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Whether the use of electricity by the Appellant at an under-construction oil refinery unit would amount to an unauthorized use of electricity under Explanation (b) (iv) of Section 126 of the Act and violate Clause 106 of the OERC Code? – Held, Yes – Mere exchange of offer between Appellant and Respondent No.1 could not be said that the CD was formally increased to 600 KVA–The agreement was formally signed on 30th May 2012 till such time, any excess consumption of electricity, contrary to the authorized use either in terms of CD or in terms of premises where the factory was located, would ipso facto attract Section 126 of the Act read with Regulation 106 of the OERC Code – Appeal dismissed.

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

W.A. NO. 267 OF 2013

M/s. S.N.M. BUSINESS PVT. LTD., BALASORE .....Appellant

.V.

THE EXECUTIVE ENGINEER (ELECT.), CENTRAL ELECTRICAL DIVISION, NESCO, BALASORE & ANR. .....Respondents

ELECTRICITY ACT, 2003 – Section 126 (b) (iv) Explanation thereto r/w Orissa Electricity Regulatory Commission (OERC) Distribution (Conditions of Supply) Code, 2004 – Clause 106 – Whether the use of electricity by the Appellant at an under-construction oil refinery unit would amount to an unauthorized use of electricity under Explanation (b) (iv) of Section 126 of the Act and violate Clause 106 of the OERC Code? – Held, Yes – Mere exchange of offer between Appellant and Respondent No.1 could not be said that the CD was formally increased to 600 KVA – The agreement was formally signed on 30th May 2012 till such time, any excess consumption of electricity, contrary to the authorized use either in terms of CD or in terms of premises where the factory was located, would ipso facto attract Section 126 of the Act read with Regulation 106 of the OERC Code – Appeal dismissed.

(Para-29)

Case Laws Relied on and Referred to :-

1. AIR 1990 SC 1984 : Mukherjee Vs. Union of India.
2. (1999) 1 SCC 45 : Vasant D. Bhavsar Vs. Bar Council of India.
3. (2012) 2 SCC 108 : Engineer, Southern Electricity Supply Company of Orissa Limited (SOUTHCO) Vs. Sri Seetaram Rice Mill.
4. AIR 1936 PC 253 : Nazir Ahmed Vs. King Emperor.

For Appellant : Mr. U. C. Mohanty

For Respondents: Mr. Prasant Kumar Tripathy

JUDGMENT Date of Judgment: 14.09.2022

Dr. S. MURALIDHAR, C.J.

1. The challenge in this writ appeal is to the judgment dated 17th May, 2013 passed by the learned Single Judge allowing W.P.(C) No.972 of 2012 filed by the Executive Engineer (Electrical), Central Electrical Division, NESCO, Balasore (Respondent No.1),which in turn sought the quashing

of an order dated 20th September, 2011 passed by the Appellate Authority-cum-Deputy Electrical Inspector (T&D), Balasore (Respondent No.2) setting aside an assessment order 10th June, 2011.

2. The learned Single Judge held that the order of the Appellate Authority (AA) had been passed in gross violation of the statutory provisions contained in the Electricity Act, 2003 ('the Act') and the Orissa Electricity Regulatory Commission(OERC) Distribution (Conditions of Supply) Code, 2004 (OERC Code).

3. While directing notice to issue in the present Appeal on 16th July 2013, it was directed by this Court that any action taken pursuant to the impugned order of the learned Single Judge would be subject to the result of the writ appeal.

4. The background facts are that the Appellant executed an agreement with Respondent No.1 on 7th April, 1999 for availing power supply with a contract demand (CD) of 83 KW for setting up a rice mill. The CD was enhanced to 160 KVA in August,2001, to 260 KVA with effect from November, 2003 and to 600 KVA on 30th May, 2012.

5. It is stated that on 5th April 2011, the NESCO intimated the Appellant that as per the records of NESCO, the consumption of electricity by the Appellant was 522 KVA in January, 2011, 498 KVA in February, 2011 and 348 KVA in March, 2011, which exceeded the CD of 340 KVA. NESCO accordingly requested enhancement of CD with reference to Clause 72 of the OERC Code within 15 days of execution of fresh agreement by depositing additional security.

6. According to the Appellant, it deposited the additional security amount on 7th April, 2011 and requested the NESCO for early execution of the agreement. The Appellant stated that it also submitted the details of premises at which the power was proposed to be used by it i.e. private resident, factory, home industry, irrigation pump, domestic, cinema, workshop, restaurant or mill and processing of paddy extraction and refining of oil with its allied and ancillary activities.

7. According to the Appellant, it paid the electricity bills as per the previous meter reading for the period from January to April, 2011. The officials of NESCO undertook a surprise check at the premises of Appellant

on 10th May, 2011 at around 10.10 am and found that the Appellant had given an extended load to an under-construction oil refinery unit adjacent to it, for which it used a black colour 35 mm. sq. 3½ core cable; it had availed power supply from a Distribution Panel Board existing at the premises of the Appellant at a distance of 200 meters. This was found to be in violation of Clauses 34, 104, 105 and 106 of the OERC Code.

8. A provisional assessment order was passed by the Executive Engineer, CED, Balasore, NESCO on 13th May, 2011 under Sections 126 (1) and 126 (2) of the Act alleging unauthorized use of electricity and directing the Appellant to file its objection within 7 days. The provisional assessment was for Rs.15,48,370.88.

9. On 30th May 2011, the Appellant filed its objection and claimed that the allegations raised by NESCO was misconstrued factually as well as legally.

10. The above objection was disposed of by Respondent No.1 on 10th June, 2011 excluding the cost of cubical meter from the provisional assessment and directing an amount of Rs.11,98,934.88 to be paid as final assessment within 15 days.

11. Aggrieved by the above assessment order, the Appellant filed an appeal under Section 127 of the Act before Respondent No.2 AA. On 27th September 2011, the said appeal was allowed, setting aside the final assessment order and directing NESCO to refund 50% of the penal assessment amount deposited with the NESCO by the Appellant or to adjust the same in the subsequent bills.

12. Against the order of the AA, NESCO filed W.P.(C) No.972 of 2012 in this Court on 16th January, 2012. Even while the writ petition was pending, the CD of the Appellant was enhanced from 340 KVA to 600 KVA by communication dated 30th May, 2012 on which date an agreement was entered into between the parties.

13. Having heard learned counsel for the parties, the learned Single Judge in the impugned order framed as many as six issues for considerations including the question of maintainability of the writ petition. The critical question however was whether the use of electricity by the Appellant at an under-construction oil refinery unit would amount to an unauthorized use

of electricity under Explanation (b) (iv) of Section 126 of the Act and violative of Clause 106 of the OERC Code?

14. It was held by the learned Single Judge that the conclusion reached by the AA that "some procedural lapses have been committed by both the Appellant and Respondent in the matter of verification of premises and request for enhancement of CD which bears no weight at this stage in view of the core of allegations made by the Respondent and objections raised by the Appellant against the same", to be not supported by any reasoning whatsoever. Relying on the decisions of the Supreme Court of India in ***S. N. Mukherjee v. Union of India AIR 1990 SC 1984 and Vasant D. Bhavsar v. Bar Council of India*** (1999) 1 SCC 45, it was held that the findings of the AA with regard to spot verification of the premises of the consumer were not sustainable in law.

15. The learned Single Judge then turned to the question of the unauthorized use of electricity by the Appellant. Reference was made to Section 126 of the Act and Regulations 105 and 106 of the OERC Code and it was held that "use of electricity other than the purpose for which the same was authorized or for the premises or area other than those for which the supply of electricity was authorized amounts to unauthorized use of electricity for which the consumer is liable to be assessed under Section 126 of the Act,2003."

16. Reference was made to the decision of the Supreme Court in ***Executive Engineer, Southern Electricity Supply Company of Orissa Limited (SOUTHCO) v. Sri Seetaram Rice Mill (2012) 2 SCC 108***. It was concluded that even assuming that the extension of load given by the Appellant for the purposes of an under- construction oil refinery unit was within the knowledge and consent of Respondent No.1, "it cannot absolve the consumer from being assessed under Section 126 of the Act." It was held that there was no estoppel against law; it was concluded that the extension of load given by the Appellant amounted to unauthorized use of electricity in terms of Explanation (b) (iv) of Section 126 of the Act as well as Clause 106 of the OERC Code. It was further held that the extension of 69 KVA load by the Appellant to the adjacent premises for construction purposes also amounted to unauthorized use of electricity.

17. The learned Single Judge upheld the assessment order under Section 126 of the Act on the ground of both the unauthorized use of electricity for a

purpose other than for which it was authorized to be used and further, use in premises other than the premises for which the supply was authorized. Accordingly, the appellate order was set aside by the learned Single Judge.

18. Mr. U.C. Mohanty, learned counsel for the Appellant submitted that the proposal of the Appellant by its letter dated 7th April, 2011 to Respondent No.1 in response to the latter's letter dated 5th April, 2011 should be deemed to be a "concluded contract" within the meaning of the provisions of the Indian Contract Act, 1872 (IC Act). According to Mr. Mohanty, this contract attained finality when the final agreement was executed between the parties on 30th May, 2012. Since the Respondent No.1 had failed to act as per Clause-104 of the OERC Code, it should be deemed to have waived its right to act thereunder. It was submitted the assessment under Section 126 of the Act was an abuse of the process of law and a deliberate attempt to humiliate the Appellant when there was no financial material loss to Respondent No.1.According to learned counsel for the Appellant, Respondent No.1 permitted the Appellant to novate the contract and enhance the CD. However, the inspection report dated 10th May, 2011 was with an "ulterior motive and mala fide intention" and, therefore, the learned Single Judge ought not to have interfered with the well reasoned order of the AA. Inasmuch as, provisions of Section 126 (5) of the Act and Clauses-104 to 106 of the OERC Code had not been adhered to, the impugned order of the learned Single Judge was contrary to the principles laid down by the Privy Council in ***Nazir Ahmed v. King Emperor AIR 1936 PC 253*** viz., that where a power had been given to do a certain thing in a certain way, it must be done in that way or not at all. Mr. Mohanty sought to distinguish the decision of the Supreme Court in ***Sri Seetaram Rice Mill*** (supra) on the ground that it was on a different set of facts.

19. Mr. Prasant Kumar Tripathy, learned counsel for Respondent No.1, on the other hand, defended the order of the learned Single Judge by pointing out that the undisputed fact was that the Appellant had diverted electricity to the neighbouring under-construction unit and this was not the purpose for which the connection was given in the first place or the load enhancement of the CD took place. Without awaiting the formal increase in the CD, the Appellant had diverted the electricity and, therefore, Section 126 of the Act was straightaway attracted. There was no error committed by the learned Single Judge, therefore, in setting aside the impugned order of the AA and restoring the final assessment order.

20. The above submissions have been considered.

21. With the enhancement of the CD of the Appellant to 160 KVA with effect from August, 2001, to 260 KVA with effect from November, 2003 and to 340 KVA with effect from November,2006, the Appellant was reclassified as a consumer under the 'Large Industry' category and the billing was raised on that basis. Since the drawal of load by the Appellant exceeded the CD from January, 2011 onwards, Respondent No.1 had in its letter dated 5th April, 2011 requested the Appellant to apply for enhancement of CD. On 7th April 2011, the Appellant expressed his willingness to enhance the CD to 600 KVA and informed Respondent No.1 that the additional security had already been deposited.

22. While it is true that prior to the sudden inspection on 10th May 2011, Respondent No.1 was aware of the above development whereby an application was being filed by the Appellant for availing load of 600 KVA, the fact remains that during the surprise inspection, it did find diversion of the electricity to an under-construction oil unit in the neighbouring premises, which was clearly without prior permission of the Respondent No.1. This diversion was through a black colour core cable.

23. As explained by the Supreme Court in ***Sri Seetaram Rice Mill*** (supra) in terms of the explanation to Section 126 of the Act, the expression "unauthorized use of electricity" would mean "what is stated under that Explanation, as well as such other unauthorized user, which is squarely in violation of the abovementioned statutory or contractual provisions."

24. In this context, the reference may be made to Section 126 of the Act, which reads as under:

> ***"126. Assessment.—***
>
> (1) If on an inspection of any place or premises or after inspection of the equipments, gadgets, machines, devices found connected or used, or after inspection of records maintained by any person, the assessing officer comes to the conclusion that such person is indulging in unauthorised use of electricity, he shall provisionally assess to the best of his judgment the electricity charges payable by such person or by any other person benefited by such use.
>
> (2) The order of provisional assessment shall be served upon the person in occupation or possession or in charge of the place or premises in such manner as may be prescribed.

(3) The person, on whom an order has been served under sub-section (2), shall be entitled to file objections, if any, against the provisional assessment before the assessing officer, who shall, after affording a reasonable opportunity of hearing to such person, pass a final order of assessment within thirty days from the date of service of such order of provisional assessment, of the electricity charges payable by such person.

(4) Any person served with the order of provisional assessment may, accept such assessment and deposit the assessed amount with the licensee within seven days of service of such provisional assessment order upon him.

(5) If the assessing officer reaches to the conclusion that unauthorised use of electricity has taken place, the assessment shall be made for the entire period during which such unauthorised use of electricity has taken place and if, however, the period during which such unauthorised use of electricity has taken place cannot be ascertained, such period shall be limited to a period of twelve months immediately preceding the date of inspection.;

(6) The assessment under this section shall be made at a rate equal to twice the tariff applicable for the relevant category of services specified in sub-section (5).

Explanation : For the purposes of this section,—

(a) "assessing officer" means an officer of a State Government or Board or licensee, as the case may be, designated as such by the State Government;

(b) "unauthorised use of electricity" means the usage of electricity—

(i) by any artificial means; or

(ii) by a means not authorised by the person or authority or licensee concerned; or

(iii) through a tampered meter; or

(iv) for the purpose other than for which the usage of electricity was Authorized; or

(v) for the premises or areas other than those for which the supply of electricity was authorised."

25. The Supreme Court in ***Sri Seetaram Rice Mill*** (supra) proceeded to clarify the expression 'unauthorised use' as under:

"44. The unauthorized use of electricity in the manner as is undisputed on record clearly brings the respondent `under liability and in blame' within the ambit and scope of Section 126 of the 2003 Act. The blame is in relation to excess load while the liability is to pay on a different tariff for the period prescribed in law and in terms of an order of assessment passed by the assessing officer by the powers vested in him under the provisions of Section 126 of the 2003 Act."

26. Adopting a purposive construction of the provisions contained under Section 126 of the Act and in particular the expression 'means', the Supreme Court further explained as under:

> "61. Unauthorised use of electricity cannot be restricted to the stated clauses under the Explanation but has to be given a wider meaning so as to cover cases of violation of terms and conditions of supply and the regulations and provisions of the 2003 Act governing such supply.`Unauthorised use of electricity' itself is an expression which would, on its plain reading, take within its scope all the misuse of the electricity or even malpractices adopted while using electricity. It is difficult to restrict this expression and limit its application by the categories stated in the explanation. It is indisputable that the electricity supply to a consumer is restricted and controlled by the terms and conditions of supply, the regulations framed and the provisions of the 2003 Act."

27. The Supreme Court in ***Sri Seetaram Rice Mill*** (supra) also referred to Regulation 106 of the Conditions of Supply Code and explained as under:

> "66. Regulation 106 of the Conditions of Supply reads as under:
>
> "106. No consumer shall make use of power in excess of the approved contract demand or use power for a purpose other than the one for which agreement has been executed or shall dishonestly abstract power from the licensee's system."
>
> 67. On the cumulative reading of the terms and conditions of supply, the contract executed between the parties and the provisions of the 2003 Act, we have no hesitation in holding that consumption of electricity in excess of the sanctioned/ connected load shall be an "unauthorised use of electricity" in terms of Section 126 of the 2003 Act. This, we also say for the reason that overdrawal of electricity amounts to breach of the terms and conditions of the contract and the statutory conditions, besides such overdrawal being prejudicial to the public at large, as it is likely to throw out of gear the entire supply system, undermining its efficiency, efficacy and even increasing voltage fluctuations."

28. Having perused the appellate order, the Court is inclined to concur with the learned Single Judge that the conclusion reached by the AA about both the Appellant as well as the Respondent No.1 having committed "some procedural lapses" was indeed without any supporting reasoning and, therefore, was unsustainable in law.

29. It is not possible to agree with the contention of the Appellant that merely because Respondent No.1 replied to the offer made by the Appellant by its letter dated 5th April, 2011 and the Appellant accepted it on 7th April, 2011, a concluded contract came into existence. Till such time the agreement

was formally signed i.e. on 30th May, 2012, it could not be said that the CD was formally increased to 600 KVA. Till such time, any excess consumption of electricity, contrary to the authorized use either in terms of CD or in terms of premises where the factory was located, would ipso facto attract Section 126 of the Act read with Regulation 106 of the OERC Code.

30. Consequently, the Court is unable to find any error having been committed by the learned Single Judge in setting aside the order of the AA and confirming the final assessment order passed against the present Appellant.

31. The appeal is accordingly dismissed, but in the circumstances, with no order as to costs.

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

W.As. NO.401, 402 AND 403 OF 2017
AND
W.P.(C) NOS.22880 OF 2019 AND W.P.(C) NOS.25971 & 26354 OF 2021

GAGAN BIHARI PATRA ….....Appellant

.V.

STATE OF ODISHA,UNION OF INDIA & ORS. ……Respondents

(IN W.A. NO.402 OF 2017) **.V.** …….Petitioners/Appellants
AMIR HARIJAN
(IN W.A. NO.403 OF 2017)
BINAYA BHUSAN BEHERA & ORS.
(IN W.P.(C) NO.22880 OF 2019)
ODISHA GRAM ROZGAR SEVAK SANGHA
(IN W.P.(C) NO.25971 OF 2021)
RAMAN RANJAN SAHU & ORS.
(IN W.P.(C) NO.26354 OF 2021)
RADHAKANTA SAHOO & ORS.

STATE OF ODISHA, UNION OF INDIA & ORS. ……..Respondents/Opp. Parties

MAHATMA GANDHI NATIONAL RURAL EMPLOYMENT GUARANTEE ACT, 2005 – Section 18 read with the MGNREGA's Operational Guidelines – Whether a Collector of a District is empowered to transfer

a Gram Rozgar Sevak (GRS) engaged as such under Section 18 of the Act? – Held, Yes – In view of the above statutory framework and set up, Operational Guidelines and instructions, the Court is satisfied that the Collector was authorised to issue orders of transfer of GRS, from one G.P to another G.P for administrative reason and it was not in violation of any of the provisions of the OGP Act – For the administrative reasons – Writ Appeal dismissed. (Para-11,12)

For Appellants / Petitioners : Mr. Sukanta Kumar Dalai
(In W.As. No.401 & 402 of 2017 and W.P.(C) Nos.22880 of 2019 and
W.P.(C Nos.25971 & 26354 of 2021)
Mr. Aparesh Bhoi (In W.A. No.403 of 2017)

For Respondents /Opp. Parties : Mr. Manoja Kumar Khuntia,AGA

JUDGMENT Date of Judgment : 19.09.2022

Dr. S. MURALIDHAR, C.J.

1. The common question that arises in the three writ appeals which challenge a common order of the learned Single Judge dismissing the corresponding writ petitions of the Appellants is whether a Collector of a District is empowered to transfer a Gram Rozgar Sevak (GRS) engaged as such under Section 18 of the Mahatma Gandhi National Rural Employment Guarantee Act, 2005 (MGNREG Act) read with the MGNREGA's Operational Guidelines, 2013? The same question arises for consideration in the three connected writ petitions.

2. It must be mentioned at the outset that the impugned transfer order issued by the Collector, Kalahandi as far as writ appeals filed by Gagan Bihari Patra (in W.A. No.401 of 2017) and Amir Harijan (in W.A. No.402 of 2017), is dated 14th September, 2017. While by the said order, Gagan Bihari Patra was transferred from Champadeipur Gram Panchayat (GP) in the Lanjigarh Block to Talnagi GP in Th. Rampur Block, Amir Harijan was transferred from Talnagi GP to Champadeipur GP. The reason given in the impugned office order is that they were being transferred on "administrative ground."

3. The learned Single Judge has while dismissing the writ petitions relied on an earlier judgment dated 11th October, 2017 in W.P.(C) No.19627 of 2017 (and batch of cases) in **Jitendra Kumar Pati v. State of Orissa**, which had been dismissed with the following observations:

> *"21. In view of the elaborate discussion made hereinabove and considering the scope and jurisdiction of the High Court sitting under Article 226 of the Constitution of India in making interference in the matter of transfer, this Court is of the considered view that the petitioners have failed to make out a case for showing interference in the impugned orders rather, it is the prerogative of the competent authority to post one or the other employee to take maximum work from them which cannot be looked into by the High Court unless any arbitrariness or malice is being shown, but the petitioners have failed to show any arbitrariness or malice in these writ petitions and as such, this Court declines from interfering with the impugned orders.*
>
> *22. In the result, the writ petitions are dismissed."*

4. Holding that the said decision in ***Jitendra Kumar Pati*** (supra) squarely covered the case on hand, the learned Single Judge has by the impugned order dismissed the writ petitions of the present Appellants.

5. It must be noted that while issuing notice in W.A. No.401 of 2017 on 21st November 2017, this Court stayed the operation of the aforementioned order dated 14th September, 2017 and that stay order has continued since. In other words, the present Appellants have continued as such as GRS in the place of their original posting in particular GP and in effect therefore for over 5 years now, the transfer order has not been operational as far as the two Appellants in question are concerned.

6. Among the grounds raised in the writ appeals was that the learned Single Judge failed to appreciate that between the GP and the GRS, a master and servant relationship exists and was governed by the provisions of Orissa Gram Panchayat Act, 1964 (OGP Act), and the Collector had therefore no authority to issue such orders of transfer. Secondly, it was submitted that the impugned orders of transfer are violative of principles of natural justice since no opportunity of hearing was afforded to any of the Appellants before the transfer orders were passed. It was submitted that the authority of the GP cannot be taken away by the Collector who has exceeded his power and authority in passing the impugned orders of transfer.

7. In the counter affidavit filed in W.A. No.401 of 2017, it has been explained in detail by the Additional Secretary, Panchayati Raj & Drinking Water Department, Government of Odisha that the engagement of the GRS was only pursuant to Section 18 of the MGNREG Act and not under the OGP Act. Under Section 18 of the MGNREG Act, the State Government is

mandated to make available to the District Programme Coordinator, who happens to be the Collector and the Programme Officer i.e. the Block Development Officer (BDO), necessary staff and technical support as may be necessary for the effective implementation of the MGNREG Scheme.

8. Reference is also made to paras 4.1 and 4.1.1. of the MGNREG Act and Operational Guidelines 2013, which read as under:

> *"**4.1 GRAM PANCHAYAT***
>
> *At the GP level, the following dedicated personnel are required:*
> *i) Gram Rozgar Sahayak or Employment Guarantee Assistant*
>
> *ii) Mates or work site supervisors*
>
> *The cost towards recruitment of GRS is the first charge on the administrative expenses under MGNREGA. Functions and responsibilities of the personnel required at the GP level are explained below:*
>
> ***4.1.1 Gram Rozgar Sahayak or Employment Guarantee Assistant***
>
> *i) Gram Rozgar Sahayak (GRS) will assist the Gram Panchayat (GP) in executing MGNREGA works at GP level.*
>
> *ii) GRS should be engaged exclusively for MGNREGA and shall not be assigned any other work.*
>
> *iii)The function of GRS and the Gram Panchayat Secretary should be distinctly outlined.*
>
> ***Box No. 4.2***
> ***Deployment of Gram Rozgar Sahayak***
>
> *The State may ensure that at least one GRS is deployed in every GP except in GPs where demand for work under MGNREGA is almost non-existent. More than one GRS may be deployed in GPs that have high labour potential and GPs with scattered habitations and tribal areas.*
>
> *iv) The responsibilities of the GRS are as follows:*
>
> *a. Overseeing the process of registration, distribution of job cards, provision of dated receipts against job applications, allocation of work to applicants etc.;*
>
> *b. Facilitating Gram Sabha meetings and social audits;*
>
> *c. Recording attendance of labour every day either himself/herself or through the mate in the prescribed Muster Rolls at the worksite;*

d. Ensuring that Group mark outs are given at work site for every groups of labourers, so that the workers know the output required to be given to earn wage rate every day;

e. Ensuring that all Mates attend worksites on time and take roll calls/attendance in prescribed muster roll at worksite only.

f. Ensuring worksite facilities [as defined in para 7.11 of Chapter 7 of the Guidelines] and updating job cards of the workers regularly.

g. Maintaining all MGNREGS-related registers at the Gram Panchayat level, assist the Panchayat Secretary or any other official responsible for maintenance of MGNREGA accounts; and ensuring that these documents are conveniently available for public scrutiny.

v) The GRS should be adequately trained in work-site management and measurement of works.

vi) The remuneration/compensation to be paid to GRS can be based on fixed pay or on performance basis. Appropriate performance incentive-disincentive system needs to be worked out accordingly."

9. As regards the power of transfer of the GRS, reference is made to para 2.4.2 (viii. and ix) of the Operational Guidelines, which reads as under:

*"**2.4.2 State Government***

Responsibilities of the State Government include:

xxx xxx xxx

viii) Ensure that full time dedicated personnel, wherever required, are in place for implementing MGNREGA, specially the Employment Guarantee Assistant (Gram Rozgar Sahayak), the PO and the staff at state, district and Cluster level;

ix) Delegate financial and administrative powers to the DPC and the Programme Officer, as is deemed necessary for the effective implementation of the Scheme."

10. In terms of the above guidelines, clear instructions have been issued regarding selection and engagement of GRSs on 6th April,2018. Separately, on 2nd June 2018, the Government of Odisha has authorised inter alia the Collector-cum-CEO, Zilla Parishad to transfer the GRSs within the district in view of administrative exigencies.

11. In view of the above statutory framework and set up Operational Guidelines and instructions, the Court is satisfied that the Collector was authorised to issue orders of transfer of GRSs and it was not in violation of

any of the provisions of the OGP Act. There is a basic misconception in construing the engagement of the GRSs as being covered by the OGP Act whereas it is covered under Section 18 of the MGNREG Act read with the Operational Guidelines issued thereunder.

12. For the administrative reasons, therefore, the Collector was empowered to transfer within the District a GRS from one GP to another GP. There is thus no illegality attached to the impugned transfer orders.

13. Although in the counter affidavit filed by the BDO, reference is made to show-cause notices having been issued to the Appellant in W.A. No.401 of 2017 about his not performing his duties properly, the Court is satisfied that the transfer was only on account of administrative exigencies. This is notwithstanding the fact that sufficient opportunity appears to have been afforded to the said Appellant to defend himself against the said allegations.

14. None of these Appellants have been able to show that the impugned transfer orders suffer from any malice in law or are manifestly arbitrary so as to warrant interference by the Court.

15. Consequently, the Court is not satisfied that any error has been committed by the learned Single Judge in dismissing the writ petitions of the present Appellants.

16. The appeals are accordingly dismissed. The interim order passed earlier stands vacated.

17. In view of dismissal of the writ appeals, the writ petitions are also dismissed.

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2022 (III) ILR - CUT- 14

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

CRA NO. 80 OF 1998

ACHUTA KUMAR NATH .....Appellant

.V.

STATE OF ORISSA .....Respondent

CRIMINAL TRIAL – Offence punishable under Section 302 of IPC – Sentence of life imprisonment – Prosecution case depend entirely on the ocular version of PW-7 – Motive for the commission of the crime not proved – Appeal – Duty of an Appellate Court – Held, It is the duty of an appellate Court to look into the evidence adduced in the case and arrive at an independent conclusion as to whether the said evidence can be relied upon or not and even if it can be relied upon, then whether the prosecution can be said to have been proved beyond reasonable doubt on the said evidence – In the present case,once the Court comes to the conclusion that the evidence of PW-7 is not entirely trustworthy or reliable, then the entire case of the prosecution has to fail – The Court is not satisfied that in the present case, the prosecution has been able to prove its case against the Appellant beyond all reasonable doubt – The appeal is allowed. (Para-37,39)

Case Laws Relied on and Referred to :-

1. AIR 1994 SC 549 : State of Punjab and Gurmej Singh Vs. Jit Singh.
2. (2003) 11 SCC 367 : Sunil Kumar Vs. State Government of NCT Delhi
3. AIR 1981 SC 765 : Shankarlal Gyarasilal Dixit Vs. State of Maharashtra.
4. 2020 II OLR SC 908 : Amar Singh Vs. State of NCT Delhi.
5. AIR1998 SC 249 : Omwati Vs. Mahendra Singh.
6. 2000 SCC (Cri) 285 : Padam Singh Vs. State of Uttar Pradesh.
7. AIR 1953 SC 364 : Dalip Singh Vs. State of Punjab.
8. AIR 1977 SC 2274: Piara Singh Vs. State of Punjab.
9. (1981)3 SCC 675 : Hari Obula Reddy Vs. The State of Andhra Pradesh.
10. (2005) 10 SCC 498 : Ramashish Rai Vs. Jagdish Singh.
11. (2013) 15 SCC 298 : Gangabhavani Vs. Rayapati Venkat Reddy.
12. AIR 1976 SC 2488 SC : State of Orissa Vs. Brahmananda Nanda.
13. AIR 1979 SC 697 : Panda Nana Kare : Vs. State of Maharashtra.
14. 1994 SCC Supp. (2) SCC 372 : Arjun Marik Vs. State of Bihar.

For Appellant : Mr. D.P. Dhal, Sr. Adv.

For Respondent : Mrs. Saswata Patnaik, AGA.

JUDGMENT Date of Judgment : 26.09.2022

Dr. S. MURALIDHAR, C.J.

1. This appeal is directed against the Judgment dated 17th March 1998, passed by the learned Sessions Judge, Bolangir in Sessions Case No.34 of 1997, convicting the present Appellant for the offence punishable under Section 302 of IPC and sentencing him to undergo imprisonment for life.

2. It must be stated at the outset that the present Appellant was sent up for trial along with two other accused. However, the said two accused persons were acquitted under Section 232 Cr PC by an order dated 4th February, 1998 of the trial Court.

Case of the prosecution

3. The case of the prosecution is that on 17th April, 1996 at around 12.45 pm, Sampad Kumar Mishra (PW-8), who was the Sub- Inspector of Police (SI) at Bolangir Town Police Station (PS), received a telephonic call from an unknown person stating that a serious "Golmal" was going on in the Palace Line locality of Bolangir town. Entering this information in his Station Diary, PW-8 proceeded to the spot along with staff. When he arrived there at 1.15 pm, he found the dead body of the deceased, Ananta Nag, the elder brother of the Appellant, lying on the eastern side of the Bolangir-Titilagarh road at the Palace Line crossing in front of Sonal Electronics. He found the deceased having suffered multiple injuries on the head which had been inflicted by sharp cutting weapons. There was a pool of blood near the dead body. Since all the nearby shops were closed, nobody came forward for his enquiry. From the injuries, he understood that it was a case of murder by unknown persons and revealing commission of cognizable offence punishable under Section 302 IPC. Then he sent the report for registration of the case. As a result, PS Case No.52 of 1996 was registered for the offence punishable under Section 302 IPC.

4. On 16th August 1996, PW-8 handed over the investigation of the case to Suresh Chandra Parichha (PW-9), who then continued the investigation and finally submitted a charge sheet against three persons, i.e., the present Appellant, Chitta Ranjan Mohanty and Naresh Kumar Nag on 4th January, 1997.

5. The prosecution case was that both the deceased and the accused, who are brothers, were residents of the Palace Line locality in Bolangir town. Due to the differences between the deceased, his wife Ranjita Nath @ Brundabati Joshi (PW-7), on the one hand, and the parents of the deceased on the other, the deceased and PW-7 with their two daughters were staying in Chudapalli at the house of the parents of PW-7 for about nine months prior to the occurrence.

6. The Appellant had a television shop in the name and style of 'Sonal Electronics' by the side of the Bolangir-Titilagarh road in the Palace Line

area. A few days prior to the occurrence, the Appellant had purchased an old TATA Mini-truck. The deceased demanded that the said Mini-truck should be registered in his name. The Appellant and his family members did not concede to that demand.

7. On 13th April 1996, the deceased left Chudapali in the morning informing his wife-PW-7 that he was going to drive the Mini- truck. He also stated that in the event he took the vehicle outside Bolangir he would return the following day. When the deceased did not return to Chudapalli till 17th April 1996, the wife of the deceased (PW-7) became worried. On that day, she is stated to have left Chudapalli at around 10 am for Bolangir by bus. After reaching Bolangir, she is stated to have walked towards the house of the deceased from the bus stand. As she arrived near the Palace Line, she is stated to have seen the Appellant dealing sword blows on the deceased in front of his shop. As a result, the deceased sustained injuries and fell down. Out of fear, PW-7 rushed back to Chudapalli and disclosed to her father, Chakradhar Joshi (not examined) about the incident. It is stated that thereafter, PW-7 returned to Bolangir with her father. Her father learnt that that the dead body of the deceased had been taken to the District Headquarters Hospital (DHH), Bolangir for postmortem. Both PW-7 and her father are stated to have gone to the DHH, seen the dead body of the deceased from a distance and returned to Chudapalli.

8. The postmortem of the deceased was conducted by Dr. Purna Chandra Das (PW-10) at 5.30 pm on 17th April, 1996 at the DHH Bolangir. Meanwhile, on the same day at 4.30 pm, PW-8 seized a Pepsi bottle, blood-stained earth and sample earth from the spot and prepared a seizure list in the presence of one Jagannath Sindhria (PW-4). He seized the wearing apparels of the deceased.

9. PW-9, who took over the investigation from PW-8, is stated to have visited the spot and prepared the spot map on 24th August,1996. He is stated to have arrested the Appellant on 8th October,1996 and forwarded him to the Court on the following day. PW-9 ultimately submitted a charge sheet on 4th January, 1997.

10. The case of the defence was one of complete denial. In his examination under Section 313 Cr PC, the Appellant claimed that PW-7 and her father demanded Rs.25,000/- from him after the death of the deceased in connection with the marriage of the sister of PW-7. According to the

Appellant, since he did not concede to that demand, PW-7 falsely implicated him.

Trial Court judgment

11. Ten witnesses were examined on behalf of the prosecution and none on behalf of the defence. On an analysis of the evidence, the trial Court concluded that the prosecution had been able to prove beyond all reasonable doubt its case against the Appellant for the offence punishable under Section 302 IPC and proceeded to sentence him in the manner indicated hereinbefore. The findings of the trial Court could be summarized as under:

(i) The death was homicidal as was made clear by the evidence of PW-10. His postmortem report revealed that there were as many as fifteen incised injuries and four abrasions on the dead body of the deceased.

(ii) The case of the prosecution depended entirely on the ocular version of PW-7. Although the prosecution was not able to prove the motive for the commission of the crime, it was well settled that where there is a trustworthy eye-witness account, motive had little role to play.

(iii) Although the prosecution could not examine a single independent eye-witness other than PW-7, a conviction could be based even on a sole testimony of a single witness as long as the evidence was 'wholly reliable and trustworthy.

(iv) There was nothing to prove that there was any inimical relationship between PW-7 and the Appellant. She could not be stated to be an 'interested witness'. She admitted to having received favours from the accused/Appellant.

(v) PW-7, withstood cross-examination and her version had not been discredited. There was nothing unnatural in PW-7 not seeking help from the outsiders or raising a protest on seeing her husband being attacked by the accused. She was a "less educated" woman from the rural background and, therefore, her omission to report the occurrence at the Office of the Superintendent of Police (SP), which was enroute Palace Line and the private bus stand and in the Town PS, situated near the private bus stand was understandable.

(vi) The examination by PW-8 of PW-7 at Chudapalli on 18th April, 1996 was neither belated nor unnatural. The testimony of PW-7 was found to be cogent, consistent and free from any material infirmity. Her evidence was corroborated by the medical evidence.

(vii) The evidence of the hostile witnesses PWs-1 to 3 was still relevant insofar as they stated that the dead body of the deceased was lying in front of the shop of the accused. The defence plea was that PW-7 learnt of the occurrence at Chudapalli from one Kamal Mishra, a maternal uncle of the deceased. This was not substantiated by the defence since no effort had been made to examine the said Kamal Mishra.

(viii) There was nothing on record to suggest that the deceased had been assaulted by a sharp cutting weapon by anyone else. The wounds on the deceased were because of the accused dealing repeated blows to the deceased with a sword.

Submissions on behalf of the Appellant

12. Mr. D.P. Dhal, learned Senior Counsel appearing for the Appellant, submitted that even if the conviction were to be based on the testimony of a single witness, such evidence must be of unimpeachable character. If such witness happens to be a close relative, then, it requires careful scrutiny considering the; (i)probabilities, (ii) previous statement and attending circumstances. Reliance is placed on the decisions in ***State of Punjab and Gurmej Singh v. Jit Singh AIR 1994 SC 549*** and ***Sunil Kumar v. State Government of NCT Delhi (2003) 11 SCC 367***.

13. Mr. Dhal pointed out numerous inconsistencies and improbabilities in the evidence of PW-7 that made her evidence untrustworthy. This will be dealt with subsequently in some detail. Relying on the decision in ***Shankarlal Gyarasilal Dixit v. State of Maharashtra AIR 1981 SC 765***, he submitted that the working of the human mind is mysterious and, therefore, it may not be possible to find the precise answer to the question why PW-7 would falsely implicate the Appellant. Reliance is also placed on the decision in ***Madkami Baja v. State of Orissa 1985 (I) OLR 421***.

14. Mr. Dhal pointed out that although the FIR was lodged on 17th April, 1996, it was sent to the Court of the S.D.J.M., only on 19th April, 1996 and there was no valid explanation for this delay. This rendered the prosecution case doubtful. Reliance is placed on the decision in ***Amar Singh v. State of NCT Delhi 2020 II OLR SC 908***. The evidence of PW-10 as regards the time of the death was also shaky. Although in the postmortem report, it was stated that the death was between 12 to 18 hours prior to the postmortem examination, in re-examination, PW-10 stated that it was less than twelve hours and that the statement of the postmortem report was a mistake.

15. PW-10 also admitted that the incised wounds could have been caused by one or several weapons and that for causing abrasions, a hard and blunt weapon must have been used. The nature of the injuries shows that they were different kind of weapons and it is not possible that only one person had caused all of them. Reliance is placed on the decision in ***Omwati v.***

Mahendra Singh AIR1998 SC 249. Reliance is also placed on the decision in ***Padam Singh v. State of Uttar Pradesh 2000 SCC (Cri) 285***.

16. Mr. Dhal further pointed out that the first person to whom PW-7 was supposed to have disclosed what she saw in the evening of 17th April, 1996 was her father, Chakradhar Joshi. However, he was not examined. Likewise, the independent witnesses who ought to have been present at a crowded market place, were not examined. In these circumstances, it could not be said that the prosecution had proved its case against the Appellant beyond all reasonable doubt.

Submissions on behalf of the State

17. On the other hand, Mrs. Saswata Patnaik, learned AGA supported the judgment of the trial Court and submitted that the evidence of PW-7 was cogent and reliable and has been rightly believed by the trial Court. She submitted that PW-7 was a chance witness, who happened to be there when the crime took place and her evidence has been fully corroborated by the medical evidence of PW-10. According to Mrs. Pattnaik, the trial Court has rightly held that given the educational status of PW-7, it was not surprising that she did not disclose the event immediately to the Police or even when she was returning to Bolangir with her father subsequently. There was no need for PW-7 to falsely implicate her own brother-in-law particularly when there was no previous enmity between them.

Analysis and reasons

18. The law in relation to interested and related witnesses is well settled. In ***Dalip Singh v. State of Punjab AIR 1953 SC 364*** it was held as follows:

> "26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth."

19. In ***Piara Singh v. State of Punjab AIR 1977 SC 2274*** the Supreme Court held:

> "4. …It is well settled that the evidence of interested or inimical witnesses is to be scrutinised with care but cannot be rejected merely on the ground of being partisan evidence. If on a perusal of the evidence the Court is satisfied that the evidence is creditworthy there is no bar in the Court relying on the said evidence."

20. In ***Hari Obula Reddy v. The State of Andhra Pradesh (1981)3 SCC 675*** the Supreme Court observed:

> "13.... it is well settled that interested evidence is not necessarily unreliable evidence. Even partisanship by itself is not a valid ground for discrediting or rejecting sworn testimony. Nor can it be laid down as an invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon."

21. Again in ***Ramashish Rai v. Jagdish Singh (2005) 10 SCC 498***, it was held:

> "7…The requirement of law is that the testimony of inimical witnesses has to be considered with caution. If otherwise the witnesses are true and reliable their testimony cannot be thrown out on the threshold by branding them as inimical witnesses. By now, it is well- settled principle of law that enmity is a double- edged sword. It can be a ground for false implication. It also can be a ground for assault. Therefore, a duty is cast upon the court to examine the testimony of inimical witnesses with due caution and diligence."

