional Standing Counsel appearing for the State-Opposite Party. Perused the record as well as F.I.R. and the statement recorded under Section 161, Cr.P.C. and the injury report.

5. Learned counsel for the petitioners seeks to assail the order dated 18.05.2022 mainly on the ground that no case under Section 307 I.P.C. is made out against the petitioner and therefore, framing of charge under Section 307, I.P.C. by the learned court below is highly illegal, erroneous and the same is outcome of non-application of judicial mind. It is further submitted by learned counsel for the petitioners that upon careful consideration of the materials available on record and the statement of the witnesses recorded under Section 161, Cr.P.C. coupled with injury report, learned court below should not have framed charge under Sections 341/323/325/294/307/34, I.P.C. Further, he submits that taking into consideration the entirety of the allegation made in the F.I.R. and further taking into consideration surrounding facts and circumstances, at best a case under Sections 323/294, I.P.C. could be said to be made out against the petitioners.

6. Mr. Mishra, learned counsel for the petitioners further contends that while framing of charge, learned trial court has proceeded in a mechanical manner and further without considering the statement of the witnesses recorded under Section 161, Cr.P.C. as well as injury report of the injured persons, the learned court below has erroneously framed the charge vide order dated 18.05.2022. Further referring to the injuries narrated in the injury report, learned counsel for the petitioners made an attempt to impress upon this Court with the nature of injury as has been described in the injury report does not support the framing of charge under Section 307, I.P.C. Therefore, he further submits that the injury report reveals that the injured, namely Satyanarayan Rath had sustained four injuries and further injuries sustained by another injured Rabinarayan Rath is only one and another injury has been described as simple. The entire thrust of the argument advanced by learned counsel for the petitioner is based on the fact that the injuries sustained by the injured persons are all simple in nature as has been described in the injury report. Therefore, learned counsel for the petitioners with much vehemence argues that the learned trial court has committed gross error of law by framing of charge under Section 307, I.P.C. in the present case.

7. Learned Additional Standing Counsel for the State-Opposite Party submits that the learned court below while passing order dated 18.05.2022 has not committed any error or illegality. He further submits that mere framing of charge upon a careful consideration of the allegations made in the F.I.R. does not amount to conviction of the petitioners under such Sections. He further submits that the grounds

taken by the learned court below can very well be taken during trial. In the trial after considering the evidences, the materials available on record and submissions of the respective parties shall pass the final judgment of either conviction or acquittal. In such view of the matter, learned counsel for the State submits that this Court should not interfere with the impugned order at this stage and accordingly, prays for dismissal of the revision petition filed by the accused petitioners.

8. Having heard learned counsel for the parties and upon careful consideration of the submissions made by learned counsels appearing for the respective parties and upon careful examination of the materials placed before this Court, this Court would like to analyze the factual background of the case leading to framing of the charge. Upon a careful consideration of the F.I.R. and the statement of the witnesses recorded under Section 161, Cr.P.C., this Court is of the considered view that the allegations made in the F.I.R. are well supported by the statement of the witnesses recorded under Section 161, Cr.P.C. Although the statements recorded under Section 161, Cr.P.C. are not substantive evidence, however, at the stage of framing of charge, the trial court is expected to examine the F.I.R., statement of the witnesses, injury report and other relevant materials placed on record.

9. While deciding the validity and correctness of order dated 18.05.2022 where under charges have been framed against the petitioners by the trial court, this Court carefully examine the records and the order-sheet. Upon careful consideration of the order-sheet, it is seen that before framing of charge vide order dated 18.05.2022, the learned court below vide order dated 29.04.2022 had rejected the petition filed by the petitioner under Section 226, Cr.P.C. to discharge the accused persons. Further, upon a bare perusal of the order dated 29.04.2022, this Court is of the considered view that the trial court has carefully considered the matter and accordingly he has come to a conclusion to frame the charge under Sections 341/323/325/294/307/34, I.P.C. vide order dated 18.05.2022.

10. Section 307, I.P.C. provides for punishment for commission of an offence of an attempt to murder. A plain reading of the said Section makes it crystal clear that whoever does any act with such intention or knowledge under such circumstances that, if he by that act cause death, he will be guilty of murder, shall be punishable with imprisonment as has been provided for in the said Section. Therefore, Section 307, I.P.C. provides that the person who is guilty of commission of an offence like an attempt to murder must have intention or knowledge that by his such conduct the person, who/whom he is assaulting is likely to die. The question of intention or knowledge to cause death as has been narrated in Section 307, I.P.C. is basically a question of fact and not one of the law. Therefore, the framing of charge basing on such facts is entirely dependent on the satisfaction of the trial court, which is likely to frame charge in the matter. In other words, the court below depends on the subjective satisfaction with regard to factual aspect of the matter to frame charge

under a particular Section of the I.P.C. Therefore, there exists a little scope of inference by a revisional court in the matter of framing of charge by a trial court. Unless the order is manifest with glaring illegality and palpable errors, the revisional court should not inference in such orders as a matter of routine only when the revisional court is convinced that the error is so apparent and the illegality is so glaring and allowing the same to stand would be travesty of justice, only then the revisional court should interfere in such orders where under a charge has been framed by the trial court.

11. Law is fairly well settled by a catena of judgment of this Court as well as Hon'ble Supreme Court of India that to attract the punishment as prescribed under Section 307, I.P.C. and to frame the charge thereunder it is not necessary that injury caused by the accused is always capable of causing death or should have been inflicted on the person of the injured, what is relevant for consideration is, to attract the provisions of Section 307, I.P.C. the intention and knowledge of the accused that by his conduct, it would in all probability cause death of a person irrespective of the actual result of the assault. Under such circumstances, it is entirely upon the trial court to draw an inference after careful examination of the allegations made in the F.I.R. and the supporting materials placed before the court while framing charge under Section 307, I.P.C.

12. The scope of interference by this Court while exercising revisional power under Section 401 read with Section 397 Cr.P.C. is also circumscribed by statutory provisions. Therefore, it is not open to this Court to set aside the order passed by the learned trial court merely because another view is possible or according to the perception of the petitioners that the alleged assault would not have caused death or the actual result has not caused death of the accused. The only thing, i.e. relevant at the stage of framing of charges is that the learned trial court is required to carefully examine the factual circumstances and to draw inference with regard to the intention and knowledge of the accused persons and accordingly, the learned trial court is required to frame charges.

13. Reverting back to the facts of the present case, this Court would also like to examine the material aspects of the present case in the light of law analyzed in the preceding paragraphs. On a bare reading of the F.I.R., the allegation made by the informant is very clear and specific with regard to the assault on the injured persons. Further, the statement of the witnesses recorded under Section 161 Cr.P.C. also supports the allegations made in the F.I.R. Further, the allegations of the informant is also supported by the medical evidence i.e. injury report of the two injured persons. On a careful scrutiny of the injuries of the injured persons reveals that injured Satyanarayan Rath sustained four injuries. Although all the injuries have been opined to be simple in nature, however, the injury no.1 is lacerated injury on the scalp measuring 3'x1'. The injury no. 1 speaks a volume about the intention and knowledge of the accused petitioners. Any assault on vital organ of the body would

definitely cause death under normal circumstances. Therefore, intention and knowledge to cause death can very well be inferred while framing charge under a particular provision of the IPC by the learned court below. Secondly, the injury caused to injured Rabinarayan Rath is also a lacerated wound on the scalp measuring 2'x1/2', caused by blunt object, therefore, considering the fact that the injury is caused on a vital organ of the human body and the same has the potential to cause death of a person under ordinary circumstances, irrespective of the result, learned trial court is not entirely wrong while drawing an inference that such injury would attract the punishment under Section 307, I.P.C.

14. In view of the analysis of law made hereinabove and further taking into consideration the material available on record to support the allegation as has been made in the F.I.R., this Court is of the considered view that the learned court below has not committed any illegality while framing charge under Sections 341/323/ 325/294/307/34, I.P.C. Therefore, no fault can be found with the order dated 29.04.2022 as well as 18.05.2022 passed in S.T. No.149 of 2021 by the learned A.S.J.-cum-A.C.J.M., Berhampur. Accordingly, the revision petition is devoid of any merit and the same is hereby dismissed. However, there shall be no order as to cost.

15. Before parting, this Court makes clear that the observations made hereinabove are confined to the present revision and to examine the validity and correctness of framing of charge and the trial court shall not be influenced by such observation while conducting the trial and shall conduct the trial and pass judgment on the merits of the matter and on the basis of the evidence likely to be adduced by both sides during trial.

—— o ——

2022 (II) ILR - CUT-1061

V. NARASINGH, J.

W.P.(C) NO. 4518 OF 2019

SMT. BANDITA ROUT ……..Petitioner

.V.

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

SERVICE LAW – Appointment – The Petitioner appointed as Anganwadi Worker – The Appointing Authority rejected the candidature of Opp. Party No. 5 on technical ground – Appellate Authority set aside the rejection of Opp.Party No.5 – Whether the Appellate Authority was justified interfering the decision of the Appointing Authority ? – Held, Yes – Whenever there is a conflict between the substantial justice and

hyper-technicality, then the substantial justice should be preferred to avoid the defeat the ends of justice – Admittedly the Opp.Party No. 5 is more meritorious than the petitioner – Hence on a conspectus of materials on record, this Court does not find any illegality in the order passed by the Appellate Authority and consequential appointment of Opp.Party No. 5 so as to warrant inference.