22. In ***Gangabhavani v. Rayapati Venkat Reddy (2013) 15 SCC 298*** the Supreme Court held:

> "…Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon. (See Anil Rai Vs. State of Bihar, (2001) 7 SCC 318; State of U.P. Vs. Jagdeo Singh, (2003) 1 SCC 456; Bhagalool Lodh & Anr. Vs. State of U.P., (2011) 13 SCC 206; Dahari & Ors. Vs. State of U. P., (2012) 10 SCC 256; Raju @ Balachandran & Ors. Vs. State of Tamil Nadu, (2012) 12 SCC 701; Gangabhavani Vs. Rayapati Venkat Reddy & Ors., (2013) 15 SCC 298; Jodhan Vs. State of M.P., (2015) 11 SCC 52)."

23. Since the entire case of the prosecution rests only on the deposition of PW-7, her evidence requires very careful scrutiny. From the evidence of PW-7, it is seen that the deceased had left his house on 13th April, 1996 itself.

She waited for about four days and on 17th April 1996, left Chudapalli by bus to Bolangir Town at around 10 am. She is supposed to have then walked from the bus stand in Bolangir towards the Palace Line and at a distance of 20 to 25 cubits from the shop of the Appellant, she is supposed to have seen him attack her husband with a sword.

24. If one looks at the spot map, it is clear that there were several shops in and around the shop in front of which the crime occurred and yet PW-7 cannot state whether the markets were open at the time of the occurrence. This appears to be extremely unlikely. It appears to be a busy Chhak and a commercial locality with several shops. Yet PW-7 states in her cross-examination as under:

> "12…… I did not raise any noise. I did not notice any one else in the vicinity at that time. I do not recollect if any pedestrian was present nearby. I do not recollect if there was transaction in the nearby shops at the time of occurrence."

25. To the Court, this appears to be most unnatural and in fact unbelievable. The conduct of PW-7 after witnessing the event also is not properly explained. Even assuming that out of fear for her life, she rushed back to Chudapalli without lodging any information in the SP's Office or with the Town PS, which were all in the vicinity, it is surprising that she did not immediately go to the houses of her father's sister or the father's elder brother's daughter both of whom who lived in Bolangir Town PS. What is, however, even more inexplicable was when she returned with her father some time later to see the dead body of her deceased husband, neither PW-7 nor her father again informed the Police or anyone else about the incident. There was sufficient time gap after the occurrence by this time and the initial fear must have dissipated. In any event, it cannot be said that the father of PW-7 was also under an equal fear that prevented him from going to the Police to give the information. This conduct was indeed unnatural.What makes it even more mysterious is the failure of the prosecution to examine the father of PW-7, Sri Chakradhar Joshi.

26. The fact that PW-7 may be a rustic woman, who is not well- educated still does not explain why she would not raise any hullah or disclose the occurrence to anyone else particularly, the Police, till such time PW-8 himself met her. Her failure to narrate the incident at the earliest opportunity raises serious doubts about the veracity of her version. In similar circumstances in ***State of Orissa v. Brahmananda Nanda AIR 1976 SC 2488 the Supreme Court*** observed:

> "2…The evidence suffers from serious infirmities which have been discussed in detail by the High Court. It is not necessary to reiterate them, but it will be sufficient if we refer only to one infirmity which, in our opinion, is of the most serious character. Though according to this witness, she saw the murderous assault on Hrudananda by the respondent and she also saw the respondent coming out of the adjoining house of Nityananda where the rest of the murders were committed, she did not mention the name of the respondent as the assailant for a day and a half. The murders were committed in the night of 13th June, 1969 and yet she did not come out with the name of the respondent until the morning of 15th June, 1969. It is not possible to accept the explanation sought to be given on behalf of the prosecution that she did not disclose the name of the respondent as the assailant earlier than 15th June, 1969 on account of fear of the respondent. There could be no question of any fear from the respondent because in the first place, the respondent was not known to be a gangster or a confirmed criminal about whom people would be afraid, secondly, the police had already arrived at the scene and they were stationed in the Club House which was just opposite to the house of the witness and thirdly, A.S.I. Madan Das was her nephew and he had come to the village in connection with the case and had also visited her house on 14th June, 1969. It is indeed difficult to believe that this witness should not have disclosed the name of the respondent to the police or even to A.S.I. Madan Das and should have waited till the rooming of 15th June, 1969 for giving out the name of the respondent. This is a very serious infirmity which destroys the credibility of the evidence of witness."

27. Again, in ***Panda Nana Kare v. State of Maharashtra AIR 1979 SC 697*** the Supreme Court observed:

> "7.The explanation of P.W. 7 for his concealing the name of the assailant before the two Doctors and Kherappa is that as the accused was his sister's husband, he did not want to implicate him and then only later he felt that he should tell the truth. The trial court observed that even if this version is true the evidence of the witnesses cannot be acted upon. We entirely agree with the view taken by the trial court."

28. It is even more strange that PW-8 does not disclose how he came to examine PW-7 in Chudapalli on the following day without getting a hint from anyone else about her presence at the scene of occurrence. The trial Court has sought to explain this by saying that since PW-7 was a near relative, he went to examine her. However, he does not appear to have examined any other witness including the neighbouring shop-keepers.

29. It is significant that PW-8 had initially examined PW-2, who had a vegetable shop and PW-3, who had a grocery shop. Those witnesses obviously had indicated that the attack was not just by one person but by

more than one and which is why the chargesheet was laid against three persons. With both these witnesses turning hostile, the absence of any independent witness to corroborate the version of PW-7 assumes significance. It changes the entire narrative of the prosecution. Whereas the initial prosecution case was that the crime had been committed by three persons, it suddenly converted into a crime at just the evidence of one of them. That makes the case of the prosecution extremely weak. If indeed PW-7 had seen more than one person attack her husband, then there is no valid explanation why she would implicate only the present Appellant. Moreover, given the number of injuries on the body of the deceased, it is unlikely to be the work of a single individual.

30. The trial Court has correctly observed that the motive for the commission of the crime has not been explained. Particularly, since the Appellant is known to have helped his deceased brother on several occasions including with the criminal cases against the deceased, it is indeed a mystery that PW-7 has still chosen to implicate the Appellant. The following observation of the Supreme Court in ***Shankarlal Gyarasilal Dixit v. State of Maharashtra*** (supra) is indeed relevant in these circumstances.

> "33. Our judgment will raise a legitimate query: If the Appellant was not present in his house at the material time then why did so many people conspire to involve him falsely. The answer to such questions is not always easy to give in criminal cases. Different motives operate on the minds of different persons in the making of unfounded accusations. Besides, human nature is too willing, when faced with brutal crimes to spin stories out of strong suspicion."

31. Likewise in ***Madkami Baja v. State of Orissa*** (supra), it was observed as under:

> "8. But mysterious is the working of human mind and it is not always possible for an accused person to say as to how and why a case has been foisted against him and some witnesses have come forward to depose against him."

32. A reading of the evidence of PW-7 does not leave the Court with the feeling that she is speaking the entire truth. Her conduct after the occurrence appears to be unnatural and raises far more questions than have been satisfactorily answered by the prosecution.

33. The number of injuries inflicted on the body of the deceased and the reply that was given to the questions put to PW-10 in his cross-examination

does make it appear that the crime could not have been committed just by one person. In **Omwati v. Mahendra Singh** (supra), in somewhat similar circumstances, the Supreme Court observed thus:

> "9. The High Court has sent for the weapon and also examined Dr. R.N.Katiyar, an expert who opined that the injuries on the body of the deceased could not be caused by a single blow of the hasiya. the said doctor stated that the post morterm examination report does not show that the injury was caused by more than one blow. Considering the fact that as many as seventeen incised wounds were found on the body of Raj Kumar Singh, the High Court found it difficult to believe that he was assaulted by only one assailant with a sharp cutting weapon. The High Court opined that there were more than one assailant armed with the such sharp cutting weapons. The opinion of the High Court cannot be considered to be totally baseless or perverse."
>
> 33. PW-10 is candid in the cross-examination when he states as under:
>
> "10. It is a fact that incised wounds on the deceased could have been caused by one weapon or several. I cannot deny to the suggestion that several weaponsmight have been used. It is a fact that blows were dealt and injuries were inflicted from different angles and directions. It is a fact that injury No.(ii) could have been caused by sharp cutting weapon of the type used for sacrificing goats and sheep."

34. He further states as under:

> "14. From the nature of injuries it cannot be said if the same were inflicted by one person or more than one person."

35. The trial Court appears to have completely overlooked the fact that initially the case was against three persons with two having been acquitted under Section 232 Cr.P.C. and that having completely altered the case of the prosecution.

36. This Court being an appellate Court, requires to be even more circumspect when it examines the evidence as was explained in ***Padam Singh v. State of Uttar Pradesh*** (supra) with the following words:

> "2. …It is the duty of an appellate Court to look into the evidence adduced in the case and arrive at an independent conclusion as to whether the said evidence can be relied upon or not and even if it can be relied upon, then whether the prosecution can be said to have been proved beyond reasonable doubt on the said evidence. The credibility of a witness has to be adjudged by the appellate Court in drawing inference from proved and admitted facts. It must be remembered that the appellate

> Court like the trial Court has to be satisfied affirmatively that the prosecution case is substantially true and the guilt of the accused has been proved beyond all reasonable doubts as the presumption of innocence with which the accused starts, continues right through until he is held guilty by the final court of appeal and that presumption is neither strengthened by an acquittal nor weakened by a conviction in the trial court The judicial approach in dealing with the case where an accused is charged of murder under Section 302 has to be cautious, circumspect and careful and the High Court, therefore, has to consider the matter carefully and examine all relevant and material circumstances, before upholding conviction."

37. Once the Court comes to the conclusion that the evidence of PW-7 is not entirely trustworthy or reliable, then the entire case of the prosecution has to fail. No doubt, the crime is a ghastly one but, the Court has to be satisfied that the guilt of the accused is proved by the prosecution beyond all reasonable doubt. In Padam Singh v. State of Uttar Pradesh (supra), the Supreme Court explained what the duty of the appellate Court while examining a trial Court judgment on conviction was:

> "2. …It is the duty of an appellate Court to look into the evidence adduced in the case and arrive at an independent conclusion as to whether the said evidence can be relied upon or not and even if it can be relied upon, then whether the prosecution can be said to have been proved beyond reasonable doubt on the said evidence. The credibility of a witness has to be adjudged by the appellate Court in drawing inference from proved and admitted facts. It must be remembered that the appellate Court like the trial Court has to be satisfied affirmatively that the prosecution case is substantially true and the guilt of the accused has been proved beyond all reasonable doubts as the presumption of innocence with which the accused starts, continues right through until he is held guilty by the final court of appeal and that presumption is neither strengthened by an acquittal nor weakened by a conviction in the trial court The judicial approach in dealing with the case where an accused is charged of murder under Section 302 has to be cautious, circumspect and careful and the High Court, therefore, has to consider the matter carefully and examine all relevant and material circumstances, before upholding conviction."

38. The graver the crime, the higher the degree of proof. As was explained in ***Arjun Marik v. State of Bihar 1994 SCC Supp. (2) SCC 372***:

> "14. In *Masalti v. State of U.P. AIR 1965 SC 202* it was observed that it is perfectly true that in a murder trial when an accused person stands charged with the commission of an offence punishable under Section 302, he stands the risk of being subjected to the highest penalty prescribed by the IPC; and naturally judicial approach in dealing with such cases has to be cautious, circumspect and careful. In dealing with such appeals or reference proceedings where the question of

> confirming a death sentence is involved the Court has to deal with the matter carefully and to examine all relevant and material circumstances before upholding the conviction and confirming the sentence of death.
>
> 15. We are also aware of the fact that as a rule of practice, in appeal against conviction for offence of murder Supreme Court is slow to disturb a concurrent finding of fact unless it is shown that the finding is manifestly erroneous, clearly unreasonable, unjust or illegal or violative of some fundamental rule of procedure or natural justice. Further it has also to be remembered that in a murder case which is cruel and revolting it becomes all the more necessary for the Court to scrutinise the evidence with more than ordinary care lest the shocking nature of the crime might induct instinctive reaction against a dispassionate judicial scrutiny of the evidence in law."

39. For the aforementioned reasons, the Court is not satisfied that in the present case, the prosecution has been able to prove its case against the Appellant beyond all reasonable doubt. Accordingly, the impugned judgment of the trial Court is hereby set aside. The Appellant is acquitted of the offence punishable under Section 302 IPC. His bail bonds stand discharged.

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

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2022 (III) ILR - CUT- 27

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

CRLA NO.131 OF 2014

PRADYUMNA SAHU .....Appellant

.V.

STATE OF ODISHA .....Respondent

INDIAN PENAL CODE, 1860 – Section 302 and 498-A – Offence under – Conviction based on circumstantial evidence – Plea that the chain of circumstances has not been established by the prosecution – Effect of – Held, having carefully perused the entire evidence, the Court is not satisfied that, the prosecution has been able to prove each of the links of the chain of circumstances convincingly – The evidence placed on record does not unerringly point to the guilt of the Appellant – The Appellant is acquitted of the offences under Sections 498-A and 302 of IPC.

Case Laws Relied on and Referred to :-

1. (1973) 2 SCC 793 : Shivaji Sahabrao Bobade Vs. State of Maharashtra.
2. (1984)4 SCC 116 : Sharad Birdhichand Sarda Vs. State of Maharashtra.

For Appellant : Ms. C. Kasturi

For Respondent: Mr. Janmejaya Katikia, Addl. Govt. Adv.

JUDGMENT Date of Judgment: 30.09.2022

Dr. S. MURALIDHAR, C.J.

1. This appeal is directed against the judgment dated 11th December, 2013 passed by the learned Additional District and Sessions Judge, Jharsuguda in S.T. No.11/10/11 of 2012-13 convicting the Appellant for the offence punishable under Section 302 and 498-A IPC and sentencing him to undergo rigorous imprisonment (RI) for life and pay a fine of Rs.10,000/- and in default to undergo RI for one year for the offence under Section 302 IPC and to RI for two years for the offence under Section 498-A IPC.

2. The case of the prosecution was that the Appellant was working as Labourer under a contractor of Colliery. He was continuously quarreling with his wife and assaulting her on trivial matters. As per the FIR lodged by Basudev Jadav (PW 9) on 22nd July, 2011 at about 8 a.m., he went to a nearby shop to purchase gutkha and learned that the accused had assaulted his wife (deceased) in the previous night and again in the morning of 22nd July, 2011 by pressing her neck. The deceased became unconscious. Hearing about this PW 9 went to the house of the Appellant and found the deceased lying unconscious on the bed. The female neighbours of the Appellant were massaging oil on her. PW 9 was supposed to have enquired from the Appellant about the occurrence and the Appellant apparently disclosed to PW 9 that the Appellant had assaulted the deceased in the previous night and next morning and left her inside a separate room. After some time when the Appellant went to the said room, he found the deceased hanging from the angle of the ceiling by means of a saree. The Appellant immediately brought down the deceased, lay her on the bed and called one Pandey Doctor of Rampur, who came and declared her dead. Thereafter the deceased was taken to Rampur Hospital, where the doctor declared her dead. PW 9 suspected that due to assault on the deceased by the Appellant, she had committed suicide out of anger.

3. On the above basis, P.S. Case No.164 of 2011 was registered at Brajarajnagar Police Station (PS) under Section 306 IPC and the investigation was taken up. Pradeep Kumar Tandi (PW 20) was working as Sub-Inspector (SI) of Police attached to Rampur Outpost under the Brajarajnagar PS. He took up the investigation, examined PW 9 and other witnesses. He conducted the inquest on the dead body of the deceased in the presence of witnesses and her parents. He then sent the body for post-mortem examination. On 23rd July, 2011 he arrested the Appellant and interrogated him. PW 20 seized the wearing apparels of the Appellant and sent his blood sample for examination. On completion of investigation, he laid a charge sheet against the Appellant for the aforementioned offence under Sections 498-A and 302 IPC.

4. The Appellant pleaded not guilty and claimed trial. 20 witnesses were examined by the prosecution. One Laxminarayan Sahu was examined as DW 1 for the defence. He disclosed in the Examination-in-Chief that the Appellant was his maternal uncle- in-law and the deceased was his aunt-in-law. He claimed that the deceased was ill-tempered and was always quarreling with the Appellant due to his meager earnings. DW 1 claimed that she had committed suicide by hanging herself with a saree. On an analysis of the evidence, the trial Court came to the conclusion that the prosecution has proved the case against the Appellant for the aforementioned offences and proceeded to sentence him in the manner indicated.

5. Among the circumstances, delineated by the trial Court were the following:

(i) the doctor admittedly did not specifically mention in the post- mortem report that the deceased had died homicidal death. However, medical opinion could not override the eye-witnesses version.

(ii) The opinion of the doctor was categorical that the cause of death was due to asphyxia resulting from manual compression of the trachea as well as injury to the carotid artery.

(iii) On careful scrutiny of evidence available and on perusal of decisions cited by both parties, it was concluded that the deceased had died a homicidal death.

(iv) The two witnesses to the inquest i.e. PW 1 and 6 did not support the case of the prosecution. Likewise, PWs 4, 5 and 7 to 11 and 13 also did not

support the case of the prosecution. Even PW 9, the informant, turned hostile. The FIR had been scribed on the instruction of PW 9 who is a Hindi speaking person. Although it was scribed in Odia words and letters, the language was in Hindi.

(v) PW 4 had been gained over by the accused as was evident from his cross-examination. PW 12 the father of the deceased and PW 14 the mother stated that the Appellant had assured them to keep the deceased in a congenial atmosphere and they accordingly let her go with the accused to her in-laws house.

(vi) PW 12 further stated that after fifteen days, when PW 14 and her mother went to the house of the accused they saw the deceased being hale and hearty. Fifteen days after returning from the house of the accused, the sister of the accused (PW 2) informed them that the deceased was seriously ill. Thereafter, they rushed to the house of the accused and then to the hospital and there found the deceased lying on the bed. PW 12 had stated to the IO that the accused had already assaulted the deceased and continued to do so despite the assurance.

(vii) There were no material contradictions in the evidence of PWs 12 and 14. Except the bald statement of DW 1, there was no evidence on record that the deceased had committed suicide. It appeared that the Appellant had taken a false plea to create doubts. Since the deceased was admittedly with the Appellant on the date of occurrence, it was his duty to explain how she sustained the nail mark injuries on her face and on her hyoid bone which was fractured due to strangulation. The nail marks might be sustained by the deceased with her own nails when she was struggling to save herself at the time of occurrence. Thus, the explanation given by the Appellant was false and supplied a vital additional link to the chain of circumstances.

6. This Court has heard the submissions of Ms. C. Kasturi, learned counsel for the Appellant and Mr.J.Katikia, learned Additional Government Advocate for the State-Respondent.

7. This being a case of circumstantial evidence, the law in this regard is well settled. In ***Shivaji Sahabrao Bobade v. State of Maharashtra (1973) 2 SCC 793***, the Court noted that the circumstances "must or should be" established and not "may be" established. It was stated that:

> "19....Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

8. In ***Sharad Birdhichand Sarda v. State of Maharashtra (1984)4 SCC 116***, five principles were laid down to prove a case based on circumstantial evidence:

> "153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:
>
> (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.
>
> (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;
>
> (3) the circumstances should be of a conclusive nature and tendency,
>
> (4) they should exclude every possible hypothesis except the one to be proved, and
>
> (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

9. At the outset, the Court would like to observe that the trial Court judgment fails to properly delineate the various circumstances, which according to the trial Court formed a chain so complete with each of the links in the chain being proved by the prosecution, whereby the guilt of the Appellant is unerringly established. To begin with, even the medical evidence is not categorical that the death of the deceased was homicidal. Dr. Priyadarshi Sahoo (PW 15) who conducted the post-mortem found the condition of the body to be as under:

> "The face was congested, the deceased was average body built. Eyes were semi open, Mouth semi open, Tongue inside the mouth, blood tinged froath coming out from both the nostrils. There was multiple abrasion of finger nail mark seen around face and neck. i.e. on the left side of chin one of size 1.5 cm, (ii) left side chin of size 1.5 cm, (iii) left side neck 2 in numbers of 1 cm each, (iv) right side neck 3 in numbers 1-2 cm each. A faint impression present over front of neck running upto left side angle of mouth of sixe 2 to 3 cm in breadth and 14 cm in length."

10. Upon dissection of the neck, PW 15 noticed bruises. There was a fracture of the hyoid bone. The cause of death according to PW 15 was as under:

> "The cause of death of deceased was due to asphyxia as a result of manual compression of trachea as well as injury to the common carotidartery."

11. Importantly, in his cross examination, PW 15 stated as under:

> "5. The external injury noticed by me can be possible by self infliction. I did not notice any finger print impression on the neck of the deceased. There is no difference between manual strangulation and throttling. Asphyxial death can also be possible by hanging. It is not a fact that I have not dissected the belly, chest and brain of the deceased during P.M. examination. It is not a fact that I have prepared Ext. 3 to suit the prosecution case. It is a fact that I have not mentioned in Ext.3 as to whether the deceased suffered a homicidal death or suicidal death."

12. Consequently, PW 15 was unable to form a categorical opinion that the death of the deceased was purely homicidal. In fact, there was no other evidence available on record to indicate that the death was homicidal.

13. PW 9 was the informant, who did not support the prosecution. Even according to the statement made by PW 9 at the stage of the FIR, the Appellant told him that he had found the deceased hanging from the ceiling by her saree; her body was then brought down and later taken to the hospital, where she was declared brought dead. That portion of the so called extra judicial confession made by the Appellant to PW 9 about his having assaulted the deceased on the previous evening and the very morning of her death has not been proved by the prosecution. This was in fact the most crucial link in the entire chain of circumstances.

14. Consequently, two important links in the chain of circumstances i.e. the Appellant subjecting the deceased to cruelty soon prior to her death and the death of the deceased being homicidal, have not been proved by the prosecution.

15. The evidence of PW 12 is also not very helpful to the prosecution. He was the father of the deceased. Although he does say that soon after the marriage was solemnized in 2003 the Appellant was assaulting the deceased, the crucial factor as far as the prosecution was concerned, was what happened immediately prior to the death of the deceased on 22nd July, 2011. When PW

12 says "the deceased when came to my house, I noticed mark of injury of a person", he does not state when it happened? On the contrary after a fortnight after sending the deceased with the accused to her in-laws' house, according to PW 12, his mother-in- law and wife came to the accused and "saw the deceased being hale and hearty."

16. Further 14 days thereafter, Gomati (PW 2) (the sister of the accused) informed them about the deceased being seriously ill. It is then that they came to the hospital and found the deceased dead. In his cross-examination, PW 12 admitted that he did not report the incident of assault to the police and that at the time of her death she had been married for ten years and had three children. He also stated "I cannot say the reason of assaulting the deceased". He also admits as under:

> "I have signed on Ext.1 at the Police-station. As the police asked me to sign. I do not know the contents of Ext.1. My statement is hearsay. It is not a fact that the deceased had committed suicide by hanging. I have not seen any injury on the body of the deceased nor noticed any bandage on entire body any parts of the body, at the time of burial."

17. The evidence of PW 12 also therefore does not clearly bring out that soon prior to her death the deceased was subjected to assault by the accused. PW 14, the mother of the deceased also stated that she did not report the assault to the police. She too confirmed that when she and her mother visited the house of accused after the daughter was sent back, she found that the "deceased was hale and hearty". Therefore, the evidence of PW 14 also does not support the case of the prosecution about what happened immediately prior to the date of death of the deceased.

18. There was no forensic evidence that linked the Appellant to the death of the deceased. Importantly, the medical opinion as regards the ligature marks on the neck of the deceased, which could have indicated whether it was indeed a homicidal death, does not appear to have been examined properly by the doctor i.e. PW 15. In other words, all of the above evidence does not add to the case of the prosecution that it was the Appellant and the Appellant alone who committed the murder of the deceased after subjecting her to cruelty.

19. Having carefully perused the entire evidence, the Court is not satisfied that the prosecution has been able to prove each of the links of the chain of

circumstances convincingly. The evidence placed on record does not unerringly point to the guilt of the Appellant.

20. For the aforementioned reasons, the Appellant is acquitted of the offences under Sections 498-A and 302 IPC. His bail bonds shall stand discharged.

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

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2022 (III) ILR - CUT- 34

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

W.P.(C) NO. 29177 OF 2021

BOMBAY INTELLIGENCE SECURITY (INDIA) LTD. ……..Petitioner

.V.

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

TENDER – The petitioner challenges the decision of the tendering authority qualifying the bid of opposite party No.5 and awarding the contract for providing manpower on outsourcing basis – Scope of judicial review in case of administrative action – Held, the duty of the court is to confine itself to the question of legality – Its concern should be: (1) Whether a decision-making authority exceeded its powers? (2) Committed an error of law(3) Committed breach of the rule of natural justice (4) reached a decision which no reasonable tribunal would have reached (5) abused its powers. (Para-26)

In the present case, this Court from the materials available on record comes to a finding that the evaluation of tender was done by following due process as advertised, giving equal opportunity of consideration to all the bidders as per the Clause-4 of the Financial Bid – Hence the writ petition is dismissed. (Para-30)

Case Laws Relied on and Referred to :-

1. (2017) 4 SCC 269 : Reliance Telecom Ltd. Vs. Union of India
2. (1994) 6 SCC 651 : TATA Cellular Vs. Union of India:
3. J(2007) 14 SCC 517 : Jagdish Mandal Vs. State of Orissa & Ors.

4. (2016) 15 SCC 272 : (2007) 14 SCC 517 : Montecarlo Ltd. Vs. National Thermal Power Corporation Ltd.
5. 2022 SCC Online SC 336 : N.G. Projects Limited Vs. Vinod Kumar Jain & Ors.
6. 2020(III) ILR-CUT-587 : Jasoda Roadlines and Ors Vs. Orissa State Warehousing Corporation & Ors.

For Petitioner : Mr. D.P.Nanda, Sr. Adv. & Miss. Sarita Moharana.

For Opp. Parties : Mr. P.K.Parhi, ASGI
Mr. B.S. Rayaguru, CGC
Mr. Goutam Mukherjee, Sr. Adv.
Mr. Aviral Dhirendra,Mr. Anupam Dash
Ms. Supriya Patra

JUDGMENT Date of Hearing: 02.08.2022 :Date of Judgment: 26.08.2022

BY THE BENCH

The petitioner, a company registered under the Companies Act, namely Bombay Intelligence Security (India) Ltd challenges the decision of the tendering authority/the opposite party no.2-All India Institute of Medical Science (Hereinafter, AIIMS for short), Bhubaneswar in qualifying the bid of opposite party no.5 : Quess Corporation Ltd. and awarding the contract to opposite party no.5 for providing manpower on job outsourcing basis at AIIMS Bhubaneswar for a period of two years from the date of award of contract and further extendable.

2. In the writ petition the following prayers have been made :

> *(a) The acceptance of the tender bid of the opposite party no.5 and award of contract under Annexure-13 should be declared illegal, arbitrary, unreasonable and be quashed.*
>
> *(b) The bid of the petitioner should be accepted since the petitioner has complied all criteria of the tender notice dated 10.02.2021 and quoted equal rate similar to opposite party no.5.*
>
> *(c) The process adopted by the opposite party nos.3 & 4 in evaluation and finalization of the public tender should be declared illegal, arbitrary, mala fide and violative of the article 14 of the constitution of India.*

3. The opposite party no.2-All India Institute of Medical Science Bhubaneswar is a statutory body and it is agreed by the petitioner as well as the opposite parties that the said authority is a "State" as defined under Article 12 of the Constitution of India.

4. The facts as they have emerged are that after the E-tender notice dated 30.12.2020 (Annexure-2) inviting tender from intending bidders, a corrigendum dated 10.02.2021 (Annexure-4 to the writ petition) was issued. In the said corrigendum, Clauses-11, 19 & 20 of Technical Bid (Eligibility Criteria) have proved to be the bone of contention between the parties and, therefore, are quoted herein for convenience of reference :

> ***"Clause-11*** *(i) Valid Labour License copies issued in favour of the Firm by Labour Commission, GOI of respective areas exclusively for manpower deployment (Health care, Technical, Administrative, Engineering and similar Services) where manpower have been provided by the firm during last 05(Five) FYs (2015-16), 2016-17,2017-18, 2018-19, 2019-20).*
>
> *(ii) Undertaking to be submitted by the bidder (who is not operating in Bhubaneswar) that they will obtain and submit valid labour license from the local authority for area of work at Bhubaneswar within 30 (Thirty) days from the date of award of work/contract."*
>
> *"**Clause-19**-Experience in providing Manpower Services {(Health Care, Technical, Administrative, Engineering and Similar Services (Excluding security, Watchman & Housekeeping Services)} as per Annexure-III. This shall cover the details of works of similar nature, approximate magnitude and duration carried out and/or on hand as on 31.03.2020 for last 5 years along with copy of work orders/certificates issued by concerned authority from Central Government/State Govt./PSU/Autonomous bodies/reputed private organization where the job was carried out.*
>
> ***Clause-20**- Bidders must have completed a single work order for minimum value of Rs.5.00 crore (Rupees five crore only) towards Manpower service {for Health care, Technical, Administrative, Engineering and similar Services (Excluding security, watchman & Housekeeping service)} in any year during last 5 years. (Please enclose copy of necessary completion certificate.)".*

The notice inviting the tender requires the bidders to enclose the copies of completion certificate towards satisfaction of the eligibility criteria as quoted here above, provided in Clauses-19 and 20. The completion certificate has to be of the work done towards manpower during the last five years excluding *Security, Watchman, Housekeeping Service*.

Referring to clauses quoted above, it is sought to be submitted that the opposite party no.5's bid should have been disqualified being not in consonance with Clauses-19 & 20 above as the opposite party no.5 in the completion certificate produced for evaluation of it's bid has not excluded "*Security, Watchman & Housekeeping Services*".

5. The tender is in two parts as specified in the E-tender No.11031 dated 30th December,2020 as quoted herein:

> *"TENDER EVALUATION*
>
> ***Tenders evaluation will be done in two stages**:*
>
> *a. Technical bid (Eligibility Criteria).*
> *b. Financial bid.*
>
> ***Terms of Two Bid System:***
>
> *The e-tender online shall be submitted in 2(Two) parts:*
>
> *(i) **Technical Bid**: Online Submission of all required documents.*
> *(ii) **Financial Bid**: Financial bid shall be submitted online. The Financial Bid of bidders, who qualify at Technical Bid Evaluation, will be opened thereafter."*

The tender was to be awarded to the L1 bidder as provided in Clause-11 of the "General Terms and Conditions" that is quoted herein:

> *"… … Firstly, agency who have quoted lowest service charge not below 2.08% in finance part shall be awarded as L1 bidder. Secondly, if two or more agencies have quoted same service charge then the lowest bidder amongst them will be decided based on the highest value of cumulative gross turnover arising out of the manpower services for last 05(five) years of the bidder as depicted in the Audited Financial Statement/IT Returns during the year 2015-16, 2016-17, 2017-18, 2018-19 and 2019-20. Accordingly bidders have to enclose self-attested copies of IT Returns and Audited Financial statements along with their Technical bid."*

*Clause-**4*** of the Financial Bid further clarifies the method of selection of L1 bidder as quoted herein :

> *"4. The Lowest Bidder (L-1) shall be determined on the basis of service charges quoted by the bidders. The service charge should be more than 2.08% (TDS-IT) @ 2% primary education cess @ 2% of TDS-IT & Higher education cess @ 2% of TDS-IT)of the consolidated wage and maximum two digits after decimal points is to be taken for evaluation. It should not be mentioned in the fraction. It should not be mentioned in the fraction. The service charge is also to be at percentage common to all categories. Firstly, agency who has quoted lowest service charge (More than 2.08%) in finance part shall be awarded as L-1 bidder. Secondly, if two or more agencies have quoted same percentage of lower service charge, than the lowest bidder amongst them will be decided based on the highest value of cumulative gross turnover arising out of manpower services (excluding security, watchman and housekeeping services) for last five (05) years of the bidder as depicted in the column A of the Annexure-IV. Accordingly, bidders have to enclose self-attested copies of IT Returns and Audited Financial Statements along with their technical bid. Clearly showing the turnover for manpower service (excluding security,*

watchman & housekeeping service). In case the value of such services are not segregated clearly, the bid will be rejected." (emphasis supplied)

6. Out of ten bidders, nine bidders including the petitioner and the opposite party no.5 were declared qualified in the technical bid. On 06.09.2021 the price bids were opened and it was found that out of nine qualified bidders, six bidders quoted equal rate of service charges, i.e., 2.09 percent (%) of total remuneration payable for the outsourcing job. The tender committee selected opposite party no.5 as lowest bidder on the ground that the opposite party no.5 showed to have highest turnover and the petitioner was found to be the second lowest bidder.

7. The petitioner on 19.07.2021(Annexure-6) issued request letter for re-valuation of the tender document on certain grounds pertaining to technical evaluation of bids.

On 27.07.2021 (Annexure-7) the authority replied to the petitioner giving clarification in the form of parawise reply to the issues raised petitioner's letter dated 19.07.2021, i.e., pertaining to nature of service to be provided by bidders, Trade licenses of the bidders turnover of bidders and lastly regarding the bidders having office at Bhubaneswar.

Thereafter, the petitioner on 03.08.2021 (Annexure-8) made a further request to the authority for reconsideration of all the evaluated technical bids tendered by all the participants and not to proceed further in finalizing the tender. The tendering authority responded to the letter dated 03.08.2021 giving detailed reply and went on to finalise the tender and awarded the contract in favour of opposite party no.5 by issuing "Notification of Award" dated 06.09.2021 (Annexure-13).

8. The challenge to the acceptance of the (Technical Bid) tender of opposite party no.5 is on the ground that the completion certificate submitted by the opposite party no.5 as part of his bid document includes "*housekeeping, sanitation service, cleaning etc*.," therefore is contrary to the mandatory condition of Technical Bid (Eligibility Criteria).

It is alleged by the petitioner that action of the opposite party nos.2 to 4, qualifying the bid of opposite party no.5 and accepting the same is a result of favouritism shown to the opposite party no.5, therefore, rendering the process of decision making bad in law, and hence award of the contract is liable to be set aside.

9. It is submitted by the petitioner that the work completion certificate, furnished by opposite party no.5 in the form of performance statement, is not in accordance with Clauses-19 and 20 of the Technical Bid (Eligibility Criteria) as the said clauses provide that housekeeping service is to be excluded while giving completion certificate whereas the opposite party no.5 had included housekeeping service to show the financial turnover.

It is averred by the petitioner that in contrast to the approach of opposite party no.5 tenderer, the petitioner has complied with the conditions contained in Clauses-19 and 20 and has excluded the financial turnover of housekeeping, *"sanitation service*,, cleaning etcs." in the work completion certificate.

10. This Court after hearing the learned counsel for the petitioner and the learned Additional Government advocate on 01.10.2021 issued notice and in the interim it was directed that there shall be stay of operation of the work order dated 06.09.2021 (Annexure-13) by which the opposite party no.5 was awarded the tender and the work order was issued. Since the tender is for the provision of manpower service for a large Hospital like, AIIMS, the petitioner who was earlier engaged by the opposite party no.2 was allowed by the employer to extend the contract up to 31.10.2021 and the said contract has been extended during the pendency of the present writ petition, thereby the petitioner is continuing. Interim order passed by this Court in I.A.No.13499 of 2021 dated 01.10.2021 has been extended by the subsequent orders of this Court.

11. As far as the pleadings are concerned, in response to the writ petition counter has been filed by opposite party no.5 dated 08.12.2021. The tendering authority opposite party nos. 1 to 4 have filed their counter dated 16.02.2022. Thereafter additional affidavit on behalf of opposite party nos.1 to 4 has been filed. Rejoinder dated 16.05.2022 in response to the counter filed by opposite party nos.1 to 4 dated 16.02.2022 has been filed. Additional affidavit dated 05.08.2022, has been filed by the opposite parties-1 to 4, which are on record.

12. On 21.06.2022 a Division Bench while hearing the matter considered the contention in respect of ineligibility of opposite party no.5 as advanced by the petitioner and noted by it's order that the turnover component qua *"Housekeeping, Sanitation Service"* was severable and by excluding the same, opposite party no.5 was not only eligible but has much more

turnover than the petitioner. For ready reference the said order dated 21.06.2022 is reproduced herein :

> *"3. Referring to the e-tender documents, Mr. B.Routray, learned Senior Advocate for the petitioner argued vehemently stating inter alia that the bidders must have completed a single work order of minimum value of Rs.5.00 crore (rupees Five Crore only) towards Manpower service {(Human Resources (health care, Technical Administrative, Engineering and other Services)} in a year during last 05 (five) years for which necessary completion certificate should be furnished by the bidder. Thereafter a corrigendum was issued on 10.02.2021 under 2 Annexure-4, wherein at Clause-20, it has been indicated as follows:-*
>
> *"Bidders must have completed a single work order for minimum value of Rs.5.00 crore (rupees Five Crore only) towards Manpower service {(for Health care, Technical, Administrative, Engineering and other Services (excluding security, watchman & House keeping Service)} in any year during last 05 (five) years."*
>
> *3.1 Learned counsel for the petitioner further contended that since tender condition stipulates exclusion of security, watchman & House keeping Service and for that the minimum value of 5 crore will be computed towards Manpower service {(for Health care, Technical, Administrative, Engineering and other Services in any year during last 05 (five) years, the opposite party no.5 does not satisfy this requirement. He also brings to the notice of this Court the certificate issued by the Kasturba Hospital at page 130 and referring to Clause-9, i.e. description of the services provided by the firm, which reads as follows:-*
>
> *"Integrated Facility Management services including Housekeeping & Sanitation, Cleaning, Façade Cleaning, Horticulture, Pest control, Paramedics & Disinfection, Garbage Management, Canopy cleaning, Mechanized cleaning of High rise building Glass and Steel structure etc., Bio waste management, Hygiene, Patient care, Repair and Maintenance (includes preservative maintenance of Electrical equipment, Civil, Air-Conditioning equipment's and repairs thereof, Engineering services including repairs and maintenance of lifts, Mechanical, Plumbing & Sewage, Medical Gas system and Laundry services etc.*
>
> *3.2 It is further contended that since the housing keeping and sanitation, cleaning, Façade Cleaning, Horticulture, Pest control, Paramedics & Disinfection, Garbage Management, Canopy cleaning, Mechanized cleaning etc. have been included, therefore, the opposite party no.5 does not satisfy the requirement as per the terms and 3 conditions of the tender documents.*
>
> *4. Mr. G. Mukherjee, learned Senior Advocate appearing for the opposite party no.5 brings to the notice of this Court the very same document, where at Clause-12, the break up of the amount has been made and House Keeping & Sanitation has also been excluded and the amount was indicated. If that will be excluded, it also comes to 12.00 crores. In the subsequent document at page-131 issued by the very*

> *same hospital, it comes to 15 crores. Thereby even excluding security, watchman & House keeping Service as has been mentioned above, the opposite party no.5 satisfies the minimum value of 5.00 crores in any year of the last 5 years. Thereby the opposite party no.5 is eligible to participate in the tender."*
>
> *(emphasis supplied)*

13. Mr. D.P. Nanda, learned Senior Advocate, instructed by Miss. Sarita Maharana, learned counsel for the petitioner; Mr. P.K. Parhi, learned Assistant Solicitor General of India (ASGI) along with Mr. B.S.Rayaguru, learned Central Government Counsel (CGC) for opposite party no.1 & Mr. Goutam Mukherjee, Senior Advocate instructed by Mr Aviral Dhirendra and Mr. Anupam Dash, learned counsel for O.P. No.5 made their submissions on behalf of the respective parties and the learned counsel were heard at length. The parties have filed their list of dates and notes of submission which form part of the record.

14. In view of the contention of the petitioner that acceptance of the Technical Bid of the petitioner is contrary to clause-11 of the "General Terms and Conditions" issued by the tendering authority along with the notice dated 30.12.2022 (Annexure-2) inviting tender, the said "Clause-11" is quoted herein:

> *"11. After evaluation, the work shall be awarded to L1 bidder after complying with all Acts/provisions stated/referred to for adherence in the tender. The service charge to be quoted should be more than 2.08% (TDS-IT@2%, Primary education cess-@0.02% of TDS-IT- & Higher education cess- @ 0.02% of TDS-IT) of the consolidated wage and maximum two digits after decimal points is to be taken for evaluation. The service charge is also to be at Percentage common to all categories. The Bidder has to comply all the provisions of the labour laws and all other applicable rules/regulation/laws."*

It is found that since all the nine technically qualified bidders quoted service charge @ 2.09%, the lowest bidder has been decided as per the clause: *"if two or more agencies have quoted same service charge then the lowest bidder amongst them will be decided based on the highest value of cumulative gross turnover arising out of the manpower services for last 05(five) years of the bidder as depicted in the Audited Financial Statement/IT Returns during the year 2015-16, 2016-17, 2017-18, 2018-19 and 2019-20."*

15. The contention of the petitioner that the opposite party no.5 has not complied with Clauses-19 and 20 of the Technical Bid (Eligibility Criteria)

quoted (supra) and that the tendering authority have not followed the said clauses-19 and 20, has been specifically answered by the tendering authorities in their counter affidavit filed by opposite party nos.1 to 4 dated 16.02.2022 which is as follows (in paragraph-20) :

> *"The Tender Committee evaluated the documents submitted by the participating bidders including the petitioner and the opposite party no.5(Quess Corporation Ltd.), as per the requirements of the Technical Bid (Eligibility Criteria) and found 9 (nine) nos. of bids as technically qualified in the Technical Bid, including both the petitioner-company and the opposite party no.5. Further, the opposite party no.5 submitted list of posts deployed by it at Kasturba Hospital along with the performance report, as per requirement of Clause-19 of the Technical bid (Eligibility Criteria) and also submitted documents regarding competition of single work order for minimum 5.00 crore (in any year between 2015-16 to 2019-20) of Kasurba Hospital, as per the requirements of Clause-20 of the Technical bid (Eligibility Criteria).*
>
> *The documents as has been submitted by the opposite party no.5 in Technical Bid, clearly reflects that the opposite party no.5* ***has provided Manpower service, i.e., health care, technical, administrative, engineering and similar services], apart from security, watchman & Housekeeping service, to Kasturba Hospital, Manipal*** *and has got outstanding performance report, as per requirement of Clause-19 of the Technical bid (Eligibility Criteria). Further the documents submitted by opposite party no.5 in the Technical bid, it is mentioned that it has completed single work order for minimum* ***5.00 Crore (i.e.,1468.36 lakhs, in the financial year 2018-2019, in other Outsource Manpower****), in Kasturba Hospital, Manipal, which does not include the value of services for Housekeeping and Sanitation. Thus, the documents clearly established the Technical bid eligibility Criteria, in favour of opposite party no.5 (Quess Corporation), as per requirements of Clause-19 and Clause-20."*

16. To fortify their pleadings, the tender evaluating authorities/employer have annexed the work completion certificate submitted by opposite party no.5 enclosed to their counter marked as Annexures-A/2 and B/2. It has been further pleaded by opposite party nos.1 to 4 (Paragraphs-18, internal pages-11, 12 & 13 of the counter) as reproduced herein :

> *"Thus, as per Condition (4) of the Financial Bid, if two or more agencies have quoted same percentage of lowest service charge, then the lowest bidder*

amongst them will be decided based on the highest value of cumulative gross turnover arising out of manpower service (Excluding security, watchman & Housekeeping Service) for last 05 (five) years of the bidder as depicted in the Column "A" of Annexure-IV). ***The Opp.Party No.5 (Quess Corporation) submitted Turnover Certificate duly certified by Chartered Accountants showing value of cumulative gross turnover arising out of manpower service (Excluding security, watchman & Housekeeping Service) for last 05(Five) years of the bidder as per Column "A" of Annexure-IV). The Turnover certificate submitted by opposite party no.5 reveals the value of cumulative gross turnover arising out of manpower service (Excluding security, watchman & Housekeeping Service) for last 05 (Five) years, as 18,027.19 crores****."*

" … … ***In the instant case, as six bidders quoted same percentage of lowest service charge i.e., 2.09, hence the lowest bidder (L-1) is determined basing upon the highest value of cumulative gross turnover arising out of manpower service (Excluding Security, watchman & Housekeeping Service) for last 05 (Five) years of the bidders, as per Condition (4) of the Financial bid****.*

As the value of cumulative gross turnover of Opposite Party No.5 for last 05 (Five) years from manpower service (Excluding Security, watchman & Housekeeping Service) (Quess Corporation) ***was the highest i.e. 18027.19 Crores and hence the Tender Committee declared Opposite Party No.5 as L-1, as per the terms and conditions stipulated at the Financial Bid of the Tender Document****. The Tender committee has not committed any irregularity or illegality in evaluation of both Technical bid and financial bid of the bid documents submitted by participating bidders, in the Tender Process. The Opposite Party no.5 is declared as L-1 (Lowest bidder) in the Tender Process validly and rightly, as per terms and conditions of Tender Notice."*

The turnover certificate of opposite party no.5 has been annexed marked as Annexure-C/2 to the counter of opposite party nos.1 to 4.

17. The rejoinder filed by the petitioner to the counter of opposite party nos.1 to 4 breaks no further ground, the averments being inter alia repetitions of the averments made in the writ petition.

18. The opposite party no.5, the successful bidder, in its counter dated 8.12.2021 has raised preliminary objection regarding maintainability of the writ petition contending that it is the prerogative of the tendering authority to

evaluate the tender and it is also in the realm of policy of the public authority (Opposite party nos.2 to 4) and, therefore, the writ petition is not maintainable.

18.1 Apart from the raising preliminary objection on ground of maintainability, it has been specifically averred by opposite party no.5 in their counter that the evaluation of tender has been done within four corners of the bid conditions in accordance with the tender documents as envisaged under Caluse-4 (quoted at above) of the financial bid which provides the manner of selecting L-1.

It has been further averred by opposite party no.5 that on opening of the financial bid on 6.9.2021 in presence of all the bidders including the petitioner, it was found that all the bidders have quoted service charge in excess of 2.08 and at the relevant para-17 of counter it has been thus stated :

> *" … … Since, all the nine financial bidders quoted service charge in excess of 2.08% and six financial bidders quoted the same service charge. However, the opposite party no.5 was declared as a lowest (L-1) bidder as per Clause-4 of the Financial Bid because the annual cumulative turnover of the opposite party no.5 for the last financial year was highest among the six financial bidders who quoted the same price for service charge."*

18.2 Regarding the cumulative turnover of opposite party no.5 as compared to the petitioner, it has been specifically averred by the opposite party no.5 *"… cumulative turnover of the opposite party no.5 for the Financial Years 2015-16 to 2019-20 is INR 18027,19,00,000 (Eighteen Thousand Twenty Seven Crore Nineteen Lakh Only) whereas the cumulative turnover of the petitioner for the Financial Years 2015-16 to 2019-20 is INR 1065,61,92,592 (One Thousand Sixty Five Crores Sixty One lakh Ninety Two Thousand Five Hundred Ninety Two Only … …*" and therefore the opposite party no.5 has to be declared as L1 as per the conditions of tender.

19. The comparative assessment of annual turnover of bidders by the authorities (opposite party nos.1 to 4) filed before this Court, is reproduced herein for reference :

Coomparison statement as per Turn over								
Sl No	Firm Name		FY Year					
			2015-16	2016-17	2017-18	2018-19	2019-20	Cumulative Turnover(Rs.)
1	M/S BIS(Petitioner)	Total Annual turn over out of Manpowe	1,92,50,00,034.00	1,99,92,17,401.00	2,25,92,57,661.00	2,22,03,51,432.00	2,25,23,66,064.00	10,65,61,92,592.00
		Total Annual turn over other than manpower service(Rs.)	3,37,50,00,221.00	4,14,60,32,231.00	4,87,61,13,585.00	4,81,66,17,967.00	4,65,84,17,910.00	21,87,21,81,914.00
		Total Turnover(Rs.)	5,30,00,00,255.00	6,14,52,49,632.00	7,13,53,71,246.00	7,03,69,69,399.00	6,91,07,83,974.00	32,52,83,74,506.00
2	GA Digital	Total Annual turn over out of Manpower service(Rs.)	132.95 Crores	125.86 Crores	145.66 Crores	209.72 Crores	272.06 Crores	886.25 Crores
		Total Annual turn over other than manpower service(Rs.)	0	0	0	0	0	0
		Total Turnover(Rs.)	132.95 Crores	125.86 Crores	145.66 Crores	209.72 Crores	272.06 Crores	886.25 Crores
3	Kapston Facilities	Total Annual turn over out of Manpower service(Rs.)	70,27,38,022.00	90,63,08,004.00	1,11,02,84,164.00	1,47,23,03,769.00	2,13,39,27,316.00	6,32,55,61,275.00
		Total Annual turn over other than manpower service(Rs.)	Nil	Nil	Nil	Nil	Nil	Nil
		Total Turnover(Rs.)	70,27,38,022.00	90,63,08,004.00	1,11,02,84,164.00	1,47,23,03,769.00	2,13,39,27,316.00	6,32,55,61,275.00
4	Source Dotcom	Total Annual turn over out of Manpower service(Rs.)	28,55,61,322.00	22,87,55,312.00	21,67,35,517.00	24,43,23,420.00	25,54,67,879.00	1,02,64,69,146.80
		Total Annual turn over other than manpower service(Rs.)	10,87,11,199.00	8,77,67,060.00	8,73,93,064.00	11,18,23,975.00	7,84,68,914.00	9,48,32,842.40
		Total Turnover(Rs.)	39,42,72,521.00	31,65,22,372.00	30,41,28,581.00	35,61,47,395.00	33,39,36,793.00	1,43,78,58,227.00
5	Quess (Opp. No. 5	Total Annual turn over out of Manpower service(Rs.)	2,419.46 Crores	2787.19 Crores	2799.56 Crores	3,725.77 Crores	6,295.21 Crores	18,027.19 Crores
		Total Annual turn over other than manpower service(Rs.)	498.72 Crores	655.74 Crores	1611.27 Crores	1969.02 Crores	1445.02 Crores	6179.77 Crores
		Total Turnover(Rs.)	2,918.18 Crores	3,442.93 Crores	4,410.83 Crores	5,694.79 Crores	7,740.23 Crores	24,206.96 Crores
6	Oriental Security	Total Annual turn over out of Manpower service(Rs.)	24.1041 Crores	26.3919 Crores	36.6068 Crores	41.9868 Crores	40.2968 Crores	169.3864 Croress
		Total Annual turn over other than manpower service(Rs.)	0.1445 Crores	0.1059 Crores	0.1394 Crores	0.1741 Crores	0.2918 Crores	0.8557 Crores
		Total Turnover(Rs.)	24.2486 Crores	26.4978 Crores	36.7462 Crores	42.1609 Crores	40.5886 Crores	170.2421 Crores

The above comparative analysis goes to show that the cumulative annual turnover of petitioner "*excluding security, watchman, housekeeping service*" is Rs.2187.21 crores, whereas that of the opposite party no.5 is Rs.6179.77 crores.

20. Before we proceed to deal with the rival contentions we would deem it appropriate to take note of the pronouncements laying down the propositions of law regarding scope of judicial review of the process of evaluation of tender by State/instrumentality of State.

Learned counsel for the petitioner has placed reliance on the decision rendered by the Hon'ble Supreme Court reported in ***(2017) 4 SCC 269: Reliance Telecom Ltd. V. Union of India*** to contend that the judicial review cannot be denied so far as exercise of power of government/public bodies to enter into the contract is concerned, so as to prevent arbitrariness or favoritism.

21. The opposite party nos.1 to 4 have relied on the decisions rendered by the Hon'ble Supreme Court in ***TATA Cellular v. Union of India: (1994) 6 SCC 651*** paragraphs-70, 74 and 75; ***Jagdish Mandal v. State of Orissa and others : (2007) 14 SCC 517 and Montecarlo Ltd. V. National Thermal Power Corporation Ltd. : (2016) 15 SCC 272***. Referring to Tata Cellular (supra), it is contended by opposite party nos.1 to 4 that on clear scrutiny of the materials available on record, it can be concluded that in the tender process the authority has adhered to the principles established by law and the entire tender process was free from arbitrariness, malafides & favoritism as well as is in consonance with the public policy.

22. The learned counsel for opposite party no.5 seeks support from the decisions of Hon'ble Supreme Court in ***TATA Cellular*** (supra), ***Jagdish Mandal*** (supra) and further on ***Tamil Nadu Generation & Distribution Corporation Limited (TANGEDCO) Rep. by its Chairman and Managing Director and another v. CSEPDI- TRISHE Consortium, Rep. by its Managing Directors and another): (2017) 4 SCC 318; N.G. Projects Limited v. Vinod Kumar Jain & others: 2022 SCC Online SC 336 and Jasoda Roadlines and Ors v. Orissa State Warehousing Corporation and Ors: 2020(III) ILR-CUT-587***, to show the scope of judicial review of a process of selection of bidder/finalization of tender by the Government/instrumentality of the Government.

It is submitted by the learned Senior Counsel for opposite party no.5 that the Courts cannot really enter into the realm of evaluation of tender by the authority, in exercise of power of judicial review, when the evaluation is neither ex-facie erroneous nor can be perceived as flawed nor perverse or absurd.

It is further contended that the Court cannot adopt the approach of an appellate forum or authority and extend the principle of judicial review to the area of evaluation of tender unless some manifest error in the method adopted is shown to the Court.

23. Apart from the above decisions cited at the bar, it would be apt to refer to certain other judicial pronouncements those are regarded as Locus Classicus on the scope of judicial review of administrative action.

In ***Chief Constable of the North Wales Police v. Evans: 1982(1) WLR 1155; (1982)3 All E R 141 (HL):*** pp 1160H-1161A, 1173F 1174F-G of WLR, it was held by the House of Lords *"judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made". ".....judicial review is concerned, not with the decision, but with the decision-making process"*

Lord Hailsham in his separate yet concurring opinion observed (pp.1160E-H -1161-A of WLR):

> *"The first observation I wish to make is by way of criticism of some remarks of Lord Denning M.R. which seem to me capable of an erroneous construction of Rules of the Supreme Court: the rules which governed civil procedure in the Supreme Court of Judicature of England and Wales from its formation in 1883 until 1999. The purpose of the remedy by way of judicial review under R.S.C., Ord.53. This remedy, vastly increased in extent, and rendered, over along period in recent years, of infinitely more convenient access than that provided by the old prerogative writs and actions for a declaration, is intended to protect the individual against the abuse of power by a wide range of authorities, judicial, quasi-judicial, and, as would originally have been thought when I first practiced at the Bar, administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner.*
>
> *(emphasis supplied)*
>
> *Since the range of authorities, and the circumstances of the use of their power, are almost infinitely various, it is of course unwise to lay down rules for the application of the remedy which appear to be of universal validity in every type of case. But it is important to remember in every case that the purpose of the remedies is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the*

authority constituted by law to decide the matters in question. The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law. There are passages in the judgment of Lord Denning M.R. (and perhaps in the other judgments of the Court of Appeal) in the instant case and quoted by my noble and learned friend which might be read as giving the courts carte blanche to review the decision of the authority on the basis of what the courts themselves consider fair and reasonable on the merits. I am not sure whether the Master of the Rolls really intended his remarks to be construed in such a way as to permit the court to examine, as for instance in the present case, the reasoning of the subordinate authority with a view to substituting its own opinion. If so, I do not think this is a correct statement of principle. The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorized by law to decide for itself a conclusion which is correct in the eyes of the court. (Emphasis supplied)

Lord Brightman in his opinion (which was agreed to by the majority) observed as follows :

Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.

(pp.1173-F of WLR)
(Emphasis Supplied)

There is however a wider point than the injustice of the decision-making process of the chief constable. With profound respect to the Court of Appeal, I dissent from the view that " Not only must [the probationer constable] be given a fair hearing, but the decision itself must be fair and reasonable." If that statement of the law passed into authority without comment, it would in my opinion transform, and wrongly transform, the remedy of judicial review. Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made.

(pp. 11874-F, G of WLR)
(Emphasis supplied)

24. Again, the House of Lords in ***Council of Civil Service Unions (C.C.S.U.) v. Minister for Civil Service, [1984] 3 AII E.R.935, H.L.(E); [1984] 3 W.L.R. 1174; Civil Services [1985] A.C 374***, considering the scope of judicial review of administrative action have held (opinion of Lord Diplock, *pp:1196-B-C-D-E-F-G of WLR*) as follows :

" … … Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality", the second "irrationality" and the third "procedural impropriety". That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognized in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.

> *By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.*
>
> *By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v. Bairstow [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision- maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.*
>
> *I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. …"*
>
> *(Emphasis supplied)*

25. Apart from the broad principles to be adopted by the superior courts for Judicial Review of administrative action, as laid down in ***Chief Constable of the North Wales Police*** (supra), the development of the principle of proportionality as a further ground of judicial review is to be noted. (***R. v. Secretary of State for the Home Department, ex Brind, (1991)1 AC 696; (1991)2 WLR 588 (HL):*** (Opinion of Lord Lowry: pp 609C, D, H-610 A, B of W.L.R).

> *"The applicants have relied on the doctrine of proportionality. That is, in one sense of the word, a deeply rooted and well understood idea in English law. In a claim for damages for personal injuries suffered by a workman allegedly through his employer's negligent system of work the court has to weigh the risk of an accident, the likely severity of the consequences, the expense and difficulty of taking precautions and the resources of the employer with a view to deciding whether the employer failed to take reasonable care for the safety of the workman. In another field, as counsel once contended in Reg. v. Secretary of State for Transport, Ex parte Pegasus Holdings (London) Ltd. [1988] 1 W.L.R. 990, 1001, proportionality is simply a way of approaching the Wednesbury formula: was the administrative act or decision so much out of proportion to the needs of the situation as to be "unreasonable" in the Wednesbury sense.*
>
> *xxx xxx xxx*
>
> *2. The judges are not, generally speaking, equipped by training or experience, or furnished with the requisite knowledge and advice, to decide the answer to an administrative problem where the scales are evenly balanced, but they have a much better chance of reaching the*

right answer where the question is put in a Wednesbury form. The same applies if the judges' decision is appealed. 3. Stability and relative certainty would be jeopardized if the new doctrine held sway, because there is nearly always something to be said against any administrative decision and parties who felt aggrieved would be even more likely than at present to try their luck with a judicial review application both at first instance and on appeal. 4. The increase in applications for judicial review of administrative action (inevitable if the threshold of unreasonableness is lowered) will lead to the expenditure of time and money by litigants, not to speak of the prolongation of uncertainty for all concerned with the decisions in question, and the taking up of court time which could otherwise be devoted to other matters. The losers in this respect will be members of the public, for whom the courts provide a service. … …"

Having considered the conspectus of the decisions as discussed above, in our considered view, the efforts of this Court has to be to adopt the test, i.e. to *"consider whether something has gone wrong of the nature and degree which requires its intervention"*.

26. Similarly, the Hon'ble Supreme Court in TATA Cellular (supra) (at paragraphs-77 & 80 of SCC) considering the scope of judicial review of the process of evaluation of tender by State/instrumentality of State have laid down the following :

"77. The duty of the court is to confine itself to the question of legality. Its concern should be :

1. Whether a decision-making authority exceeded its powers?

2. Committed an error of law,

3. committed a breach of the rules of natural justice,

4. reached a decision which no reasonable tribunal would have reached or,

5. abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(i) Illegality : This means the decision- maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesday unreasonableness.(iii)Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, in R. v. Secretary of State for the Home Department, ex Brind, Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should, "consider whether something has gone wrong of a nature and degree which requires its intervention".

> *"**80**. At this stage, The Supreme Court Practice, 1993, Vol.1, pp. 849850, may be quoted :*
>
> *"4. Wednesbury principle.- A decision of a public authority will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the court concludes that the decision is such that no authority properly directing itself on the relevant law and acting reasonably could have reached it. (Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn. per Lord Greene, M.R.)"*

27. It has also to be noted that there was pre-bid conference amongst the tenderer and the intending bidders on 12.01.2021 and subsequent opportunity was given to the tenderers including the petitioner to make representation seeking clarification. These inbuilt mechanisms included in the tender process also add to the sanctity of the tender process making it more in tune with the principles of natural justice as well as making the process more transparent.

28. When the matter was taken up on 08.07.2022 the learned Senior Counsel for the petitioner submitted that the petitioner would prefer not to raise the contention that the opposite party no.5's bid was technically disqualified. However, since the said issue has been pleaded it is answered by this Court.

In view of the aforesaid discussions, it has to be held that the petitioner has not been able to demonstrate that the opposite party no.5 has not complied with the conditions provided in Clauses 19 & 20 of the Technical Bid (Eligibility Criteria) as quoted supra.

The comparative evaluation shows total annual turnover of the opposite party no.5 other than manpower service is Rs.6179.77 crores whereas the said annual turnover other than manpower service of the petitioner is Rs.2187.21 crores (Rs.21,87,21,81,914.00), thereby, indicating that both having quoted 2.09% as rate of service charge the opposite party no.5 having higher cumulative turnover for the last five years becomes L1.

29. The pleadings of the petitioner and assertions based thereon have been duly evaluated. In the legal and factual premise, the petitioner's contention that the O.P. NO.5 did not satisfy the conditions as contained in clauses 11, 19 & 20 Technical Bid (Eligibility Criteria) and that the evaluation of the bid of O.Ps.1 to 4 was contrary to the said clauses-11, 19 & 20 as well as clause-4 of Financial Bid, fails scrutiny of this Court.

We find that substantial and pertinent reasons have been ascribed by the tender evaluating authority in qualifying the bid and awarding the tender to the O.P. No.5 which is upheld. The dictum in ***Reliance Telecom Ltd***. (supra) is of no avail to the petitioner.

30. Now coming to the other allegations of the petitioner that is: the process of evaluation of tender, is vitiated by arbitrariness, is unreasonable and therefore, is liable to be interfered with, has to be rejected, inasmuch as, this Court from the materials available on record, comes to a finding that the evaluation of tender was done by following due process as advertised, giving equal opportunity of consideration to all the participating bidders as per the Clause-4 of the Financial Bid read with Clauses-11, 19 and 20 of the Financial Bid (Eligibility Criteria).

31. Before parting with the case, considering that by interim order dated 01.10.2021 this Court directed stay of operation of the work order dated 06.09.2021 (Annexure-13) issued in favour of O.P. No.5 that was to commence w.e.f. 01.10.2021 and taking into consideration the principle ***actus curae neminem gravabit*** i.e, act of Court should harm none, it is further directed that the work order dated 6.9.2021 (Annexure-13) issued by the O.Ps.1 to 4, in favour of O.P. No.5 shall be implemented forthwith by the parties keeping intact the paragraph-4 of the work order i.e., the duration of the contract shall be initially for a period of 02(two) years from the date of award of contract and further extendable for another 01(One) year on mutually agreeable terms of conditions.

32. The writ petition is dismissed, however, opposite party nos.1 to 4 shall be bound by the aforesaid directions. There shall be no order as to costs.

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2022 (III) ILR - CUT- 52

S. TALAPATRA, J & M.S. SAHOO, J.

JCRLA NO. 56 OF 2015

SAMBHU BECK ……..Appellant

.V.

STATE OF ODISHA ……Respondent

CRIMINAL TRIAL – Conviction under section 302 of IPC – Entire case of prosecution is dependent on the testimony of P.W.8 – The P.W.8 saw the assailants and accomplices for a fleeting moments as he was away 10 fts and there was a grill from outside, the P.W.8 did not provide any identifiable feature of the person who fired the shot in his first information report – Effect of – Held, the primary identification could not at all be proved by the prosecution – Therefore, in absence of any statement by P.W.8 that, whether the person he had identified, had shot the deceased from his pistol or not, the purported identification has become fragile and cannot be accepted for any purpose – As such the benefit of doubt be extended to the appellant. (Para-27)

Case Laws Relied on and Referred to :-

1. AIR 1981 SC 1392 : Wakil Singh Vs State of Bihar.
2. 1995 Supp(4) SCC 448 : Satrughana Vs State of Orissa.
3. AIR 1970 SC 1321 : Budhsen Vs State of U.P.
4. AIR 2017 SC 642 : Md. Sajjad Vs State of West Bengal.
4. 1984 (II) OLR 1089 : P. Krishna Reddy Vs. State of Orissa.

For Appellant : Mr. Mohit Aggrawal

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

JUDGMENT Date of Judgment: 26.09.2022

S. TALAPATRA, J.

This is an appeal by the convict, hereinafter referred to as the appellant, from the judgment and order of conviction and sentence delivered in S.T. Case No.177/41/45 of 2011-13 by the Addl. Sessions Judge, Sundargarh. By the said Judgment dated 14.07.2015, the appellant has been convicted under Section 302 of the IPC for committing murder of Anuj Gupta, a villager from Satbarua, District- Palemu, (Jharkhand). Pursuant to the said conviction, he has been sentenced to suffer rigorous imprisonment for life and to pay fine of Rs.10,000/- with default imprisonment. It has been also directed that the period of detention, the appellant has undergone, be set off in terms of provisions of Section 428 of the Cr.P.C. It may be noted that by the impugned Judgment, the petitioner has been acquitted from the charges under Section 3 of the Explosive Substance Act and Sections 25 (1-B) and 27(1) of the Arms Act.

2. Briefly stated the prosecution case, as transpires from the records is that on 05.03.2010 at around 05:00 P.M., one Binod Gupta (P.W.8) and his staffs were taking stock of the accounts of their country liquor shop, some

unknown persons arrived near the main gate of the shop and asked them to open the shop. The deceased is named before was one of the staffs who was present in the said shop. Those persons asked the deceased to give them liquor worth Rs.100 and told him that they had come to the village Sabdega, being invited as the guests. One of those persons, suddenly fired at the deceased and he succumbed to the injury, sustained by the gun shot. They had hurled bomb at the informant but that missed the target. When the police arrived at the place of occurrence. The Manager of the shop (P.W.8) lodged the information to the police. The said information was registered as Talsara P.S. Case No. 11/2010 under Section 302/34 of the IPC read with Sections 25/27 of the Arms Act and under Section 3 of the Explosive Substance Act.

3. On Completion of the investigation, the police submitted the final report/charge-sheet under Section 173(2) of the Cr.P.C. The charge-sheet had been submitted against the appellant and two other persons. The case was split up and the case of the appellant was committed to the Court of the Sessions Judge, Sundargarh for trial. The accused person namely, Tenguna @ Tikeswara Oram was dead before the Trial could commence. The charge against the present appellant was framed by the Adhoc Addl. Sessions Judge, Sundargarh, on transfer of the case by the Sessions Judge, Sundargarh under Sections 302/34, Section 3 of the Arms Act and Section 25(1-B)/27(1) of Arms Act. The appellant denied the charges.

4. In order to substantiate the change, the prosecution adduced as many as 9 witnesses and introduced few documents in the records. The appellant adduced himself, following the procedure of Section 315 of the Cr.P.C. as D.W.1 for laying the foundation of the plea that on the day when the occurrence took place, he was at Goa and later on, he was shown as the accused in the said police case and brought to Sundargarh from Goa. After the prosecution evidence was recorded, the statement of the appellant was recorded under Section 313 of the Cr.P.C. on 15.04.2015, when the appellant denied that he is involved in the crime. The evidence that has been adduced by the prosecution are all false and he pleaded his innocence again.

5. On appreciation of the evidence, as laid by the prosecution and the defence, the Trial Judge has returned the finding of conviction observing that on analysis of the evidence of P.W.8 (the informant), it has become clear, cogent, unambiguous, trustworthy and as free from embellishment that he was not known to the appellant and he was working as a Manager of the

Liquor shop, therefore, he had no axe to grind against the accused and he had seen the deceased being killed by the appellant before his own eyes. His evidence is without any doubt, quite sterling. It has been further observed by the trial Judge that admittedly the appellant was arrested at Goa which was far away from Odisha. D.W.1 in his evidence has stated that about five to six years back he was in Goa earning his livelihood by fishing in the sea and on a date while he was in a local police station at Goa, Sundargarh Police picked him up from there. The evidence of D.W.1 in this regard is suggestive of the fact that he was not at all present at the scene of crime in question and that by then, he was far away there from. This in essence, is the substance of the plea of *alibi* raised by the appellant. Thereafter, it has been observed by the Trial Judge that after the prosecution has proved by the evidence of P.W.8 that it is the appellant who fired at the deceased, it is the wholesome burden which squarely falls on the appellant to prove that on the date and time of the crime in question, he was not there. No evidence was adduced on behalf of the defence, barring D.W.1 (the appellant himself). Nothing has been elicited from P.W.7 in order to demonstrate that the appellant was involved in the fishing business at Goa.

6. From his evidence at [Para 16], it transpires that the appellant was brought from Goa where he was lodged in the Jail being arrested in a criminal case on 06.05.2010 by the Anti Narcotic Police Station, Goa. But, according to the Trial judge, the defence plea is not trustworthy.

7. But, Mr. M. Agarwal, learned counsel appearing for the appellant has challenged the Judgment contending that the same is based on perverse appreciation, so far the evidence relating to identification of the accused by P.W.8 is concerned. Mr. Agarwal, learned counsel having referred to the report of the Test Identification parade (T.I Parade in short) has submitted that the procedure that has been followed for conducting the said parade is in infraction of Section 9 of the Indian Evidence Act. According to Mr. Agarwal, learned counsel it appears even from the reports that P.W.8 had prior input for identifying the suspect. The appellant has stated before the Magistrate who conducted the identification parade that his photograph was taken in the police station. Our attention has been drawn to the Column 7 of Schedule-XLVII used for purpose of the report during or after the identification parade. The said column is for *"if identified correctly"*. According to Mr. M. Agarwal, learned counsel submitted that this very column shows that the suspect has been presumed to be the offender. But the

test was not for establishing whether the person as brought before the T.I parade was involved in the crime or not.

8. Mr. Agarwal, learned counsel has submitted that entire case of the prosecution is dependent on the testimony of P.W.8. From other witnesses, nothing could be elicited to support the prosecution's case. Mr. Agarwal, learned counsel has therefore, extensively read the testimony of P.W.8 and he has thereafter submitted that no other witness, who was working on that night in the said country liquor shop was brought to identify the suspect. It has been also pointed out by Mr. Agarwal that the statement of P.W.8 had been recorded on 01.11.2011, whereas the occurrence took place on 05.03.2010. According to Mr. Agarwal, identification on the basis of the said parade becomes risksome for convicting someone.

9. It appears from the report of the T.I parade that one Bhola Gupta was also brought in the T.I. parade. P.W.7 who carried out the investigation has stated in the trial as follows:

> *"Then, accused Sambhu Beck was also remanded to this case since 12.05.2010. On the very same day, I had also made a prayer before the learned S.D.J.M., Sundargarh for making T.I. parade of accused Sambhu Beck inside the jail by witnesses Binod Gupta and Bhola Gupta and the same petition for T.I. parade was allowed. Thereafter, I also made a prayer for the T.I. parade of accused Sambhu Beck by another witness i.e. Muna Yadav and my said application was allowed. Then, T.I. parade of accused Sambhu Beck was conducted at Dist. Jail, Sundargarh by the Magistrate on dated 17.05.2010 and on dated 08.06.2010 respectively. On dated 17.05.2010 witness Binod Gupta had participated and on 08.06.2010 witnesses Bhola Gupta and Muna Yadav had participated. Then on 15.07.2010 I seized the license of the Mada Bhati of Balishankara from Rajkishore Jaiswal of Ranibagicha, Sundargarh on his production and prepared the seizure list. Ext.8 is the said seizure list and Ext.8/1 is my signature on Ext.8."*

10. Mr. Agarwal has pointed out that those witnesses as referred by P.W.7 namely, Bhola Gupta and Muna Yadav who had participated in the identification parade had been withheld by the prosecution. It would further appear from the cross examination of P.W.7 that during the investigation, P.W.8 had disclosed that one of the culprits was black in complexion and he was a tall guy. Another witness namely, Bhola Gupta had disclosed that all the culprits were black in complexion and between the age group of 25. No distinct features of the accused were not specifically stated by any of the witnesses. P.W.7 has admitted that during his investigation he did not explore the distance between the main gate of the premises where the sale counter was located and the place where Anuj Gupta (deceased) was sitting as well as

the direction of the sale counter. P.W.8 had not specifically stated to him that at the relevant time he along with others including Anuj Gupta were counting money. P.W.8 had not stated that the bullet that was fired at Anuj Gupta had entered through his chest and exited at his back. He has also stated that his investigation did not reveal that the accused had previous enmity or grudge with Anuj Gupta (the deceased).

11. Mr. Agarwal, learned counsel has emphatically submitted that P.W.7 has failed to reveal how he identified the appellant at Goa as there was no description to him according to his own statement. Even Binod Kumar Gupta (P.W.8) could not make out any special feature of the person, who shot the deceased. Even he did not disclose whether he had got any input from the police at Panaji, Goa. According to Mr. Agarwal, the report of the T.I. parade is completely inadequate. In the report what precautions were taken before the parade has not been disclosed. Even the Magistrate who conducted the T.I. parade was not adduced in the trial. As a result, the defence has been deprived of eliciting the vital facts on how the T.I. parade was conducted. No description how the parade was conducted or whether the persons of the same height and complexion with similar kind of dresses or not, it is available in the report. It has been only recorded that persons of the same age group was only selected with the similar features. For adduction of the J.M.F.C., Sundargrh who conducted the parade has severely prejudiced the defence and as such the identification in the parade is required to be discarded.

12. Mr. Agarwal, learned counsel has contended stated that presence of the Magistrate who conducted the TIP in the trial is essential. In this regard, he relied on a decision of the Apex Court in **Wakil Singh Vs State of Bihar** reported in **AIR 1981 SC 1392** where it has been held *inter alia* as under;

> *"As regards the other two appellants viz., Sheobalak Singh and Kuppi Singh, the High Court seems to have committed a serious error of law in convicting these appellants. It has been established that so far as Kuppi Singh is concerned he undoubtedly had smallpox marks and was identified by as many as 6 witnesses-PWs. 2, 3, 5, 12, 13 and 15. The T.I. parade charge does not show that any person having small pox marks was mixed up with this accused at the time of the parade, nor does the T.I. chart show that any precaution for concealing the pox marks was taken. The trial court rightly pointed out that in view of the pox marks, the mistake in identification could not have been excluded. The High Court did not agree with the reasoning of the trial court because it construed the T.I. parade in a most technical fashion. It is well known that all T.I. parades contain a cyclostyled or printed certificate that necessary precautions have been taken, and the Magistrate merely signs on the dotted lines. But that by itself, would not show for the purpose of proving a criminal charge that this precaution was actually taken, unless the Magistrate himself appeared as a witness and says what precautions were taken. Apart from endorsing the certificates, the Magistrate who held*

> *the T.I. parade in this case does not state that he had taken any precaution to conceal the small pox marks appearing on the face of Kuppin Singh by mixing other persons who had some small pox marks. Furthermore, the very fact that even under the stress and strain of such serious incident as the present one, as many as 6 witnesses identified Kuppi Singh without at all giving any kind of description of this accused, clearly shows that the witnesses identified him merely because of the pox marks. At any rate, here also the possibility of mistake in identification because of the pox marks cannot be reasonably excluded. For these reasons, therefore, we are unable to support the reasons given by the High Court for reversing the acquittal of Kuppi Singh also."*
>
> [Emphasis Added]

13. We do agree with Mr. Agarwal that there is no reflection of taking care of special identification mark such as height, complexion etc., only there is reference to age and similar feature. Mr. Agarwal, has also added that if the special features for identification disclosed in the FIR be taken care of for conducting the T.I. parade. Mr. Agarwal, learned counsel did not forget to remind us that the said T.I. parade was held after about one year and no special feature was disclosed in the first information report. In this regard, he has referred a decision of the Apex Court in **Satrughana vs State of Orissa** reported in **1995 Supp(4) SCC 448** where the Apex Court has clearly observed as follows:

> ……"*the dilution of the evidentiary value of identification by witnesses who claim to have seen the accused at night almost ½ months back but who did not in their statements before the police or in the first information report reveal any special features for identification, is a matter which weighs against the prosecution. It must be remembered that the accused persons are required to be produced before the court latest within 15 days of their arrest and, therefore, it would be reasonable to infer that they were so produced. There is nothing on the record to show that the prosecution had taken care to ensure that their identity was not revealed when they were taken to court and produced as required by law. In these circumstances, when the prosecution witnesses had admitted in their oral statements that they had not noticed any special identifying features, it becomes unsafe to place implicit reliance on the evidence regarding identification emanating from the proceedings at the test identification parade. In these circumstances since there is no other corroborative evidence, we find it difficult, to place implicit reliance on the identification made at the test identification parade. We are, therefore, of the opinion that the appellants are entitled to benefit of doubt*." [Emphasis Added]

14. That apart, Mr. Agarwal learned counsel has placed his reliance on 3 other reports viz. **Budhsen Vs State of U.P.** reported in **AIR 1970 SC 1321**, **Md. Sajjad vs State of West Bengal** reported in **AIR 2017 SC 642** and **P. Krishna Reddy Vs. State of Orissa** reported in **1984 (II) OLR 1089.** In all these reports, one common aspects has been expounded. The said aspect is that the identifier (the witness) shall state specifically that the part played by the accused in the commission of crime. Mr. Agarwal learned counsel has

submitted that in this case the only witness P.W.8 did not state either to the police or in the trial what part the appellant had played.

15. Mr. Agarwal, learned counsel on the aspect of non-examination of the conducting Magistrate has relied on a decision of the Apex Court in **Umesh Chandra Vs State of Uttarakhand (Judgment dated 11.08.2021)** delivered in **Crl. Appeal No.802 of 2021**. It has been held by the Apex Court that more important is that the test identification parade being a part of the investigation, has to be proved by the prosecution as having been held in accordance with law. The onus lies on the prosecution to establish that the T.I.P was held in accordance with law. It is only after the prosecution prima facie established a valid TIP has been held, the question of considering any objection arises. If the prosecution failed to establish that a TIP was properly held by examining the witnesses, there is nothing for the accused to disprove. In that case, a Magistrate is stated to have conducted the TIP. The Magistrate has not been examined. No explanation is forthcoming why the Magistrate was not examined. The only evidence that surfaces is through the Station House Officer who has testified that during the investigation, the TIP was held in the District Jail, Nainital and he identified the proceeding records in the Court. The identification of the proceeding records is irrelevant as he could not have been present during the TIP. TIP, a part of the investigation, therefore cannot be said to have been proved, much less that it was held in accordance with the law.

16. Mr. Agarwal, learned counsel has submitted that this principle squarely applies in the present case in as much as the conducting Magistrate was not adduced as the witness in the trial and moreover, the entire proceeding of T.I.P was introduced by the investigating officer who is not supposed to be present during the T.I.P. As such, the investigation through T.I.P has been vitiated and it cannot be relied by the prosecution but that has been relied exceedingly by the Trial judge.

17. Finally, Mr. Agarwal, learned counsel has argued that true it is that as per the settled position of law, an FIR cannot be encyclopedia, however, at the same time when no TIP was conducted, what the first version of the complainant as reflected therein, would play an important role. It is to be considered whether the eye witness in his first version either has disclosed the identifying features or the description of the accused based which he can recollect at the time of deposition and identify the accused for the first time in

the Court room. It is apparent as pointed out by Mr. Agarwal, learned counsel appearing for the appellant that no such identification features have been described in the FIR. In this regard, Mr. Agarwal, has referred a recent decision of the Apex Court in **Amrik Singh Vs. State of Punjab (Judgment dated 11.07.2020)** delivered in **Crl. Appeal No.993 of 2012.** It has been clearly held that if the identification features are not disclosed in the first version or in the FIR, the identification remains within penumbra. On the basis of such as identification, it is not safe to convict the accused only on such identification made for the first time in the Court.

18. Ms. S. Patnaik, learned Addl. Government Advocate appearing for the State has in order to repel the contentions of Mr. Agarwal, learned counsel appearing for the appellant has submitted that there is no reason to disbelieve the testimony of P.W.10. The Trial Judge has correctly opined that even though P.W.8 in his complaint did not describe the physical characters of the assailant but he had mentioned in the complaint (the FIR) that he would be able to identify the person whom had he seen firing at the deceased. Therefore, P.W.8 had a clear vision of the assailant. P.W.8 has categorically stated that at the relevant point of time he was counting the collected cash. At that time, 3 persons entered in the premises of the liquor shop. They came near the main gate and knocked. On being asked by the deceased, they said that they had come to purchase liquor, for Rs.100, 12 pouches of liquor were delivered through the counter, suddenly, *one of them* fired from his pistol at him. In order to identify the very person who opened to fire, P.W.8 has identified the appellant in the trial as the person who fired the bullet from the pistol. Ms. S. Patnaik, learned Addl. Govt. Advocate has admitted that P.Ws. 3,4,5 and 9 have not supported the case of the prosecution and hence, P.W.8 remained as the sole ocular witness to the occurrence, but she could not explain why the other two witnesses who attended even the test identification parade were not cited as the witness by the prosecution. According to Ms. S. Patnaik, learned Addl. Government Advocate, there is no infirmity in conducting the T.I. parade in as much as all the procedural safeguards were maintained and there had no challenge from the appellant at the time of the said T.I. parade. In the alternative, Ms. Patnaik, learned Addl. Government Advocate has stated that holding of T.I. parade is not the rule of law but the rule of prudence, so that the subsequent identification during the trial could safely be relied upon. However, in absence of such test identification parade (T.I.P), the identification in the Court can, in the given circumstances, be relied upon if the witnesses are otherwise trustworthy and reliable. No

clarification has come from Ms. S. Patnaik, learned Addl. Government Advocate in respect of admission of P.W.10 that he had not stated to the investigating officer that the person who had fired from the pistol was the appellant (unidentified).