Case Laws Relied on and Referred to :-

1. SLP No.706/2014 (dated 08.10.2014) : Union of India & Anr. Vs. Sarwan Ram & Anr.
2. (2002) 3 SCC 496 : Haryana State Financial Corporation vs. Jagdamba Oil Mills.
3. 2022 SCC Online Raj 463 : Western Railway & Another vs. Harendra Gawaria.

For Petitioner : Mr. S.K. Ojha
For Opp.Parties : Mr. M. Mishra, ASC , Mr. G. Mishra

JUDGMENT Date of Hearing & Judgment : 15.07.2022

V. NARASINGH , J.

1. The lis relates to selection of Anganwadi Worker of Chhandamunda Anganwadi Centre. The petitioner and the Opposite Party No.5 were applicants to be engaged as Anganwadi workers of the Centre in question. The selection committee after due scrutiny found the petitioner to be eligible and accordingly she was engaged as such.

2. During her incumbency as Anganwadi Worker Chhandamunda Anganwadi Centre, assailing her appointment the Opposite Party No.5 preferred an appeal before the statutory Appellate Authority that is A.D.M. Jajpur by filing A.W.W. Misc. (Appeal) No.05 of 2018. The appellate Authority by order dated 13.02.2019 after giving all concerned opportunity of hearing set aside the selection of the petitioner and directed the Administrative Authority that is C.D.P.O. Binjharpur to take appropriate steps to "engage the appropriate candidate observing all formalities". Consequent upon the same the petitioner was disengaged and the Opposite Party No. 5 was engaged as such.

Assailing such order of the Appellate Authority dated 13.02.2019 at Annexure-7 the present Writ Petition has been filed.

3. Learned counsel for the petitioner Mr. Ojha submits that the appellate Authority has committed manifest error in failing to note the that admittedly no mark-sheet was submitted by the Opposite Party No. 5 in terms of the advertisement. It is also further contended that the mark-sheet submitted by the said Opposite Party at the stage of verification is at variance with the mark-sheet originally submitted.

4. Hence, it is stated that the Appellate Authority has committed material irregularity in allowing the appeal and thereby it is submitted that petitioner right for consideration has been violated infringing his right guaranteed under Article 14 and

16(1) of the Constitution and undue advantage has been given to the Opposite Party No. 5 in patent violation of the guidelines.

5. Learned counsel for the Opposite Party No. 5 on the basis of his recitals in the counter affidavit states that there has been no material omission as canvassed by the counsel by the petitioner in as much as admittedly he has submitted the mark-sheet issued by the Headmaster of her school and along with the H.S.C certificate and at the time of verification the mark-sheet issued by the Borad has been submitted and as such the Selection Committee ought to have taken such mark-sheet into consideration. More so admittedly, when there is no variance in the marks and the petitioner being more meritorious deserves to be engaged as AWW in preference to the petitioner and as such there is no illegality in the Appellate order warranting interference by this Court.

6. The State Authorities have filed two counter affidavits one by Opposite Party Nos. 3 and 4 and the other by Opposite Party No. 2, the appellate authority.

7. The counsel for the Parties to substantiate their submissions have relied on the several judgments.

8. Learned counsel for the petitioner Mr. Ojha has relied on the judgment of the Apex Court in the case ***Union of India and Another Vs. Sarwan Ram and Another*** dated 08.10.2014 SLP No.706 of 2014 and the decision of this Court dated 20.03.2019 in W.P.(C) No.6355 of 2019.

9. It is stated at the bar that the order of the Hon'ble Single Judge in W.P.(C) No. 6355 of 2019 was affirmed Writ Appeal.

10. To decide the lis, it is necessary to refer to the advertisement dated 27.06.2017 which is at Annexure-1. There is a stipulation in the advertisement as to the documents which are required to be enclosed to the application form. The same has been stated in Odia and is reproduced in Vernacular.

> x x x x x "Matric pass Pramana
> *Patra and number talika." x x x x x*
> **English Translation:**
> *Matriculation certificate and mark list.*

11. The revised guidelines on the basis of which the candidature for engagement of AWW is being considered specifically refer to the marks secured in matriculation since it is the minimum educational qualification prescribed. Paragraph-3 of the revised guidelines at Annexure-2 (Page 19-20) is quoted hereunder;

> ***Page-20:***
> ***x x x x x*** *"3. The minimum educational qualification for selection will be Matriculation. In the ITDA and MADA areas, however, if no Matriculate candidate is available, the educational qualification may be relaxed for the tribal candidates and SC candidates to Class-VIII examination from a recognized High School.*

Percentage of marks obtained in the Matriculation examination shall be the basis of drawing a merit list amongst the applicants." ***x x x x x***

12. The proceedings of the Selection Committee is on record at Annexure-3 page 25. The concerned Anganwadi Centre is at Serial No.5 Chhandamunda-3 at Page 28-29.

13. The proceeding of the committee relating to Chhandamunda is extracted here under for convenience of ready reference;

x x x x x "(5) *Chhandamunda-3:- Total 8 (Eight) nos of applications were received for the said center & among of them Manorama Das, Snehanjali Bisoi & Anutapta Sahoo were absent on the date of verification. So their applications were not taken into consideration. On verification of remaining 5 nos of applications, Manisa Ghadai's application was rejected due to Underage. At the same time Bandita Ghadai had withdrawn her application. Out of the rest 3 candidates, Biswabidita Ghadai's application was rejected due to non attachment of HSC & +2 certificates to her application & Ranjita Pradhan's application was rejected due to non attachment of HSC board mark sheet to her application.*

On through scrutiny/verification of their respective mark sheet and other documents attached to the application, the findings of the committee are as follows;

1) BISWABIDITA GHADAI D/O- BIBHUTIBHUSAN GHADA [Matric 78% (468/600) +5 (Qualification HSC above)] NO HSC, +2 ORIGINAL CERTIFICTE ATTACHED ON APPLICATION, REJECTED

2) BANDITA GHADAI, D/O. CHAKRADHAR GHADAI :Total 67% [Matric 62% (372/600) +5 (Qualification HSC above) WITHDRAW

3) MANORAMA DAS, D/O. SANATAN DAS : Total 42% [Matric 37% (281/750) +5 (Qualification HSC above) ABSENT

4) RANJITA PRADHAN, D/O. PURNA CHANDRA PRADHAN : Total 69.4% [Matric 64.4% (483/750)+5 (Qualification HSC above)] NO ORIGINAL BOARD MARKSHEET ATTACHED ON APPLICATION, REJECTED

5) SNEHANJALI BISOI, D/O. BHARAT CHANDRA BISOI : Total 67% [Matric 62% (558/900) +5 (Qualification HSC above)] ABSENT

6) MANISHA GHADAI, D/O, ASUTTOSH GHADAI : Total 82.16% [Matric 77.16% (463/600) +5 (Qualification HSC above)] Underage

7) ANUTAPTA SAHOO, D/O. ANTARYAMI SAHOO :Total 41.6% {Matric 36.6% (275/750) +5 (Qualification HSC above)] ABSENT

8) BANDITA ROUT, D/O, BRAJASUNDAR ROUT : Total 38.33% [Matric 38.33% (230/600)]

Among them BANDITA ROUT, D/O. BRAJASUNDAR ROUT has secured highest percentage of marks i.e. Total 38.33% [Matric 38.33 % (230/600)] and is selected as AWW by the committee for the said center." ***x x x x x***

14. The marks calculated on the basis of the proceeding in a tabular form is at page 45 of the Writ Petition which clearly indicates that the Opposite Party No.5 at Serial No.4 has secured 69.4 marks as the petitioner, at Serial No.8 secured 38.33 of marks.

15. There is no dispute regarding academic qualification of both the petitioner as well as Opposite Party No. 5.

16. On a bare perusal of the advertisement adverted to herein above, it can be seen that the same stipulated for submission of self-attested Xerox copies of the documents relied upon, matriculation certificate and mark-sheet figured in the list of such documents. Admittedly, it did not state the authority by whom said certificate and mark sheet is to be issued obviously for the reason that there are number of academic bodies who are conducting matriculation or equivalent examination and issuing mark-sheets.

17. It is contended by the learned counsel for the petitioner with vehemence that since the mark list was admittedly not issued by Board of Secondary Education, Odisha (the Board conducting the examination in the case at hand) such mark list ought not to be taken into account and this goes to the root of the matter and the illegality could not have been condoned by the Appellate Authority. And as such, there was no irregularity in the Selection committee rejecting the claim of the Opposite Party No. 5 on that ground.

18. On Close scrutiny of the condition stipulated regarding submitted documents, it is to be stated at the cost of repetition that the authority by whom such mark sheet was to be issued has not been prescribed and what has been stated is that certificate evidencing passing of matriculation and mark-sheet.