19. Admittedly, P.W.8 did not state before the conducting Magistrate during the T.I.P that the appellant had fired the bullet at the deceased from his pistol. He (P.W.8) has not described to the investigating officer during his examination under Section 161 of the Cr.P.C, the identifiable feature of the assailant. Ms. Pattnaik, learned Addl. Government Advocate has also admitted that no motive could be established by the prosecution for the said culpable act of murder.

20. To establish motive for doing a criminal act is generally considered a difficult area of prosecution. One cannot normally seen into the mind of the offender to locate the motive. Motive is a complex from of emotion which impels a man to do a particular act. Such impelling causes need not proportionately grave. Many a times murders have been committed without prominent cause. It is quite possible that the factors which impelled would remain undiscoverable. Ms. Pattanaik, learned Addl. Govt. Advocate has supported the finding that the testimony of P.W.8 is clear, cogent, unambiguous, trustworthy and free from embellishment and P.W.8 had seen the deceased being killed by the appellant before his bare eyes thus, his evidence is reliable and sterling.

21. When this Court queried Ms. S. Patnaik, learned Addl. Government Advocate appearing for the State that on the basis of what material, the appellant was arrested from Goa and who disclosed that material to the police. She did express her inability as there is no materials in the evidence. Only evidence that is available in the records is that the appellant was arrested from Panaji at Goa and he was brought to Sundargarh police station. Ms. Patnaik, learned Addl. Government Advocate has, in the last part of her submission stated that the plea of *alibi* as resorted by the appellant has fallen flat as he could not establish the day and time when he left Odisha for the State of Goa. The burden on the prosecution is will delineated, it is to be proved that the accused was present at the scene and had participated in execution of the crime. The burden would not be lessened by the mere fact that the accused had adopted the defence of *alibi*. The plea of the accused in such cases need be considered only after the burden of proof has been

discharged by the prosecution. Therefore, this contention of Ms. Patnaik, learned Addl. Government Advocate is *ex-facie* acceptable. Even there is no statement, there is no challenge from the appellant in respect of the homicidal death of the deceased namely, Anuj Gupta and death from bullet injury has also been quite succinctly proved by Dr. Bira Kishore Patel (P.W.1) who carried out the autopsy and found 4 lacerated wounds over right intra-axillary area 3'' below the right axilla, irregular in margin and inverted and is in close proximately with the 3rd wound. Lacerated wound (hole) over posterior aspect of right arm of size ¾" diameter, inverted, irregular margin in line with the 2nd wound. Lacerated wound (hole) of 1'' diameter over lateral aspect of right arm, posteriorly located in the mid arm and inverted margin. He has stated during the cross examination very clearly as follows:

> *"On dissection-A track of lacerated wound found from wound No.1 to 2, injurying left chest wall, left lung, both ventricle of the heart, right lung and right chest wall with bilateral haemothorax. The size varies from 1" x ¾". There are also track of lacerated wound over the posterior aspect of the right arm in the mid arm region lacerating posterior muscle groove of right arm, roughly a soft stick can be passed from wound No.1 to wound No.4 via wound Nos.2 and 3."*

P.W.1 has clearly stated that the nature of death is homicidal and out of those injuries. In the further cross-examination which had taken place on 03.04.2014, he had stated that the injury No.1 as cited in the deposition was entry point of bullet and injury No.4 is the exit wound through which the bullet had exited. But those were not mentioned by him in his post-mortem examination report. He has admitted that no pistol or bullet was produced before him for examination or opinion.

22. P.W.2, Keura Kiro, is the witness to the seizure of wearing apparels, after the post mortem examination was over, by means of the seizure list (Ext.2).

23. P.W.3, Santosh Ghana stated that he was not examined by the police and he has stated nothing more in the trial. P.W.4, Sumanta Pradhan did not support the prosecution case, even though he had admitted that he was examined by the police, and hence he was declared hostile under Section 154 of the Indian Evidence Act. In the cross- examination by the prosecution, he had stated that he did not state anything to the police in respect of involvement of the appellant or to have seen any part of the transaction. P.W.5, Md. Gaffar has also been declared hostile but he did not accede to the

suggestion made in the cross examination by the prosecution. P.W.6, Nandan Singh, even though has admitted that he did know Binod Prasad Gupta (P.W.8) and the deceased Aunj Gupta but he does not know anything about the appellant's involvement in the matter. Further, he had admitted that he found a dead body lying near the liquor shop as referred. He was not declared hostile and the defence did not cross-examine him as from him nothing material is elicited. P.W.7, Jeetendra Kumar Sahu is the investigating officer and he has stated that P.W.8 lodged the first report of the occurrence and since a cognizable offence was disclosed a specific case was registered and taken up for investigation. At the relevant point of time, he was the IIC of Talsara police station. He has testified that P.W.8 reported that unknown persons opened fire causing death of the deceased. P.W.7 has identified the complaint and accused that he had endorsed the case for prosecution. He has briefly narrated how he had carried out the inquest and sent the dead body of the deceased for post-mortem examination report. Most relevant part of his testimony is that P.W.7 arrested the appellant (Sambhu Beck) from Panaji being aided by the Goa police. P.W.7 along with one A.S.I., namely, Santosh Kumar Dehury proceeded to Goa for bringing Sambhu Beck on remand in this case. Evidently, P.W.7 did not disclose what was the material or the input based on which they proceeded to Goa to bring Sambhu Beck, as till then none had identified the assailant, nor even on the gathered description, any portrait was drawn by the police. This is a big gap which has been left unfilled by the prosecution. P.W.7 has stated that thereafter, he had produced the appellant in the Court of the Judicial Magistrate First Class(C) Mafusa, Goa, with prayer for remand in connection with Talsara P.S. Case No.11 of 2010, on admiration of which, this appeal arises. The Talsara police was permitted to bring the appellant to Sundargarh and accordingly, they produced him before the Court of the Sub Divisional Judicial Magistrate, Sundargarh in connection with the said case being Talsara PS Case No.11 of 2010. There was a prayer for remand of the appellant to the police custody and that was allowed. On that very day the I.O., P.W.7 made a prayer for T.I. parade of the appellant. In the T.I. parade two witnesses, according to P.W.7, were brought for purpose of identification. They were P.W.8 and one Bhola Gupta. Again, he prayed for the T.I. parade of the appellant by another witness Manoj Yadav and his application was allowed. He had also taken the sanction from the Dist. Magistrate, Sundargarh for lodging the prosecution report against the appellant under the provisions of Arms Act and Explosive Substance Act. Further, he has stated that he seized the wearing apparels and those materials sent to the State Forensic Science Laboratory, Bhubaneswar.

But the report (Ext.9) was not of any help for the prosecution. As already stated that the prosecution has failed to prove the charges as framed under Section 3 of the Explosives Substance Act and under Sections 25/27 of the Arms Act. In the cross-examination, P.W.7 had stated that he came to know about the involvement of the accused Sambhu Beck from the examination of the witnesses namely, Sumanta Pradhan (P.W.4) and Gaffar Khan (P.W.5). He has stated further that after knowing the involvement of the accused Sambhu Beck in this case, he had proceeded to Goa and arrested the appellant. He has admitted that his prayer for interrogation of the appellant was not allowed by the S.D.J.M. Sundargarh. P.W.8 (Binod Gupta) claimed to have witnessed the occurrence. He had stated that 3 unknown persons entered in the premises of their liquor shop. At that time one of the salesmen namely, Anuj Gupta asked them for which purpose they were knocking at the door, they replied that they had come to purchase liquor and according to him those persons purchased 12 pouches of liquor but as stated by P.W.8, 'suddenly, one amongst the culprits opened fire with a pistol at Anuj Gupta through the grill of the sales counter. The fired bullet pierced the chest of Anuj Gupta and came out through the other side of the chest. After receiving the said shot from pistol, Anuj Gupta fell down on the cushion (sitting place) with injury on his chest. At the time of firing, they were at a distance of 10ft. away from Anuj Gupta. Immediately thereafter, culprits hurled bomb on the pillar of the said sales counter. The culprits fled away after throwing another bomb which bursted on the outer wall of the sales counter. P.W.8 has further stated the electric light was burning near the sales counter. From that visibility, he saw the culprits. He finally identified the appellant in the dock by stating that he was the person who fired from the pistol to Anuj Gupta. He had stated that having information that a untoward occurrence had taken place, he had rushed to the premises of the liquor shop and received a complaint from P.W.8, P.W.8 had identified the appellant in the parade. Even he had identified the appellant in the trial. In the cross-examination, he had stated that he even disclosed to the police that he could be able to identify the accused, if they shown to him.

24. P.W.8 has admitted in the cross-examination that during the time of incident, all the staffs were sitting near the sales counter, inside the grill. They were sitting at a distance of 8 to 10 ft. away from the place of delivery of liquor. At the sales counter, there is an iron grill leaving space for transaction purpose. But he failed to say that on which direction of the sales counter, the main road runs. He has testified that he did not see the appellant

after the occurrence and before the T.I. parade. He denied the suggestion made by the defence, contrary to his statements made in the examination in chief. He has admitted that he had not stated in the FIR that the person who had fired the pistol was Sambhu Beck. He has given a short description about the T.I. parade and according to him, all the participants (U.T.Ps) were of similar dresses and heights at the time of T.I. parade. The following statement is of relevance for the present purpose:

> *"I have stated before him that this accused, standing in the dock, is one of the participants in the incident. But I had not stated before the Magistrate specifically that, this accused had fired the pistol."*

He denied the suggestion that appellant was not involved in the crime nor did he fired any bullet from the pistol.

25. P.W.9 Santosh Kumar Naik, as stated earlier, turned hostile and did not state anything of material importance. As we have noted at the outset that the appellant examined himself as D.W.1 after observing the requirement of Section 315 of the Cr.P.C. The purpose of his testimony was to show at the relevant point of time that he was in Goa and not in Odisha, but he failed to answer when he left Odisha. Thus, his testimony loses it importance.

26. One of the major lapses in the prosecution case is that they did not seize the electric light by which P.W.8 has claimed to have been identified the appellant.

27. The principle that unless any lamp which is the source of light for purpose of identification is seized by the police, it becomes doubtful about the identification. It is now well-acknowledged. In this regard, we would like to accept the contention of Mr. Agarwal, learned counsel that P.W. 8 saw the assailants and accomplices for a fleeting moment as he was away 10 fts. and there was a grill from the outside.That apart he did not provide any identifiable feature of the person who fired the shot in his first information report. Not on the basis of any information provided by P.W.8, the appellant was arrested from Panaji, Goa. But on the basis of the information that was provided by P.Ws.4 and 5, the police followed the trail and arrested the appellant but P.Ws.4 and 5 clearly denied that he had stated to P.W.8 that the appellant had shot at the salesman by gun. Similarly P.W.5 denied to have stated to the police that appellant had called him over telephone and stated that he had committed murder at Balishankara liquor shop. Thus, the primary

identification could not at all be proved by the prosecution. Thus, identification for purpose of arrest becomes unbelievable. As the conducting magistrate of the T.I.parade was not examined, his report cannot be accepted by the court nor can it be considered as a valid piece of evidence. As P.W 7 has introduced the T.I. parade report, the said documentary had been accepted in the evidence illegally. Therefore, the TI Parade report cannot be treated as legal evidence. It has been held in *Bhutsen* (supra) that in T.I. parade, witness must state what role the person had played in the commission of offence. P.W.8 had squarely stated that he did not state to the Magistrate that the appellant fired the shot from a pistol. To an extent, absence of details of the characteristic features of the suspect in the F.I.R makes the subsequent identification either in T.I. parade or in the trial unreliable. True it is that in the trial P.W 8 has clearly stated that appellant had fired the shot. As already noted that the other witnesses who took part in the T.I. parade were not adduced for examination in the trial. For such withholding adverse inference against the prosecution has to be drawn. When some witnesses were allowed to participate in the T.I. parade, the court rightfully presumes that they had seen the accused during the transaction of the crime. Holding back such witnesses from the trial, may persuade the court to take such adverse inference that if they were adduced, they would not have supported the prosecution case. The trial Judge has observed that the T.I parade report (Ext.11) reveals that the accused during the said proceeding had not raised any objection but on perusal of the said report we have come across the objection raised by the appellant that he was photographed by the police before he was put up for the test identification parade. This shows that there was no proper appreciation to the T.I.P report by the trial Judge. True it is that Anuj Gupta (the deceased) died out of the bullet injury. The question that falls before us for a serious consideration is whether by the identification of P.W.8 the conviction can be sustained. In this regard, we agree with Mr. Agarwal, learned counsel appearing for the appellant that no credence can be given to the identification made in the T.I parade, for the reason of non-adduction of the conducting magistrate to depose in the trial and introduce the report which according to the Apex Court decision has essentially to be done. Moreover, the question as formulated by the conducting magistrate and in the manner the answer has been recorded in the report are seriously prejudicial. According to us, the entry whether the witness had correctly identified the accused person, the answer as recorded by the conducting magistrate is-yes the format in this regard is contrary to the fair trial principles. Therefore, in absence of any statement by P.W.8 that whether the

person he had identified, had shot the deceased from his pistol or not, the purported identification has become fragile and cannot be accepted for any purpose. On the contrary, such identification turns prejudicial for the accused as the person would have tendency to identify him in the trial. P.W.8 had identified the appellant in the trial. Thus, in absence of the seizure of the electric bulb and failure of P.W.8 to lay the relevant feature of the person who fired the shot in the first report, grinds severe doubts in the mind of the court. In order to convict the appellant, reliance on the identification made by P.W. 8 in the trial, will not be safe. As such, we hold that the benefit of doubt be extended to the appellant. Having observed thus, the Judgment and order of conviction and sentence dated 14.07.2015 are set aside. As consequence, the appellant is entitled to be released and set at liberty forthwith, if not warranted in any other case(s). It is ordered accordingly.

28. In the result, the appeal stands allowed.

29. Send down LCRs forthwith.

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2022 (III) ILR - CUT- 67

Dr. B. R. SARANGI, J.

W.P.(C) NO. 1018 & 8554 OF 2014
AND
W.P.(C) NO.18578 OF 2015

RABINARAYAN DAS & ORS. ……..Petitioners
.V.
STATE OF ODISHA & ANR. ……..Opp. Parties

W.P.(C) NO. 8554 OF 2014
ODISHA MINING WORKERS' FEDERATION ……..Petitioners
.V.
STATE OF ODISHA & ORS. ……..Opp. Parties

W.P.(C) NO. 18578 OF 2015
DURGA CHARAN DAS & ORS. ……Petitioners
.V.
STATE OF ODISHA & ORS. ……Opp. Parties

CONSTITUTION OF INDIA, 1950 – Article 14 – Doctrine of equality before the law – In the writ petitions, prayer has been made to issue direction to the opposite parties to extend the pension scheme to the employees of Orissa Mining Corporation Limited at par with the employees of similarly situated Public Sector Undertakings – The Government by order dated 28.04.2014 refused the proposal of the OMC and denied the pensionary benefit to its employees – Effect of – Held, cannot sustain in the eye of law – Accordingly the same is liable to be quashed and is hereby quashed. (Para- 45)

Case Law Relied on and Referred to :-

1. AIR 1974 SC 2048 : Smt. Asha Devi Vs. Dukhi Sao
2. (1996) 3 SCC 52 : Baddula Lakshmaiah Vs. Shri Anjaneya Swami Temple.
3. (2006) 13 SCC 449: B. Venkatamuni Vs. C.J. Ayodhya Ram Singh.
4. (2005) 6 SCC 243 : Umabai Vs. Nilkanth Dhondiba Chavan.
5. (2016) 9 SCC 538 : Commissioner of Income Tax Vs. Karnataka Planters Coffee Curing Work Private Limited.
6. AIR 1963 SC 1558 : Hari Narain Vs. Badri Das.
7. (1983) 4 SCC 575 : Welcome Hotel Vs. State of A.P.
8. (1991) 3 SCC 261 : G. Narayanaswamy Reddy Vs. Govt. of Karnataka.
9. (1994) 1 SCC 1 : S.P. Chegalvaraya Naidu Vs. Jagannath.
10. (2007) 4 SCC 221 : A.V. Papayya Sastry Vs. Govt. of A.P.
11. (2007) 8 SCC 449 : Prestige Lights Ltd Vs. SBI.
12. (2008) 2 SCC 326 : Sunil Poddar Vs. Union Bank of India.
13. (2008) 12 SCC 481 : K.D. Sharma Vs. SAIL.
14. G. (2009) 3 SCC 141 : Jayashree Vs. Bhagwandas S. Patel.
15. (2010) 2 SCC 114 : Dalip Singh Vs. State of U.P.
16. (2000) 8 SCC 633 : AIR 2001 SC 152 : Praveen Singh Vs. State of Punjab.
17. (2001) 2 SCC 386 : AIR 2000 SC 3689 : Om Kumar Vs. Union of India.
18. (2001) 8 SCC 491 : AIR 2001 SC 3887 : Union of India Vs. Dinesh Engineering Corporation.
19. (2006) 8 SCC 212 : AIR 2007 SC 71 : M.Nagaraj Vs. Union of India.
20. (2002) 4 SCC 34 : AIR 2002 SC 1533 : Ashutosh Gupta Vs. State of Rajasthan.
21. (1992) Supp.3 SCC 217 : AIR 1993 SC 477 : Indra Sawhney Vs. Union of India.

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W.P.(C) NO. 8554 OF 2014

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W.P.(C) NO. 18578 OF 2015

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JUDGMENT Date of Hearing: 08.12.2021: Date of Judgment: 23.12.2021

Dr. B.R. SARANGI, J.

1. In all these three writ petitions, prayer has been made to issue direction to the opposite parties to extend the pension scheme to the employees of Orissa Mining Corporation Limited at par with the employees of similarly situated Public Sector Undertakings. Therefore, these writ petitions have been heard analogously and are disposed of by this common judgment.

2. For just and proper adjudication of these cases, the facts of W.P.(C) No.1018 of 2014 have been referred to.

2.1 The Orissa Mining Corporation Limited (for short "OMC Ltd") is a Public Sector Undertaking (PSU) being controlled, managed and financed by the State Government. The petitioners, who were appointed to different posts of the OMC Ltd, have retired from services, after rendering continuous and uninterrupted services, on attaining the age of superannuation. While they were in service, the Board of Directors of OMC Ltd in its 268th meeting dated 25.03.1989 decided in principle on the proposal for introduction of pension scheme for the employees of the Corporation at par with the benefit extended to the State Government employees with effect from 01.04.1989. A committee was accordingly constituted comprising of Chairman, Managing Director; Joint Secretary, Finance, Govt. of Orissa; and Secretary & Financial Advisor, OMC Ltd to examine and submit a report in the matter of introduction of pension scheme for the employees of the OMC Ltd so as to take a decision by the OMC Ltd. A report was accordingly prepared and placed before the Board of Directors in its 282nd meeting dated 25.06.1991, who, on consideration of the same, unanimously resolved to approve the introduction of pension scheme for the employees of the OMC Ltd. Consequentially, a memorandum was prepared to obtain approval of the State Government and the Central Provident Fund Commissioner before implementation of such scheme. The said decision of the Board of Directors, on being forwarded, was approved by the State Government,

after due consideration. Accordingly, on 05.10.1991, Under Secretary to the Government in the Department of Steel and Mines addressed a letter to the Chairman-cum-Managing Director,OMC Ltd indicating therein that the proposal for introduction of pension scheme for the employees of the OMC Ltd was approved by the Government with due concurrence of the Finance Department, w.e.f. 01.04.1989 subject to modification to the effect that the age of superannuation of the employees of the Corporation shall be 58 years except in case of Class-IV employees where it is 60 years.

2.2 So far as grant of exemption of Section 17 (1)(a) of Employees Provident Fund and Miscellaneous Provisions Act, 1952 (for short "EPF & MP Act, 1952") is concerned, the Regional Provident Fund Commissioner communicated a letter to the State Government indicating that the State Government is the appropriate authority to grant exemption and to issue necessary notification in exercise of power conferred on it by Clause-(a) of Sub-Section (1) of Section 17 of the Act. Consequentially, the State Government in Labour and Employment Department granted exemption in exercise of power conferred on it. All the conditions enumerated by the State Government, while granting exemption in the notification dated 01.06.1985, were complied with by the OMC Ltd.

2.3 Despite approval of the State Government with due concurrence of the Finance Department, the decision taken by the Board of Directors for introduction of pension scheme for the employees of OMC Ltd, was not implemented from 1991 to 2000. When several demands were raised by the employees of the Corporation, the Board of Directors, on 30.03.2000, again issued a memorandum for introduction of pension scheme for the employees of the OMC Ltd wherein it was stated that it would be given effect to after receiving approval from the competent authority, which was not necessary at the relevant point of time, as the same was duly approved and concurred by the competent authority.

2.4 In the categorization of State Public Sector Enterprises, the OMC Ltd has been placed under 'Gold Category', as per the decision taken by the Government of Orissa in Public Enterprises Department in Annexure-6 dated 20.12.2011, along with other Public Sector Undertakings, i.e., Orissa Power Generation Corporation (OPGC), Orissa Hydro Power Corporation (OHPC) and Industrial Development Corporation Limited (IDCO). In case of OHPC Ltd, which is also coming under the 'Gold Category', the pensionary benefit was extended to its employees, way back on 11.07.2012. But for some plea or other the said benefit has not been extended to the employees of the OMC Ltd. Therefore, some of the ex-employees of the OMC Ltd, namely, Durga Charan Das and others filed

W.P.(C) No.19405 of 2009 seeking direction to the State Government and OMC Ltd to implement the pension scheme for the employees of OMC Ltd at par with the provision of pension followed by the State Government for their employees. This Court, vide order dated 08.10.2012, directed to the State Government to take a decision on the matter within a period of four months. Consequentially, the OMC Ltd, on 09.04.2013, submitted a proposal on the basis of resolution passed by the Board of Directors seeking direction of the Government. But the Government, vide order dated 28.04.2014 in Annexure-9, refused the proposal of the OMC Ltd. submitted on 09.04.2013, meaning thereby denied the pensionary benefit to its employees, hence these writ petitions.

3. On the basis of the pleadings available on record, these writ petitions were heard together and disposed of vide common judgment dated 29.01.2019. But the State-opposite parties preferred writ appeals, bearing W.A. Nos.445, 612 and 613 of 2019, which were heard together and disposed of by a common order dated 22.06.2021, whereby the Division Bench set aside the judgment dated 29.01.2019 and restored these writ petitions to the file of the learned Single Judge by passing the following orders:-

> *"22. It has been clarified in the memorandum of the present appeal that OPGC employees were provided only a one time lump sum payment towards pension as per the PE Department circular dated 23rd March, 2017 along with CPF. Consequently no comparison could be drawn between the employees of OMC and those of OPGC.*
>
> *23. At this juncture, this Court notes that the letter dated 29th March, 2017 of the PE Department, Government of Odisha states that in PSUs under the gold category, six months' salary "as onetime payment towards pension at the time of retirement of the concerned employees", may be made.*
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> *24. As far as employees of OHPC are concerned, it is explained by the Appellants that they were the erstwhile employees of the Government of Odisha itself or the Odisha State Electricity Board (OSEB) who came to OHPC on redeployment or transfer or deputation from various other hydro projects in the State. They were absorbed in OHPC as of the date of its formation i.e. 1st April, 1996. It was decided to continue the benefits available to such employees at the time of such absorption. The OHPC therefore decided to extend a scheme of uniform pensionary benefits to its non-pensionary regular employees by a notification dated 6th September, 2012 which was subsequently amended on 21st November, 2015. The said uniform pensionary scheme was applicable only to those employees who were prepared to return the employer's share of the PF with interest to OHPC on the date of their retirement and that payment of Temporary Increase (TI) as sanctioned by the Government from time to time was subject to certain stipulations. It is pointed out that therefore no comparison can be drawn between the retired employees of OHPC with that of OMC since all OMC employees were appointed directly by it and were entitled to CPF only.*
>
> *25. Sri Das, learned Senior counsel appearing for the contesting Respondents, on the other hand sought to support the judgment of the learned Single judge and submitted that the pension scheme for the employees of OMC was approved way back on 5th October, 1991 by*

the S&M Department and also confirmed by the Finance Department. Therefore, this could not be resiled from subsequently. He sought to contend that the decision taken on the file by the Government of Odisha in 1991 had to be implemented and there was no occasion to reconsider that decision at a subsequent point in time. He pointed out that the actuarial studies showed that there would be no additional financial burden on the State Government as a result of the introduction of a pension scheme in terms of the decisions dated 5th October 1991 and that the burden if at all was on OMC which has not challenged the judgment of the learned Single Judge.

26. Mr. S. Mohanty, learned Senior counsel appearing on behalf of OMC, submitted that the impact of the judgment of the learned Single Judge would be felt not only by OMC but importantly by the State Government since OMC was 100% owned by the State Government. He further submitted that although the OMC may not have itself filed an appeal, it was supporting the stand of the State Government in the present appeals.

27. The above submissions have been considered. Indeed the ratio of the judgment of the learned Single Judge turns on a single ground viz., violation of Article 14 of the Constitution. This is premised on employees of OMC being treated on par with those of two other PSUs i.e. OHPC and OPGC, in the matter of pensionary benefits. The learned Single Judge did not examine any other ground as has been urged by the contesting Respondents. In other words, the intrinsic merit of the proposals of the management of OMC made way back in 1991 for introduction of a pension scheme was not examined by the learned Single Judge while issuing a mandamus to the Appellant to reconsider the introduction of a pension scheme for the retired employees of OMC.

28. The Court finds that OPGC employees in fact have no pensionary scheme governing them. The clarification issued by the Department of PE, Government of Odisha makes it clear that they were entitled only to a lump sum payment equivalent to six months' salary at the time of retirement. This crucial information was not considered by the learned Single Judge possibly because it was not placed before him.

29. As far as the OHPC is concerned, the history of its incorporation and the circumstances under which erstwhile employees the Government of Odisha or the OSEB were either redeployed to it or deputed or transferred to it, makes OHPC very different from OMC. This was the reason behind OHPC extending pensionary benefits to all its employees subject to certain stipulations. This was in the nature of continuation of the benefits they would have otherwise enjoyed had they continued as employees of Government of Odisha or the OSEB. The circumstances attending the employment of the contesting Respondents in OMC are quite different. They were directly employed by the OMC itself. Absent a pension scheme at the time of their employment, they cannot claim any vested right to such pension on the basis that they were on par with employees of OHPC or OPGC.

30. Therefore, the Court is not satisfied that the contesting Respondents have made out a case for the applicability of Article 14 of the Constitution vis-à-vis the pensionary benefits enjoyed by the employees of OHPC. Consequently, the Court is unable to agree with the conclusion of the learned Single Judge in the impugned order that the decision dated 28th April, 2014 of the Appellant rejecting the proposal for introduction of a pension scheme in OMC was violative of Article 14 of the Constitution and therefore required to be set aside on that ground.

31. However, this Court finds that there are other grounds urged by the contesting Respondents on the intrinsic merit of the pension scheme which had earlier been approved by

the Government of Odisha and for the implementation of which a mandamus was sought. There was no occasion for the learned Single Judge to examine these other grounds in support of the prayers in the writ petition of the contesting Respondents herein.

32. Consequently, while setting aside the impugned judgment of the learned Single Judge dated 29th January, 2019 for the aforementioned reasons, this Court restores the writ petitions to the file of the learned Single Judge for a fresh consideration on grounds other than the ground already examined by the learned Single Judge. It is clarified that this Court has expressed no opinion on the merits of the other grounds urged in the writ petitions and leaves the contentions of the contesting Respondents herein (i.e. the writ petitioners) as well as the contentions of the present Appellant in opposition thereto open to be urged before the learned Single Judge in accordance with law.

33. The writ petitions shall now be listed before the learned Single Judge on 1st August, 2021 for directions. The Appellant shall file not later than two weeks prior to that date, affidavits and the documents which according to it are relevant for the issues arising for consideration in the said writ petitions with advance copies to the counsel for the writ petitioners who shall file their response thereto by that date, i.e., 1st August, 2021. It is made clear that the learned Single Judge will not grant any adjournment to any of the parties for that purpose.

34. Learned Single Judge is requested to proceed with the hearing of the writ petitions on merits on the points other than the one on which decided in the impugned order dated 29th January, 2019 and to pass a fresh order, after hearing the parties, not later than 1st November, 2021. The parties will cooperate with the learned Single Judge to ensure that the above time schedules are adhered to.

35. The writ appeals are disposed of in the above terms."

This is how these writ petitions have been placed before this Court for re-consideration in the light of the observations made by the Division Bench in its order dated 22.06.2021.

4. It is of relevance to mention here that the Division Bench at the outset even though has taken note of, that the learned Single Judge had issued mandamus to the opposite parties only to re-consider the matter with regard to extending pensionary benefits to the petitioners, as per the pension scheme approved by the Government of Odisha and concurred with by the Finance Department in its letter dated 05.10.1991, still then entertained the writ appeals, even though admittedly W.A. No. 445 of 2019 had been filed with a delay of 162 days, W.A. No. 612 of 2019 had been filed with a delay of 273 days and W.A. No. 613 of 2019 had been filed with a delay of 293 days. At the time of hearing of the writ appeals, though it was specifically submitted on behalf of the petitioners, as respondents therein, that no proper explanation had been given for the inordinate delay in filing the writ appeals, for which the delay ought not to be condoned, and in support of such submission reliance had also been placed on the judgment of the Supreme Court in ***Office of the Chief Post Master General and others*** *v.* ***Living Media India Ltd.*** (2012) 3 SCC 563 and a series of orders

recently passed by the Supreme Court refusing to condone the delay in filing appeals and petitions by the State or State agencies merely on administrative grounds, and though the Division Bench in paragraph-9 of the order has taken note of the fact that the delay was caused at different stages of the administrative movement of the file, which is not at all a valid ground for condoning the delay in all cases, but taking into account the submission made by Mr. M.S. Sahoo, the then learned Addl. Government Advocate, that there are arguable grounds on merit in the appeals, the delay had been condoned subject to payment of cost of Rs.25,000/- (Rupees twenty five thousand) in each appeal within a period of four weeks.

5. Furthermore, the Division Bench summarized the reasons, which weighed with the learned Single Judge in issuing the above directions, in paragraph-20 of the order to the following effect:

> *"(i) OMC is a stable 'PSU' in the State and has been making profits continuously since 1976. The Board of Directors of OMC had already recommended the introduction of a pension scheme. The S&M Department, Government of Odisha had approved the scheme and the Finance Department had also conveyed its concurrence. However, for reasons best known to the authorities, the said decision was not implemented.*
>
> *(ii) After the pay scale revision in 1989, a resolution was passed by the Public Enterprises (PE) Department on 16th August, 1995 reiterating the recommendation that such PSUs should formulate suitable pension schemes but it was stated that existing employees "may be asked to exercise their option either for continuance under the existing CPF scheme or come over to the pension scheme to be devised by the management". Since this recommendation was general in nature, and not specific to OMC, it would have no effect on the earlier decision dated 5th October, 1991 of the S&M Department approving the OMC's proposal for introduction of a pension scheme.*
>
> *(iii) Since OPGC and OHPC have also been categorized as 'gold category' PSUs and have introduced a pension scheme for their employees, the denial of a similar pension scheme to the OMC employees was discriminatory. The impugned order dated 28th April, 2014 declining to extend the pension benefits to the employees of OMC was arbitrary and violative of Article 14 of the Constitution. Accordingly, the impugned order dated 28th April, 2014 was quashed and a direction was issued to the present Appellant to reconsider the extension of pensionary benefits as per the earlier approval dated 5th October, 1991 'as expeditiously as possible'.*

The Division Bench, while passing the order of remand, took note of the submissions of the learned State counsel in paragraph-21 as follows:-

> *"Mr. M.S. Sahoo, learned AGA points out that there is a factual error in the impugned judgment of the learned Single Judge. In particular he points out that a query was addressed by the Appellants to OPGC whether in fact, any pension scheme governed its employees. By a letter dated 19th August 2019, OPGC confirmed to the Appellant that OPGC has not implemented any pension scheme for its employees at any point of time".*

From the above, it would be evident that the Division Bench has not taken into consideration the fact that the learned counsel who was appearing for the Government in the writ appeals was not the counsel appearing before the learned Single Judge and, more so, the letter dated 19.08.2019, on which reliance had been placed by the learned State Counsel, was a subsequent document, because the judgment was passed by the learned Single Judge on 29.01.2019. Thereby, a new document had been introduced at the stage of the appeal by the learned counsel, who had not addressed before the learned Single Judge, and on the basis of the materials available on the record itself if the learned Single Judge had passed the judgment, the same should have been looked into in its proper perspective, instead of looking into the new documents introduced at the stage of the appeal, which is not permissible.

6. The argument, as recorded in paragraph-22 of order dated 22.06.2021 of the Division Bench, was not advanced either by the learned counsel appearing for the State or by the learned counsel appearing for OMC before the learned Single Judge, so as to give reply to the same. In any case, in appellate stage by introducing new documents, the State had tried to make out a new case, which is not permissible at all in the eye of law.

7. Surprisingly, in paragraph-26 of the order dated 22.06.2021 of the Division Bench, it is recorded that the OMC has supported the stand taken by the State, but the OMC had not filed any appeal against the judgment passed by the learned Single Judge, which has been candidly admitted before this Court by the learned Senior Advocate appearing on behalf of the OMC. This apart, the Senior Advocate, who argued the matter before the Division Bench, was not the counsel appearing for the OMC before learned Single Judge. On the basis of pleadings available on record, when the OMC, in one hand supported the stand of the petitioners before the learned Single Judge, it cannot turn around and take different stands at different places. This itself indicates that the statement made by the OMC before the learned Single Judge is not the same as before the Division Bench. With the change of the counsel, the stand has been changed. This question was confronted to the learned Senior Counsel appearing for the OMC and it has been candidly admitted that the counsel, who was appearing before the learned Single Judge, was not the counsel before the Division Bench. Thereby, on the basis of the document introduced before the Division Bench, which had not been placed before the learned Single Judge, a new case has been totally made out, which is contrary to the provisions of the law.

8. The Division Bench in paragraph-27 of the order observed as follows:-

> *"27. The above submissions have been considered. Indeed the ratio of the judgment of the learned Single Judge turns on a single ground viz., violation of Article 14 of the Constitution. This is premised on employees of OMC being treated on par with those of two other PSUs i.e. OHPC and OPGC, in the matter of pensionary benefits. The learned Single Judge did not examine any other ground as has been urged by the contesting Respondents. In other words, the intrinsic merit of the proposals of the management of OMC made way back in 1991 for introduction of a pension scheme was not examined by the learned Single Judge while issuing a mandamus to the Appellant to reconsider the introduction of a pension scheme for the retired employees of OMC."*

The Division Bench, while remanding the matter, has observed that the learned Single Judge has passed the judgment on the single ground, i.e. violation of Article 14 of the Constitution of India and the same is premised on employees of OMC being treated on par with those two other PSUs, i.e. OHPC and OPGC, in the matter of pensionary benefits, and has not examined any other grounds as had been urged by the contesting respondents, the petitioners herein, which cannot be a substantial ground for passing an order of remand. It has also been clarified by the Division Bench that the intrinsic merit of the proposals of the management of OMC made way back in 1991 for introduction of pension scheme was not examined by the learned Single Judge while issuing mandamus to the opposite parties to reconsider the introduction of a pension scheme for the retired employees of the OMC. Such an observation is also not legally tenable, when intrinsic value of such proposal was not disputed by the opposite parties before the learned Single Judge.

9. In paragraph-28 of the order dated 22.06.2021 of the Division Bench, it has been mentioned that the crucial information was not considered by the learned Single Judge. But the fact remains that the said information was obtained only on 19.08.2019, i.e. much after the judgment was passed and had never been placed before the learned Single Judge for consideration, which has also been noted in the order itself. So far as extension of the benefits as have been extended to the employees of OHPC and/or OPGC is concerned, learned Single Judge had not expressed the opinion that the benefits should be extended to the OMC, rather the matter was left to the opposite parties to reconsider the same, so far as grant of the pensionary benefits is concerned.

10. In paragraph-31 of the order of the Division Bench, the observation has been made that there were other grounds urged by the petitioners on the intrinsic merit of the pension scheme which had earlier been approved by the Government of Odisha and for the implementation of which a mandamus was sought and there was no occasion for the learned Single Judge to examine those other grounds in support of the prayers in the writ petition of the petitioners. However, the Division Bench has remanded the matter, without specifying which grounds

have not been considered, and thereby an open remand has been for re-hearing of the matter on the basis of an extraneous document placed before the Division Bench for consideration, which was not made available before the learned Single Judge at the time of passing of the judgment.

11. In the case of ***Smt. Asha Devi V. Dukhi Sao***, AIR 1974 SC 2048, the apex Court held that the power of a Division Bench hearing a Letters Patent appeal under Clause 10 from the judgment of a Single Judge in first appeal is not limited only to a question of law under section 100 of the Civil Procedure Code but it has the same power which the learned Single Judge has as a first appellate court. The limitations on the power of the court imposed by sections 100 and 101 of the Code of Civil Procedure cannot be made applicable to an appellate court hearing a Letters Patent Appeal for the simple reason that a Single Judge of the High Court is not a Court subordinate to the High Court.

12. In ***Baddula Lakshmaiah -Vrs.- Shri Anjaneya Swami Temple***, (1996) 3 SCC 52, the apex Court held that the writ appeal has been nomenclatured as an application under Article 4 of the Orissa High Court Order, 1948 read with Clause 10 of the Letters Patent Act, 1992. Letters Patent of the Patna High Court has been made applicable to this Court by virtue of Orissa High Court Order, 1948. Letters Patent Appeal is an intra-court appeal where under the Letters Patent Bench, sitting as a court of correction, corrects its own orders in exercise of the same jurisdiction as vested in the Single Bench. The Division Bench in Letters Patent Appeal should not disturb the finding of fact arrived at by the learned Single Judge of the Court unless it is shown to be based on no evidence, perverse, palpably unreasonable or inconsistent with any particular position in law. This scope of interference is within a narrow compass. Appellate jurisdiction under Letters Patent is really a corrective jurisdiction and it is used rarely only to correct errors, if any made.

13. In ***B. Venkatamuni -Vrs.- C.J. Ayodhya Ram Singh***, (2006) 13 SCC 449, the apex Court held that in an intra-court appeal, the Division Bench undoubtedly may be entitled to reappraise both questions of fact and law, but entertainment of a Letters Patent Appeal is discretionary and normally the Division Bench would not, unless there exist cogent reasons, differ from a finding of fact arrived at by the Single Judge. Even a court of first appeal which is the final court of appeal on fact may have to exercise some amount of restraint. Similar view was taken in ***Umabai -Vrs.- Nilkanth Dhondiba Chavan***, (2005) 6 SCC 243. In ***Commissioner of Income Tax*** *v.* ***Karnataka Planters Coffee Curing Work Private Limited***, (2016) 9 SCC 538, the apex Court held that the jurisdiction of the Division Bench in a writ appeal is primarily one of

adjudication of questions of law. Findings of fact recorded concurrently by the authorities under the Act and also in the first round of the writ proceedings by the learned Single Judge are not to be lightly disturbed.

14. In ***Roma Sonkar v. Madhya Pradesh State Public Service Commission****, 2018 (II) OLR (SC) 483,* the apex Court has categorically ruled that the Division Bench in appeal arising out of order passed under writ jurisdiction exercises same jurisdiction, primarily and mostly to consider the correctness or otherwise of the view taken by the learned Single Judge. Therefore, the learned Single Judge is not sub-ordinate to the Division Bench. In such circumstance, the Division Bench is to consider the writ appeal on merits instead of remitting the matter back to the learned Single Judge without specifying to examine what are the other grounds which has been raised and requires for adjudication on remand.

Fundamentally, "remand" means an order by an appellate court sending the proceeding back to the original court with a direction to dispose of the same in the manner indicated in the order. Thereby the order by which the matter remanded back does not specify to dispose of the said application in the manner to which it requires to be decided. More so, while the learned Single Judge has passed an order for re-consideration of the matter by the authority, the word "re-consider" if taken into ordinary meaning, which is to think and consider the matter over again for the purpose of passing upon the matter on such second consideration. In other words, it is taking up the renewed consideration that which has been passed or acted on previously. As such no direction has been given for implementation of the pensionary benefits in favour of the petitioners. The learned Single Judge has conscious enough to pass an order directing to re-consider the matter once again by the authority concerned on the basis of the pleadings advanced by the parties, which are on record.

When an order of the learned Single Judge goes on writ appeal to a Division Bench, in view of the law laid down by the apex Court in ***Shiv Shakti Coop. Housing Society v. Swaraj Developers***, (2003) 6 SCC 659: AIR 2003 SC 2434 that the appeal strictly so called is one in which the question is, whether the order of the Court from which the appeal is brought was right on the materials which that Court had before it. In ***Bolin Chetia v. Jagdish Bhuyan***, (2005) 6 SCC 81 : AIR 2005 SC 1872, it has been held that in its natural and ordinary meaning the word 'appeal' means a remedy by which a cause determined by an inferior forum is subjected before a superior forum for the purpose of testing the correctness of the decision given by the inferior forum on the basis of materials available at the relevant point of time. Essentially it is a judicial examination for

the decision by a higher forum of a decision of a inferior forum to rectify any possible error in the order under appeal.