19. Hence, this Court is of the considered opinion that the Selection Committee misinterpreting the stipulations contained in the advertisement has wrongly rejected the mark-sheet submitted by the Opposite Party No. 5.

20. Learned counsel for the petitioner further submits that it is on record that the Opposite Party No.5 has stated that she has submitted the mark-sheet issued by the council whereas in the case at hand it is not the "council" but the Board of Secondary Education which has submitted the mark sheet hence the finding by the Appellate Authority that the mark-sheet has been submitted by the Board is ex-facie outcome of non- application of mind and indicative of over jealousness of the Appellate Authority to favour the Opposite Party No.5.

21. This Court had occasion 0to scrutinize the mark-sheet issued by the Headmaster and the mark-sheet issued by Board of Secondary Education and it is worth noting that there is no variance in the mark-sheet issued by the Headmaster in which the roll number of the petitioner has been mentioned and it has also been stated that she has secured 1st division having got 483 marks out of 750. Both the mark sheets issued by the Headmaster and the Board are on record as part of Annexure-C/5 Series (running Page 63 & 64).

22. Adverting to the judgments relied upon by the learned counsel for the Petitioner, it is seen that the judgment of the Apex Court in the Case of ***Union of India and Another Vs. Sarwan Ram and another (Supra)*** relates to recruitment of posts of Group-D, Ex-Service Man quota and in that particular case, the Apex Court

took exception to the non-pasting of the Photograph, inter alia, on the ground that pasting of such Photograph was required to eliminate the possibility of fake persons getting recruited and it was held that condition was mandatory in nature and could not have been given a go by.

23. The other judgment relied on by the learned counsel for the petitioner of the Hon'ble Single Judge of this Court relates to the grant of additional marks on the basis of a disability certificate which was admittedly submitted beyond the stipulated time.

24. The factual matrix of both the cases cited are of no assistance to the petitioner and the judgments passed therein have no application to the facts of the present case. In persuading this Court to rely on these judgment, the salutory principles of interpretation of judgments has escaped the careful attention of the learned counsel for the petitioner in as much as it is the settled principle of interpretation of judgments that judgments are not to be read as "Euclid's Theorem" and in this context this Court refers to the judgment of the Apex Court in the case of ***Haryana State Financial Corporation vs. Jagdamba Oil Mills*** reported in ***(2002) 3 SCC 496*** and this Court in impelled to reiterate with profound respect the immortal words of Lord Denning referred to in the case of ***Haryana State Financial Corporation (supra)***;

> *"Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo) by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, the board resemblance to another case is not at all decisive."*
>
> * * *
>
> *"Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could implede it."*
>
> *(At Page 509)*

25. The learned counsel for the Opposite Party no. 5 has relied on the judgment of the Apex Court in the case ***Western Railway and Another vs. Harendra Gawaria*** reported in ***2022 SCC Online Raj 463***, more particularly Para-16 order of which is quoted hereunder;

> *x x x x* ***"16****. It is the settled position of law that whenever there is a conflict between the substantial justice and hyper-technicality then the substantial justice should be preferred to avoid the defeat for the ends of justice. If the hyper-technical stand of the petitioner is allowed to stand as it is then it would amount to failure of justice. The judgments cited by the counsel for the petitioners are not applicable to the facts of the present case."* ***x x x x x***

26. As per the norms of selection of Anganwadi the mark secured in the matriculation is of primary consideration. On perusal of the materials on record it is seen that admittedly the Opposite Party No. 5 is more meritorious than the petitioner and this Court is persuaded to hold that the mark sheet submitted by the Opposite

Party No. 5 which was issued by the Headmaster of the school conforms the stipulation of the advertisement relating to submission of Photostat copy of the mark sheet. The selection committee in rejecting her candidature has virtually rewritten the stipulations relating to the submission of mark sheet to be submitted which is ex-facie not permissible.

27. Hence on a conspectus of materials on record this Court does not find any illegality in the order passed by the appellate authority and consequential appointment of Opposite Party No.5 so as to warrant inference in exercise of its plenary jurisdiction.

28. The Writ application accordingly stands dismissed.

29. There shall be no order as to cost.

—— o ——

2022 (II) ILR - CUT-1067

V. NARASINGH, J.

W.P.(C) NO. 8283 OF 2015

MADAN MOHAN PANI ……..Petitioner

.V.

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

CONSTITUTION OF INDIA, 1950 – Article 226 r/w Section 46(4) of Code of Criminal Procedure, 1973 – Due to non-compliance of the Section 46(4) of Cr.P.C, "OHRC" recommended exemplary punishment against the petitioner who is the Investigating Officer – Plea of the petitioner that the OHRC should have weighed the non-arrest of Opp.Party Nos. 5 & 6 while passing the impugned order – Interference of Court under Article 226 of the Constitution of India – Held, Law is no longer *res integra* that, this Court in exercise of its plenary powers can mould the relief to sub-serve justice – This Court feels that in the facts of the present case, the ends of justice and equity will be sub-served, if the petitioner is directed to pay a sum of Rs. 50,000/- (Rupees Fifty Thousand) to the Opp.Party as compensation in lieu of Departmental Proceeding as directed by OHRC.

Case Laws Relied on and Referred to :-

1. AIR (1994) SC 1349 = (1994) 4 SCC 260 : Joginder Kumar Vrs. State of U.P.
2. (2014) 8 SCC 273 : Arnesh Kumar Vrs. State of Bihar & Another.
3. AIR 1973 SC 1034 =1973 1 SCC 1034 : Hiralal Rattanlal v. State of U.P.
4. (2004) 9 SCC 686 : Prakash Nath Khanna v. CIT.
5. AIR 1966 SC 81 : Dwarka Nath V. Income Tax Officer, Spl.Circle, D.Ward, Kanpur & Anr.

6. AIR 1975 SC 1409 : Pasupuleti Venkateswarlu V. The Motor and General Trader.
7. (1995) 6 SCC 749 : B.C. Chaturvedi vs. Union of India & Others.

For Petitioner : Ms. Saswati Mohapatra
For Opp.Parties: Mr. D. Mund, AGA

JUDGMENT Date of Hearing : 24.06.2022 : Date of Judgment : 29.07.2022

V. NARASINGH , J.

1. Assailing the Order of the Odisha Human Rights Commission, hereinafter referred to as "OHRC" dtd. 12.01.2015 in OHRC Case No. 1388 of 2014, at the instance of Amrita Padhy (Opposite Party No.5) recommending exemplary punishment against the petitioner - the Investigating Officer in Jarada P.S. Case No.42 of 2014, the present writ petition has been filed under Article-226 of the Constitution of India.

2. The complainant before the OHRC has been arrayed as Opposite Party No.-5 and her mother as Opposite Party No. 6 and the Registrar, Odisha Human Rights Commission is impleaded as Opposite Party No.4. The complaint-Opposite Party No.5 before the OHRC filed a written memo indicating her stand in the case at hand.

2(a). By way of an additional affidavit filed on 23.06.2022, the petitioner has placed on record initiation of BPR Dist. Prog. No.02/2015 against him (ASI/372 M.M.Pani) in terms of the order passed by the HRC as communicated by the Superintendent of Police, Berhampur under Letter No. 832/RO Date.13.05.2015 (Annexure-9).

2(b). Copy of the memorandum of charges inter alia refers to the impugned direction of the HRC recommending "exemplary punishment" for the alleged dereliction of duty as stated in the charge memo.

3. The factual background germane for just adjudication is stated hereunder;

> (i) On 26.04.2014 at about 4.05A.M. requisition was received in Baidyanathpur Police Station in connection with investigation of Jarada P.S. Case No. 42 of 2014, dtd. 12.03.2014 U/s.341/294/323/355/506/34, I.P.C.
>
> (ii) Pursuant to such requisition a Station Diary Entry No. 623, dtd. 26.04.2014 (4.05 A.M) was made in Baidyanathpur P.S. and ASI of Police one Sri R.K. Dash of Baidyanathpur P.S. accompanied the police officers of Jarada Police Station ASIs of police M.M. Pani (the petitioner) and P.C. Panigrahi, Havildar- N.C. Mishra and Women Constable-167 as per Station Diary Entry No. 624 (4.15 A.M.).

Station Diary Entry Nos. 623, 624 and 625 dtd. 26.04.2014 are quoted hereunder for convenience for ready reference.

> *623-4.05A.M. At this hour ASI Madan Mohan Pani of Jarada P.S. appeared at P.S. and presented a requisition for apprehending the accused 01. Dilu Padhi, S/O. B.Padhi, 02. Amrita Padhi D/O B. Padhi and 3. Smt. Indira Padhi W/O B. Padhi of Khodasingi Banchanindhi Nagarin Jarada P.S. Case No. 42 dt. 12.03.2014 U/S. 34/294/323/ 355/506/34 I.P.C. On this intimated to IIC who directed to depute local staff for assistance noted the fact in SD for further reference". (Part of Annexure-2 in the connected W.P.(C) No. 8283 of 2015).*
>
> *624-4.15A.M. At this hour ASI R.K.Dash was deputed to render assistance to ASI M.M.Pani to Jarada PS for apprehending the accused persons at Banchanindhi Nagar, 5th Lane, Khodasingi, Berhampur.*
>
> *625-5.30A.M. At this time ASI R.K. Dash returned to PS after making proper assistance to the staff as well as ASI M.M. Pani of Jarada PS in raid but get no success for at Berhampur of the accused persons.*

4. It is stated that since the Opposite Parties-5 and 6 are cited as Accused Nos.2 and 3 in Jarada P.S. Case No. 42 of 2014 and as part of the ongoing investigation, the raid was conducted.