15. In course of hearing Mr. B.P. Tripathy, learned Additional Government Advocate appearing for the State filed an affidavit on 02.07.2021 sworn to by opposite party no.1 introducing 16 documents. It has been mentioned in the heading of the affidavit that such documents have been filed pursuant to the order dated 22.06.2021 passed by the Division Bench in W.A. No.613 of 2019. But on perusal of the order passed by the Division Bench dated 22.06.2021, it is found that there is no such direction to introduce such new documents so as to be taken into consideration for adjudication by the learned Single Judge on remand. Therefore, vide order dated 08.12.2021, this Court rejected such affidavit filed by the State-opposite party and proceeded with the matter taking into consideration whatever materials were available at the time, when the matter was heard before this Court and judgment was delivered on 29.01.2019. The extraneous documents which were placed before the Division Bench and also before this Court by way of affidavit on 14.07.2021 were declined to be taken into consideration. Adhering to the judicial discipline, in compliance to the order dated 22.06.2021, this Court called upon the respective parties to address the Court afresh.

16. Mr. B. Routray, learned Senior Advocate appearing along with Mr. S.K. Samal, learned counsel for the petitioners in W.P.(C) No. 1018 of 2014 contended that the petitioners were appointed to different posts under the OMC and after rendering their continuous and uninterrupted service they retired on superannuation from their respective posts. The Board of Directors of Orissa Mining Corporation in its 268th meeting held on 25.03.1989 decided on principle on the proposal for introduction of pension scheme for the employees of the Corporation at par with the benefits extended in favour of State government employees with effect from 01.04.1989. Accordingly in the said meeting it was decided to constitute a committee consisting of Chairman, Managing Director; Joint Secretary, Finance, Government of Orissa; and Secretary and FA, OMC Ltd. to examine and submit a report in the matter of introduction of pension scheme for the employees of the Corporation so as to take a final decision by the Corporation. As per the aforesaid decision, the committee duly constituted examined the matter and submitted the report for introduction of the pension scheme for the employees of the OMC Ltd. The said report of the committee was placed before the Board of Director, in its meeting held on 25.06.1991 and the Board of Directors considering such report and unanimously resolved to approve the introduction of the pension scheme for the employees of the OMC. Accordingly a memorandum was prepared for obtaining approval from the state

government and Central Provident Fund Commissioner before implementation of the scheme. The State Government after due consideration of such decision of the Board of Directors also approved the decision of the Board of Directors and, subsequently, on 05.10.1991, the opposite party no.1 addressed a letter to the opposite party no.2 indicating that the proposal for introduction of Pension Scheme for the employees of the OMC has been approved by the Government with due concurrence of the Finance Department with effect from 01.04.1989 subject to modification to the effect that "the age of superannuation of the employees of the Corporation shall be 58 years except in case of Class-IV where it is 60 years".

16.1 It is further contended that so far as grant of exemption under Section 17(1)(A) of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 is concerned, the Regional Provident Fund Commissioner communicated letter to the opposite party no.1 indicating that the State Government is the appropriate authority to grant exemption and to issue necessary notification in exercise of the power conferred on it under clause-A of sub-section (1) of Section 17 of the Act. The State Government in the Labour and Employment Department had in fact granted exemption in exercise of the aforesaid power conferred on it. The exemption granted by the State Government in its notification dated 01.06.1985 has already been complied with by the Corporation.

16.2. Mr. Routray, learned Senior Advocate further contended that despite approval of the State Government with due concurrence of the Finance Department accepting the decision of the Board to extend pensionary benefits, the same had not been implemented from 1991 to 2000. Consequentially, several demands had been raised by the employees of the Corporation. On 30.03.2000, the Board of Directors again placed a memorandum for introduction of the pension scheme for the employees of the OMC Ltd., wherein it was stated that it would be given effect to after receiving approval from the competent authority.

16.3. It is contended that as the State Government has already approved the decision of the competent authority with a condition, there was no further occasion for the Corporation to again require approval of the State Government, which was objected to by the employees of the Corporation. But the Board of Directors, again decided in the meeting, authorizing the Managing Director of the Corporation-opposite party no.2 to explore all possibility for arranging sources to implement the Pension Scheme as already been decided by the Corporation and approved by the State Government. It is also contended that the Public Enterprise Department of the Government of Odisha had passed a

resolution bearing No.3169 dated 16.08.1995, wherein they have authorized the respective management of the Public Sector Undertakings/ Enterprises to formulate a suitable scheme to be applicable to its employees and it was also decided that the existing employees may be asked to exercise their option either they want to continue under the existing CPF scheme or come over to the pension scheme to be devised by the respective management. The Mining Corporation being one of the Public Sector Undertakings was included in the said resolution under Annexure-A. It is also contended that OMC having been placed under "Gold" category by virtue of the decision of the Government in Public Enterprises Department dated 19.12.2011 along with other Public Sector Undertakings, i.e. OPGC, OHPC and IDCO, the universal pensionary benefits as has been extended to the OHPC employees way back on 11.07.2012. However, so far as OMC employees are concerned, though decision has been taken by the Board of Directors to extend such benefit, which has already got approval of the State Government and there is adequate fund available to meet the expenses for implementation of the scheme by the Corporation, but the same has not been given effect to without any reason. Thereby, the action taken by the authority is arbitrary, unreasonable and contrary to Article 14 of the Constitution of India. It is further contended that against such inaction on the part of the management, several employees made representations to opposite party no.2 requesting him to implement the pension scheme. Even the employees like the petitioners, who have already retired from service, have made their grievance time and again before the authorities. As a consequence thereof, opposite party no.2 vide letter dated 01.08.2012 again recommended to the Government to extend the pensionary benefits to the employees of the OMC wherein it has been specifically indicated about the earlier decision of the Government with regard to approval for implementation of the pension scheme, but the same has not been implemented by the Corporation. It is further contended that there is no necessity for the Corporation again to send it to the Government for extension of pensionary benefits, particularly when the State Government had earlier approved the decision of the Corporation for extending the pensionary benefits to its employees and, as such, the State Government had already informed the Corporation for implementation of the same. Instead of extending the universal pensionary benefits to the regular employees of the Corporation like the petitioners, there was no necessity for opposite party no.2 to again send it to the opposite party no.1 and, as such, in order just to deprive the benefits to the petitioners, such dilly dally tactics has been followed. It is further contended that the employees of OHPC having been extended with such benefits, taking into consideration the directive issued by the Public Enterprises Department on 20.12.2011, the inaction on the part of the Corporation in extending the benefits

to the petitioners amounts to arbitrary and discriminatory. It is further urged that in the preliminary counter affidavit filed by opposite party no.2 incorporating the decision taken by the Government on 28.04.2014, which has been annexed as Annexure-B/2, wherein it has been mentioned that while deciding the claim of similarly situated employee of OMC in the case of ***Durga Charan Das v. State of Odisha*** (W.P.(C) No.19405 of 2009), the opposite parties have rejected the similar claim of pensionary benefit solely on the ground that Central Government and State Government has modified the existing pension scheme for its own employees, even though so far as OMC is concerned, the said pension scheme has already been approved by the Government. It is further contended that the committee which was constituted for the above purpose had taken into consideration the service conditions of not only of the employees of the Corporation but also the financial condition of the Corporation and had submitted exhaustive report and such report had been duly considered by the Board of Directors, pursuant to which decision has been taken to extend the pensionary benefits subject to approval of the State Government. It is contended that once the State Government has accepted and approved the decision of the Corporation, particularly when the Public Enterprises Department, which is the competent authority in this regard, had already issued directives to the opposite party no.2-Corporation to extend the pensionary benefits to the employees of the Corporation, there was no occasion for the opposite party no.2 to send the proposal to the opposite party no.1 for any further approval.

17. Mr. S.S. Das, learned Senior Counsel appearing along with Mr. B. Mohanty, learned counsel for the petitioners appearing in W.P.(C) No.8554 of 2014 reiterated the contention raised by Mr. B. Routray, learned Senior Counsel appearing for the petitioners in W.P.(C) No. 1018 of 2014 and contended that Steel and Mines Department is the administrative department of OMC Limited as per Govt. of Odisha Rules of Business made under Article 166 of Constitution of India. Chapter-XII of Rules of business deals with Steel and Mines department. Clause-6 of the State Subjects indicates Orissa Mining Corporation Limited. Therefore, under the Rules of business if Steel and Mines Department is the competent department, which has got decision to extend the benefit to the OMC employees, unless the same is modified or clarified, denial of benefits under Annexure-9 dated 28.04.2014 on consideration of the grievance made by the employees, cannot sustain in the eye of law. It is further contended that OMC Limited has been categorized as 'gold' category as per the notification of Public Enterprises Department on 20.12.2011, relying upon the profit statement of PSUs. The employees of PSUs, namely, OPGC and OHPC having been extended the pensionary benefits, denial of such benefits to their counterparts in the OMC Limited, amounts to discrimination and violative of

Article 14 of Constitution of India. It is further contended that Steel and Mines Department has passed the impugned order under Annexure-9, in view of the opinion of the Public Enterprises Department. But under the Rules of Business, Steel and Mines Department is competent to take such a decision. Therefore, denial of such benefits to the OMC employees, pursuant to order dated 28.04.2014, cannot sustain in the eye of law and the same is liable to be quashed. It is further contended that W.P.(C) No.1018 of 2014 and W.P.(C) No.18578 of 2015, which have been filed by some other employees with similar kind of prayer and all the three writ petitions were heard analogously and this Court vide judgment dated 29.01.2021 allowed all the three writ petitions by quashing the order dated 28.04.2014 with a direction to the opposite parties to reconsider the matter with regard to extension of pensionary benefits as per the scheme approved by the State Government and concurred by the Finance Department in letter dated 05.10.1991, as expeditiously as possible preferably within a period of four months. It is further contended that applying hot and cold rules again to exploit the petitioners, opposite parties have taken prevaricated stand and thereby they are approbate and reprobate on the same facts. As a consequence thereof, the stand so taken by the authority cannot sustain in the eye of law. More so, in one PSU the benefit having been extended, non-extension of such benefits to the OMC employees is hit by the doctrine of estoppel. It is further contended that the Finance Department regretted the proposal that the employees should continue to be under CPF in which they were recruited and any change in the pension of PSU employees should be considered uniformly not in isolation and, as such, the department may issue a speaking order after obtaining approval of the P.E.Department and Government. Therefore, the order impugned dated 28.04.2014 cannot sustain in the eye of law and is liable to be quashed. To substantiate his contention, he has relied upon the judgment of the apex Court in the cases of ***Amar Singh v. Union of India***, (2011) 7 SCC 69, ***Suzuki Parasrampuria Suitings Private Limited v. Official Liquidator of Mahendra Petrochemicals Limited***, (2018) 10 SCC 707, Prafulla Kumar Swain v.Prakash Chandra Misra, 1993 Supp (3) SCC181 and ***Samareswar Singh v. Ishwar Chand Aggarwal,*** AIR 1974 SC 2192.

18. Mr. N.C. Das, learned counsel for the petitioner in W.P.(C) No. 18578 of 2015 supported the arguments advanced by Mr. B. Routray, learned Senior Counsel and Mr. S.S. Das, learned Senior Counsel appearing in two other writ petitions as mentioned above.

19. Mr. B.P. Tripathy, learned Addl. Government Advocate, referring to the affidavit filed by opposite party no.1 incorporating certain documents on 14.07.2021 in W.P.(C) No.18578 of 2015 which were not made part of the

record when the matter was initially argued before the learned Single Judge, wanted to address the Court. But the same has been rejected, vide order dated 08.12.2021, because on the basis of materials available on record at the time of hearing, learned Single Judge adjudged the matter and, as such, he was not the counsel for the State before the learned Single Judge. Rather, Mr. S. Mishra, learned Addl. Government had argued the matter before the learned Single Judge and he candidly admitted on the basis of pleadings available on record that State Government in its Steel and Mines Department had approved the recommendation made by the OMC Limited for introduction of pension scheme w.e.f. 01.04.1989, subject to modification of item no.6 of the draft rules, i.e., the age of superannuation of the employees of the OMF Ltd. would be 58 years except in case of Class-IV, where it was 60 years. Mr. B.P. Tripathy, learned Addl. Government Advocate contended that since the affidavit filed on 14.07.2021 has been rejected by this Court, there is no further material available on record to address the Court. Therefore, he has chosen not to address the Court, as the materials available on record do not contemplate any new ground other than what had been advanced before this Court earlier. It is further contended that this Court had taken note of the contentions raised by learned State Counsel in detail earlier on the basis of the materials available on record itself at the relevant point of time. When the learned Single Judge adjudged the matter, it was admitted that the draft rule had got concurrence of the Finance Department vide G.O.R. No.392/CS.III dated 09.08.1991.The Public Enterprises Department notified on 16.08.1995 by way of resolution, in relation to rationalized scale of pay and allowances structure of the employees in the management cadres in the State Public Sector Enterprises where under the heading "retirement benefit" it has been provided that the management of enterprises may formulate suitable pension schemes applicable to the new recruits and the existing employees may be asked to exercise their option either for continuance under existing CPF scheme or come over to the pension scheme to be devised by the management. But before issuance of the resolution, OMC Ltd. had already taken a decision and approved in principle for introduction of pension scheme for its employees, which had also got approval of the State Government and concurrence of the Finance Department. But at the same time, OMC Ltd. in its 355th meeting held on 23.03.2006 introduced a new scheme "OMC Retiring Employees Benefit Scheme" which was duly approved by the Board of Directors to be implemented prospectively after approval of the Government. Though it was moved, vide communication dated 03.04.2006, to accord approval for implementation of the scheme and concurrence was sought from the Finance Department, in reply thereto certain observations were made by the Addl. Secretary to the Govt. in the Department of Steel and Mines vide

letter dated 30.10.2006. Thereby, it is contended that grant of pensionary benefit to the employees of OMC Ltd does not arise and, as such, the authorities are justified in rejecting the claim of the petitioners in extending such benefit to the employees of the OMC Ltd.

20. Mr. S. Mohanty, learned Senior Counsel appearing along with Mr. A.K. Panigrahi, learned counsel appearing for the opposite party-OMC, on query being made by this Court whether he was the counsel before the learned Single Judge, he candidly and fairly stated that he had not appeared before the learned Single Judge and he has also not known what was the argument advanced by the counsel for the OMC before the learned Single Judge. But he was the counsel before the Division Bench and supported the stand of the State which has been endorsed by the Division Bench in paragraph-26 of the order, wherein it has been stated that impact of the judgment of the learned Single Judge would be felt not only by OMC but importantly by the State Government since OMC was 100% owned by the State Government. It was also submitted that although the OMC had not filed any appeal separately, it was supporting the stand of the State Government in the writ appeals. But on the basis of the materials, which were available before the learned Single Judge, it was unequivocally admitted by the OMC Ltd that the Board of Directors of OMC had approved the pensionary benefits to its employees, which was duly recommended by it to the State Government and in turn the State Government also approved the same and the Finance Department concurred with the same. But for the reasons best known to the authorities, such benefit has not been extended to the employees of the OMC though similarly situated employees of OHPC and OPGC have been granted with such benefit. It was further contended that the decision taken by the Administrative Department with regard to extension of pensionary benefits which has been duly approved, has neither been modified nor nullified and the same still holds good and governs the field. Consequentially, the impugned order refusing to grant the benefit to the employees of OMC having been passed without application of mind, cannot sustain and is liable to be quashed.

Learned Senior Counsel appearing for opposite party-OMC, referring to the memorandum of 268th meeting of Board of Directors dated 25.03.1989, further contended that as provided under Rules of OMC, employees at the time of retirement receive benefit of gratuity and also employees contribution to the provident fund provided under the statute. Since the employees are coming under the EPF Act, unless a clearance is received from the appropriate Government, the benefit cannot be extended to the petitioners. It is further contended that the appropriate government means, the Central Government, not the State Government and, as such, even if the State Government has given

clearance, it is not competent to do so, rather the Central Government is the competent authority to extend such benefits to the petitioners. In absence of any clearance from the Central Government, the benefit as claimed, cannot be admissible to the petitioners.

21. This Court heard Mr. B. Routray, learned Senior Counsel appearing along with Mr. S.K. Samal, learned counsel for the petitioners in W.P.(C) No.1018 of 2014; Mr. Mr. S.S. Das, learned Senior Counsels appearing along with Mr. B. Mohanty, learned counsel for the petitioner in W.P.(C) No.8554 of 2014; and Mr. N.C. Das, learned counsel for the petitioners in W.P.(C) No.18578 of 2015; Mr. B.P. Tripathy, learned Additional Government Advocate appearing for the State opposite parties; and Mr. S. Mohanty, learned Senior Counsel appearing along with Mr. A.K. Panigrahi, learned counsel for the Orissa Mining Corporation Ltd. by hybrid mode. Pleadings having been exchanged between the parties, with the consent of learned counsel for the parties, all the three writ petitions were heard together and disposed of finally at the stage of admission taking into consideration the observations made by the Division Bench in W.A. Nos. 445, 412 and 613 of 2019.

22. On the basis of the stands of the petitioners in the aforesaid writ petitions, which have been described above, this Court is to examine the stand taken by the State before the learned Single Judge which reads as under:-

> *"(i) The State Government in its Steel and Mines Department had approved the recommendation made by the OMC Ltd for introduction of pension scheme with effect from 01.04.1989 subject to modification of item No.6 of the draft rules, i.e., the age of superannuation of the employees of the OMC Ltd. would be 58 years except in case of Class-IV where it was 60 years.*
>
> *(ii) The aforesaid approval had got concurrence of the Finance Department, vide G.O.R. No.392/CS.III dated 9th August1991.*
>
> *(iii) The Public Enterprises Department notified on 16th August, 1995, by way of resolution, in relation to rationalized scale of pay and allowances structure of the employees in the management cadres in the State Public Sector Enterprises where under the heading "retirement benefit" it has been provided that the management of enterprises may formulate suitable pension schemes applicable to the new recruits and the existing employees may be asked to exercise their option either for continuance under the existing CPF scheme or come over to the pension scheme to be devised by the management.*
>
> *(iv) But before issuance of this resolution dated 16th August, 1995, the OMCL had already taken a decision and approved in principle for introduction of pension scheme for its employees, which had also got approval of the State Government and concurrence of the Finance Department.*

(v) At the same time the OMCL in its 355th meeting held on 23rd March, 2006 introduced a new scheme "OMC Retiring Employees Benefit Scheme" which was duly approved by the Board of Directors to be implemented prospectively after approval of the Government. Though it was moved, vide communication dated 03.04.2006, to accord approval for implementation of the scheme and concurrence was sought for from the Finance Department, in reply thereto certain observations were made by the Addl. Secretary to the Govt. in the Department of Steel and Mines vide letter dated 30.10.2006."

23. Similarly, opposite party no.2-OMC has pleaded in paragraph-4 of its counter filed before the learned Single Judge to the following effect:-

"(i) The Board of Directors of the OMC Ltd had approved the extension of pensionary benefit to its employees, which was duly recommended by it to the State Government, and the State Government in its turn approved the same and the Finance Department also granted concurrence, but for the reasons best known to the authorities such benefit has not been extended to the employees of the OMC Ltd, though similarly situated PSUs, such as OHPC and OPGC have granted such benefit to their employees.

(ii) The decision taken by the Administrative Department, with regard to extension of retirement benefit, which was duly approved, has neither been modified nor nullified and the same still holds good and governing the field.

(iii) In view of the above, the impugned order refusing to grant pensionary benefit to the employees of OMC Ltd, having been passed without application of mind, cannot sustain in the eye of law and is liable to be quashed."

24. In view of the pleadings, as were available before the learned Single Judge, the observations to the following effect were made:-

"11. ..... In spite of approval granted by the State Government and the concurrence given by the Finance Department for introduction of pension scheme for the employees of the OMC Ltd, vide communication dated 05.10.1991, for the reason best known to the authorities, the same has not been implemented. But subsequently, after revision of the scale of pay of the State Government employees in 1989, a resolution was passed by Public Enterprises Department on 16.08.1995, with regard to rationalization of the scale of pay and allowances structure of the employees in the management cadres of the State Public Sector Enterprises, wherein under the heading "retirement benefit" it has been stated thus:-

"<u>Retirement benefit :</u>

Management of the Enterprises may formulate suitable pension schemes to be applicable to new recruits and the existing employees may be asked to exercise their option either for continuance under the existing CPF scheme or come over to the pension scheme to be devised by the management."

Even though the recommendation made by the Board of Directors was duly approved for introduction of pension scheme for the employees of the OMC Ltd. and concurrence was also granted on 05.10.1991, the same has not been implemented for the reasons best known to the authorities and on the contrary a resolution was passed on 16.08.1995 for consideration of retirement benefit asking for option from the person concerned.

12. It is worthwhile to mention, under Article 166 of the Constitution of India, the conduct of business of the Government on State subjects has been prescribed. As per Rule-4, the business of the Government shall be transacted in the departments specified in the First Schedule and shall be classified and distributed between those departments and their branches as laid down therein. Chapter XII, which was substituted by notification no.15116-Gen. dated 28.05.1990, deals with Steel and Mines Department. Clause-6 of the State subjects indicates Orissa Mining Corporation Limited. Therefore, the administrative department of OMC Ltd is Steel and Mines Department. The letter dated 05.10.1991, reference to which has been made above, was issued by the Department of Steel and Mines, which is the administrative department of OMC Ltd. As such, as a matter of principle the State Government had already approved the draft proposal for introduction of pension scheme for the employees of OMC Ltd w.e.f. 01.04.1989 subject to modification of item No.6 of the draft rules to the extent that "the age of superannuation of the employees of the Corporation shall be 58 years except in case of Class-IV where it is 60 years", which got concurrence of the Finance Department vide G.O.R. No.392/C.S.III dated 09.08.1991. Therefore, if the Government of Orissa in the Department of Steel and Mines has approved the benefit of pension scheme for the employees of the OMC Ltd, which has also got concurrence of the Finance Department, unless the same is annulled, or modified, or clarified, or withdrawn, the same has to remain in force. Merely because a resolution was passed by the Public Enterprises Department seeking exercise of option either for continuance under the existing CPF scheme or coming over to the pension scheme, which is of general nature and not a specific one, that will not have any effect on the letter dated 05.10.1991 in Annexure-4 issued by the Department of Steel and Mines.

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15. Applying the above principle to the present context, since the order dated 05.10.1991 in Annexure-4 has been issued in adherence to the Rules of Business, the same should have been given effect to in letter and spirit and subsequent resolution issued by the Public Enterprises Department calling for option for retirement benefit have no consequence, when the administrative department of OMC Ltd in Annexure-4 dated 05.10.1991 has already approved for introduction of pension scheme for the employees of OMC Ltd. and the Finance Department has concurred with the same.

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17. ..... Once the proposal for implementation of pensionary scheme has been duly approved and concurrence has been granted, as indicated in letter dated 05.10.1991, there was no need for further reconsideration of the matter by the State and as such, such request could not have been made by the Chairman-cum-Managing Director of OMC Ltd. for reconsideration. Nothing has been placed on record by any of the parties to indicate that letter dated 05.10.1991 issued by the Department of Steel and Mines for introduction of pension scheme for the employees of OMC Ltd. has either been annulled, or clarified, or withdrawn at any point of time in between. But in the name of a decision taken in its 355th meeting held on 23.03.2006 for introduction of new pension scheme, namely, "Orissa Mining corporation Retiring Benefits" the board approved the said scheme to be implemented prospectively after approval of the Government and accordingly the Government of Odisha in Steel and Mines Department was moved, vide letter dated 03.04.2006, to accord approval to the said scheme and concurrence of the Finance Department was also sought. In reply thereto, Addl. Secretary to the Government in the Department of Steel and Mines wrote letter dated 30.10.2006 to the Managing Director, OMC Ltd to furnish a clear proposal after taking into account the observations made therein. But that itself is a separate consideration all together and that has got no nexus with the decision taken earlier on 05.10.1991.

> *18. In view of Section 17 of the EPF and MP Act, 1952, the State Government has exempted OMC Ltd. and the impugned order dated 28.04.2014 in Annexure-9 refusing to extend the pensionary benefits to the employees of OMC Ltd. is arbitrary and without any authority of law. Needless to say that in similar circumstances the Orissa State Electricity Board, as it was then, was exempted from the ambit of EPF and MP Act, 1952, which was subject matter of consideration in a batch of cases in SLP (Civil) No. 1983 of 1994, and SLP (Civil) Nos. 3078, 3080, 3084, 3025 and 3086 of 1995 and the apex Court held that the EPF and MP Act, 1952 on introduction of pension scheme in April, 1965 is a matter which has to be determined and the same can be implemented by the State under Section 17. Therefore, if the State has already exercised its power under Section 17 of the EPF and MP Act, 1952 granting exemption, in that case subsequent non-extension of pensionary benefit to the employees of the OMC Ltd. amounts to arbitrary and unreasonable exercise of powers by the authorities concerned."*

25. But the State of Odisha challenged the aforesaid judgment of the learned Single Judge by filing W.A. Nos. 445, 412 and 613 of 2019, which were disposed of vide order dated 22.06.2021 and the writ petitions were restored to the file of the learned Single Judge. In the writ appeals, State of Odisha relied upon the letter dated 19.08.2019 issued by OPGC limited, which is a document came into existence much after the judgment was passed by the learned Single Judge on 29.01.2019. Apart from the same, it was stated by the learned State Counsel before the Division Bench that the pleas advanced in the writ petitions were not taken into consideration by the learned Single Judge. Such stands of the State Government in the writ appeals are reflected in paragraphs-21, 22, 23 and 24 of the order dated 22.06.2021 passed in the aforesaid writ appeals. It is also made clear that the opposite party-OMC has taken prevaricating stands before the learned Single Judge as well as before the Division Bench in writ appeals. Its earlier stand taken before the learned Single Judge was that the impugned order refusing to grant pensionary benefits to the employees of OMC having been passed without application of mind cannot sustain in the eye of law and it is liable to be quashed, which has been mentioned in judgment dated 29.01.2019 passed by the learned Single Judge in paragraph-7, but now a different stand has been taken by the OMC in the appeals before the Division Bench and taking into such pleadings available before the Division Bench, observations have been made by the Division Bench in paragraphs-27 to 33, which are extracted hereunder:-

> *"27. The above submissions have been considered. Indeed the ratio of the judgment of the learned Single Judge turns on a single ground viz., violation of Article 14 of the Constitution. This is premised on employees of OMC being treated on par with those of two other PSUs i.e. OHPC and OPGC, in the matter of pensionary benefits. The learned Single Judge did not examine any other ground as has been urged by the contesting Respondents. In other words, the intrinsic merit of the proposals of the management of OMC made way back in 1991for introduction of a pension scheme was not examined by the learned Single Judge while issuing a mandamus to the Appellant to reconsider the introduction of a pension scheme for the retired employees of OMC.*

28. The Court finds that OPGC employees in fact have no pensionary scheme governing them. The clarification issued by the Department of PE, Government of Odisha makes it clear that they were entitled only to a lump sum payment equivalent to six months' salary at the time of retirement. This crucial information was not considered by the learned Single Judge possibly because it was not placed before him.

29. As far as the OHPC is concerned, the history of its incorporation and the circumstances under which erstwhile employees the Government of Odisha or the OSEB were either redeployed to it or deputed or transferred to it, makes OHPC very different from OMC. This was the reason behind OHPC extending pensionary benefits to all its employees subject to certain stipulations. This was in the nature of continuation of the benefits they would have otherwise enjoyed had they continued as employees of Government of Odisha or the OSEB. The circumstances attending the employment of the contesting Respondents in OMC are quite different. They were directly employed by the OMC itself. Absent a pension scheme at the time of their employment, they cannot claim any vested right to such pension on the basis that they were on par with employees of OHPC or OPGC.

30. Therefore, the Court is not satisfied that the contesting Respondents have made out a case for the applicability of Article 14 of the Constitution vis-à-vis the pensionary benefits enjoyed by the employees of OHPC. Consequently, the Court is unable to agree with the conclusion of the learned Single Judge in the impugned order that the decision dated 28th April, 2014 of the Appellant rejecting the proposal for introduction of a pension scheme in OMC was violative of Article 14 of the Constitution and therefore required to be set aside on that ground.

31. However, this Court finds that there are other grounds urged by the contesting Respondents on the intrinsic merit of the pension scheme which had earlier been approved by the Government of Odisha and for the implementation of which a mandamus was sought. There was no occasion for the learned Single Judge to examine these other grounds in support of the prayers in the writ petition of the contesting Respondents herein.

32. Consequently, while setting aside the impugned judgment of the learned Single Judge dated 29th January, 2019 for the aforementioned reasons, this Court restores the writ petitions to the file of the learned Single Judge for a fresh consideration on grounds other than the ground already examined by the learned Single Judge. It is clarified that this Court has expressed no opinion on the merits of the other grounds urged in the writ petitions and leaves the contentions of the contesting Respondents herein (i.e. the writ petitioners) as well as the contentions of the present Appellant in opposition thereto open to be urged before the learned Single Judge in accordance with law.

33. The writ petitions shall now be listed before the learned Single Judge on 1st August, 2021 for directions. The Appellant shall file not later than two weeks prior to that date, affidavits and the documents which according to it are relevant for the issues arising for consideration in the said writ petitions with advance copies to the counsel for the writ petitioners who shall file their response thereto by that date, i.e., 1st August, 2021. It is made clear that the learned Single Judge will not grant any adjournment to any of the parties for that purpose."

26. On perusal of the aforementioned paragraphs, it is made clear that while disposing of the writ appeals, the Division Bench had no occasion to examine other grounds, than the ground concerning of Article 14 of the Constitution of India, for which the writ petitions have been restored for a fresh consideration.

Therefore, the findings rendered by the learned Single Judge in paragraphs-11 to 18 of judgment dated 29.01.2019, having not been set aside, have attained finality. More so, none of the parties have filed any review petition before the learned Single Judge questioning such findings within the permissible limit of the review jurisdiction. Most importantly, OMC Ltd did not challenge the judgment dated 29.01.2019, consciously for the reason that it has also questioned before the learned Single Judge the governmental action of not extending the pensionary benefits to the employees of OMC. Thereby, the findings of the learned Single Judge in judgment dated 29.01.2019, other than the finding on Article 14 of the Constitution of India, reached finality. A review petition bearing RVWPET No.129 of 2021, which was filed for review of the order dated 22.06.2021 passed in W.A. No.612 of 2019, was dismissed vide order dated 15.07.2021.

27. The learned Single Judge in its judgment dated 29.01.2019 has decided the writ petitions to the following effect:-

> *"(i) The Steel and Mines Department is the Administrative Department of OMCL (page 20 of the judgment).*
>
> *(ii) Order dated 5th October, 1991 has been issued in adherence to Rules of business (page-22, paragraph-15 of the judgment).*
>
> *(iii) Since the order dated 5th October, 1991 has been issued in adherence to the Rules of business, the same should have been given effect to in letter and spirit and subsequent resolution issued by the P.E. Department calling for option for retirement benefit have no consequence when Administrative Department of OMCL has already approved for introduction of the Pension Scheme for the employees of OMCL and the Finance Department has concurred with the same (page 23 of the judgment).*
>
> *(iv) New Pension scheme itself, is a separate consideration all together and has no nexus with the decision taken on 5th October, 1991 (page-26 of the judgment).*
>
> *(v) The exemption from the ambit of EPF and MP Act, 1956, which was subject matter of consideration in a batch of cases, is matter which has to be determined and implemented by the State as has been held by the Hon'ble Supreme Court of India (Page-26, paragraph-18 of the judgment)."*

28. Therefore, it was only the OMCL letter which speaks of OPGC, OHPC and IDCO etc. As such, once the opposite parties, especially opposite party no.2, has written to the Principal Secretary, S&M Department with regard to P.E. Department contemplating to implement, vide Annexure-6 dated 01.08.2012 in W.P.(C) No.8554 of 2014, as a uniform pension scheme for the employees of the PSUs placed in the gold category, it is absolutely preposterous to take a stand different from the above in the writ appeals and to further enlarge the scope of writ petitions.

29. The submission made by Mr. Mohanty, learned Senior Counsel for OMC is too late to be taken into consideration, as nothing has been placed on record to that effect either by way of pleading or by way of any document. Rather, it was candidly submitted on behalf of the OMC that the petitioners are to be extended with the pensionary benefits at par with their counterparts in the similar PSUs of the State. As a consequence thereof, the contention raised by Mr. Mohanty, is not acceptable and the same is absolutely unwarranted at this stage in absence of pleadings available in record.

30. Preliminary counter affidavit was filed by opposite party no.2 in W.P.(C) No.1018 of 2014 on 08.07.2014. The averments made in paragraphs-3, 4, 5, 7, 8, 9, 10 and 11 are extracted hereunder:-

> *"3. That this opposite party has written letter no.11678 OMC:LW dt.1.8.2012 to O.P.No.1 for extension of pensionary benefit to the employees of Odisha Mining Corporation Ltd. The true copy of letter dt.01.08.2012 is annexed as Annexure-A/2. The O.P. No.1 vide order dt.28.04.2014 regretted the proposal of this opposite party submitted vide letter no.4587 dt.09.04.2013. The true copy of order dated 28.04.2014 is annexed as Annexure-B/2. True copy of letter no.4587 dated 09.04.2013 is annexed as Annexure-C/2.*
>
> *4. That, the certificate given by writ petitioners that the matter out of which the writ petition arises was never before this Hon'ble Court is not true. It is a fact the present writ petition is connected with W.P.(C) No.19405 of 2009 disposed of on 08.10.2012, W.P.(C) No.928 of 2011 disposed of on 10.02.2011, W.P.(C) No.22507 of 2011 dismissed on 11.09.2012 and CONTC No.539 of 2013 arising out of W.P.(C) No.19405 of 2009 which is pending. The true copies of orders dated 08.10.2012, 10.02.2011 and 11.09.2012 are annexed as Annexure-D/2 series.*
>
> *5. That, the averments made in paragraph-1 of the writ petition, it is a fact that OMC management took a decision for introduction of pension scheme for its employees w.e.f. 01.04.1989. On receipt of approval of Govt., vide letter no.12610 dated 05.10.1991, OMC management initiated steps for obtaining approval from central provident fund Commissioner, EPFO, New Delhi for grant of exemption to adopt the scheme in lieu of the Employer's share to the CPF scheme. The scheme was rejected vide letter no.11879 dated 26.03.2003 on the ground that all categories of employees of OMC (both regular and non-regular) have not been covered in the proposed scheme. The true copy of letter dated 05.10.1991 is annexed as Annexure-E/2 and true copy of the letter dated 26.03.2003 is annexed as Annexure-F/2.*
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> *xxx xxx xxx*
>
> *7. That in reply to averments made in paragraph-9 it is humbly stated that as the introduction of pension scheme was in lieu of the Employer's share of CPF, the CPFC, New Delhi was moved for exemption under EPF & MP Act, 1952. The CPFC, EPFO, New Delhi vide their letter no.8934 dated 21.04.1992 while pointing out several short comings of the scheme, advised OMC management to approach LIC of India for a suitable scheme. The true copy of letter dated 21.04.1992 is annexed as Annexure-G/2.*

The Govt. of Odisha, in Labour and Employment Department was moved seeking exemption from operation of the EPF Act, 1952 for adoption of OMC, Employees'' Pension Scheme. The Govt. vide letter dated June, 2002 referred the matter to the Regional PF Authority, Bhubaneswar for his views on the proposed scheme of OMC. The true copy of letter dated June, 2002 is annexed as Annexure-H/2.

In the mean while, a statutory pension scheme i.e. Employees Pension Scheme-95 (EPC'95) under the EFP came into force w.e.f. 16.11.1995. As OMC was planning to implement its own pension scheme for its regular employees, the RPFC, Odisha was requested to grant exemption from the operation of EPF Act. but the RPFC, Odisha rejected the proposal on the ground that all categories of employees of OMC like contract employees and other employees, even in cases where separate sub-code members have been allotted, have not been covered in the proposed pension scheme.

It is further stated that employees of this corporation were entitled to contributory provident fund as per service condition during recruitment and no pension was admissible.

8. That with regard to averments made in paragraph-10 it is humbly stated that the Board of Directors of OMC approved introduction of pension scheme for its employees during the year 1989. The management took up matter with CPFC, New Delhi for grant of exemption. LIC of India for adoption of a suitable scheme as advised by the CPFC, New Delhi and Actuary for evaluation of financial involvement. The scheme could not be implemented due to abnormal time taken by CPFC, LIC of India and the Actuary. Hence, the matter was placed before the BOD in its 321st meeting held on 30.03.2000. The Board advised to explore the possibility of providing the requisite funds for the scheme. However, the Board also advised to apply to the competent authorities in the meantime. The true copy of 321st meeting dated 30.03.2000 is annexed as Annexure-J/2.
9. That with regard to averments made in paragraph-11 it is humbly stated that as regards resolution of PE Department no.3169 dated 16.08.1995 is concerned, it may be mentioned here that prior to issuance of the above resolution, OMC had already taken a decision and approved in principle for introduction of pension scheme for its employees and got the approval of the Govt. Hence, it has no relevance to the formulation of suitable pension scheme for the employees of OMC.

10. That this opposite party has no comments to made on averments made in paragraphs-12 and 13 of writ petition.

11. That with regard to averments made in paragraph-14, it is humbly stated that it is a fact that OMC decided to introduce a pension scheme in lieu of the Employer's share to the CPF scheme and got the approval of Govt. but the scheme could not be implemented due to certain constraints imposed by the statutory authorities and introduction of EPS'95.

However, when the proposed pension scheme, which was approved by Govt. could not be feasible for its implements, OMC management decided to introduce a third benefit and placed a proposal before the BOD in its 355th meeting held on 23.03.2006 for introduction of a new scheme, namely "OMC Retiring Employees Benefit". The true copy extract of 335th meeting dated 23.03.2006 is annexed as Annexure-K/2. The Board

approved the scheme to be implemented prospectively after approval of the Government. The Govt. of Odisha in Steel and Mines Department was moved to accord approval for implementation of the scheme on 03.04.2006. While the concurrence of the Finance Department was sought, the Finance Department made certain observations vide letter no.15691 dated 30.10.2006 which is annexed as Annexure-L/2 which are as follows:

- *Today, OMF Ltd. is earning profit because of boom in the market. If tomorrow price falls and demands become sluggish, how the additional expenditure is to be met?*

- *OMC should at least pay Rs.100.00 crore towards dividends to enable State Govt. to fund the key developments.*

- *What is going to happen to the existing pension/benefit scheme under which payment is being made. There can not be two parallel scheme.*

The observations of the Govt. was placed before the BoD in its 359th meeting held on 15.12.2003. The Board decided to request the Govt. to approve the OMC Retiring Employees' Benefit Scheme to ameliorate the hardship that an employee will face after his retirement. In spite of repeated persuation, the Govt. in Steel and Mines advised OMC to re-examine the proposal in the light of CPF scheme floated by Govt. of India. Finally, the proposal, duly examined by the In-House Committee of OMC, placed before the BoD held on 07.09.2009. The Board discussed the matter threadbare and made the following observations. True copy of Note Sheet dated 15.09.2009 is annexed as Annexure-M/2.

1. Proposed retirement benefit ranging from Rs.1,000.00 to Rs.2,000.00 per month is too palty a sum to serve the desired purpose.

2. With the economy of the country growing, the rate of interest will come down appreciably over the long run. This may be adverse financial implication on OMC on account of the proposed scheme.

3. In the present format, the scheme does not seem to be rationale for the long term sustainability and profitability of the corporation.

Hence, the Board advised that the scheme need fresh examination by the Management.

Therefore, the allegation that the management slept over the matter with an ulterior motive is false and unfounded, as it evident from above facts that the management, after rejection of the proposed pension scheme by the statutory authority, took action for introduction of a separate benefit scheme to the employees furnished to extend a third benefit scheme, which could also not be materialized."

31. Similarly, opposite party no.1 had filed preliminary counter affidavit on 19.03.2015, paragraphs-4 to 11 of which read thus:-

"4. That Sri Durga Charan Das and two others had filed W.P.(C) No.19405 of 2009 seeking a direction to the opposite parties for introduction of pension scheme w.e.f. 01.04.1989.

5. That this Hon'ble Court vide order dated 08.10.2012 disposed of the above writ with following orders:

"We are of the view that it is a fit case where the Principal Secretary should be directed to take a decision in terms of the request made by the Managing Director within a stipulated time. Let him to do so within a period of four months from the date of communication of this order.

The writ petition is accordingly disposed of."

6. That, pursuant to the direction of this Hon'ble Court in W.P.(C) No.19405 of 2009, Government in Public Enterprises Department vide their UOR No.19/PE dated 03.02.2014 had given their opinion which is extracted hereunder for kind perusal.

"The Public Enterprises Department opined that the employees of OMC Ltd. as per the service condition during recruitment were entitled to contributory provident fund and no pension was admissible. Central Government as well as the State Government has modified the existing pension scheme for its own employees and moved to contributory pension scheme as it did not commensurate with the modern principles. Restoring to the old Government scheme to a group of employees recruited in between with retrospective effect seems to be retrograde step. The service conditions of the employees should not hop from one scheme to another without considering the merits and implications in each case.

On the premises, Finance Department regrets the proposal. The employees should continue to be in CPF in which they were recruited. Any change in pension scheme of PSU employees should be considered uniformly and not in isolation. Department may issue a speaking order after obtaining approval of P.E. Department and Government."

7. That, the present case is similar to W.P.(C) No.19405 of 2009 filed by Durga Charan Das v. State of Odisha and others wherein prayer was made to this Hon'ble Court to direct the opposite parties, more particularly, the opposite party no.2 viz OMC Ltd. to implement the pension scheme for the employees of Odisha Mining Corporation Ltd.

8. That pursuant to the order dated 08.10.2012 of the Hon'ble High Court of Orissa in W.P.(C) No.194058 of 2009, Steel and Mines Department has regretted the proposal of OMC Ltd. vide letter no.3058 dated 28.04.2014, after consultation with the Finance Department and the Public Enterprises Department. The copy of the Steel and Mines Department order no.3058/SM dated 28.04.2014 is annexed herewith and marked as Annexure-a/1.

9. That it is humbly submitted that the facts stated and averments made in the writ application which have not been specifically replied and are not matters of record shall be deemed to have been denied by the answering opposite party. The allegations made in the writ petition are denied in toto.

10. That the answering opposite party craves for leave of the Hon'ble Court to make further submissions and further affidavits in support of their contentions, in the interest of justice and for effective adjudication by the Hon'ble Court.

11. That in view of the facts stated and submissions made in the foregoing paragraphs, it is humbly submitted that the writ application is liable to be dismissed by the Hon'ble Court being devoid of any merit, the petitioners not being entitled to any of the reliefs sought for."

32. On the basis of aforesaid pleadings, if the matter has been decided by the learned Single Judge, subsequently the opposite party no.1 cannot make out a new case by producing new documents before the Division Bench and, as such, on perusal of the affidavit filed by opposite party no.1, it appears that there is no denial with regard to 'gold' category, as has been pleaded in the writ petition itself. If there is no denial with regard to 'gold' category and opposite party no.2-OMC has been included in such category and similarly situated PSUs have been extended with such benefits, denial of such benefit to the petitioners is absolutely contrary to the provisions of law and, thereby, the same cannot sustain in the eye of law.

33. In ***Amar Singh*** (supra), the apex Court in paragraphs-46 to 58 held as follows:

> *46. The said affidavit of the petitioner filed in February, 2011, completely knocks the bottom out of the petitioner's case, inasmuch as by the said affidavit the petitioner seeks to withdraw all averments, allegations and contentions against the respondent no. 7. The main case of the petitioner is based on his allegations against respondent no.7. The burden of the song in the writ petition is that the respondent no. 7, acting out of a political vendetta and exercising its influence on Delhi Police administration caused interception of the telephone lines of various political leaders of the opposition including that of the petitioner. The subsequent affidavit also acknowledges that the petitioner is satisfied with the investigation by the Delhi Police in connection with the forgery alleged to have been committed, namely the fabrication of orders on the basis of which the phone lines of the petitioner were tapped. Petitioner also makes a statement that the said Anurag Singh edited and tampered some of the conversations of the petitioner.*
>
> *47. It is very interesting to note that when the petitioner filed a detailed affidavit in support of his writ petition, pursuant to the order of this Court, the petitioner admitted that he relied on the information from the same Anurag Singh, and the main annexures to the petition, namely A and B were received by him from the same Anurag Singh. Paragraphs 2 (2), 2 (3), 2 (4) and 2 (6) are based on the information received from Mr. Anurag Singh.But he did not say all these in his affidavit when he filed the writ petition on 21st January 2006.*
>
> *48. It may be noted that when the writ petitioner filed the petition on 21st January, 2006, he was aware of an investigation that was going on by the Delhi Police in connection of the forgery of annexures A and B. Even then he filed the petition with those annexures and without a proper affidavit. It therefore appears that the petitioner has been shifting his stand to suit his convenience.*
>
> *49. In 2006, the gravamen of the petitioner's grievances was against the respondent no. 7, and the basis of his petition was the information that he derived from the said Anurag Singh. On the basis of such a petition, he invoked the jurisdiction of this Court and an interim order was issued in his favour, which is still continuing. Now when the matter has come up for contested hearing, he suddenly withdraws his allegations*

against the respondent no. 7 and feels satisfied with the investigation of the Police in connection with the aforesaid case of forgery and also states that the same Anurag Singh "edited and tampered certain conversations of the petitioner.

50. This Court wants to make it clear that an action at law is not a game of chess. A litigant who comes to Court and invokes its writ jurisdiction must come with clean hands. He cannot prevaricate and take inconsistent positions.

51. Apart from the aforesaid, in the writ petition which was filed on 21st January, 2006, there is no mention of the fact that the petitioner gave a statement under section 161, Code of Criminal Procedure in connection with the investigation arising out of FIR lodged on 30th December, 2005. From the records of the case it appears the petitioner gave 161 statement on 13th January, 2006. In the writ petition there is a complete suppression of the aforesaid fact. A statement under Section 161 is certainly a material fact in a police investigation in connection with an FIR. The investigation is to find out the genuineness of those very documents on the basis of which the writ petition was moved. In that factual context, total suppression in the writ petition of the fact that the petitioner gave a 161 statement in that investigation is, in our judgment, suppression of a very material fact.

52. It is, therefore, clear that writ petition is frivolous and is speculative in character. This Court is of the opinion that the so called legal questions on tapping of telephone cannot be gone into on the basis of a petition which is so weak in its foundation.

53. Courts have, over the centuries, frowned upon litigants who, with intent to deceive and mislead the courts, initiated proceedings without full disclosure of facts. Courts held that such litigants have come with "unclean hands" and are not entitled to be heard on the merits of their case.

54. In Dalglish v. Jarvie {2 Mac. & G. 231,238}, the Court, speaking through Lord Langdale and Rolfe B., laid down:

"It is the duty of a party asking for an injunction to bring under the notice of the Court all facts material to the determination of his right to that injunction; and it is no excuse for him to say that he was not aware of the importance of any fact which he has omitted to bring forward."

55. In Castelli v. Cook {1849 (7) Hare, 89,94}, Vice Chancellor Wigram, formulated the same principles as follows:

"A plaintiff applying ex parte comes under a contract with the Court that he will state the whole case fully and fairly to the Court. If he fails to do that, and the Court finds, when the other party applies to dissolve the injunction, that any material fact has been suppressed or not property brought forward, the plaintiff is told that the Court will not decide on the merits, and that, as has broken faith with the Court, the injunction must go."

56. In the case of Republic of Peru v. Dreyfus Brothers & Company {55 L.T. 802,803}, Justice Kay reminded us of the same position by holding:

"...If there is an important misstatement, speaking for myself, I have never hesitated, and never shall hesitate until the rule is altered, to discharge the order at once, so as to

impress upon all persons who are suitors in this Court the importance of dealing in good faith with the Court when ex parte applications are made."

57. In one of the most celebrated cases upholding this principle, in the Court of Appeal in R. v. Kensington Income Tax Commissioner {1917 (1) K.B. 486} Lord Justice Scrutton formulated as under:

"and it has been for many years the rule of the Court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts- facts, now law. He must not misstate the law if he can help it - the court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the Court enforces that obligation is that if it finds out that the facts have been fully and fairly stated to it, the Court will set aside any action which it has taken on the faith of the imperfect statement."

58. It is one of the fundamental principles of jurisprudence that litigants must observe total clarity and candour in their pleadings and especially when it contains a prayer for injunction. A prayer for injunction, which is an equitable remedy, must be governed by principles of `uberrima fide'."

34. In view of the law laid down by the apex Court, as mentioned supra, this Court is of the considered view that an action at law is not a game of chess. Therefore, the litigant who comes to Court and invokes its writ jurisdiction must come with clean hands and he cannot prevaricate and take inconsistent positions. In view of the aforesaid situation, it is made clear that opposite party no.1 has taken a prevaricating and inconsistent position and, as such, it has not come to the Court with clean hands invoking writ jurisdiction. Thereby, at its instance, the writ appeals preferred before the Division Bench should not have been entertained.

35. Similar view has also been taken by the apex Court in the cases of ***Hari Narain v. Badri Das***, AIR 1963 SC 1558, ***Welcome Hotel v. State of A.P.***, (1983) 4 SCC 575, ***G. Narayanaswamy Reddy v. Govt. of Karnataka***, (1991) 3 SCC 261, ***S.P. Chegalvaraya Naidu v. Jagannath***, (1994) 1 SCC 1, ***A.V. Papayya Sastry v. Govt. of A.P.***, (2007) 4 SCC 221, ***Prestige Lights Ltd. v. SBI***, (2007) 8 SCC 449, ***Sunil Poddar v. Union Bank of India***, (2008) 2 SCC 326, ***K.D. Sharma v. SAIL***, (2008) 12 SCC 481, ***G. Jayashree v. Bhagwandas S. Patel***, (2009) 3 SCC 141 and ***Dalip Singh v. State of U.P.***, (2010) 2 SCC 114.

36. In ***Suzuki Parasrampuria Suitings Private Ltd.*** (supra), the apex Court in paragraphs-12 and 13 held as under:-

"12. A litigant can take different stands at different times but cannot take contradictory stands in the same case. A party cannot be permitted to approbate and reprobate on the same facts and take inconsistent shifting stands. The untenability of an inconsistent stand in the same case was considered in Amar Singh v. Union of India observing as follows:

> *"50. This Court wants to make it clear that an action at law is not a game of chess. A litigant who comes to court and invokes its writ jurisdiction must come with clean hands. He cannot prevaricate and take inconsistent positions."*
>
> *13. A similar view was taken in Joint Action Committee of Air Line Pilots' Assn. of India v. DGCA, observing:*
>
> *"12. The doctrine of election is based on the rule of estoppels- the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppels by election is one of the species of estoppels in pais (or equitable estoppels), which is a rule in equity. …….. Taking inconsistent pleas by a party makes its conduct far from satisfactory. Further, the parties should not blow hot and cold by taking inconsistent stands and prolong proceedings unnecessarily."*

37. In view of the above position, this Court is of the considered view that by taking prevaricating statements a party cannot be permitted to approbate and reprobate on the same facts and take inconsistent shifting stands. Thereby, the doctrine of election is based on the rule of estoppel and the principle that one cannot approbate and reprobate inheres in it. Thereby, taking inconsistent pleas by a party makes its conduct far from satisfactory.

38. In ***Praveen Singh v. State of Punjab***, (2000) 8 SCC 633: AIR 2001 SC 152, the apex Court held the arbitrariness, being opposed to reasonableness, is an antithesis to law.There cannot, however, be any exact definition of arbitrariness neither can there be any strait-jacket formula evolved therefor, since the same is dependent on the varying facts and circumstances of each case.

39. In ***Om Kumar v. Union of India***, (2001) 2 SCC 386 : AIR 2000 SC 3689 the apex Court held that arbitrary action is described as one that is irrational and not based on sound reason or as one that is unreasonable.

40. In ***Union of India v. Dinesh Engineering Corporation***, (2001) 8 SCC 491 : AIR 2001 SC 3887 the apex Court held that any decision, be it a simple administrative decision or a policy decision, if taken without considering the relevant facts, can only be termed as an arbitrary decision and violative of the mandate of Article 14 of the Constitution.

41. In the case of ***Praveen Singh*** (supra), the apex Court further held as follows:-

> "*The administrative or quasi-judicial authority clothed with the power of selection and appointment ought to be left unfettered in adaptation of procedural aspect but that does not however mean and imply that the same would be made available to an employer at the cost of fair play, good conscience and equity."*

42. In ***M.Nagaraj v. Union of India***, (2006) 8 SCC 212 : AIR 2007 SC 71, the apex Court held that the constitutional principle of equality is inherent in the rule of law. The rule of law is satisfied when laws are applied or enforced equally, that is, even-handedly, free of bias and without irrational distinction. The concept of equality allows differential treatment but it prevents distinctions that are not properly justified.

43. In ***Ashutosh Gupta v. State of Rajasthan***, (2002) 4 SCC 34 : AIR 2002 SC 1533 the apex Court held that the doctrine of equality before law is a necessary corollary to the concept of the rule of law of the constitution.

44. In ***Indra Sawhney v. Union of India***, (1992) Supp.3 SCC 217 : AIR 1993 SC 477 the apex Court held that the doctrine of equality is a dynamic and evolving concept. The concept of equality before law means that among equals the law should be equal and should be equally administered and the likes should be treated alike. All that Article 14 guarantees is a similarity of treatment and not identical treatment.

45. In view of the law laid down by the apex Court and by applying the same to the present context, since similarly situated PSUs, such as, OPGC and OHPC, having come within the Gold category, have extended pensionary benefit to their employees, non-extension of such benefit to the similarly situated PSU like OMC Ltd., even though as a matter of principle the State Government has approved the same which has received the concurrence of the Finance Department, amounts to violation of Article 14 of the Constitution of India. As the equality is the basic feature of the Constitution and the concept of Article 14 was interpreted by the Supreme Court as a concept of equality confined to the aspects of discrimination and classification, this Court is of the considered view that in the order impugned dated 28.04.2014, which has been passed while complying with the order dated 08.10.2012 passed in W.P.(C) No. 19405 of 2009, this basic principles have been lost sight of. Therefore, the order impugned dated 28.04.2014 in Annexure-9 cannot sustain in the eye of law and accordingly the same is liable to be quashed and is hereby quashed. This Court directs the opposite parties to reconsider the extension of pensionary benefit, as per the pension scheme approved by the State Government and concurred by the Finance Department in letter dated 05.10.1991 in Annexure-4, as expeditiously as possible, preferably within a period of four months from the date of communication of the judgment.

46. The writ petitions are thus allowed. However, there shall be no order as to costs.

2022 (III) ILR - CUT- 101

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

W.P(C) NO. 15998 OF 2016

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

.V.

SUBRAT DASH & ORS. .....Opp. Parties

APPOINTMENT – Odisha Subordinate Agriculture Service Rules, 1980 r/w proviso to Rule-2 of the Odisha Civil Services (Fixation of Upper Age Limit) Rules, 1989 – Relaxation of upper age limit – Whether proviso to Rule-2 of 1989 Rule, which has been deleted by way of an amendment vide Notification dated 14.07.2011, published in Odisha Gazette on 15.07.2011, is applicable to Opposite Party No.1 and other Applicants, when vacancies are prior to 15.07.2011? – Held, Yes – Vacancies which arose prior to 15.07.2011 are to be governed by the old Rule, i.e., un amended Rule, 1989 and the candidates are to get the benefit of age relaxation. (Para- 12)

Case Laws Relied on and Referred to :-

1. (1983) 3 SCC 284 : Y.V. Rangaiah Vs. J. Sreenivasa Rao.
2. AIR 2007 SC 2840 : P. Mohanan Pillai Vs. State of Keral.
3. (1983) 3 SCC 33 : A.A. Calton Vs. Director of Education.
4. (1997) 10 SCC 419 : State of Rajsthan Vs. R. Dayal.
5. (1998) 9 SCC 223 : B.L. Gupta Vs. M.C.D.

For Petitioners : Mr. S.N. Nayak, Addl. Standing Counsel

For Opp. Parties : M/s. D.K. Panda, G. Sinha, S. Behera & A. Mishra
Mr. P.K. Mohanty,Sr.Adv.

JUDGMENT Judgment Decided On : 11.08.2022

Dr. B.R.SARANGI, J.

1. By means of this Writ Petition, filed at the instance of the State and its functionary, prayer has been made to quash the common Order dated 13.01.2016 passed in O.A. No.109 (C) of 2012 and batch, as at Annexure-3, whereby the Odisha Administrative Tribunal, Cuttack Bench, Cuttack has directed the State-Petitioners to extend age relaxation to Opposite Party No.1 and other Applicants in the connected Original Applications against the vacancies in the post of Assistant Agriculture Officer occurred prior to 15.07.2011, during which period the proviso to Rule-2 of the Odisha Civil Services (Fixation of Upper Age Limit) Rules, 1989 (in short Rules, 1989) was in force, with an observation that in the event Opposite Party No.1 and other

Applicants are found eligible to such age relaxation, their candidature may be accepted and if they have already participated in the written test, their result should be declared along with other candidates. If any of the Applicants have not appeared in the written test and are found eligible on the basis of age relaxation, a Special Recruitment Test be conducted for them within a period of one month and consequential action be taken for declaration of result and for that requisite number of posts be kept vacant. It has also been observed that the said exercise, however, shall not be a bar for publication of result and issuance of appointment order of other selected candidates.

2. The factual matrix of the case, in brief, is that pursuant to an Advertisement was issued by Opposite Party No.3-Odisha Public Service Commission for filling up of the posts of Assistant Agriculture Officer, Opposite Party No.1, having requisite qualification, applied for the said post. As per criteria prescribed in the Advertisement, a candidate must be under 32 years and above 21 years of age as on 1st January, 2011, i.e., he/she must have been born not earlier than 2nd January, 1979 and not later than 1st January, 1990. As no recruitment was held for the post of Assistant Agriculture Officer for more than a decade and in the meantime, the candidates have become overage, they would be deprived of appearing the recruitment test in view of the upper age limit prescribed in the Advertisement.

2.1 As per Proviso to Rule-2 of the Orissa Civil Services (Fixation of Upper Age Limit) Rules, 1989, "if for any reason applications have not been invited by the Authority competent to conduct examination during any particular year to fill up the vacancies of that year, Applicants, who would have been eligible if applications were invited during that year, shall be eligible to compete at the examination held in the subsequent year". In view of this, Rules, 1989 will be applicable to Odisha Subordinate Agriculture Service Rules, 1980 and while publishing the Advertisement, the Authorities ought to have stipulated the said Clause enabling the Applicants to appear in the recruitment test by relaxing the upper age limit.

2.2. As per information obtained under the Right to Information Act, 2005 (for short "RTI Act, 2005"), out of the sanctioned strength of 552 Jr. Agriculture Officers, 277 posts were vacant during the year 2005, 319 in 2007 and 326 in 2009, when the said posts were abolished and upgraded to that of Assistant Agriculture Officer (Group-B) in 2009. In the rank of Assistant Agriculture Officer, 118 posts were vacant in 2009 and it was increased to 415 in 2010, after the cadre strength of the Assistant Agriculture Officer was increased to 1166 due to the up-gradation of 552 posts of Junior Agriculture Officer to that of

Assistant Agriculture Officer. In 2011, the vacancy position of Assistant Agriculture Officer was increased to 479. The State Government brought an amendment to the Orissa Civil Services (Fixation of Upper Age Limit) Rules, 1989, in which Proviso to Rule-2 was deleted. This amendment was notified by the G.A. Department on 14.07.2011 and it came into effect on 15.07.2011. In that view of the matter, the vacancies which arose prior to 15.07.2011 are to be governed by the old Rules, i.e., un-amended Rules, 1989 and the candidates are to get the benefit of relaxation of age. As such, the Applicants, being debarred from their legitimate right of age relaxation as per the un-amended Rules, 1989, filed O.A. Nos.109(C) 223(C), 224(C), 226(C), 245(C), 246(C), 247(C), 248(C), 249(C), 250(C), 292(C), 293(C), 3496(C), 3497(C) and 3496 (C) of 2012.

2.3 The State-Petitioners filed their Counter Affidavit before the Tribunal contending that as per Rules, 1989, if for any reason applications were not invited by the Authority competent to conduct examination during any particular year to fill up the vacancies of that year, Applicants, who would have been eligible, if applications were invited during that year, shall be eligible to compete at the examination held in the subsequent year. The said Proviso to Rules, 1989, has been deleted by an amendment vide Para-3 of the G.A. Department Notification dated 14.07.2011. Hence, the relaxation of upper age limit in respect of Applicants does not stand any merit after issuance of Notification dated 14.07.2011 of the G.A. Department. As a consequence thereof, the State-Petitioners claimed before the Tribunal for dismissal of the aforesaid Original Applications.

3. The Tribunal, after due consideration of the rival contentions of the parties, vide Order dated 13.01.2016, came to a conclusion that since the vacancies against the post of Assistant Agriculture Officer occurred prior to 15.07.2011, during which period the Proviso to Rule-2 of the Rules, 1989 was in force, the benefit is admissible to Opposite Party No.1 and other Applicants, therefore, allowed O.A. No.109(C) of 2012 and batch. Hence, the State-Petitioners have challenged the said Order in this Writ Petition.

4. Mr. S.N. Nayak, learned Additional Standing Counsel appearing for the State-Petitioners, contended that by the time Advertisement was issued, if Opposite Party No.1 and other Applicants incurred disqualification, for having become overage, they are not entitled to participate in the process of selection, because by that time amendment to Proviso to Rule-2 of the Rules, 1989 was already made. Even if vacancies are prior to 15.07.2011, in that case Opposite Party No.1 and other Applicants are not entitled to get the benefit, as directed by

the Tribunal. Thereby, it is contended that the Order dated 13.01.2016 passed by the Tribunal in O.A. No.109(C) of 2012 and batch should be quashed.

5. Mr. D.K. Panda, learned Counsel appearing for Opposite Party No.1, contended that as per un-amended Proviso to Rule-2 of Rules, 1989, if for any reason applications have not been invited by the Authority competent to conduct examination during any particular year to fill up the vacancies of that year, Applicants, who would have been eligible if applications were invited during that year, shall be eligible to compete in the examination held in the subsequent year. In such eventuality, since there was no recruitment made from 1991 to 2011 and vacancies are prior to 2011, Opposite Party No.1, along with other Applicants, is eligible to participate in the process of selection. The vacancies relate to the period from 2005 to 2011, i.e., before commencement of the amended Proviso to Rule-2 of the Rules, 1989. To substantiate his contentions, he has placed reliance on the judgments of the apex Court in ***Y.V. Rangaiah v. J. Sreenivasa Rao*****, (1983) 3 SCC 284; *P. Mohanan Pillai v. State of Keral*****, AIR 2007 SC 2840; *A.A. Calton v. Director of Education*****, (1983) 3 SCC 33; *State of Rajsthan v. R. Dayal*****, (1997) 10 SCC 419 and *B.L. Gupta v. M.C.D*****., (1998) 9 SCC 223.**

6. Mr. P.K. Mohanty, learned Senior Counsel appearing for Opposite Party No.3-Odisha Public Service Commission, contended that in compliance of the interim Order passed by the Tribunal, the result of the candidates has been kept in sealed cover, which shall be subject to result of the Writ Petition. As such, it is contended that since it is a year old case, he has not received any further instructions as to what has happened in the meantime.

7. This Court heard Mr. S.N. Nayak, learned Additional Standing Counsel appearing for the State-Petitioners; Mr. D.K. Panda, learned Counsel for Opposite Party No.1; and Mr. P.K. Mohanty, learned Senior Counsel appearing for Opposite Party No.3-Odisha Public Service Commission, 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.

8. There is no dispute that Opposite Party No.1 and other Applicants have got requisite qualification for the post of Assistant Agriculture Officer, save and except some of them have become age barred because of the age limit fixed in the Advertisement and they have been deprived of appearing in the examination, even though they have fulfilled other requirements fixed in the Advertisement. Therefore, the sole question, which revolves round in this case for decision of

this Court, is whether proviso to Rule-2 of the Rules, 1989, which has been deleted by way of an amendment vide Notification dated 14.07.2011, published in Odisha Gazette on 15.07.2011, is applicable to Opposite Party No.1 and other Applicants, when vacancies are prior to 15.07.2011?

9. As it appears, the last recruitment for the post of Junior Agriculture Officer (Group-C), as per Odisha Subordinate Agriculture Services Rules, 1980, was held in the year 1994 and, thereafter, the post of Junior Agriculture Officer was upgraded to Assistant Agriculture Officer (Group-B) of Odisha Agriculture Service by way of restructuring the cadre of Odisha Agriculture Service and selection to such post was to be made through the OPSC, vide Resolution No.4968-AFE-1(SP)27/2005-Ag. dated 17.02.2009 published in the Odisha Gazette on 07.03.2009. Pending framing of Rules, for the purpose of regulating the Recruitment and Conditions of Service of Assistant Agriculture Officer (Group-B) under Article 309 of the Constitution, the State Government in Agriculture Department issued instructions vide Resolution No.6812 dated 17.03.2011. Therefore, Odisha Subordinate Agriculture Services Rules, 1980 are not applicable to recruitment of the Assistant Agriculture Officer (Group-B), whose Appointing Authority is the Government in Agriculture Department. There is no dispute with regard to the fact that during the period from 1991 to 2011, neither the recruitment to the post of Junior Agriculture Officer nor Assistant Agriculture Officer was made. Though Opposite Party No.1 and other Applicants had requisite qualification, but, as because no Advertisement was made during that period even if vacancies were there, they could not be able to get any opportunity to try their luck. Now that some of them have become over-aged, since the vacancies occurred prior to amendment of the Proviso to Rule-2 of the Rules, 1989, which came into force w.e.f. 15.07.2011, such vacancies should be filled up as per old Rules, but not by the amended Rules.

10. In ***Y.V. Rangaiah***, ***P. Mohanan Pillai*** and ***A.A. Calton*** supra), the apex Court held that the vacancies which occurred prior to the amendment to the Rules would be governed by the old Rules and not by the amended Rules and, as such, ordinarily the Rules, which were prevailing at the relevant time, when the vacancies arose, would be adhered to and the qualification must be fixed at that time and the eligibility criteria as also the procedure prevailing on the date of vacancies should ordinarily be followed.

Similar view has also been taken by the apex Court in ***R. Dayal*** (supra).

11. In ***B.L. Gupta*** (supra), the apex Court in Paragraph-9 of the said Judgment held as follows:

"9. When the statutory rules had been framed in 1978, the vacancies had to be filled only according to the said Rules. The rules of 1995 have been held to be prospective by the High Court and in our opinion this was the correct conclusion. This being so, the question which arises is whether the vacancies which had arisen earlier than 1995 can be filed as per the 1995 Rules. Our attention has been drawn by Dr. Behta to a decision of this Court in the case of N.T. Devin Katti vs. Karnataka Public Service Commission. In that case after referring to the earlier decision in the cases of ***Y.V. Rangaiah Vs. J. Sreenivasa Rao****,* ***P. Ganeswar Rao Vs. State of A.P.*** *and* ***A.A. Calton Vs. Director of Education*** *it was held by this Court that the vacancies which had occurred prior to the amendment of the Rules would be governed by the old Rules and not by the amended Rules".*

12. In view of such position, vacancies which arose prior to 15.07.2011 will be governed by the old Rules, i.e., un-amended Rules, 1989 and the candidates are to get the relaxation in age notwithstanding anything contrary contained in the Recruitment Rules. Therefore, this Court is of the considered view that the Tribunal has not committed any error apparent on the face of the record by passing the Order dated 13.01.2016 in O.A. No.109(C) of 2012 and batch, which is hereby upheld.

13. Accordingly, the Writ Petition merits no consideration and the same is hereby dismissed.

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2022 (III) ILR - CUT- 106

ARINDAM SINHA, J.

WP(C) NO. 3324 OF 2022

Dr. SUJOG KUMAR NAYAK ……..Petitioner

.V.

BANDITA DAS & ANR. ……..Opp. Parties

LEGAL SERVICES AUTHORITIES ACT, 1987 – Section 22A(b-v) – Permanent Lok Adalat passed an award against petitioner/who is a doctor by profession – Claim of compensation for his negligence in surgery personally against him as well as against the hospital – Claim against the hospital dismissed but personal claim against the doctor sustained – The impugned award was not passed on the basis of documentary evidence – The impugned award challenged – Held, the award is not sustainable.

Case Laws Relied on and Referred to :-

1. (2021) 10 SCC 291 : Dr.Harish Kumar Khurana Vs. Joginder Singh.
2. (2012) 8 SCC 243 : Bar Council of India Vs. Union of India.
3. (2005) 6 SCC 1 : Jacob Mathew Vs. State of Punjab.

For Petitioner : Mr. Suryakanta Dash
For Opp. Parties : Mr. Manoj Kumar Mohanty (2)

ORDER Date of Order: 24.08.2022

ARINDAM SINHA, J.

1. Mr. Dash, learned advocate appears on behalf of petitioner, who is a doctor. On 24th June, 2022, he had moved the petition to submit, his client performed operation on private opposite party, who thereafter complained of medical negligence and the Permanent Lok Adalat (PLA), by impugned award dated 9th November, 2021, found in her favour. By order made that day Court had posed queries to Mr. Mohanty, learned advocate appearing on behalf of said private opposite party. Paragraph 3 in said order, containing the queries, is reproduced below.

> *"3. Court requires satisfaction that medical negligence is covered by entry (v) under clause (b) of section 22A in Legal Services Authorities Act, 1987. Furthermore, cursory glance at impugned award does not reflect evidence was laid before the PLA that corrective procedure was performed, for finding of mistake amounting to medical negligence."*

2. Mr. Dash relies on following judgments of the Supreme Court.

(i) ***Dr.Harish Kumar Khurana v. Joginder Singh****, reported in* ***(2021) 10 SCC 291***, paragraphs 25 and 27. Paragraph 25 is reproduced below.

> *"The extracted portion would indicate that the opinion as expressed by NCDRC is not on analysis or based on medical opinion but their perception of the situation to arrive at a conclusion. Having expressed their personal opinion, they have in that context referred to the principles declared regarding Bolam test and have arrived at the conclusion that the second surgery should not have been taken up in such a hurry and in that context that the appellants have failed to clear the Bolam test and therefore, they are negligent in performing of their duties. The conclusion reached to that effect is purely on applying the legal principles, without having any contra medical evidence on record despite NCDRC itself observing that the surgeon was a qualified and experienced doctor and also that the anaesthetist had administered anaesthesia to 25,000 patients and are not ordinary but experienced doctors."*

(ii) ***Judgment dated 20th April, 2022 in Civil Appeal no.6507 of 2009 (Dr. (Mrs.) Chanda Rani Akhouri v. Dr. M.A. Methusethupathi)***, paragraphs 23, 26 and 27 (Live Law print). A passage from paragraph 23 is reproduced below.

> *"23. In the case of medical negligence, this Court in* ***Jacob Mathew v. State of Punjab and Another, (2005) 6 SCC 1*** *dealt with the law of medical negligence in respect of professionals professing some special skills. Thus, any individual approaching such a skilled person would have a reasonable expectation under the duty of care and caution but there could be no assurance of the result. No doctor would assure a full recovery in every case. At the relevant time, only assurance given by implication is that he possessed the requisite skills in the branch of the profession and while undertaking the performance of his task, he would exercise his skills to the best of his ability and with reasonable competence. Thus, the liability would only come if (a) either a person (doctor) did not possess the requisite skills which he professed to have possessed; or (b) he did not exercise with reasonable competence in given case the skill which he did possess. It was held to be necessary for every professional to possess the highest level of expertise in that branch in which he practices. It was held that simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of the medical professional. xx xx xx"*

3. Relying on above authorities Mr. Dash submits, the PLA did not have any tangible medical evidence to find negligence against his client. On the contrary, in paragraph 8 of impugned award, finding was that problems of private opposite party were not the outcome of negligence or carelessness of the doctor but due to some unknown, unintentional and unwilling but curable mistakes during the operation.

4. Mr. Mohanty relies on judgment of the Supreme Court in ***Bar Council of India v. Union of India****, reported in* ***(2012) 8 SCC 243***, paragraphs 24, 26 and 32. A passage from paragraph 24 is reproduced below.

> *"xx xx xx The establishment of Permanent Lok Adalats and conferring them jurisdiction up to a specific pecuniary limit in respect of one or more public utility services as defined in Section 22-A(b) before the dispute is brought before any court by any party to the dispute is not anathema to the rule of law. Instead of ordinary civil courts, if other institutional mechanisms are set up or arrangements are made by Parliament with an adjudicatory power, in our view, such institutional mechanisms or arrangements cannot be faulted on the ground of arbitrariness or irrationality."*

Regarding above queries put by Court Mr. Mohanty submits, service rendered by petitioner as a practising doctor and surgeon is covered by entry (v) under clause (b) in section 22A. He submits further, parties had filed their respective evidence before the PLA and there was adjudication, upon failure of conciliation. In the circumstances, there should be no interference in writ jurisdiction.

5. It appears from impugned award that it was made against petitioner, who was respondent no.2 in the proceeding before the PLA. Respondent no.1 was Proprietor, Jaya Hospital Private Limited. Against said respondent the grievance petition of private opposite party was dismissed. Section 22A provides for 'service in hospital or dispensary' by entry (v) under clause (b). It appears, the grievance of private opposite party against the hospital stood dismissed but compensation directed against the doctor. The entry in question does not give distinction or amplification in the meaning of public utility service of hospital given thereunder, to include separately and in addition, services rendered by doctor(s). The PLA having had the grievance of private opposite party before it, against the hospital and the doctor, found that there was no deficiency in service by the hospital. It is clear that thereafter adjudication and finding against the doctor is clearly beyond the meaning of public utility service in respect of, in this case, service in hospital, wherein the operation was performed.

6. It will appear from paragraph 25 in **Dr. Harish Kumar Khurana** (supra) reproduced above that the Supreme Court found therein, opinion expressed by National Consumer Disputes Redressal Commission (NCDRC) was not on analysis nor based on medical opinion but their perception of situation to arrive at conclusion. In context of expressing the opinion there was reference to principle declared regarding Bolam test. The Supreme Court found the conclusion reached on the opinion was purely on applying legal principles, without having any contra medical evidence on record despite NCDRC itself observing that the surgeon was qualified and experienced doctor and so also the anaesthetist. In **Dr. (Mrs.) Chanda Rani Akhouri** (supra) the Supreme Court interpreted its earlier judgment in ***Jacob Mathew v. State of Punjab,*** *reported in* ***(2005) 6 SCC 1*** to say that by the earlier judgment the Court had said, the liability (on medical negligence) would come only if (a) either a person (doctor) did not possess the requisites skills, which he professed to have possessed; or (b) he did not exercise with reasonable competence in given case, the skill which he did possess.

7. By impugned award the PLA disbelieved petitioner's denial that private opposite party had not got in touch with him post operation. It went on to find that a corrective procedure was undergone by private opposite party from a separate facility. In that context a passage from paragraph 8 in impugned award is extracted and reproduced below.

> *"xx xx xx The contract of the doctor with the patient or his professional duty was not over soon after discharge of the patient but continued for some more time till it is finally found okay. So, Respondent No.2 was certainly negligent as he did not take any action when the Applicant complained of some problems after the surgery,* ***even though her problems were not the outcome of any negligence or carelessness of the doctor but due to some unknown, unintentional and unwilling but curable mistakes during the operation****. The patient had no earlier history of such problems as the discharge certificate is silent about the same."*
>
> *(emphasis supplied)*

On query from Court nothing could be shown from impugned award regarding reliance on documentary evidence regarding the second, said to be corrective procedure undergone by private opposite party. In the circumstances the finding is clearly an opinion not based on medical evidence and covered by aforesaid interpretation of the Supreme Court in **Dr. (Mrs.) Chanda Rani Akhouri** (supra).

8. In view of aforesaid, it is clear that the PLA acted illegally in awarding against petitioner, upon having dismissed the grievance against the hospital, inasmuch as its jurisdiction to adjudicate was confined to services rendered by the hospital and having discharged it, could not have gone any further. It also acted with material irregularity in rendering opinion to indict petitioner without any basis of medical evidence.

9. Impugned award is set aside and quashed and the writ petition, disposed of.

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2022 (III) ILR - CUT- 110

ARINDAM SINHA, J.

W.P.(C) NO.19374 OF 2022

M/s. NAYAGARH COOPERATIVE SUGAR INDUSTRIES LTD., NAYAGARH. …….. Petitioner

.V.

NAYAGARH SUGAR COMPLEX LTD., KHURDA & ORS. ……Opp. Parties

ARBITRATION AND CONCILIATION ACT, 1996 – Section 5 – Judicial interference – When admissible? – Held, when there is no remedy provided in the Act for the situation arisen on the reference proceeding in spite of the moratorium, then the Judicial review is necessary.

For Petitioner : Mr. Debendra Kumar Dwibedi
For Opp. Parties : Mr. Durga Prasad Nanda, Sr. Adv.
Mr. Lalit Maharana

ORDER Date of Order: 25.08.2022

ARINDAM SINHA, J.

1. Mr. Dwibedi, learned advocate appears on behalf of petitioner and submits, his client is respondent in the arbitration reference having made counter claims against the corporate debtor/claimant. He draws attention to order dated 12th December, 2021, whereby there was declaration of moratorium under section 14 of Insolvency and Bankruptcy Code, 2016, in respect of opposite party no.1 (corporate debtor). He submits, prayer in the petition is for quashing order dated 8th July, 2022 passed in the reference, thereby holding that it can be continued with in spite of the declaration.

2. Mr. Nanda, learned senior advocate appears on behalf of opposite party no.1. He submits, the writ petition is not maintainable as judicial intervention is limited by section 5 in Arbitration and Conciliation Act, 1996. Without prejudice, he supports the view expressed in impugned order by reliance on clause(a) under sub-section (1) in section 14. He submits, the prohibition is only on actions against the corporate debtor.

3. Mr. Maharana, learned advocate appears on behalf of the Resolution Professional (RP). He draws attention to his client's letter dated 10th March, 2022 addressed to Chairman of opposite party no.1. He relies on following in the letter, reproduced below.

> *"Accordingly, in view of the above, we once again request you to handover the control & custody of the said premises along with the detailed inventory & videography, as was prepared by you at the time of seizure, at the earliest possible, to enable us for smooth conduct of the Corporate Insolvency Resolution Process."*

Mr. Nanda disputes the allegation.

4. There is no dispute that there has been declaration of moratorium. There is also no dispute, as Court has ascertained, petitioner has counter

claims against the corporate debtor in the reference. There is no law, which provides for proceeding with a reference piece meal. The moratorium applies. That being said, it is not necessary to go into the supplementary dispute as to whether management of the corporate debtor has been handed over to the RP.

5. The writ petition is found to be maintainable as because there is no remedy provided in the 1996 Act for the situation, arisen on the reference proceeding in spite of the moratorium. Judicial review therefore is necessary.

6. The reference, in which impugned order was passed, will remain stayed till subsistence of the declaration of moratorium. In event, thereby, the mandate expires, parties to the reference will find their remedy for extension of the mandate, as and when the occasion arises.

7. The writ petition is disposed of.

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2022 (III) ILR - CUT- 112

D.DASH, J.

S.A. NO. 290 OF 2000

STATE OF ORISSA, REPRESENTED BY THE COLLECTOR, KALAHANDI & ORS. ……..Appellants

.V.

SRI BANAMALI JAL (SINCE DEAD) BY HIS LRs. ……Respondents

ORISSA GOVERNMENT LAND SETTLEMENT ACT, 1962 – Section 7-B– The Tahasildar issued show cause notice for cancellation of the Patta issued in favour of the Plaintiff by a lease Case – After hearing, Tahasildar referred the matter recommending to the Collector through the Sub-Collector to cancel the Patta – Plaintiff filed the suit for declaration of title – Whether in view of the bar contained in Section 7-B of the OGLS Act, the suit for declaration of title is maintainable? – Held, No.

For Appellants : Miss.Samapika Mishra, Addl. Standing Counsel.

For Respondents : M/s.D.P.Dhal, S.K. Dash, B.S.Dasparida.

JUDGMENT Date of Hearing: 03.08.2022:Date of Judgment: 08.08.2022

D.DASH, J.

The State-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 13.05.1999 and 25.06.1999 respectively passed by the learned District Judge, Kalahandi-Nuapada at Bhawanipatna in Title Appeal No.26 of 1998.

By the same, the Appeal filed by the present Respondent (Plaintiff), being the unsuccessful Plaintiff under section 96 of the Code, has been allowed and the judgment and decree dated 21.09.1998 and 25.09.1998 respectively passed by the learned Civil Judge, Senior Division, Bhawanipatna in T.S. No.55 of 1997 have been set aside. The Respondent (Plaintiff) being the unsuccessful before the Trial Court on being non-suited, he has been successful in the First Appeal in obtaining a declaratory decree that the order dated 23.08.1996 and subsequent orders passed by the Tahasildar, Kalahandi in Misc. Case No.3 of 1996 are illegal and the Appellants (Defendants) have been permanently injuncted from taking any legal action against the Respondent (Plaintiff) impeaching his right, title, interest and possession over the suit land.

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

3. The Plaintiff's case is that in the year 1976, he being a landless person, applied for lease of Government land before the Tahasildar, Kalahandi. Accordingly, by the order passed in Lease Case No.34 of 1976, Patta had been granted to him leasing out Ac.0.300 decimals of land belonging to the State. The Plaintiff accordingly possessed the said land. It is stated that after grant of Patta to the Plaintiff, the record of right was corrected in the Hal Settlement Operation and the land was recorded in the name of the Plaintiff.