5. The H.R.C. took serious exception to the factum of the raid by the officials of the Jarada Police Station including the petitioner who was the I.O. without obtaining any permission of the Magistrate as envisaged under Section-46(4) of Cr.P.C.,1973. Also taking note of the violation of the mandate of the Apex Court in the case of ***Joginder Kumar Vrs. State of U.P. AIR (1994) SC 1349 = (1994) 4 SCC 260 and Arnesh Kumar Vrs. State of Bihar & Another*** reported in ***(2014) 8 SCC 273***, OHRC directed for exemplary punishment to the police Officer who were involved in the raid including the petitioner.

6. There is nothing on record to show that the petitioner as I.O has made any attempt to serve a notice as envisaged under Section 41-A Cr.P.C. from the date of institution of the case on12..03.2014 till the raid was conducted on 26.04.2014.

7. In fact, in Paragraph-11 of the Counter affidavit filed by the State, it is stated that the petitioner (M.M. Pani) on 17.11.2014 filed a declaration to the following effect;

> *"It is not out of place to mention here that the present petitioner Sri Madan Mohan Pani, ASI of police, appeared before the learned Commission on 17.11.2014 and filed a declaration mentioning therein that he had written the names of lady accused persons by mistake in the requisition submitted at B.N.Pur Police Station and had prayed for unqualified apology for his such mistake."*

8. Hence, this Court as such does not find any merit in the contention of the writ petitioner for absolving him from the accusation of violation of human rights which is established beyond iota of doubt. .

9. So far as violation of ***Arnesh Kumar (Supra)***, it is noted that the said decision was rendered on 02.07.2014 and the incident in question had admittedly taken place prior to rendering of such decision on 26.04.2014. Hence, the said dictum cannot have any application in the case at hand and the HRC's reliance on the same oblivious of the factual matrix is outcome of fallacious appreciation.

10. The finding of the HRC relating to violation of Section-46(4) of the Cr.P.C cannot be faulted, merely because, no arrest has been made, since, language of Section-46(4) Cr.P.C takes within its fold both arrest or intended arrest.

> *"46 [(4) Cr.P.C.. Save in exeeptional circumstances, no woman shall be arrested after sunset and before sunrise, and where such exceptional circumstances exist, the woman police officer shall, by making a written report, obtain the prior permission of the Judicial Magistrate of the first class within whose local jurisdiction the offence is committed or the arrest is to be made.]"*

It has to be borne in mind that keeping in view the status of women, the legislature has consciously not prescribed any such dichotomy, when the Sub Section-4 of Section-46 of the Cr.P.C. was inserted by Section-6 of Act, 25 of 2005 w.e.f. 23.06.2006.)

The submission of the learned counsel for the petitioner that while passing in the impugned order the non-arrest of Opposite Party Nos. 5 and 6 ought to have weighed with the commission does not merit consideration.

11. Hence, the non-arrest of the Opposite Parties-5 and 6 cannot in any way dilute the infraction of Section-46 (4) Cr.P.C. In this context, the salutory principles of interpretation of statute stating that when a Provision is clear, it must be given its full play, succinctly stated in the following decisions can be gainfully referred.

> ***(i) Hiralal Rattanlal v. State of U.P. AIR 1973 SC 1034 =1973 1 SCC 1034.***
>
> *"22 In construing a statutory provision, the first and the foremost rule of construction is the literary construction. All that the court has to see at the very outset is what does that provision say. If the provision is unambiguous and if from that provision the legislative intent is clear, the court need not call into aid the other rules of construction of statues. The other rules of construction of statutes are called into aid only when the legislative intention is not clear (p.1035)"*
>
> ***(ii) Prakash Nath Khanna v. CIT (2004) 9 SCC 686.***

12. It is apposite to state here that after conclusion of the investigation the petitioner has submitted Final Form No.67, dtd.23.05.2014 absolving the Opposite Parties 5 and 6 of the accusations and assailing the same the informant has filed 1.C.C. No. 9 of 2014 in the Court of Jurisdictional Magistyrate (J.M.F.C., Patrapur, Ganjam), which is at Annexure-4.

13. It is apt to note here that by Order dtd. 13.05.2015 in Misc. Case No. 8091 of 2015 this Court stayed the operation of the impugned order of the OHRC relating to the petitioner and the same is still in vogue and in the meanwhile the petitioner has retired.

It is submitted by the learned counsel for the petitioner though petitioner has retired in 2014, is not getting any pensionary benefits because in terms of the impugned order passed by the OHRC, Departmental Proceeding (BPR Dist. Prog. No.02/2015) has been instituted against the petitioner and is pending.

14(A). The prayer in the writ petition is extracted hereunder for convenience of ready reference;

> "Under the aforesaid facts and circumstances, it is therefore, prayed that this Hon'ble Court may graciously be pleased to:
>
> (i) Quash the order, dated 12.01.2015 passed in O.H.R.C.Case No. 1388 of 2015 under Annexure-7 by concurrently holding the same as bad, illegal and not sustainable in the eye of law;
>
> (ii) Pass such other order(s)/ or issue direction (s) as may be deemed fit and proper in the bonafide interest of justice; And for which act of kindness, the petitioner as in duty bound, shall ever pray."

On a bare perusal, it can be seen that the petitioner has not prayed for quashing of Departmental Proceeding.

14(B). Law is no longer res integra that, this Court in exercise of its plenary powers can mould the relief to sub-serve justice. On this aspect, decision of the Apex Court in ***Dwarka Nath V. Income-tax Officer, Special Circle, D.Ward, Kanpur and another*** reported in ***AIR 1966 Supreme Court-81*** is relied upon.

> ***"That apart High Courts can also issue directions, orders or writs other than the prerogative writs . The High Courts are enabled to mould the reliefs to meet the peculiar and complicated requirement of this Country."***

In ***Pasupuleti Venkateswarlu V. The Motor and General Trader*** reported in ***AIR 1975 Supreme Court 1409*** the Apex Court held as under;

> "Equity justifies bending the rules of procedure, where no specific provision or fairplay in violated with a view to promote substantial justice – subject, of course, in the absence of other disentitling factors or just circumstances."

In ***B.C.Chaturvedi vs.Union of India and Others (1995) 6 Supreme Court Cases 749***, the Apex Court held thus;

> "xxx xxx xxx A High Court would be within its jurisdiction to modify the punishment/penalty by moulding the relief. xxx xxx xxx " (Page-763).

15. In view of the law laid down in the aforementioned cases, this Court feels that in the facts of the present case, the ends of justice and equity will be sub-served, if the petitioner is directed to pay a sum of Rs.50,000/- (Rupees Fifty Thousand) to the Opposite Party Nos.5 and 6 as compensation in lieu of Departmental Proceeding as directed by HRC.

16. Such compensation of Rs. 50,000/- (Rupees Fifty Thousand) should be paid by the State Authorities within a period of six weeks from today and the pensionary benefits of the petitioner be released within a period of eight (8) weeks hence, after deducting the sum of Rs. 50,000/- (Rupees Fifty Thousand) on account of payment of compensation by the State.

17. The Order of the HRC is modified accordingly. The Departmental Proceeding (BPR Dist. Prog. No.02/2015) shall stand quashed vis-à-vis the petitioner.

18. The Writ Petition thus stands disposed of. No cost(s).

—— o ——

2022 (II) ILR -CUT-1072

BIRAJA PRASANNA SATAPATHY, J.

W.P.C (OAC) NO. 2645 OF 2014
(WITH BATCH CASE)

W.P.C (OAC) NOs.140,215,216,217,218 OF 2013 & 2390 OF 2014
W.P.C(OAC) NOs.404,517,586,1194OF2013&2513,2514,2515,
2750 OF2014&2070,2072OF2015& 4142,4144, 4643,4752,4754,4762,4768,4769OF2016
& 102,1324,3187,3188,3189,3190,3191,3192,3193&3345OF2017
W.P.C (OAC) NOs.2617,2618,2619,2620 & 2621 OF 2014
W.P.C (OAC)NOs.2975,3341,3343,3344,3406,3407,3408,3448,
3449,3486,3487,3521,3522,3738,3739,4833,4834OF2016
AND 84,212 OF2017&1072of 2019
W.P.C (OAC) NOs. 2751,2752 OF 2014 &1047 & 1048 OF 2017
W.P.C (OAC) NOs.1971&1972OF2018
W.P.C (OAPC) NO.83 OF 2017 & W.P.(C) NO.17568 OF 2019
WPC (OAC)NOs.1917OF2017&18300OF2019
WPC (OAC) NO.578 OF 2014
W.P.C (OA)NOs.1891OF2014 &W.P.C (OAC)NO.4642OF2016AND
W.P.(C)NOs.16840,17470,18359OF2019&17075OF2022

SANTOSH KU. MANDAL & ORS. …….. Petitioners

.V.

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

SERVICE LAW – Appointment – The Odisha Diploma Engineers Services (Method of Recruitment and Conditions of Service) Rules, 2012 – Total vacancies available was 2773 – But in terms of Communication dated

by the Government of Odisha, Department of Planning and Co-ordination, requisition were received in respect of 1869 posts – Whether the State Government can be compelled to fill up the rest vacancies from the panel maintained by the Committee of Chief Engineers and Engineer in Chief (Civil), Orissa? – Held, No – In view of the decision of the Hon'ble Apex court passed in the case of *Anurag Sharma & Ors. Vs. State of Himachal Pradesh & Ors. (2022) S.C.C OnLine S.C 860,* the State Govt. cannot be compelled to fill up all those vacant posts. (Para 21)

Case Laws Relied on and Referred to :-

1. Civil Appeal No.9482 of 2019 (disposed of on 17.12.2019) : Dr.(Major) Meeta Sahai Vs. State of Bihar & Ors.
2. Civil Appeal No. 4578-4580 of 2022 (disposed of on 16.6.2022) : Krishna Rai & Ors. Vs. Benaras Hindu University through Registrar & Ors.
3. 2022 S.C.C, OnLine S.C 860 : Anurag Sharma & Others Vs. State of Himachal Pradesh & Ors.

For Petitioners : M/s. Buddhadev Routray, Sr. Advocate.
M/s. Jayanta Rath, Sr. Advocate.
M/s. Gyanaloka Mohanty, D.Rath.
M/s. Shashi Bhusan Jena, S. Behera & C.K. Sahu.
M/s. Srikanta Ku. Sahoo, A.K.Sahoo, B.B.Biswal & S.Mishra.
M/s. Sumanta Ku. Nayak, S.K.Sahoo, A.B.Parida & S.Dash.
M/s. Kali Prasanna Mishra, S.Mohapatra, T.P.Tripathy and L.P.Dwibedy.
M/s. Dhuliram Pattnayak, P.K.Das, N.Biswal & L.Pattanayak.
M/s. Ajit Ku. Sahoo, A.Sahoo, A.K.Biswal, R.K.Jena, R.K. Sahoo & P.Sahu.
M/s. Pramod Ku. Nayak, A.K.Dalai, S.Aun & A.K.Mahakud.
M/s. Manoj Ku. Khuntia, G.R.Sethi, J.K.Digal,B.K.Pattnaik.
M/s. R.Mohanty, M.Mohanty, P.Mohanty.
M/s. R.C.Roy.
M/s. Budhadev Routray, Sr. Adv, R.P.Dalai, K.Mohanty, S.K.Samal, S.P.Nath, S.D.Routray, B.R.Pattnayak, J.Biswal.
M/s. Debendra Ku. Sahoo-1, S.N.Nayak.
M/s. Manoj Ku.Pati, R.Mohapatra, S.Das.
M/s.Digambar Sethi & S.K.Dash.

For Opp.Parties : M/s. Ashok Ku. Parija, Advocate General
Mr. R.N.Mishra, A.G.A, Mr. Balabantaray, S.C.
Mr. S.N.Pattnaik (O.P. No. 6)

JUDGMENT Date of Hearing : 21.7.2022 : Date of Judgment : 17.8.2022

B.P. SATAPATHY, J.

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

2. Since the issue involved in all the aforesaid Writ Petitions are identical, all the matters were heard analogously and disposed of by this common order.

3. WPC (OAC) No. 2645 of 2014 and batch of Writ Petitions were filed challenging the advertisement issued by the Orissa Staff Selection Commission on 4.8.2014 vide Annexure-6 inviting applications to fill up the post of Junior Engineer (Civil), under the Government of Odisha,Works Department & H & UD(PH) Department by way of direct recruitment. Similarly W.P.(C) No.16840 of 2019 has been filed challenging the advertisement issued by the self-same Orissa Staff Selection Commission on 29.8.2019 inviting applications to fill up 257 posts of Jr. Engineer (Civil) under the aegis of Engineer in chief (Water Resources),Govt. of Odisha.

4. Heard Mr. Buddhadev Routray and Mr. Jayanta Kumar Rath, learned Senor Counsels appearing on behalf of the petitioners in W.P.C (OAC) No.2645 of 2014 and W.P.(C) No.16840 of 2019 and other counsel appearing for the Petitioners in all the aforesaid Writ Petitions and Mr. Ashok Kumar Parija, learned Advocate General along with Mr. R.N. Mishra, learned Addl. Government and Mr. M.K. Balabantaray, learned Standing Counsel on behalf of the Opp. Parties and Mr. S.N. Pattnaik, learned counsel appearing for the Orissa Staff Selection Commission and learned counsels appearing for the intervenor-petitioners.

5. All the aforesaid Writ Potions were filed by the petitioners, who are admittedly Diploma Holders in Engineering in different disciplines. It is submitted that pursuant to the decision taken by the Government in the then Department of Planning and Coordination, Government of Odisha on 18.1.1972 it was decided to continue with the appointment/engagement of unemployed Engineering Personnel (Civil) both Graduates and Diploma Holders from the panel to be maintained by the said Department of Planning and Coordination. In the said communication dated 18.1.1972 under Annexure-2, Government decided to follow the procedure for absorbing engineering personnel in various posts in different Departments. The said procedure is enumerated below:

> *1. Employment of engineering personnel i.e. Graduate Engineer and Diploma Holders should be made year wise in order merit. All candidates of particular year have to be observed first before candidates of the following years are considered.*
>
> *2. The Planning and Coordination Department will continue to maintain a register of these candidates.*
>
> *3. On receipt of requisitions for filling of posts under various Department, the Planning and Coordination Department should recommended candidates as many as four times the under of vacancies.*
>
> *4. Recruitment to all post i.e. J.E,S.A.E, Surveyor, Tracer, Drafts man embankment inspector, and works sarkar is to be made though his department as being done now.*

6. It is submitted that subsequently the appointment of Diploma Engineers continued and sponsoring of candidates from the panel was vested with the

Committee of Chief Engineers and Engineer in Chief(Civil) was declared as the sponsoring authority. It is submitted that the Diploma Engineers in different disciplines were being provided with appointment after due sponsoring of their names by the Committee of Chief Engineers and Engineer-in-Chief (Civil) Odisha in different Departments coming under the State Government as well as public sector undertakings. It is submitted that while the appointment of Diploma Holders was so continuing, Government in the Department of Water Resources for the first time came up with a notification on 29.12.2012 by framing the Rules namely The Odisha Diploma Engineers Services (Method of Recruitment and Conditions of Service) Rules, 2012 under Annexure-3. It is submitted that the said Rules were framed in order to provide appointment in the grade of Junior Engineer and Asst. Engineer by way of direct recruitment to be conducted by the Orissa Staff Selection Commission, in respect of Junior Engineer and by the self-same Commission with consultation of Orissa Public Service Commission in case of Assistant Engineer. It is further submitted that pursuant to the said notification and framing of the Rules issued vide Notification dated 29.12.2012 when it was felt that recruitment through Orissa Staff Selection Commission will take some time and various Departments coming under the State Government are in urgent need to fill up the vacancies in the cadre of Jr. Engineer, Government in the Department of Water Resources vide its order dated 5.10.2013 under Annexure-4 passed the following order.

> *"NOW, THEREFORE, in exercise of the powers conferred by rule-19 of the said "Odisha Diploma Engineers' Service (Methods of Recruitment and Conditions of Service) Rules, 2012 and in exigencies of public interest, Government after careful consideration, do hereby relax the provisions of the aforesaid rules 31st March, 2014 and as such all appointments to the existing vacancies of Junior Engineer shall be made as were being made prior to commencement of those rules i.e. from out of the panel maintained by the Committee of Chief Engineers and Engineer-in-Chief (Civil) Odisha.*

7. It is submitted that as per the said order, the State Government took the decision in exercise of the power conferred under Rule 19 of the aforesaid 2012 Rules and decided that till 31stMarch, 2014 all appointments to the existing vacancies of Jr.Engineer shall be made as were being made prior to the commencement of these Rules i.e. from out of the panel maintained by the Committee of Chief Engineers and Engineer in Chief(Civil), Odisha.