On 05.08.1996, the Plaintiff received the notice from the Tahasildar, Kalahandi calling upon him to show the cause as to why the lease Patta granted him shall not be cancelled. The Plaintiff then denied the allegations

made against him. The Tahasildar, after hearing, referred the matter recommending to the Collector through Sub-Collector for cancellation of the Patta issued in favour of the Plaintiff. It is said that said initiation of the proceeding by the Tahasildar is illegal. The Plaintiff, therefore, filed the suit praying therein to declare that said order passed by the Tahasildar recommending cancellation of the lease be held illegal and it be further held that the Defendants have no right to cancel the Patta issued in favour of the Plaintiff.

The Trial Court dismissed the suit in view of the bar contained in Section 7-B of the Orissa Government Land Settlement Act, 1962 (for short, 'the OGLS Act').

4. The Plaintiff thus being non-suited, having carried the Appeal, has been able to get those judgment and decree passed by the Trial Court reversed. The First Appellate Court has decreed the suit as aforestated.

5. The Appeal has been admitted on 10.01.2019 to answer the following substantial questions of law:-

> "A. Whether the suit for permanent injunction restraining the Collector, Kalahandi, defendant no.1, from passing any order on the recommendation dated 23.8.1996 to the Tahasildar, Bhawanipatna, defendant no.3 is maintainable?;
>
> B. Whether the plaintiff is entitled to the lease of the Government land having an area of three acres of land, when the plaintiff is a Government servant and is not a landless person?; and
>
> C. In view of the bar contained in section 7-B of the OGLS Act, whether the suit for declaration of title is maintainable?; and
>
> D. Whether the Collector, Kalahandi, plaintiff no.1, has jurisdiction to cancel the same, when the lease is granted not in conformity with the principles of the OGLS Act?"

6. Learned counsel for the State-Appellants submitted that in view of the bar contained in Section-7-B of the OGLS Act, the Trial Court having rightly dismissed the suit, the First Appellate Court has erred in law in taking a view to the contrary. It was submitted that for the purpose, the First Appellate Court has fallen in grave error by relying on a decision of this court in relation to a case where the bar contained under section 16 of the Orissa Prevention of Land Encroachment Act has been discussed and its scope has

been outlined. According to her, the said decision in the case of State of Orissa –V- Bhanu Mali (Dead) Nurpa Bewa and others; 1996 (I) OLR 460 has absolutely no application to the case in hand. She further submitted that after the said order passed by the Tahasildar issuing Patta in respect of the suit land in favour of the Plaintiff, it being discovered that the Plaintiff had practiced fraud upon the Authority acting under the OGLS Act in falsely representing on the material facts which are the main criterias as to the eligibility of a person to be entitled to lease of public property; the move for cancellation as per law has been taken. She, therefore submitted that in the above backdrop the suit in the present form seeking the relief as prayed for ought to be dismissed as the provision of Section 7-B of the OGLS Act squarely comes into play and stand on the way of entertaining of such a suit that the functionaries under the OGLS Act cannot prevented from proceeding and for that reason the OGLS Act prescribes the forums to be knocked at for redressal of the grievances. She further submitted that the suit seeking permanent injunction restraining the Defendant No.1 from passing any order on the recommendation dated 23.08.1996 as made by Defendant No.3 is not maintainable in the eye of law and the First Appellate Court has committed grave error in even passing such a decree restraining the statutory authority to act in terms of the statute and in consonance with the power provided thereunder.

7. Learned counsel for the Respondents submitted that the proceeding for cancellation being barred as having not been initiated within the period of fourteen years of grant of lease, the First Appellate Court cannot be said to have committed any mistake in decreeing the suit.

In response to the above, learned counsel for the Appellants submitted that here the Plaintiff having practiced fraud upon the Authority and having mis-represented the material facts, which have persuaded the Authority to pass the order of lease in his favour, the question of limitation even as per the provision as it stood prior to the year 2013 would not stand.

8. Keeping in view the submissions made, I have carefully read the judgments passed by the Courts below. In the fitness of the things, this Court feels that as the substantial questions of law as at A and C touch upon the root of the matter, that be answered first.

9. Admittedly, the Plaintiff having made an application for grant of lease of the land belonging to the State, Lease Case No.34 of 1976 had been

registered. Finally, in the said case, the order was passed for grant of Patta in respect of the land in question in favour of the Plaintiff. The Authority then in the year 1996 initiated action for cancellation of said Patta and the Plaintiff being provided with the opportunity of showing cause and hearing, the Authority, i.e, the Tahasildar has recommended the matter to the Superior Authority for cancellation of said lease and consequently, the Patta. At this stage, the Plaintiff has filed the suit seeking the reliefs as already stated.

Section-3B of the OGLS act empowers any officer authorized under clause (e) of section 3 for resumption of Government land and imposition of penalty on the person in whose favour the Government land has been settled. Section 7-B of the said Act bars the jurisdiction of the Civil Court to entertain any suit or proceeding in respect of any matter which any officer or authority is empowered by or under the Act to determine. It further provides that no injunction shall be granted by any Civil Court in respect of any action taken or to be taken in exercise of any power conferred by or under the Act. The provision contained in sub-section 3 of section 7 of the Act also empowers the Collector to examine any records on his own motion or otherwise for the purpose of himself that any such order was passed under a mistaken of fact or owing to a misrepresentation or on account of any material irregularity and procedure and he then may pass such order thereon as he thinks fit.

The Plaintiff thus having not waited till the final order, has come forward to file the suit simply stating that initiation of such action does not have sanction of law. In view of the clear provision, as aforestated, in my view, the Trial Court, on going through the averments taken in the plaint further viewing the reliefs sought for by the Plaintiff, was absolutely right in dismissing the suit, which is found to have been erroneously set aside by the First Appellate Court by taking a view which appears to be indefensible.

With the above answer to the substantial questions of law as at A and C; this Court feels no further necessity to answer the other substantial questions of law.

10. In the result, the Appeal stands allowed and the judgment and decree passed by the First Appellate Court are hereby set aside and those passed by the Trial Court are restored. There shall, however, be no order as to cost.

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2022 (III) ILR - CUT- 117

D.DASH , J.

R.S.A. NO. 330 OF 2009

PRAFULLA KUMAR NAIK ……..Appellant

.V.

LOKANATH MAHAKUD & ORS. ……..Respondents

ADVERSE POSSESSION – Determination of title –When the antecedent title holder Projects a case of permissive possession and fails – Whether that failure would ipso facto give rise to a finding that the possessor has perfected title by adverse possession – Held, No. – The defendants are still under legal obligation to plead and prove that all through, they have remained in possession of the lands for upward of the prescribed period by satisfying all the requirements for the purpose by leading clear, cogent and acceptable evidence – Mere long Possession of a piece of immovable Property does not ensure to be benefit of the possessor in establishing his case of acquisition of title by way of adverse possession. (Para-11 & 12)

For Appellant : M/s.S.P. Misra, B. Mohanty, S. Nanda, S.K. Sahoo, S. Kashyap

For Respondents: M/s.Prafulla Chandra Das,M.R. Satpathy, T.K. Mohanty, S.K. Pattanaik

JUDGMENT Date of Hearing : 01.08.2022:Date of Judgment: 22.08.2022

D.DASH , J.

These Appellants in filing this Appeal under Section-100 of the Code of Civil Procedure 1908 (for short, 'the Code') have assailed the judgment and decree passed by the learned District Judge, Keonjhar, in RFA No.14 of 2008.

By the same, the Appeal filed by these Appellants as the aggrieved Defendants in Civil Suit No.53 of 2005 under Section-96 of the Code has been dismissed. The First Appellate Court has confirmed the judgment and decree passed by the learned Civil Judge (Senior Division), Keonjhar in the above noted suit whereby the right, title and interest of the Respondents No. 1(Plaintiff) and Respondent Nos.2 to 8 (Defendant Nos.9 to 15) over the suit land has been declared and these Appellants (Defendant Nos.1 and 3 to 7) as well as Respondent Nos. 4 to 10 (Defendant Nos. 9 to 15) have been directed to deliver vacant the possession of the suit land in favour of the parties as above whose title over the suit land has been declared.

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

3. The Plaintiffs case is that one Baraju Mahakud is the common ancestors of the Plaintiff and Defendant Nos.9 to 15. He died leaving behind his son Laxman. The three sons of Laxman are Giridhari, Jatadhari and Dhira. Giridhari being dead, his wife being one of his heirs is Defendant No.15. The plaintiff being his son is the other heir of Giridhari. Defendant No.13 and Defendant No.14 are the other son and daughter of Giridhari. Daitari is dead, Defendant No.11 is the wife of Daitari and Defendant Nos. 10 and 11 are Daitari's son and daughter respectively. Dhira being alive is Defendant No.9

The property described in Schedule-'A' of the plaint stated to be ancestral property of the Plaintiff and Defendant nos.9 to 15. Giridhari was residing in village Gumura; whereas Daitari residing at village Dimbo and in village Motitungir, Dhira was residing. It is stated that all these three brothers jointly alienated some immovable properties in favour of the Defendant Nos.1 and 3 to7 and the father of Defendant Nos. 2 & 8 in village Badahal. It is further stated that they permitted those purchasers to possess their adjoining land with the condition that when they would leave the possession whenever so demanded. It is stated that although the purchased land have been recorded in the name of the purchasers in the record of Hal Settlement, the land which was not alienated in their favour is standing recorded under Khata No.21 simply with a noting in the remark column of the record of right that the said land is the possession of those purchasers of the adjoining plot of land.

The Plaintiffs admitted that the land under Plot No.52 is in possession of Defendant No.1; under Plot No.154 is in possession of the defendant No.5; the land under Plot No.154/353 is in possession of Defendant No.2 and the land under plot no.152/354 is in possession of Defendant No.8. It is stated that Giridhari was spending most of his time in doing social work and was coming in association with Saints. He died two years before the institution of the suit i.e. around the year, 2003 or so and before his death, he had directed his sons to take possession of the land shown in Schedule-'A' of the plaint from the Defendant No.1 to 8 and cultivate if they so desire. The Plaintiffs claim to be the Karta of the family. He states that on becoming major, when

he asked the Defendants to leave the possession of the suit land, they did not agree. Therefore, the suit has come to be filed.

4. The Defendant Nos. 1 and 3 to 7 together filed the written statement. It is stated that the land which the Defendant have purchased under registered sale-deed have been duly recorded in their name in record of right. They claim to be in possession of the land under Plot Nos.152, 154 and 159 since they purchased the nearby land which have been recorded in their name. Therefore, they claim to have perfected title over the suit land which lies near their purchased land by way of adverse possession. It is stated that they were never disposed from the said land. They claim that such possession is hostile, continuous and uninterrupted to the knowledge of the Plaintiff and Defendant Nos. 9 to 15.

5. On the above rival pleadings, the Trial Court in total framed eight (8) issues. Proceeding to answer rightly the crucial issues together i.e. issue nos. 7 & 8 which concern with the claim of the Plaintiff and Defendant Nos.9 to 15 as having the subsisting right, title and interest over the suit property as also the competing claim of the Defendant Nos. 1 to 8 as to have perfected their title over the said land by virtue of adverse possession in extinguishment of the right, title and interest of the Plaintiff and Defendant Nos. 9 to 15; upon examination of evidence and their analysis from all angles in the backdrop of the settled position of law the Trial Court has answered those in favour of the Plaintiff and Defendant Nos. 9 to 15 and against the Defendant nos. 2 to 8. This answer has led the Trial Court to decree the suit granting the Plaintiff all the reliefs that he had prayed for. Defendant Nos. 1 to 8 being aggrieved by the aforesaid judgment and decree passed by the Trial Court having carried the First Appeal have been unsuccessful. Hence, the present Second Appeal.

6. The Appeal is admitted to answer the following substantial questions of law:-

> (1) Whether the courts below have acted contrary to law in holding that the defendants are in permissive possession even though they came into the possession pursuant to their purchase from the plaintiffs' forefather under a registered sale-deed?
>
> (2) Whether the courts below have erred in law in not considering the plea of adverse possession taken by the defendants in their written statements as an alternative plea?

7. Mr. S.P. Misra, learned Senior Counsel for the Appellants submitted that in so far the purchased land of the Defendant Nos. 1 to 8 by registered sale-deed dated 09.09.1972, 12.10.1972, 04.12.1972, 23.02.1973, 18.05.1973 and 11.09.1973 are concerned, there is no dispute that said lands are in possession of the purchasers (vendees) and they are having the right, title and interest over the same. He submitted that the dispute is with regard to excess land remaining in possession of these Defendant Nos. 1 to 8 and those excess land are stated to have been in possession of the Defendant Nos. 1 to 8. He submitted that when the Plaintiff says that it was so permitted by his predecessor-in-interest with the assurance that the possession would be left when asked for that is denied by the Defendants. He therefore submitted that when such theory of permissive possession of the suit land being left in the hands of the Defendant Nos. 1 to 8 has not been established by the Plaintiffs leading, clear, cogent and acceptable evidence, the Courts below ought not to have rejected the claim of the Defendant Nos. 1 to 8 that by virtue of long possession over the suit property in open and peaceful manner and that too continuously; they have perfected their title over the same and thereby the right, title and interest of the Plaintiff and Defendant Nos. 9 to 15 over the land stood extinguished by operation of law. He further submitted that on the failure of the Plaintiff to establish the fact that the Defendant Nos. 1 to 8 had been permitted by the Plaintiff and Defendant Nos. 9 to 15 to possess the suit land, the very nature of possession ought to have been held as hostile to the true owner and in denial of the title of the true owner. According to him, when it is said that the Plaintiff and others were aware of the factum of the possession of the suit land by these Defendant Nos. 1 to 8, the conclusion has to be that they have perfected their title over the suit land by virtue of adverse possession and the right, title and interest of the Plaintiff and Defendant Nos. 9 to 15 has stood extinguished long since and as such the suit as laid is maintainable and the relief as prayed for are not allowable in the eye of law being barred by limitation.

8. Mr. P.C. Das, learned Counsel for the Respondents submitted all in favour of the findings recorded by the Trial Court as affirmed by the First Appellate Court. According to him, the failure of the Plaintiff to prove the fact that the Defendant Nos. 1 to 8 had been permitted to occupy the suit land is hardly of any legal consequences except to say that they merely admit the possession of those Defendants from the time when they sold their other lands over which there is no dispute. He submitted that when the antecedent title over the suit land rests with the Plaintiff and Defendant Nos. 9 to 15

which is not disputed, it is for the Defendant Nos. 1 to 8 to establish as to how they have acquired title over it by adverse possession by clearly pleading and proving all those elements in support of said claim of acquisition of title by adverse possession. According to him, the concurrent finding of fact as have been rendered by the Courts below touching upon the ingredients behind the establishment of claim of acquisition of title over the suit land by way of adverse possession by the Defendant Nos.1 to 8 in the negative is not liable to be interfered with as there surfaces no such perversity nor in the matter of appreciation of evidence there is any legal flaw to be so taken cognizance of so as to upset.

9. Keeping in view the submissions made, I have carefully read the judgments passed by the Courts below, I have also gone through the plaint and written statement and have perused the depositions of the witnesses as well as the documents admitted in evidence and marked exhibits from the side of the parties.

10. Admitted factual position stands to the effect that Defendant Nos. 1 to 8 have purchased some properties vide registered sale-deed which have been admitted in evidence and marked Ext.A to F and they are the recorded tenants in respect of said purchased land and as such in possession of the said land and paying rent to the same. In so far as the suit land is concerned, when it is stated by the Plaintiff that those Defendants were permitted to occupy the said land and the Defendants do not admit the factum of being entrusted with that property in their occupation as per the permission of the Plaintiff and with the condition as to leaving the possession of the same as and when so desired.

11. When the Plaintiff in paragraph-3 of the plaint has stated about permission as aforesaid, the Defendants in their written statement at paragraph-7 have pleaded as follows:-

> "It is false to say that Defendant No.1 and 3 to 7 possessed adjoining land with permission from the vendors and when the vendors still desire to them would vacant and their possession that too in fact the possession of the excess land under Plot No.152 and 159 by Defendant No.1 forcibly, hostile, exclusive, open and from the knowledge of the vendors and their successors in interest including the Plaintiff and everybody continuous, uninterrupted from 12.08.1972 for which the forcibly note of possession has been recorded in the name of Defendant No.1 in the Hal ROR."

It is the settled position of law that where the antecedent title of a person over a piece of immovable property is established/proved, the burden lies on the possessor of the said immovable property to establish his claim of acquisition of title by adverse possession, through satisfactory evidence in meeting the classical requirements which are *nec vi, nec clam and nec precario*. The possession must be open, peaceful and continuous without any interruption from any quarter and more importantly, the possessor must have began to possess denying the title of the true owner exhibiting hostile animus claiming title unto himself to the knowledge of the true owner as such all through.

In case where the antecedent title holder projects a case of permissive possession and fails; it is not the law that said failure would ipso facto give rise to a finding that the possessor has perfected title by adverse possession in relieving the possessor of the legal obligation as he is to so discharge under normal circumstances. In that event also the nature of possession of the possessor in law automatically cannot be taken to be hostile to the antecedent title holder and it is not permissible to deem that the possessor is possessing the suit land adversely denying the title of the true owner and claiming title unto himself. I am afraid in accepting the submission that here the failure of the Plaintiff to establish the theory of permissive possession of the suit land by the Defendants as projected would enure to the benefit of the Defendants in holding that from that very time onward there was the denial of the title of the true owner by them. The antecedent title holder having failed to prove the projected permissive theory cannot thereby be further burdened to prove that the possessors have not acquired the title by adverse possession. In that view of the matter in my opinion, here the Defendant Nos.1 to 8 are still under the legal obligation to plead and prove that all through, they have remained in possession of the lands for upward of the prescribed period by satisfying all the requirements for the purpose by leading, clear, cogent and acceptable evidence. The contention of the learned Senior Counsel for the Appellants on this score thus cannot be countenanced with.

12. Adverting to the pleading in the written statement, it is seen from paragraph-11 that the Defendants have pleaded that the possession of the excess land than that of the purchased land is to the knowledge of the vendor which was forcible and continuous. Here the Defendants do not say that they began to possess the suit land as if the same as their purchased land. Even it is not stated in clear terms that they possessed the land being so delivered by

the vendor as they possessed their purchased land being so delivered by the vendor. Therefore, if they have possessed the suit land when they possessed the purchased land lying by its side, the nature of possession of the suit cannot be taken to be as that of the same as in respect of the purchased land and as its owner and in denial of the title of the true owner. The Defendant No. 1 having come to the witness box, very interestingly has stated at paragraph-4 in his evidence in chief that his possession over the suit plot Nos. 152 and 159 was not permissive nor he was giving any bhag or kara either to the ancestors of the Plaintiff or the Plaintiff from the date of his purchase in the year 1972. In the previous paragraph, it has been stated that he altogether purchased Ac.0.80 decimals of land under two sale-deeds and that he is in possession of the Ac.0.78 decimals of land comprising of Plot Nos. 152, 159 and 153/359 and as such he is in possession over the suit plot from 12.10.1972 and has prescribed his title thereto being in long and continuous possession to the knowledge of the Plaintiff and others. This falls far short of the satisfaction as to the fulfillment of the requirements as to acquisition of title by adverse possession.

With such state of affairs in the pleadings in the written statement and the evidence, on the face of the settled position of law that mere long possession of a piece of immovable property, does not enure to the benefit of the possessor in establishing his case of acquisition of title by way of adverse possession; the Courts below are found to have rightly answered those issues in finally decreeing the suit; granting the reliefs as prayed for.

The aforesaid discussion and reasons accordingly provide the answer to the substantial questions of law which in turn lead to confirm the judgment and decree passed by the Courts below.

13. In the result, the Appeal stands dismissed. However, there shall be no order as to cost.

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2022 (III) ILR - CUT- 124

BISWANATH RATH , J.

W.P.(C) NO. 20049 OF 2022

KAPALA BULU @ K. BULU ……..Petitioner

.V.

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

ORISSA GRAMA PANCHAYAT ACT, 1964 – Section 25 – The authority Passed an order of suspension of petitioner who was a elected sarapanch merely on the premises that he was arrested and kept in jail custody from 8.06.2022 to 27.06.2022 – Subsequently a consequential order is also passed Placing the Naib sarapanch as sarapanch – Whether the Orders passed by the authority sustainable under the Law? – Held, No – On entire reading of the provision of section 25 and delving into the reason placing the petitioner under suspension, this court finds none of the provision satisfying the action of the competent authority – The order has been passed mechanically and without even proper understanding the provision contained in the Act – The impugned order set-aside. (Para-8)

Case Laws Relied on and Referred to :-

1. 2009(1)ILR-CUT-69 : Basudev Dandasena Vs. State of Orissa & Ors.
2. 2009 (Supp.1) OLR 1025 : Sri Pramod Kumar Tripathy Vs. State of Orissa & Ors.

For Petitioner (s) : Mr. S.Ku. Pradhan

For Opp. Parties : Mr. U.K. Sahoo, Addl. Standing Counsel

JUDGMENT Date of Hearing & Judgment: 22.08.2022

BISWANATH RATH, J.

1. For the involvement of serious legal question this Court on consent of both the parties; proceeds to decide this matter finally at the stage of admission.

2. The order of suspension vide Annexure-5 is challenged through the Writ Petition on the premises that the reason in suspending the Petitioner does not come within the parameters of the provision at Section 25 of the Orissa Grama Panchayats Act, 1964 hereinafter in short be called as "the Act, 1964".

3. Reading the impugned order Mr. Pradhan, learned counsel for the Petitioner contended that the Petitioner has been suspended merely on the premises that he was arrested and kept in jail custody from 8.06.2022 to 27.06.2022 and subsequently a consequential order is also passed placing the Naib Sarpanch as Sarpanch, which order is also impugned herein. Taking this Court to the provision at Section 25 of the Act, 1964 and reading through the same Mr. Pradhan, learned counsel for the Petitioner submitted that the reason in placing the Petitioner being the elected Sarapanch under suspension is found to be beyond the scope of Section 25 of the Act, 1964 and thus Mr. Pradhan, learned counsel for the Petitioner claimed that there is mechanical passing of the impugned orders which must go. In the process Mr. Pradhan, learned counsel for the Petitioner further relied on two decisions of this Court in the case of ***Basudev Dandasena*** Vrs. ***State of Orissa and Ors.*** reported in **2009(1)ILR-CUT-69** and in the case of ***Sri Pramod Kumar Tripathy*** Vrs. ***State of Orissa and 3 others*** as reported in **2009 (Supp.1) OLR 1025**. Taking this Court to the above judgments Mr. Pradhan, learned counsel for the Petitioner alleged that in spite of the settled position of law on this score in the contest of the State on the issue, the Public Authorities have acted being influenced by the local leaders and even the Petitioner being the elected representative of the Gram Panchayat is placed under suspension since 16.07.2022. Mr. Pradhan, learned counsel for the Petitioner further contended that in this regard a response even though was filed by the Petitioner on 12th August, 2022, the same remained undisposed.

It is, in the above premises, Mr. Pradhan, learned counsel for the Petitioner requested this Court for interfering in the impugned order and setting aside the same.

4. Mr. Sahoo, learned State Counsel taking this Court to the reason of placing the Petitioner under suspension and further also taking this Court to the involvement of the Petitioner in the Criminal Case vide P.S. Case No.236 dated 7.06.2022 contended that not only the Petitioner is facing serious criminal charges, but the Petitioner was also found to be in custody for more than 15 days. It is, at this stage of the matter, reading through the provision at Section 25 of the Act, 1964 an attempt is made by Mr. Sahoo, learned State Counsel to justify the impugned order at Annexure-5. Mr. Sahoo, learned State Counsel also looking to the nature of offence alleged to have been committed by the Petitioner, contended that the Petitioner does not deserve to be representing the local people. In his opposition to the decisions cited by

Mr. Pradhan, learned counsel for the Petitioner, Mr. Sahoo, learned State Counsel contended that the decisions since involve different issue, the same have no application to the case at hand.

5. It is, in the above background of the matter, Mr. Sahoo, learned State Counsel submitted that for the Petitioner's claim of raising an objection before the competent authority pursuant to the order of suspension vide Annexure-5, the Director in exercise of power U/s.115(2) of the Act, 1964 can very well consider such issue and therefore, urged that the writ petition is not maintainable at this stage. Mr. Sahoo, learned State Counsel claimed that the matter may be remitted back to the Director for taking a lawful decision. At the same time Mr. Sahoo, learned Additional Standing Counsel further taking this Court to the provision at Section 21 of the Act, 1964 further submitted that in the event a Sarpanch is absent for a substantial period; the authority has power to put Naib Sarpanch in the temporary position of Sarpanch and Mr. Sahoo, learned Additional Standing Counsel thus contended that there is no illegality in exercise of power U/s.115 of the Act, 1964 in passing the impugned order.

6. Considering the rival contentions of the parties this Court from Annexure-5 finds, the followings are the reason of suspension of the Petitioner:-

> "Whereas, it appears from the report of the Collector Ganjam that, Sri Kapala Bulu, Sarpanch of Masiakhali Gram Panchayat under Kukudakhandi Block has been involved in Berhampur P.S. Case No.236, dated 07.06.2022 U/S – 341/294/326/307/34 IPC turned to U/S 341/ 294/ 326/ 307/ 114/34 IPC vide GR NO.1216/2022. Sri Kapala Bulu was arrested on 08/06/2022 by Berhampur Sadar Police and he is in jail custody till reporting by Collector on 27.06.2022 and as such his further continuance as Sarpanch of Masiakhali Grama Panchayat is detrimental to the interest of the inhabitants of the Masiakhali Grama Panchayat."

7. It is, at this stage of the matter, this Court finds, there is no dispute that the Petitioner is already involved in a Criminal Case U/s.341/294/326/307/34 of I.P.C vide G.R. No.1216/2022. There is no dispute that the Petitioner Kapala Bulu @ K. Bulu was found in custody from 8.06.2022 till 27.06.2022. This Court reading through the provision at Section 25 of the Act, 1964 nowhere finds, there is provision for suspending a member of the Gram Panchayat on the ground of his remaining in custody for any period.

This Court here takes into account the submission of Mr. Sahoo, learned Additional Standing Counsel through the provision at Section 21 of the Act, 1964 and finds, the Section 21 of the Act, 1964 reads as follows:-

> "**21. Powers and functions of the Naib-Sarpanch** – (1) The Naib-Sarpanch shall exercise such powers, discharge such duties and perform such functions of the Sarpanch as the Sarpanch may from time to time delegate to him in writing and the Sarpanch may in like manner withdraw any or all the powers, duties and functions as so delegated.
>
> (2) When the office of the Sarpanch falls vacant the Naib-Sarpanch shall for all the purposes of this Act, exercise the powers, discharge the duties and perform the functions of the Sarpanch until a new Sarpanch is elected or nominated, as the case may be, to fill up the vacancy.
>
> (3) In the absence of the Sarpanch, the Naib-Sarpanch shall preside over the meetings of the Grama Panchayat and in the absence of both at the meeting any other member of the Grama Panchayat present may be elected to preside over the meeting.
>
> (4) When the office of the Sarpanch is vacant or the Sarpanch has been continuously absent from the Grama for more than fifteen days or is incapacitated for more than fifteen days and there is either a vacancy in the office of the Naib-Sarpanch or the naib-Sarpanch has been continuously basent from the Grama for more than fifteen days or is incapacitated for more than fifteen days, the powers and functions of the Sarpanch shall devolve on a member of the Grama Panchayat from out of a panel of three such members in order of priority elected in the prescribed manner by the Grama Panchayat in that behalf, who shall be the officiating Sarpanch and shall exercise the powers and perform the functions of the Sarpanch subject to such restrictions and conditions, if any, as may be prescribed until a Sarpanch or Naib-Sarpanch assumes office, on being duly elected or, as the case may be, takes charge of his office.
>
> Provided that in the absence of any such panel or in the case of non-availability of the members on such panel the Sub-Divisional Officer may nominate one of the members of the Grama Panchayat to officiate the Sarpanch and to exercise the powers and perform the functions of the Srapanch in accordance with the provisions of this sub-section."

Reading the provisions taken note hereinabove enabling the competent authority to put the Naib Sarpanch in the post of Sarpanch, this Court finds, such provision can be applicable; if the Sarpanch remains unavailable. Through the recordings made in the impugned order it becomes clear that the basis of putting the Naib Sarpanch in place of Sarpanch is the Sarpanch remaining in custody during the period from 8.06.2022 to

27.06.2022. Materials further disclose that the Petitioner i.e. the elected Sarapanch got bail by the competent Court's order on 11.07.2022. Undisputedly the impugned order was passed on 16.07.2022 vide Annexure-5 and the Naib Sarpanch was put in position of Sarapanch on 27.07.2022 when the Sarapanch was very much available to be working. For the above scenario there was no scope for pressing the provision at Section 21 of the Act, 1964.

Further keeping in view the provision at Section 25 of the Act, 1964, this Court finds, the Petitioner was languished in jail for nearly about twenty days and the same does not debar him from continuing as a member of the Gram Panchayat even being elected as a Sarapanch of the Gram Panchayat. The provision at Section 25(f) & (g) prescribes; a Member of the Gram Panchayat can be suspended provided he is convicted of an election offence under any law for the time being in force; or is convicted for an offence involving moral turpitude and sentenced to imprisonment of not less than six months unless a period of five years has elapsed since his release or is ordered to give security for good behavior under Section 110 of the Code of Criminal Procedure, 1898 (5 of 1898). This Court here also taking into consideration the judgments relied on by the Petitioners and taken note hereinabove, finds, the judgments have direct application to the case at hand.

8. On entire reading of the provision at Section 25 of the Act, 1964 and getting into the reasons of placing the Petitioner under suspension, this Court finds, none of the provision satisfies the action of the competent authority in placing the Petitioner under disqualification clause. It is, at this stage of the matter this Court takes into consideration the serious objection of the learned State Counsel that for the statutory provision U/s.115(2) of the Act the Director can undertake such exercise, this Court finds, the Petitioner being an elected Sarapanch has been placed under suspension for more than one month and it is not known; whether the Petitioner will be convicted or not in the criminal case pending against him and for the Petitioner holding a statutory position in the Office of the Sarapanch, that too an elected representative, he cannot be prevented from discharging his responsibility under the Act, 1964 on mere technicalities. This Court also otherwise finds, in the event the Petitioner is acquitted, the period of loss cannot be made available to the Petitioner. For the clear position in the statute to bring one under disqualification clause, this Court finds, the order at Annexure-5 has been passed mechanically and without even proper understanding of the provision contained in the Act, 1964. Thus, interfering with the impugned order at

Annexure-5 being contrary to the provision at the Odisha Grama Panchayats Act, 1964, this Court sets aside the same and further declares the action pursuant to the order at Annexure-5 vide Annexure-6 also bad.

9. The writ petition succeeds to the extent indicated hereinabove. There is, however, no order as to the costs.

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2022 (III) ILR - CUT- 129

BISWANATH RATH , J.

W.P.(C) NO.19373 OF 2022

BALARAM PANDA ……..Petitioner

.V.

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

CONSTITUTION OF INDIA, 1950 – Article 226, 227 – Allegation of non-admission of a proceeding, pending since 2021 before the commissioner, consolidation and settlement – The Direction issued to secretary of Government Revenue and Disaster Management Department to undertake an exercise to avoid flowing of such un-necessary litigations to High Court by making positive arrangements.

(Para-4)

For Petitioner : Mr.S.Pattanaik

For Opp. Parties : Mr.S.Mishra, ASC

ORDER Date of Order: 30.08.2022

BISWANATH RATH , J.

1. Heard learned counsel for the Parties.

2. There is an allegation of non-admission of a proceeding pending since 2021 by the Commissioner, Consolidation & Settlement, Cuttack. This Court finds, every now and then such applications are being filed in High Court seeking direction for admission of such matter appearing to be unnecessary litigations. This Court finds, everyday there are five to six such matters listed, someday even this Court gets a dozen such matters and High Court has to spend some precious time on these unnecessary litigations. Such time, if saved can be spent in clearing the hearing matter pending long since. It is needless to mention here that this Court also gets at last three matters a day

for targeting final disposal of such matters, which even pending over six years. This Court expresses its anxiety and displeasure in over-burdening the High Court in unnecessary litigations and State has to find concrete resolution to such aspects.

3. This Court however in disposal of the matter at hand observes, in the event the Petitioner files an application for admission of R.C. Case No.213 of 2021 before the Commissioner, Consolidation & Settlement, Cuttack, O.P.2 within seven days from today, the same shall be acted upon and steps for admission shall be undertaken within further seven days.

4. The Secretary to Government in Revenue and Disaster Management Department, O.P.1 is also directed to undertake an exercise to avoid flowing of such unnecessary litigations to High Court by making positive arrangement for admission and early disposal of such disputes at least within a period of two weeks from the date of filing and finalize at least within a period of six months from the date of its filing.

5. The Petitioner is directed to serve a copy of this order along with copy of the Writ Petition on O.P.2.

6. Registry is directed to communicate this order to O.P.1 forthwith.

7. Issue urgent certified copy.

8. A free copy of this order be supplied to the learned Additional Standing Counsel.

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2022 (III) ILR - CUT- 130

S.K. SAHOO, J.

CRL. REV. NO. 1093 OF 2006

1. SUSHANT KUMAR MEHER
2. SUBRANSU SEKHAR MEHER .....Petitioners

.V.

STATE OF ODISHA .....Opp. Party

CRL. REV. NO. 20 OF 2016

DUSHILA MEHER .....Petitioner

.V.

STATE OF ODISHA .....Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Sections 227, 228 – Framing of charges – Duty of Court and principles – Discussed with case laws.
(Para-5)

Case Laws Relied on and Referred to :-

1. A.I.R 1977 SC 1489 : State of Karnataka Vs. L.Muniswamy & Ors.
2. A.I.R 1979 SC 366 : Union of India Vs. Prafulla Kumar Samal & Anr.
3. A.I.R. 1990 SC 1962 : Niranjan Singh Karam Singh Punjabi Vs. Jitendra Bhimraj Bijja & Ors.
4. (2019) 75 OCR (SC) 1 :Dipakbhai Jagdishchandra Patel Vs. State of Gujarat & Anr.
5. (2010)47 OCR (SC) 650 : Sajjan Kumar Vs. Central Bureau of Investigation.
6. (2017)66 OCR 654 : Bikuna Sahu & Ors. Vs. State of Orissa.
7. (2017) 66 OCR 608 : Manoj Kumar Bohidar Vs. State of Orissa.

For Petitioners : Mr. Himanshu Sekhar Mishra

For Opp. Party : Mr. Rajesh Tripathy, Addl. Standing Counsel

JUDGMENT Date of Hearing: 25.08.2022: Date of Judgment: 16.09.2022

S.K. SAHOO, J.

The petitioners Sushant Kumar Meher and Subransu Sekhar Meher have filed Crl. Rev. No.1093 of 2006 challenging the order dated 30.08.2006 passed by the learned Sessions Judge, Bolangir (hereafter 'trial Court') in Sessions Case No. 88-B of 2005 in rejecting the petition filed by them under section 227 of Cr.P.C. for their discharge from the offences under sections 302 and 304-B of the Indian Penal Code.

The petitioner Dushila Meher has filed Crl. Rev. No.20 of 2016 challenging the order dated 15.12.2015 passed by the learned trial Court in Sessions Case No. 54-B of 2006 in framing charges against her for the offences under sections 498-A, 304-B, 302, 201 and 202 read with section 34 of the Indian Penal Code and section 4 of the Dowry Prohibition Act.

Since both the revision petitions arise out of one case and common questions of fact and law are involved, with the consent of the learned counsel for both the parties, those were heard analogously and disposed of by this common judgment.

The learned trial Court has rejected the discharge petition of the petitioners in Crl. Rev. No. 1093 of 2006 as per impugned order dated 30.08.2006 on the ground that charges were framed against the petitioners

for the offences under sections 498-A, 304-B, 302, 201 and 202 read with section 34 of the Indian Penal Code and section 4 of the Dowry Prohibition Act and three witnesses were examined from the side of the prosecution and there are prima facie materials against them.

Pursuant to the query made by this Court as per order dated 17.08.2022 as to why there was delay in filing the discharge petition before the learned trial Court by the petitioners in CRL. REV. No. 1093 of 2006, learned counsel for the petitioners submitted that accused Lingaraj Meher (since dead) approached this Court earlier in CRLMC No. 179 of 2006 challenging the order of framing of charge dated 02.01.2006 and this Court vide order dated 14.02.2006 granted liberty to him to file suitable petition before the learned Court below, whereafter discharge petition was filed by the petitioners and the impugned order dated 30.08.2006 was passed and therefore, there is no delay in filing the discharge petition.

2. The prosecution case, as per the first information report lodged by Yudhistir Meher before the officer in charge of Tusura police station on 31.03.2005 is that he had given marriage of his daughter Bharati Meher (hereafter 'the deceased') to the petitioner no.1 Sushant Meher as per Hindu rites and customs on 04.07.2003. During the marriage, he had given one Hero Hondo motor cycle, gold ornaments weighing about seven tolas and other house hold articles to his son in-law.In the month of September 2004, the petitioner no.1 told the deceased wife Bharati to bring cash of Rs.25,000/- (twenty five thousand) from her father (informant) for opening of a Homeopathic clinic at village Tusura and her father-in-law Lingaraj Meher (dead), mother-in-law Dushila Meher and brother-in-law Subransu Sekhar Meher along with her husband (petitioner no.1) threatened her to bring the same from the informant. During the Dussehra, when the informant made a phone call to the mother-in-law of the deceased and requested her to allow the deceased to visit her paternal place, she replied that unless Rs.25,000/- was not paid, the deceased would not be allowed to go to her father's place. On the day of Maha Saptimi of Dussehra, the informant along with his elder son-in-law Sashibhushan Meher came to the in-laws' house of the deceased with pooja materials and dresses and by that time the mother- in-law, father-in-law, brother-in-law and the husband of the deceased misbehaved with them due to non-payment of the demanded amount and the informant expressed his inability to fulfill their demand for which the deceased was tortured physically and mentally. On 03.03.2005

the deceased gave birth to a male child and the informant and his wife visited the house of her in-laws on 05.03.2005 and brought back the deceased along with her son to their house finding inadequate treatment to them. The father-in-law and mother-in-law of the deceased also accompanied them and returned back after staying for three days. On 18.03.2005 the petitioner no.1 visited the house of the informant and insisted for payment of Rs.4,000/- (rupees four thousand), which was fulfilled by the informant, who also promised to pay the balance amount in future. On 20.03.2004 the petitioner no.1 left the house of the informant with the deceased and after four days, the deceased made a telephone call to the informant and told that the in-laws family members were torturing her to which the informant assured her that on 28.03.2005 he would visit Barkani to attend a Ganga Sradha and at that time, he would visit her. On 28.03.2005 at about 11.00 a.m. the informant and his brother Gobardhan Meher got information that the heath condition of deceased was very serious. Thereafter, the informant and his brother visited the in- laws' house of the deceased and found that the deceased was lying dead on a cot and dry blood was seen on her mouth. Thereafter, he lodged the F.I.R. basing on which Tusura P.S. Case No. 48 dated 31.03.2005 was registered.

The officer in-charge of Tusura police station took up investigation of the case. It was found during investigation that the dead body of the deceased was consigned to flame in the cremation ground without reporting at the police station. The statements of the witnesses were recorded. The dowry articles were seized on production of zima of the son of the informant. The I.O. arrested the petitioners in CRL. REV No.1093 of 2006 and forwarded them to Court and on completion of investigation, final charge sheet was submitted on 10.08.2005 against the petitioners under sections 498-A, 304-B, 302, 201 and 202 read with section 34 of the Indian Penal Code and section 4 of the Dowry Prohibition Act showing the petitioner Dushila Meher as an absconder.

3. Mr. H.S. Mishra, learned counsel appearing for the petitioners in both the revision petitions argued that it is a case of suicide and the deceased hanged herself from a beam with the help of a plastic rope and therefore, the submission of charge sheet against the petitioners under section 302 of the Indian Penal Code was unjustified. It is further submitted that from the suicidal note written in odia by the deceased on the prescription pad of Dr. S.K. Meher was seized by the I.O on production by petitioner no.1 in

presence of the witnesses on 13.04.2005 in which the deceased had specifically mentioned that whatever step she was taking on that day was on account of the in-laws'family members and her husband was no way responsible for the same. Learned counsel further submitted that ignoring all these aspects, the I.O. submitted charge sheet and the investigation is perfunctory and after the death of the deceased, the parental side family members of the deceased have foisted this case and therefore, the petitioners should be exonerated from the charges. In support of his submission, Mr. Mishra has placed reliance on the decisions of the Hon'ble Supreme Court in the cases of **State of Karnataka -Vrs.- L.Muniswamy and others reported in A.I.R 1977 Supreme Court 1489, Union of India -Vrs.- Prafulla Kumar Samal and another reported in A.I.R 1979 Supreme Court 366, Niranjan Singh Karam Singh Punjabi -Vrs.- Jitendra Bhimraj Bijja and others reported in A.I.R. 1990 Supreme Court 1962 and Dipakbhai Jagdishchandra Patel -Vrs.- State of Gujarat and another reported in (2019) 75 Orissa Criminal Reports (SC) 1**.