8. Learned counsel for the Petitioners submitted that in view of the said order issued on 5.10.2013 under Annexure-4, all the vacancies as on 31st March, were to be filled up from amongst the empanelled Diploma holders maintained by the Committee of Chief Engineers and Engineer in Chief(Civil), Orissa. It is submitted that without following that order and without filling up of the existing vacancies as on 31st March, 2014, when the first advertisement was issued by

the Commission on 4.8.2014, O.A. No. 2645(C) of 2014 along with batch of Original Applications were filed before the learned Tribunal challenging the action of the Government in filling up the post of Jr. Engineer by way of direct recruitment instead of filling up those posts from out of the panel in terms of the order issued on 5.10.2013 under Annexure-4. It is submitted that learned Tribunal vide its order dated 26.4.2017 disposed of in O.A. No.2645 (C) of 2014 and batch. Learned Tribunal in the said order while was not inclined to interfere with the advertisement and held that the Original Applications are not maintainable, but observed as herein below:

> *21. Accordingly, the grievance of the applicants to quash the impugned advertisement and the statutory rule is not allowed and the O.As are not entertain able and maintainable.*
>
> *However, keeping in view the fact that the applicants are waiting for long years for appointment, it is desirable that Government as a model employer may take a decision as one time measure and consider to relax the relevant provision under the rule for appointment of the applicants and for that purpose, if necessary, may fix certain quota in future recruitment.*

9. Mr. B.Routray, learned Senior Counsel submitted that since learned Tribunal did not interfere with the matters and only observed as indicated hereinabove, the said order was challenged before this Court in W.P.(C) NO. 8877 of 2017 and batch of Writ Petitions. This Court vide its judgment dated 28.2.2019 disposed of all those Writ Petitions by remitting the matter to the learned Tribunal for fresh disposal. Para 8 & 9 of the aforesaid judgment is quoted herein below:

> *8. Keeping in view the fact that the petitioners are eagerly waiting for their absorption since long, learned Tribunal held that it is desirbable that Government being an ideal and model employer, may take a decision as one time measure and consider to relax the relevant provision under the Rules, 2012 for appointment of the applicants and for that purpose, if necessary, may fix certain quota in future recruitment. In our considered opinion, the Tribunal while making such direction, has committed error in not ascertaining the vacancy position as on 31st March, 2014. Further, the materials now produced before us in view of the exercise made by this Court, learned Tribunal should give a relook into the matter.*
>
> *9. In that view of the matter, we are of the considered opinion that the matter is required to be remitted back to the Tribunal and we direct the same. Learned Tribunal is directed to dispose of the matter on a consolidated application being moved by a single petitioner on behalf of all these petitioners, represented by Sri Budhadev Routay, learned Senior Advocate (on consent of the panel of advocates appearing in these writ petitions), who will present matter in seriatim and in detail and will give a consolidated statement. The matter is to be disposed of within a period of twelve months from the date of filing o such consolidated application before learned Tribunal.*

10. It is submitted that this Court while remitting the matter for fresh disposal observed that without ascertaining the vacancy position as available on

31.3.2014, since the matter has been disposed of, it needs a fresh relook by the learned Tribunal. While directing so, the petitioners in WP(C) No. 8877 of 2017 were also permitted through Mr. B.Routray, learned Sr.Counsel to place all the matters so produced before this Court. After such remand of the matter and due to the abolition of the learned Tribunal in the State of Odisha, the matter was transferred to this Court and accordingly all the matters were taken up for hearing and disposal. Basing on the permission granted by this Court, necessary documents were also brought on record by way of amendment in W.P.(C) No. 8877 of 2007.

11. Mr.Routray along with Mr. Rath, learned Senior Counsel strenuously urged before this Court that since as per order dated 4.10.2013 under Annexure-4, all the existing vacancies as on 31.3.2014 were to be filled up from out of the panel, the action of the Government in allowing the Commission to go for direct recruitment without filling up the vacancies from out of the panel is illegal. It is also submitted that since without following the stipulation contained in the said order, subsequent advertisement were issued on 29.8.2019, the same was challenged in W.P.(C)16840 of 2019. This Court vide order dated 18.9.2019 passed an interim order to the effect that the process of selection pursuant to the said advertisement may continue but the same shall not be finalized without the leave of this Court.

12. It is submitted that in view of the stipulation contained in order dated 5.10.2013, the State Government is duty bound to fill up all the existing vacancies as available on 31.3.2014 from out of the panel and since that was not followed prior to issuance of the advertisement on 4.8.2014 and subsequent advertisement on 29.8.2019, the recruitment process pursuant to those two advertisements is liable to be interfered with by this Court and with a direction on the Opp.Parties to fill up those posts from out of the panel as against the vacancies available up to 31.3.2014.

13. Mr. Routray further submitted that even if some of the petitioners have made their application pursuant to the advertisement issued on 4.8.2014 and 29.8.2019 and taken part in the recruitment process, they are not stopped from challenging the impugned advertisements. In support of such stand, learned Senior Counsel relied on the decision of the Hon'ble Apex Court rendered in the case of Dr. (Major) Meeta Sahai Vs. State of Bihar & Others (Civil Appeal No.9482 of 2019 disposed of on 17.1.2.2019 & Krishna Rai & Others Vs. Benaras Hindu University through Registrar & Others (Civil Appeal No.4578-4580 of 2022, disposed of on 16.6.2022).

14. Mr. Ashok Kumar Parija, learned Advocate General along with Mr. R.N. Mishra, learned AGA and Mr. M.K. Balabantaray, learned Standing Counsel

made their submission basing on the counter filed by the State-Opp. Parties and the documents filed pursuant to the order passed by this Court.

15. It is submitted by the learned Advocate General that pursuant to the order dated 4.10.2013 and by following the panel system prevalent in the State, the State Government considering the requisition made by different Department functioning under the State Government decided to fill up 1612 number of posts from out of the panel out of the total 1869 requisitions received till 31.3.2014. It is further submitted that even though by 31.3.2014, 1869 requisitions were received by the Committee of Chief Engineers and Engineer in Chief(Civil), Orissa from different Departments and Public Sector undertakings but the State Government decided to fill up 1612 posts from the panel and the rest 257 Diploma Holders belonging to ST(Men) and S.C(Women) could not be filled up as there were no candidate in the said category as per the requisition. But, this Court while dealing with the matter and after going through the order passed by the Division Bench of this Court when found that both the sides have not produced any document showing the vacancy as on 31.3.2014, it directed the learned State Counsel to produce the total number of vacancies available as on 31.3.2014. Pursuant to the said direction of this Court, an additional affidavit was filed on 18.7.2022 indicting therein that as on 31.3.2014, the total number of vacancies in different Departments of the Government was 2723. But it is submitted that since requisitions were received to the extent of 1869 posts, the Government had no occasion to fill up the total vacancies in absence of such requisitions. Mr. Parija, learned Advocate General also brought to the notice of this Court the stipulation contained in the guideline issued on 18.1.1972 under Annexure-2. It is submitted that unless and until requisitions are received for filling up the posts from various Departments, no name from out of the panel can be sponsored by the Committee of Chief Engineers for appointment of such Diploma Holders.

16. Therefore, it is submitted that since by 31.3.2014, requisitions to the extent of 1869 posts were received by the Committee, Government decided to fill up 1612 number of posts and the rest 257 posts could not be filled up as sufficient number of candidates in the reserved category were not available for such sponsoring from the panel. It is also submitted that since as per order dated 5.10.2013, existing vacancies as on 31.3.2014 were required to be filled up from out of the panel, but in view of the requisition received to the extent of 1869 posts, no illegality can be found at the level of the Government for not filling up the entire 2773 vacancies available as on 31.3.2014. It is also submitted that the order dated 5.10.2013 is very clear as it indicates that all appointments to the existing vacancies as on 31.3.2014 shall be made from out of the panel. But

in absence of requisition from different Departments, the Committee had no occasion to sponsor the names of candidate beyond 1869 Diploma Holders from out of the panel. It is also submitted that filling up the post by the Government as against available vacancies is the prerogative of the Government and no direction can be issued compelling the State Government to fill up all the vacancies as available. Mr. Ashok Parija, learned Advocate General in support of the aforesaid submission relied on the decision of the Hon'ble Apex Court passed in the case of ***Anurag Sharma and others Vs. State of Himachal Pradesh and others (2022 S.C.C, OnLine S.C 860)***. Relying on the said decision, it is submitted that even though the vacancies as on 31.3.2014 was to the extent of 2773, but the State Government cannot be compelled to fill up all those posts. Hon'ble Apex Court in Para 7, 11, 15 to 25, 73 and 75 held as follows:-

> ***7***. *The solitary argument advanced on behalf of Respondents No. 1 to 3, which was accepted by the Division Bench was that the vacancies which arose prior to the promulgation of New Rules were to be filled only as per the 1966 Rules and not as per the New Rules. The High Court formulated the issue and proceeded to allow the Writ Petition on the ground that it is covered by the decision of this Court in Y.V. Rangaiah v. J. Sreenivasa Rao (supra). The operative portion of the judgment is extracted herein for ready reference: "The question whether the vacancies occurring before the amendment to the Recruitment and Promotion Rules are to be filled up as per the old Recruitment and Promotion Rules or by way of new Recruitment and Promotion Rules is no more res integra in view of the law laid down by their Lordships of this Court in Y.V. Rangaiah v. J. Sreenivasa Rao, (1983) 3 SCC 284."*
>
> ***11***. *The real question is whether the vacancies which arose prior to the promulgation of the new rules are to be filled only as per the old rules and not as per the amended rules? It is argued that this principle is no more resintegra as the Supreme Court recognised such a right in Rangaiah's case and it has been followed in a large number of subsequent decisions. A list of such judgments was forwarded to the Court by the Respondents. On the other hand, while submitting that there is no such right, an even larger list of decisions of this Court that distinguished Rangaiah was forwarded to us on behalf of the State.*
>
> ***15***. *The question that arose in Rangaiah's case related to the mandatory obligation under the old rules to prepare an approved list of candidates and also the number of persons to be placed in the list as per the vacancies available. It is in this context that the Court observed that the vacancies would be governed by the old rules. This decision is not to be taken to be laying down an invariable principle that vacancies occurring prior to the amendment of the rules are to be governed by old rules. It is important to note that the Court has not identified any vested right of an employee, as has been read into this judgment in certain subsequent cases.*
>
> ***16***. *However, as the observation in Rangaiah's case has been construed as a general principle that vacancies arising prior to the amendment of rules are to be filled only as per the old rules, it is necessary for us to examine the correct position of law. For this purpose, we will examine the constitutional position and the status that governs the relationship between an employee and the State. Status of persons serving the Union and the States:*

17. *The relationship between the State and its employees is provisioned in Part XIV of the Constitution. The provisions of this Part empower the Union and the States to make Laws and executive Rules, to regulate the recruitment, conditions of service ,tenure and termination of persons serving the Union or the States.*

18. *Article 310 provides that, except as expressly provided in the Constitution, every person serving the Union or the States holds office during the pleasure of the President or the Governor.*

19. *The legislative power conferred on the Parliament or a State Legislature, to make Laws, or the executive power conferred on the President or the Governor to make Rules under Article 309 is controlled by the doctrine of pleasure embodied in Article 310. This is clear from the fact that Article 309 opens with the restrictive clause, 'subject to the provision of the Constitution. It is for this reason that the power of the legislature to make laws and the executive to make Rules, for laying down conditions of services of a public servant is always subject to the tenure at the pleasure of the President or the Governor under Article 310.*

20. *The Constitutional provision to provide public employment on the basis of tenure at pleasure of the President or the Governor is based on 'public policy', 'public interest' and 'public good'. The concept of holding public employment at pleasure is explained in Constitution Bench decision of this Court in Union of India v. Tulsiram Patel . The relationship between the Government and its employees, as explained in this judgment can be formulated as under :—*

I. Unlike in the United Kingdom, in India it is not subject to any law made by Parliament but is subject only to what is expressly provided by the Constitution.

II. The pleasure doctrine relates to the tenure of a Government servant…,means the period for which an incumbent of office holds it.

III. The position that the pleasure doctrine is not based upon any special prerogative of the Crown but upon public policy has been accepted by this Court in State of U.P. v. Babu Ram Upadhya and Moti Ram Deka v. General Manager, N.E.F., Railways, Maligaon, Pandu.

IV. The only fetter which is placed on the exercise of such pleasure is when it is expressly so provided in the Constitution itself, that is when there is an express provision in that behalf in the Constitution. Express provisions in that behalf are to be found in the case of certain Constitutional functionaries in respect of whose tenure special provision is made in the Constitution as, for instance, in clauses (4) and (5) of Article 124 with respect to Judges of the Supreme Court, Article 218 with respect to Judges of the High Court. Article 148(1) with respect to the Comptroller and Auditor-General of India, Article 324(1) with respect to the Chief Election Commissioner, and Article 324(5) with respect to the Election Commissioners and Regional Commissioners.

V. Clauses (1) and (2) of Article 311 impose restrictions upon the exercise by the President or the Governor of a State of his pleasure under Article 310(1). These are express provisions with respect to termination of service by dismissal or removal as also with respect to reduction in rank of a civil servant and thus come within the ambit of the expression Except as otherwise provided by this 'Constitution' qualifying Article 310(1). Article 311 is thus an exception to Article 310 and was described in Parshotam Lal Dhingra v. Union of India, as operating as a proviso to Article 310(1) though set out in a separate Article.

VI. Article 309, is however, not such an exception. It does not lay down any express provision which would derogate from the amplitude of the exercise of pleasure under Article 310(1). It merely confers upon the appropriate legislature or executive the power to make laws and frame rules but this power is made subject to the provisions of the Constitution. Thus, Article 309 is subject to Article 310(1) and any provision restricting exercise of the pleasure of the President or Governor in an Act or rule made or framed under Article 309 not being an express provision of the Constitution, cannot fall within the expression 'Except as expressly provided by this Constitution' occurring in Article 310(1) and would be in conflict with Article 310(1) and must be held to be unconstitutional.

VII. Clauses (1) and (2) of Article 311 expressly restrict the manner in which a Government servant can be dismissed, removed or reduced in rank and unless an Act made or rule framed under Article 309 also conforms to these restrictions, it would be void. The restrictions placed by clauses (1) and (2) of Article 311 are two-(i) with respect to the authority empowered to dismiss or remove a Government servant provided for in clause (1) of Article 311, and (ii) with respect to the procedure for dismissal, removal or reduction in rank of a Government servant provided for in clause (2). (emphasis supplied)

***21**. Regardless of its origin, the doctrine of pleasure incorporated under our constitutional scheme is to subserve an important public purpose. In Para 44 and 45 of Tulsiram Patel (supra), this Court has explained the purpose and object of incorporating this principle: "44. Ministers frame policies and Legislatures enact laws and lay down the mode in which such policies are to be carried out and the object of the legislation achieved. In many cases, in a Welfare State such as ours, such policies and statutes are intended to bring about socio-economic reforms and the uplift of the poor and disadvantaged classes. From the nature of things the task of efficiently and effectively implementing these policies and enactments, however, rests with the civil services. The public is, therefore, vitally interested in the efficiency and integrity of such services. Government servants are after all paid from the public exchequer to which everyone contributes either by way of direct or indirect taxes. Those who are paid by the public and are charged with public administration for public good must, therefore, in their turn bring to the discharge of their duties a sense of responsibility. The efficiency of public administration does not depend only upon the top echelons of these services. It depends as much upon all the other members of such services, even on those in the most subordinate posts. For instance, railways do not run because of the members of the Railway Board or the General Managers of different railways or the heads of different departments of the railway administration. They run also because of engine-drivers, firemen, signalmen, booking clerks and those holding hundred other similar posts. Similarly, it is not the administrative heads who alone can see to the proper functioning of the post and telegraph service. For a service to run efficiently there must, therefore, be a collective sense of responsibility. But for a Government servant to discharge his duties faithfully and conscientiously, he must have a feeling of security of tenure.*

Under our Constitution, this is provided for by the Acts and rules made under Article 309 as also by the safeguards in respect of the punishments of dismissal, removal or reduction in rank provided in clauses (1) and (2) of Article 311. It is, however, as much in public interest and for public good that Government servants who are inefficient,

dishonest or corrupt or have become a security risk should not continue in service and that the protection afforded to them by the Acts and rules made under Article 309 and by Article 311 be not abused by them to the detriment of public interest and public good. When a situation as envisaged in one of the three clauses of the second proviso to clause (2) of Article 311 arises and the relevant clause is properly applied and the disciplinary inquiry dispensed with, the concerned Government servant cannot be heard to complain that he is deprived of his livelihood. The livelihood of an individual is a matter of great concern to him and his family but his livelihood is a matter of his private interest and where such livelihood is provided by the public exchequer and the taking away of such livelihood is in the public interest and for public good, the former must yield to the. These consequences follow not because the pleasure doctrine is a special prerogative of the British Crown which has been inherited by India and transposed into our Constitution adapted to suit the constitutional set-up of our Republic but because public policy requires, public interest needs and public good demands that there should be such a doctrine.

45. *It is thus clear that the pleasure doctrine embodied in Article 310(1), the protection afforded to civil servants by clauses (1) and (2) of Article 311 and the withdrawal of the protection under clause (2) of Article 311 by the second proviso thereto are all provided in the Constitution on the ground of public policy and in the public interest and are for public good."*

22*. The principle of a public servant holding office at the pleasure of the President or the Governor is incorporated in the Constitution itself (under Article 310). This has a direct bearing on the powers of the Parliament or the legislature to make Laws or the executive to make Rules for specifying conditions of service provided under Article 309. This position is clearly explained in the above-referred passages. In B.P. Singhal v. Union of India this Court explained the consequence of holding the office during the pleasure of the President or the Governor: "33. The doctrine of pleasure as originally envisaged in England was a prerogative power which was unfettered. It meant that the holder of an office under pleasure could be removed at any time, without notice, without assigning cause, and without there being a need for any cause. But where the rule of law prevails, there is nothing like unfettered discretion or unaccountable action. The degree of need for reason may vary. The degree of scrutiny during judicial review may vary.*

But the need for reason exists. As a result, when the Constitution of India provides that some offices will be held during the pleasure of the President, without any express limitations or restrictions, it should however necessarily be read as being subject to the "fundamentals of constitutionalism".

23*. It is in this background that the employment of a public servant is to be understood. Though the relationship between the employee and the State originates in contract, but by virtue of the constitutional constraint, coupled with the legislative and executive rules governing the service, the relation attains a unique position. Identifying such a relationship as being a 'status', as against a contract, this Court in Roshan Lal Tandon v. Union of India , explained what such a 'status' constitutes. We have extracted hereinbelow the exposition of the concept of 'status' as explained by the Constitution Bench for ready reference. In this case, the petitioner Roshan Lal Tandon was appointed as Train- Examiner - Grade 'D'. At the time when he joined the service, the promotion to the next post in Grade 'C' was governed by certain rules which later came to be amended. Questioning the amendment, he contended that he had a right*

to be promoted to Grade 'C' when he joined the service and such a right could not have been altered by way of a subsequent amendment. Rejecting this argument, this Court explained the relationship of Government employment as a 'status' as under:

"6. We pass on to consider the next contention of the petitioner that there was a contractual right as regards the condition of service applicable to the petitioner at the time he entered Grade 'D' and the condition of service could not be altered to his disadvantage afterwards by the notification issued by the Railway Board. It was said that the order of the Railway Board dated January 25, 1958, Annexure 'B', laid down that promotion to Grade 'C' from Grade 'D' was to be based on seniority-cum suitability and this condition of service was contractual and could not be altered thereafter to the prejudice of the petitioner. In our opinion, there is no warrant for this argument. It is true that the origin of Government service is contractual. There is an offer and acceptance in every case. But once appointed to his post or office the Government servant acquires a status and his rights and obligations are no longer determined by consent of both parties, but by statute or statutory rules which may be framed and altered unilaterally by the Government. In other words, the legal position of a Government servant is more one of status than of contract. The hall mark of status is the attachment to ***a legal relationship of rights and duties imposed by the public law and not by mere agreement of the parties****. The emolument of the Government servant and his terms of service are governed by statute or statutory rules which may be* ***unilaterally altered*** *by the Government without the consent of the employee. It is true that Article 311 imposes constitutional restrictions upon the power of removal granted to the President and the Governor under Article 310. But it is obvious that the relationship between the Government and its servant is not like an ordinary contract of service between a master and servant. The legal relationship is something entirely different, something in the nature of status. It is much more than a purely contractual relationship voluntarily entered into between the parties. The duties of status are fixed by the law and in the enforcement of these duties, society has an interest…*

7. We are therefore of the opinion that the ***petitioner has no vested contractual right in regard to the terms of his service*** *and that Counsel for the petitioner has been unable to make good his submission on this aspect of the case."*

24*. The principle laid down in Roshan Lal Tandon's case is followed in a number of decisions of this Court. The following are the propositions emanating from the principles laid down in these precedents.*

(i) Except as expressly provided in the Constitution, every person employed in the civil service of the Union or the States holds office during the pleasure of the President or the Governor (Article 310). Tenure at pleasure is a constitutional policy for rendering services under the state for public interest and for the public good, as explained in Tulsiram Patel (supra).

(ii) The Union and the States are empowered to make laws and rules under Articles 309, 310 and 311 to regulate the recruitment, conditions of service, tenure and termination. The rights and obligations are no longer determined by consent of the parties but by the legal relationship of rights and duties imposed by statute or the rules. The services, thus, attain a status.

(iii) The hallmark of status is in the legal rights and obligations imposed by laws that may be framed and altered unilaterally by the Government without the consent of the employee.

(iv) In view of the dominance of rules that govern the relationship between the Government and its employee, all matters concerning employment, conditions of service including termination are governed by the rules. There are no rights outside the provision of the rules.

(v) In a recruitment by State, there is no right to be appointed but only a right to be considered fairly. The process of recruitment will be governed by the rules framed for the said purpose.

(vi) Conditions of service of a public servant, including matters of promotion and seniority are governed by the extant rules. There are no vested rights independent of the rules governing the service.

(vii) With the enactment of laws and issuance of rules governing the services, Governments are equally bound by the mandate of the rule. There is no power or discretion outside the provision of the rules governing the services and the actions of the State are subject to judicial review.

***25**. In view of the above principles, flowing from the constitutional status of a person in employment with the State, we have no hesitation in holding that the observations in Rangaiah that posts which fell vacant prior to the amendment of Rules would be governed by old Rules and not by new Rules do not reflect the correct position of law. We have already explained that the status of a Government employee involves a relationship governed exclusively by rules and that there are no rights outside these rules that govern the services. Further, the Court in Rangaiah's case has not justified its observation by locating such a right on any principle or on the basis of the new Rules. As there are a large number of judgments which followed Rangaiah under the assumption that an overarching principle has been laid down in Rangaiah, we have to necessarily examine the cases that followed Rangaiah. We will now examine how subsequent decisions understood, applied or distinguished Rangaiah. Decisions that followed Y.V. Rangaiah v. J. Sreenivasa Rao.*

***73.** The consistent findings in these fifteen decisions that Rangaiah's case must be seen in the context of its own facts, coupled with the declarations therein that there is no rule of universal application to the effect that vacancies must necessarily be filled on the basis of rules which existed on the date which they arose, compels us to conclude that the decision in Rangaiah is impliedly overruled. However,as there is no declaration of law to this effect, it continues to be cited as a precedent and this Court has been distinguishing it on some ground or the other, as we have indicated hereinabove. For clarity and certainty, it is, therefore, necessary for us to hold;*

(a) The statement in Y.V. Rangaiah v. J. Sreenivasa Rao that, "the vacancies which occurred prior to the amended rules would be governed by the old rules and not by the amended rules", does not reflect the correct proposition of law governing services under the Union and the States under part XIV of the Constitution. It is hereby overruled.

(b) The rights and obligations of persons serving the Union and the States are to be sourced from the rules governing the services.

***75**. We have already held that there is no right for an employee outside the rules governing the services. We have also followed and applied the Constitution Bench decisions in Union of India v. Tulsiram Patel (supra) and more particularly the decision*

in Roshan Lal Tandon v.Union of India (supra) that the services under the State are in the nature of a status, a hallmark of which is the need of the State to unilaterally alter the rules to subserve the public interest. The 2006 rules, governing the services of the Respondents came into force immediately after they were notified. There is no provision in the said rules to enable the Respondents to be considered as per the 1966 Rules. The matter must end here. There is no other right that Respondents no. 1 to 3 can claim for such consideration.

17. It is also submitted that in view of Annexure-2, unless and until sufficient requisitions are received by the Committee from various Department of the Government, the Committee cannot and is not in a position to sponsor any candidate from the panel.Even though by 31.3.2014, requisitions to the extent of 1869 posts were received and sponsored, but Government decided to fill up 1612 posts.Accordingly, it is submitted that after filling up those posts by 31.3.2014 in compliance to order dated 5.10.2014, no illegality has been committed by the Commission in issuing the advertisement on 4.8.2014 and subsequent advertisement on 29.8.2019 inviting applications to fill up posts of Jr. Engineer by way of direct recruitment. Mr. Parija, learned Advocate General also submitted that as provided in the relevant recruitment Rules, 2012, Diploma holders, who are in the panel and due to abolition of the appointment from out of the panel, all those candidates as per the said Rules were allowed exemption for their appearing in three successive recruitment tests with relaxation of upper age limit and some of the petitioners by availing that benefit have also appeared the recruitment test pursuant to the aforesaid two advertisements. It is submitted that since the Diploma Engineers who could not avail the benefit of their appointment through the panel system which was in force up to 31.3.2014 were allowed the benefit of age relaxation in their appearance in three successive recruitment test to be conducted by the Orissa Staff Selection Commission, they should have participated in the said selection process instead of approaching this Court in the aforesaid Writ Petitions.

18. Making all these submissions, Mr. Parija, learned Advocate General submitted that the prayer made in the Writ Petition are not entertainable by this Court.

19. Mr. S.N. Pattnaik, learned Counsel appearing for the Commission on the other hand submitted that both the advertisements have been issued strictly in accordance with the 2012 Rules and no illegality has either been raised or committed by the Commission while issuing both the advertisements.

20. Heard learned counsel for the parties. Perused the materials available on record.

21. This Court after going through the same finds that though as on 31.3.2014, the total vacancies available was 2773, but since in terms of Annexure-2, requisitions were received in respect of 1869 posts, no direction can be issued to the State Government to fill up the rest vacancies from out of the panel maintained by the Committee of Chief Engineers and Engineer in Chief (Civil), Orissa. This Court also finds no illegality on the part of the State Government in not filling up all the available vacancies as State Government in view of the decision relied on by the Advocate General in the case of Anurag Sharma and Others (supra) cannot be compelled to fill up all those posts. The decisions relied on by Mr. B.Routray, learned Sr.Counsel appearing for the petitioners are not germane to the issue involved in all these Writ Petitions. Accordingly, this Court is not inclined to entertain all these Writ Petitions and the same are accordingly dismissed.

22. However, before parting with the case, this Court feels it proper to make an observation that since learned Tribunal while disposing the matter vide its order dated 26.4.2017 observed that Government as an employer may take a decision as one time measure and to consider the relevant provision under the Rule for appointment of the petitioners and for that purpose, if necessary, may fix certain quota in future recruitment, this Court observes that if Government so likes, it can consider the case of the present petitioners in future recruitments by providing them some reservation as against the vacancies to be advertised. However, this Court has expressed no opinion on such course of action if will be undertaken by the State.

23. With the aforesaid observations and directions, all the Writ Petitions are disposed of.

24. There is no order as to costs.

25. The photocopy of this order be placed on the connected cases.

—— o ——