4. Mr. Rajesh Tripathy, learned Additional Standing Counsel for the State of Odisha, on the other hand, submitted that even though it is the case of the accused persons that the deceased committed suicide inside the room by hanging herself from a beam with the help of a plastic rope, they should have reported the matter to the police so that the post mortem could have been done to ascertain the cause of death, but the accused persons disposed of the dead body in a clandestine manner by consigning to flame in the cremation ground, which has created a strong suspicion against their conduct. It is further argued that the so-called suicidal note of the deceased produced by the petitioner Susanta Kumar Meher goes to show that he is innocent, however, during the course of investigation, nothing was found that the said note was in the handwriting of the deceased. Learned counsel for the State placed the statements of the witness Yudhistir Meher (informant), Akhaya Kumar Meher, brother of the deceased, who have stated about demand of dowry by the petitioners and physical and mental torture on the deceased on account of non-payment of Rs.25,000/- (rupees twenty five thousand) towards dowry. Learned counsel further submitted that letters were written by the deceased to her family members wherein it was indicated how she was subjected to torture by her in-laws' family members. It is further argued that when the informant along with his brother Gobardhan Meher arrived in the house of the petitioners on receiving

message about the serious health condition of the deceased, they found that the deceased was found dead on a cot in her bed room and there was dry blood on her mouth and when the in-laws family members were confronted, they begged apology and the informant became senseless. Learned counsel further submitted that since there are sufficient grounds for proceeding against the petitioners on the basis of the available materials on record, the revision petition should be dismissed.

5. In **L.Muniswamy** (supra), the Hon'ble Supreme Court in paragraph 7 held as follows:

> ".....It is clear from the provision that the Sessions Court has the power to discharge an accused if after perusing the record and hearing the parties he comes to the conclusion, for reasons to be recorded, that there is not sufficient ground for proceeding against the accused. The object of the provision which requires the Sessions Judge to record his reasons is to enable the superior court to examine the correctness of the reasons for which the Sessions Judge has held that there is or is not sufficient ground for proceeding against the accused. The High Court therefore is entitled to go into the reasons given by the Sessions Judge in support of his order and to determine for itself whether the order is justified by the facts and circumstances of the case....."

In **Prafulla Kumar Samal** (supra), the Hon'ble Supreme Court in paragraph 7 held as follows:

> "Section 227 of the Code runs thus:-
>
> If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.
>
> The words 'not sufficient ground for proceeding against the accused' clearly show that the Judge is not a mere post-office to frame the charge at the behest of the prosecution, but has to exercise his judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the prosecution. In assessing this fact, it is not necessary for the court to enter into the pros and cons of the matter or into a weighing and balancing of evidence and probabilities which is really his function after the trial starts. At the stage of Section 227, the Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. The sufficiency of ground would take within its fold the nature of the evidence recorded by the police or the documents produced before the court which ex-facie disclose that there are suspicious circumstances against the accused so as to frame a charge against him."

In **Niranjan Singh Karam Singh** Punjabi (supra), it has been held as follows:

> ".....it seems well-settled that at the Sections 227-228 stage, the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging there- from taken at their face-value disclose the existence of all the ingredients constituting the alleged offence. The Court may for this limited purpose sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case."

In **Dipakbhai Jagdishchandra Patel** (supra), the Hon'ble Supreme Court in paragraph 21 has held as follows:-

> "21. At the stage of framing the charge in accordance with the principles which have been laid down by this Court, what the Court is expected to do is, it does not act as a mere post office. The Court must indeed sift the material before it. The material to be sifted would be the material which is produced and relied upon by the prosecution. The sifting is not to be meticulous in the sense that the Court dons the mantle of the trial Judge hearing arguments after the entire evidence has been adduced after a full-fledged trial and the question is not whether the prosecution has made out the case for the conviction of the accused. All that is required is, the Court must be satisfied that with the materials available, a case is made out for the accused to stand trial. A strong suspicion suffices. However, a strong suspicion must be founded on some material. The material must be such as can be translated into evidence at the stage of trial. The strong suspicion cannot be the pure subjective satisfaction based on the moral notions of the Judge that here is a case where it is possible that accused has committed the offence. Strong suspicion must be the suspicion which is premised on some material which commends itself to the court as sufficient to entertain the prima facie view that the Accused has committed the offence."

In case of **Sajjan Kumar -Vrs.- Central Bureau of Investigation reported in (2010)47 Orissa Criminal Reports (SC) 650**, it is held as follows:-

> "17. On consideration of the authorities about the scope of Section 227 and 228 of the Code, the following principles emerge:
>
> (i) The Judge while considering the question of framing the charges under Section 227 of the Cr.P.C. has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine prima facie case would depend upon the facts of each case.
>
> (ii) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained, the Court will be fully justified in framing a charge and proceeding with the trial.
>
> (iii) The Court cannot act merely as a Post Office or a mouthpiece of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities etc. However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

(iv) If on the basis of the material on record, the Court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.

(v) At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the Court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible.

(vi) At the stage of Sections 227 and 228, the Court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value discloses the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

(vii) If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal."

This Court in the case of **Bikuna Sahu and others -Vrs.- State of Orissa** reported in **(2017)66 Orissa Criminal Reports 654** has held as follows:-

".....Considering the provisions under sections 227 and 228 of Cr.P.C., it is apparent that the Judge concerned has to consider all the records of the case, the documents placed, hear the submissions of the accused and the prosecution and if there is 'no sufficient ground' for proceeding against the accused, he shall discharge the accused by recording reasons. If after such consideration and hearing, as mentioned in section 227 of Cr.P.C., the Judge is of the opinion that 'there is ground for presuming' that the accused has committed an offence, he is free to direct the accused to appear and try the offence in accordance with the procedure after framing charge in writing against the accused. The probative value of the materials collected by the prosecution cannot be gone into at the stage of framing of charge and the materials are to be accepted as true at that stage. Whether the accused in fact committed the offence or not, can only be decided in the trial. A mini trial at the stage of framing of charge is not permissible."

In the case of **Manoj Kumar Bohidar -Vrs.-State of Orissa** reported in **(2017) 66** Orissa Criminal Reports 608, this Court has held as follows:-

"Law is well settled that the truthfulness, sufficiency and acceptability of the materials produced at the time of framing of charge can be done only at the stage of the trial. Even a strong suspicion founded upon materials on record would justify the framing of charges against the accused. If the materials brought on record reasonably connect the accused with the crime, no further inquiry has to be conducted at that stage inasmuch as weighing the pros and cons of the case, alleged improbability feature and meticulous examination of the evidence is not required. The defence plea is not to be considered at that stage which can be done only in rare and exceptional cases."

6. Adverting to the contentions raised by the learned counsel for the respective parties and keeping in view the ratio laid down in the aforesaid decisions, on perusal of the case records, it appears that the family members of the deceased have consistently stated about the demand of dowry and physical and mental torture on the deceased on account of non-payment of Rs.25,000/- (rupees twenty five thousand), which was demanded by the petitioner Sushanta Kumar Meher for opening of a homeopathic clinic. Letters were seized which were written by the deceased to her elder sister Minati Meher, who was staying at Dubai, which are dated 11.08.2004, 27.12.2004 and another date (not noted) in which the deceased has expressed as to how she was subjected to torture by her husband and in-laws family members for dowry. There are also materials on record to show that even though the accused persons stated that the deceased committed suicide by hanging herself from a beam with the help of a plastic rope, but the dead body was disposed of and consigned to flame without reporting at the police station. The authenticity of the so-called suicidal note of the deceased, which was produced by the petitioner Sushant Kumar Meher could not be established. The petitioner Dusila Meher absconded for which charge sheet was submitted showing her as an absconder.

7. On a careful analysis of the case records, I am of the humble view that there are grounds for presuming that that the petitioners have committed the offences under which charges have been framed. The materials on record indicate that the petitioners not only subjected the deceased to physical and mental torture in connection with demand of dowry, but also the deceased met with an unnatural death and for disappearance of evidence, the accused persons cremated the dead body of the deceased in a clandestine manner by consigning to flame without reporting to the police authorities and thus, the learned trial Court is quite justified in framing the charges.

Accordingly, both the revision petitions being devoid of merits stands dismissed.

Since the occurrence is of the year 2005 and charge has already been framed, the learned trial Court shall do well to conclude the trial within a period of six months from the date of receipt of the order.

It is made clear that any observation made while adjudicating this revision petition challenging the legality of framing of charge should not influence the learned trial Court and he has to strictly proceed to decide the case on the basis of the evidence to be adduced by both the sides at the time of trial.

2022 (III) ILR - CUT- 139

S.K. SAHOO, J.

JCRLA NO. 70 OF 2016

PRADEEP PANDA ……..Appellant

.V.

STATE OF ODISHA ……..Respondent

JCRLA NO. 71 OF 2016

RAGHUNATH SAHU ……Appellant

.V.

STATE OF ODISHA ……. Respondent

(A) NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 – Sections 20(b)(ii)(C), 25 – Independent witness did not support the prosecution case – Effect of – Held, merely because the independent witness has not supported the prosecution case, the evidence of other witnesses and the prosecution case cannot be disbelieved.

(B) NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 – Non-compliance of sections 42, 50 and 57 – Effect of – Indicated with case laws. (Para-8c-8e)

Case Laws Relied on and Referred to :-

1. 2020 (I) OLR 39 : Herasha Majhi & Ors. Vs. State of Odisha.
2. (2020) 10 SCC120 : Mukesh Singh Vs. State (Narcotic Branch of Delhi)
3. (2009) 44 OCR (SC) 183 : Karnail Singh Vs. State of Haryana.
4. 2019 (I) OCR 34 : Biswanath Patra Vs. State of Odisha.
5. 1999 (II) OCR (SC) 474 : State of Punjab Vs. Baldev Singh.
6. (2018) 70 OCR 340 : Ramakrushna Sahu Vs. State of Odisha.
7. (2005)4 SCC 350 : State of H.P. Vs. Pawan Kumar.
8. 2020 CLJ 730 : Manoj Kumar Panigrahi Vs. State of Odisha.

For Appellants : Ms. Kiran Rout

For Respondent : Mr. Debasis Biswal, Addl. Standing Counsel

JUDGMENT Date of Hearing: 14.09.2022: Date of Judgment: 23.09.2022

S.K. SAHOO, J.

The appellant Pradeep Panda and Raghunath Sahu faced trial for the offence punishable under section 20(b)(ii)(C) of the Narcotic Drugs

and Psychotropic Substances Act, 1985 (hereafter 'N.D.P.S. Act') along with co-accused Kiran Kumar Pati who was separately charged for the offence under section 20(b)(ii)(C) read with section 25 of the N.D.P.S. Act in the Court of the learned 3rd Addl. Sessions Judge -cum- Special Judge, Berhampur, Ganjam in 2(a) C.C. Case No. 20/2012(N)/T.R. No. 22 of 2015 on the accusation that on 04.06.2012 at about 5.30 a.m., both the appellants were found in conscious possession of 220 kilograms of ganja (cannabis) and transporting the same in a Tata Indica car bearing registration No.OR-02W-5419 without having any authority or licence to possess the same and the co-accused Kiran Kumar Pati being the owner of the said car knowingly permitted the appellants to use the car for commission of transporting ganja in contravention of the provisions of the N.D.P.S. Act.

The learned trial Court vide impugned judgment and order dated 04.11.2016 while acquitting the co-accused Kiran Kumar Pati of all the charges, found the appellant guilty of the offence charged and sentenced 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 pay the fine, to undergo rigorous imprisonment for one year each.

2. The prosecution case, in short, is that P.W.7 Sarat Chandra Bhanja, S.I. of Excise, E.I. & E.B.(S.D.), Berhampur received reliable information regarding illegal transportation of ganja at Dengaosta to Seragada side on 04.06.2012 at about 3.00 a.m.. He reduced the information into writing and gave written intimation (Ext.11) to his higher authority i.e. Siba Prasad Gantayat (P.W.6), who was working as Inspector in- charge of Excise, E.I. & E.B. Unit-II, Berhampur. Then P.W.7 along with other excise officials proceeded to Narasinghagada Chhak under Patapur police station to work out the information. They reached at the spot by 5.20 a.m. and while performing patrolling duty at about 5.30 a.m., they detected one Indica car bearing registration No. OR-02W-5419 coming from the side of Dengaosta and going towards Palaspur and found two persons inside the car, one person was driving the car and another person were sitting adjacent to him in the car. After detaining the car, P.W.7 disclosed his identity to those two persons and also ascertained their identification and the appellant Raghunath Sahu was found to be driver of the vehicle and the appellant Pradeep Panda was found sitting in the front seat. Since smell of ganja was coming from inside the car, P.W.7 called P.W.1 Kali Charan Barala, who was passing by that way and requested him to remain present as

a witness. P.W.7 gave written option to the appellants about their right to be searched before a Gazetted Officer or an Executive Magistrate, but both the appellants expressed their willingness in writing to be searched by P.W.7. P.W.7 gave his personal search before P.W.1 and then the car was searched and six jerry bags containing ganja were recovered, out of which three were kept at the backside seat and three were kept in the dickey of the car. P.W.7 put the Sl. Nos.1 to 6 on six jerry bags. He opened each of the bags one after another and tested a handful of ganja from each bag by rubbing the same in his palm so also by burning the same and from its smoke, colour, text and from the departmental experience of thirty three years, he came to the conclusion that the recovered articles were nothing but cannabis. He prepared drug testing chart and on weighment of each jerry bags by means of spring balance, the total quantity of ganja came to be 220 kilograms. Since the appellants did not disclose the source from which they collected such ganja and admitted their guilt, P.W.7 sealed the jerry bags and put the impression of brass seal on each of the jerry bags so also affixed the paper slip which contains his signature, the signatures of the appellants and the witnesses. He handed over the brass seal in zima of P.W.3 Biswajit Das by executing zimanama vide Ext.5/2. He prepared the seizure list in which the signatures of the appellants so also the witnesses were taken and copy of the seizure list was given to each of the appellants. P.W.7 also prepared spot map vide Ext.6/2 and then he recorded the statements of the appellants as well as the witnesses, explained the grounds of arrest of the appellants. P.W.7 brought the appellants along with the seized articles and produced them before the learned Sessions Judge - cum- Special Judge, Berhampur and prayed for drawal of samples of the seized articles. As per the order of the learned Special Judge, he produced the seized articles before the learned S.D.J.M., Berhampur, who verified the seal and seized articles were opened for drawal of samples and accordingly, 50 grams of samples from each of the jerry bags in duplicate were collected. The sample packets Ext.A to F were handed over to P.W.5 Braja Bihari Nayak, Constable of Excise to hand over the same to the Asst. Chemical Examiner, D.E.C.T.L., Berhampur under the authorization letter issued by the learned S.D.J.M., Berhampur. The broken seals of jerry bags were kept in a separate envelope and sealed before the learned S.D.J.M., Berhampur so also the seized jerry bags Sl. Nos.1 to 6 containing cannabis were stitched and resealed by the learned S.D.J.M., Berhampur. Thereafter, the jerry bags Sl. Nos.1 to 6 with seized articles and envelope containing broken seal so also duplicate sample packets A1 to F1 were

deposited in Court Malkhana vide C.M.R. No. 26 dated 04.06.2012 as per the orders of the Court. On 05.06.2012 P.W.7 submitted preliminary report and also wrote a letter to the R.T.O., Bhubaneswar to find out the ownership of the offending vehicle. On 11.06.2012 he received the report from the R.T.O., Bhubaneswar that the owner of the vehicle was the accused Kiran Kumar Pati (who faced trial and acquitted). The Chemical Examiner indicated in his report that the sample marked as Exts. A to F were found to be cannabis (Ganja) as defined under section 2(iii)(b) of the N.D.P.S. Act. Since in spite of all attempts made by P.W.7 to serve the notice on the owner of the vehicle, it could not be possible, on completion of investigation, final prosecution report was submitted against the two appellants so also accused Kiran Kumar Pati, showing latter as an absconder.

3. The appellants pleaded not guilty to the charge framed against them and claimed to be tried.

4. The defence plea of the appellant Pradeep Panda is that on 03.06.2012 he was coming from Arakhapur from Berhampur in Kaleswari bus and at about 7.00 p.m. he reached at Berhampur bus stand and went to his friend's house through Goilundi Chhak and at that place, he was called by one person Bhanja Babu, who took him to Excise office and he was detained in the night and on the next day, his signatures were taken on some papers and thereafter, he was forwarded to Court.

The defence plea of the appellant Raghunath Sahu is that on 03.06.2012 he was going in a bus from Puri to Berhampur to his brother-in-law's house situated at Digapahandi and he was coming with a bag having sweets inside it, but he was caught by excise people who took him to Goilundi office and he was detained there on that day and thereafter, on the next day, his signatures were taken on some papers and the excise people took away his driving licence and thereafter he was produced in the Court along with the appellant Pradeep Panda.

5. During the course of trial, in order to prove its case, the prosecution examined seven witnesses.

P.W.1 Kali Charan Barada, who is an independent witness, did not support the prosecution case. He stated that on one occasion, while he was going to Lunilathi from his village in a cycle, on the way near Palaspur police

officials asked him to sign on some blank papers and no written option was given to the accused Raghunath Sahu in his presence and he also proved his signature on Ext.1. He also stated that no written option was given to the accused Pradeep Panda in his presence but he proved his signature on Ext.3. He also proved his signatures on Exts. 4, 5, 6, 7 and 8.

P.W.2 Saroj Kumar Bag, who was working as Constable of Excise, E.I. & E.B.(SD), Berhampur was issued with command certificate for service of notice on the accused Kiran Kumar Pati. He proved his signature on the command certificate in Ext.9.

P.W.3 Biswajit Dash who was working as Constable of Excise, E.I. & E.B.(SD), Berhampur was one of the members of the patrolling party with P.W.7 and stated about recovery of contraband ganja from the vehicle in question. He is a witness to the zimanama (Ext.5), spot map (Ext.6) and seizure list (Ext.7).

P.W.4 Ladu Kishore Panigrahy, who was working as A.S.I. of Excise, E.I. & E.B.(SD), Berhampur, was one of the members of the patrolling party with P.W.7 and stated about recovery of contraband ganja from the vehicle in question.

P.W.5 Braja Bihari Nayak, who was working as Constable of Excise, E.I. & E.B.(SD) Unit-II, Berhampur was one of the members of the patrolling party with P.W.7 and stated about search and seizure of contraband ganja from the possession of the appellants in the offending car. He is a witness to the written option given to the appellants as per Exts.1/1 and 2/1. He is also a witness to the drug testing chart conducted at the spot as per Ext.8/1 and also the zimanama of brass seal of the I.O. as per Ext.5/2. He is also a witness to the seizure list prepared at the spot as per Ext.7/2 as well as the spot map as per Ext.6/2.

P.W.6 Siba Prasad Gantayat, who was working as Inspector in-charge of E.I. & E.B., Unit-II, is the immediate official superior of P.W.7. He is also a witness to the written options marked as Exts.1/1,3/2, 4/2, 5/2 as well as the spot map Ext.6/2 and seizure list Ext.7/2.

P.W.7 Sarat Chandra Bhanja, who was the Sub-Inspector of Excise, E.I. & E.B. (S.D.), Berhampur is the investigating officer of the case.

The defence has examined four witnesses in support of the defence plea.

D.W.1 is the appellant Pradeep Panda, who stated that on the date of occurrence i.e. on 03.06.2012 he was coming from Arakhapur to Berhampur in Kaleswari bus and at about 7.00 p.m. he reached at Berhampur bus stand and after getting down from the bus, he had been to his friend's house through Goilundi Chhak and at that place, he was called by P.W.7 and thereafter, he took him to Excise office, kept him in their office and on the next day, he took his signatures on some papers and thereafter, he was produced in Court. He denied to have any knowledge about search and seizure and stated that the excise officers have falsely implicated in the case.

D.W.2 is the appellant Raghunath Sahu, who stated that on the date of occurrence i.e. on 03.06.2012 he came in a bus from Puri to Berhampur to his brother-in-law's house situated at Digapahandi and while he was coming with a bag having sweets inside it, the excise officials caught him and took him to Goilundi office and remained there on the same day and on the next day, they took his signatures on some papers and took away his driving licence and thereafter produced him in the Court. He further stated that the car in which he was brought to Court was brought from the office itself and he did not know anything what was kept inside the car.

D.W.3 Kiran Kumar Pati, who was one of the co-accused in the case, was the owner of the offending vehicle, which was purchased from H.D.F.C. Finance in the year 2004 and he stated that the said vehicle was sold to one Ranjit Kumar Behera of Khandagiri, Bhubaneswar on 11.12.2007. He further stated that since Ranjit Kumar Behera had not paid the full and final settled amount of the car for which he could not repay the balance amount to the Bank and the Bank issued a notice, which has been marked as Ext.B. D.W.4 Ashok Kumar Das, who was having a tea stall in front of the excise office situated at Srinagar stated that he was supplying cups of tea to the employees of the excise office. He stated about bringing of the appellants to the excise office and on the next day putting both the appellants in front of an Ambassador car and taking photographs. He also stated that he heard that the excise people have falsely implicated the appellants in this case.

The prosecution exhibited seventeen documents. Ext.1/1 is the written option of appellant Raghunath Sahu, Ext.2/1 is the written consent

of appellant Raghunath Sahu, Ext.3/2 is the written option given to appellant Pradeep Panda, Ext.4/2 is the written consent to appellant Pradeep Panda, Ext.5/2 is the zimanama, Ext.6/2 is the spot map, Ext.7/2 is the seizure list, Ext.8/1 is the drug testing report, Ext.9 is the signature of P.W.2 on the command certificate, Ext.10 is the authorization letter of S.D.J.M., Berhampur, Ext.11 is the written intimation, Ext.12is the disclosure of the grounds of arrest of appellant Pradeep Panda, Ext.13 is the disclosure of the grounds of arrest of appellant Raghunath Sahu, Ext.14 is the letter for drawal of the sample,Ext.15 is the letter to R.T.O.,Bhubaneswar, Ext.16 is the report of the R.T.O. and Ext.17 is the chemical examination report

The prosecution also proved fifteen nos. of material object i.e. M.O.I is the brass seal, M.O.II is the envelop containing broken seal, M.Os.III to VIII are the duplicate sample packets deposited in the Sessions Malkhana, M.O.IX is the remnants of samples received from D.E.C.T.L, Berhampur, M.O.X is the jerry bag Sl.No.1 containing 52 kgs., M.O.XI is the jerry bag Sl.No.2 containing 46 kgs., M.O.XII is the jerry bag Sl.No.3 containing 39 kgs., M.O.XIII is the jerry bag Sl.No.4 containing 38 kgs., M.O.XIV is the jerry bag Sl.No.5 containing 23 kgs. And M.O.XV is the jerry bag Sl.No.6 containing 22 kgs.

The defence exhibited two nos. of documents. Ext.A is the cheque signed by Ranjit Behera and Ext.B is the notice issued by H.D.F.C. Bank in favour of the co-accused Kiran Kumar Pati.

6. The learned trial Court after assessing the oral as well as documentary evidence on record, has been pleased to hold that P.Ws.2, 3, 4, 5, 6 and 7 are departmental witnesses and their statements are found to be consistent on the point of factum of recovery and seizure of six nos. of jerry bags having 220 kilograms of ganja in total along with an Indica car used in transporting the said ganja from the exclusive and conscious possession of the appellants. It was further held that the evidence of the P.Ws. is found to be convincing, credible, trustworthy, firm and concrete to fasten the guilt of illegal possession and transportation of huge quantity of ganja. The learned trial Court further held that the appellants have not rebutted the presumption available under sections 35 and 54 of the N.D.P.S. Act for their illegal possession and transportation of ganja materials in the seized vehicle. However, it was held that the evidence on record does not indicate that the co-accused Kiran Kumar Pati had any

knowledge for use of the vehicle in the commission of the offence and hence, the presumption available under section 35 of the N.D.P.S. Act cannot be drawn to hold that he had such culpable mental state in committing the offence by allowing the vehicle for use of commission of offence under the N.D.P.S. Act. Accordingly, the learned trial Court held the co- accused Kiran Kumar Pati not guilty of the offences charged, however found the appellants guilty under section 20(b)(ii)(C) of the N.D.P.S. Act.

7. Ms. Kiran Rout, learned counsel appearing for the appellants contended that the independent witness P.W.1 has not supported the prosecution case for which he was declared hostile and he has stated that he was asked to sign on some blank papers, but the other witnesses on whose statements the learned trial Court has placed implicit reliance are all departmental witnesses and conviction has been based on the evidence of such witnesses, which was not justified. It is further submitted that P.W.7 is the officer who not only received reliable information but also conducted search and seizure and he is the investigating officer of the case and therefore, he is a highly interested witness and the appellants have been seriously prejudiced on account of the investigation being conducted by such an officer. It is further submitted that the defence has examined four witnesses including the two appellants as D.W.1 and D.W.2 and D.W.4, who is having a tea stall in front of the excise office has supported the defence plea and the learned trial Court has not placed any reliance on the defence plea without any justifiable reason. It is further submitted that no malkhana register was proved in this case and therefore, the safe custody of the seized article is doubtful. It is further submitted that there is non-compliance of the provisions under sections 42, 50 and 57 of the N.D.P.S. Act and therefore, it is a fit case where benefit of doubt should be extended in favour of the appellants.

Mr. Debasis Biswal, learned Additional Standing Counsel for the State of Odisha, on the other hand, supported the impugned judgment and submitted that in the case of this nature, the version of the departmental official witnesses can be relied upon to convict the accused if their evidence is consistent and reliable. It is further submitted that merely because the independent witness (P.W.1) has not supported the prosecution case, the same cannot be a ground to doubt the veracity of the prosecution case. It is further submitted that in the accused statement, no plea has been taken by the appellants and the plea taken by examining the defence witnesses is not

acceptable and rightly, the learned trial Court has not placed any reliance on the same. It is further submitted that section 42 of the N.D.P.S. Act has been complied with, which will be clear from the evidence of P.Ws.6 and 7 and in a case of this nature, there is no requirement to comply with section 50 of the N.D.P.S. Act and further the documents and the oral account of P.W.7 and other witnesses indicate about compliance of such provisions. Learned counsel further submitted that section 57 of the N.D.P.S. Act is not mandatory and since the seized articles were produced in the Court from the spot immediately after its seizure and it was not taken to any police station or excise office, thus, there is no necessity of proving any malakhana register in the case and therefore, the appeal should be dismissed.

8. (A) **Independent witness not supported the prosecution case:**

Coming to the first submission of the learned counsel for the appellants regarding non-supporting of the case by the independent witness, this Court in the case **of Herasha Majhi and others -Vrs.- State of Odisha reported in 2020 (I) Orissa Law Reviews 39**, held as follows:

> "9…….Conviction can be based solely on the testimony of official witnesses; condition precedent is that the evidence of such witnesses must be reliable, trustworthy and must inspire confidence. There is absolute no command of law that the testimony of the police officials should always be treated with suspicion. Of course while scrutinizing the evidence, if the Court finds the evidence of the police officials as unreliable and untrustworthy, the Court may disbelieve them but it should not do so solely on the presumption that a witness from the department of police should be viewed with distrust. This is based on the principle that quality of the evidence weighs over the quantity of evidence. The rule of prudence requires a more careful scrutiny of the evidence of the police officials, since they can be said to be interested in the result of the case projected by them. Absence of any corroboration from the independent witnesses does not in any way affect the creditworthiness of the prosecution case. Non-supporting of the prosecution case by independent witnesses in N.D.P.S. Act cases is a usual feature but the same cannot be a ground to discard the entire prosecution case. If the evidence of the official witnesses which is otherwise clear, cogent, trustworthy and above reproach is discarded in such cases just because the independent witnesses did not support the prosecution case, I am afraid that it would be an impossible task for the prosecution to succeed in a single case in establishing the guilt of the accused."

Therefore, I am of the humble view that merely because P.W.1, the independent witness has not supported the prosecution case, the evidence of other witnesses and the prosecution case cannot be disbelieved.

(B) **Officer conducting search and seizure is the investigating officer:**

Law is well settled that merely because the officer who conducted search and seizure, is also the investigating officer of the case, the accused persons are not entitled to be acquitted on that score.

In **Mukesh Singh -Vrs.- State (Narcotic Branch of Delhi) reported in (2020) 10 Supreme Court Cases 120**, the Five Judge Bench of the Hon'ble Supreme Court has held as follows :

> "13.2(ii) In a case where the informant himself is the investigator, by that itself it cannot be said that the investigation is vitiated on the ground of bias or the like factor. The question of bias or prejudice would depend upon the facts and circumstances of each case. Therefore, merely because the informant is the investigator, by that itself the investigation would not suffer the vice of unfairness or bias and therefore, on the sole ground that the informant is the investigator, the accused is not entitled to acquittal."

Therefore, though the contention of the learned counsel for the appellants that since P.W.7 conducted search and seizure, in the fairness of things, he should not have investigated into the case and submitted the prosecution report has considerable force, but all the same, in absence of any unfairness or bias on the part of P.W.7 to implicate the appellants falsely, the prosecution case cannot be discarded on that score.

(C) **Non-compliance of section 42 of N.D.P.S. Act :**

In the case of **Karnail Singh -Vrs.- State of Haryana reported in (2009) 44 Orissa Criminal Reports (SC) 183**, it is held by a five-Judge Bench of the Hon'ble Supreme Court that the officer on receiving the information (of the nature referred to in sub-section (1) of section 42 of the N.D.P.S. Act) from any person had to record it in writing in the concerned Register and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of section 42(1) of the N.D.P.S. Act. It is further stated therein that the total non-compliance of requirements of sub-sections (1) and (2) of section 42 of the N.D.P.S. Act is impermissible but delayed compliance with satisfactory explanation about the delay will be acceptable compliance of Section 42 of the N.D.P.S. Act.

P.W.7 has specifically stated that on 04.06.2012 at about 3.00 a.m. he received reliable information about illegal transportation of ganja at Dengaosta to Seragada side and he gave written intimation to his higher authority i.e. Inspector in-charge of Excise Sri Siba Prasad Gantayat (P.W.6) and the said intimation letter has been marked as Ext.11. P.W.6 has also stated that on 04.06.2012 while he was working as Inspector in- charge, E.I. & E.B. Unit-II, Berhampur, P.W.7 intimated him in writing regarding illegal

transportation of ganja at village Pattapur and he also proved his signature on Ext.11. He further stated that after getting such information, he directed P.W.7 to proceed to the spot.

In the case of **Biswanath Patra -Vrs.- State of Odisha reported in 2019 (I) Orissa Law Reviews 34**, it is held as follows:

> "8. Under section 42(1), if the empowered officer receives reliable information from any person relating to commission of an offence under the N.D.P.S. Act that the contraband articles and incriminating documents have been kept or concealed in any building, conveyance or enclosed place and he reasonably believes such information, he has to take down the same in writing. However, if the empowered officer reasonably believes about such aspects from his personal knowledge, he need not take down the same in writing. Similarly recording of grounds of belief before entering and searching any building, conveyance or enclosed place at any time between sunset and sunrise is necessary under the second proviso to sub-section (1) of section 42 of the N.D.P.S. Act if the concerned officer has reason to belief that obtaining search warrant or authorization for search during that period would afford opportunity for the concealment of evidence or facility for the escape of an offender. Section 42 (2) of the N.D.P.S. Act states that when an officer takes down any information in writing under sub- section (1) or records grounds for his belief under the proviso thereto, he shall send a copy thereof to his immediate official superior within seventy-two hours."

In case of **State of Punjab -Vrs.- Baldev Singh reported in 1999 (II) Orissa Law Reviews (SC) 474**, it is held as follows:-

> "10. The proviso to sub-section (1) lays down that if the empowered officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place, at any time between sunset and sunrise, after recording the grounds of his belief. Vide sub-section (2) of Section 42, the empowered officer who takes down information in writing or records the grounds of his belief under the proviso to sub-section (1), shall forthwith send a copy of his belief under the proviso to sub- section (1) to his immediate official superior. Section 43 deals with the power of seizure and arrest of the suspect in a public place. The material difference between the provisions of Section 43 and Section 42 is that whereas Section 42 requires recording of reasons for belief and for taking down of information received in writing with regard to the commission of an offence before conducting search and seizure, Section 43 does not contain any such provision and as such while acting under Section 43 of the Act, the empowered officer has the power of seizure of the article etc. and arrest of a person who is found to be in possession of any narcotic drug or psychotropic substance in a public place where such possession appears to him to be unlawful."

In the case **of Ramakrushna Sahu -Vrs.- State of Odisha reported in (2018) 70 Orissa Criminal Reports 340**, it is held as follows:

> "12……Law is well settled that total non- compliance with the provisions under sub-sections (1) and (2) of section 42 of the N.D.P.S. Act is impermissible and it vitiates the

conviction and renders the entire prosecution case suspect and cause prejudice to the accused. Section 42 (2) of the N.D.P.S. Act states that when an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall send a copy thereof to his immediate official superior within seventy-two hours. Under section 42 (1), if the empowered officer receives reliable information from any person relating to commission of an offence under the N.D.P.S. Act that the contraband articles and incriminating documents have been kept or concealed in any building, conveyance or enclosed place and he reasonably believes such information, he has to take down the same in writing. However, if the empowered officer reasonably believes about such aspects from his personal knowledge, he need not take down the same in writing. Similarly recording of grounds of belief before entering and searching any building, conveyance or enclosed place at any time between sunset and sunrise is necessary under the second proviso to sub-section (1) of section 42 of the N.D.P.S. Act if the concerned officer has reason to belief that obtaining search warrant or authorization for search during that period would afford opportunity for the concealment of evidence or facility for the escape of an offender.

The copy of information taken down in writing under sub-section (1) or the grounds of belief recorded under the second proviso to sub- section (1) of section 42 of the N.D.P.S. Act has to be sent to his immediate superior official within seventy-two hours."

In view of the evidence of P.Ws.6 and 7, it is apparent that reliable information was reduced into writing by P.W.7 and it was sent to the higher authority (P.W.6) and the relevant document has been proved and no cross-examination has been made by the learned defence counsel on that aspect to disbelieve such compliance. Therefore, the contention of the learned counsel for the appellants that there has been non-compliance of the provision under section 42 of the N.D.P.S. Act is not acceptable.

(D) **Non-compliance of section 50 of N.D.P.S. Act** :

With regard to non-compliance of the provision of section 50 of the N.D.P.S. Act, the Hon'ble Supreme Court in the case of **State of H.P. -Vrs.- Pawan Kumar reported in (2005)4 Supreme Court Cases 350** has held that for search of vehicle, this provision did not require mandatory compliance. It was further held that there was hardly any time lag between seizure, production and also chemical examination and considering the quantity of contraband seized in the case, the possibility of planting looks an impossibility. It was further held that the samples were taken from what were seized and were also having been chemically examined and accordingly, the appellants were found guilty of the offence charged.

In the case in hand, P.W.7 has stated that he gave his identification to the appellants, who were found inside the car and expressed his intention

so also to search the car and apprised the appellants about their willingness to be searched before the Gazetted Officer or before the Executive Magistrate in writing and both the appellants expressed their willingness to be searched by P.W.7. The written option given by the appellant Raghunath Sahu has been marked as Ext.1/1 and the written option given by the appellant Pradeep Panda has been marked as Ext.3/2. The written consent given by the appellant Raghunath Sahu has been marked as Ext.2/1 and the written consent given by the appellant Pradeep Panda has been marked as Ext.4/2. Therefore, the contention of the learned counsel for the appellants regarding non-compliance of section 50 of the N.D.P.S. Act which in fact is not necessary, is not acceptable.

(E) **Non-compliance of section 57 of N.D.P.S. Act:**

So far as compliance of section 57 of the N.D.P.S. Act is concerned, it states that that whenever any person makes any arrest or seizure under this Act, he shall, within forty eight hours next after such arrest or seizure, make a full report of all the particulars of such arrest or seizure to his immediate official superior.

In the case of **Bahadur Singh -Vrs.- State of Haryana reported in (2010) 4 Supreme Court Cases 445**, it is held that the provision under section 57 of the N.D.P.S. Act is not mandatory and that substantial compliance would not vitiate the prosecution case.

In the case of **Manoj Kumar Panigrahi -Vrs.- State of Odisha reported in 2020 Criminal Law Journal 730**, it is held that even though section 57 of the N.D.P.S. Act is held not to be mandatory but the official conducting search and seizure cannot totally ignore such a provision which is directory in nature as the same has got a salutary purpose and if he ignores such a provision then adverse inference should be drawn against the prosecution.

Though P.W.7 stated that he submitted preliminary report on 05.06.2012 (date of seizure is 04.06.2012) but his evidence is silent regarding submission of full report in terms of section 57 of the N.D.P.S. Act. On this score alone, the appellants are not entitled for acquittal.

(F) **Non-production of Malkhana Register :**

Coming to the non-seizure of malkhana register, it appears that such a question was put by the learned defence counsel to P.W.7, who has stated

that he has not reflected in the malkhana register of the excise office as because he brought the seized articles directly to the Court from the seizing spot. When the contraband articles were not kept in any police station or any excise office and no entry has been made in the malkahna register, question of proving the malkhana register does not arise.

9. The presence of the appellants inside the offending car has been deposed to by the official witnesses, who are all excise officials and they have further stated that the appellant Raghunath Sahu was in the driver seat and his driving licence has also been seized, six jerry bags containing ganja were found in the car, three of them were found in the back seat and three were in the dickey of the car. All the formalities of search and seizure were complied with and the seizure list was prepared and the appellants were also supplied with a copy of such seizure list and their signatures were also taken not only in the paper slips, but also in the seizure list of the articles. The evidence of the official witnesses appears to be cogent, consistent and therefore, the learned trial Court has rightly placed reliance on their evidence.

Section 35 of the N.D.P.S. Act speaks about culpable mental state and section 54 of the N.D.P.S. Act states about presumption to be drawn from the possession of illicit articles. Section 35 of the N.D.P.S. Act requires the defence to prove that the accused had no such mental state with respect to the act charged as an offence by the prosecution. The accused is to prove that he was not in conscious possession of the contraband articles if it is proved by the prosecution that he was in possession thereof. Section 35(2) of the N.D.P.S. Act requires the accused to prove beyond reasonable doubt that he had no culpable mental state which can be discharged only by adducing cogent and reliable evidence which must appear to be believable or showing circumstances which might lead the Court to draw a different inference. An initial burden exists upon the prosecution and only when it stands satisfied, the legal burden would shift.

The prosecution has to prove the fundamental facts so as to attract the rigors of section 35 of the N.D.P.S. Act.

In view of section 54 of the N.D.P.S. Act, both the appellants are to account satisfactorily about the possession of the contraband articles. If the prosecution proves the search and seizure of the contraband articles from

the accused to have been conducted in strict compliance of all the mandatory provisions and other directions provisions as far as possible, the burden shifts to the accused to account it satisfactory otherwise presumption shall be raised against him that he has committed an offence under the Act.

It has been rightly observed by the learned trial Court that both the appellants have not rebutted such presumption under sections 35 and 54 of the N.D.P.S. Act by bringing into evidence, therefore, presumption is to be drawn against them for their illegal possession and transportation of ganja material in the seized vehicle.

It is no doubt that the appellants examined themselves as witnesses and stated that they were brought to the excise office and detained and some signatures were taken in blank papers and they were forwarded to Court on the next day. D.W.4 has stated that he had seen the excise people brought both the appellants one after another to the excise office and on the next day, they were forwarded to Court and that the excise people brought gunny bags from their office and put them in an Ambassador car and asked the appellants to stand near the said car and then photographs were taken, but no such plea has been taken by the appellants when they were examined as defence witnesses rather in the accused statements their plea was one of denial. The learned trial Court has discussed the evidence of the four defence witnesses and rightly placed no reliance on them.

10. In view of the foregoing discussions, when the evidence of the official witnesses appears to be clear, cogent, trustworthy and reliable and the appellants were found inside the offending car and there was seizure of commercial quantity of ganja in six jerry bags from the said car and there has been compliance of section 42 of the N.D.P.S. Act and the appellants have failed to rebut presumption under sections 35 and 54 of the N.D.P.S. Act and the defence plea is not acceptable, I am of the humble view that both of them have been rightly found guilty under section 20(b)(ii)(C) of the N.D.P.S. Act. The sentence which has been imposed on the appellants is the minimum sentence prescribed for the offence. Therefore, no interference is called for with the impugned judgment of the learned trial Court.

Accordingly, both the jail criminal appeals being devoid of merit, stand dismissed.

The trial Court records with a copy of this judgment be sent down to the learned trial Court forthwith for information and necessary action.

2022 (III) ILR - CUT-154

K.R. MOHAPATRA, J.

CMP NO. NO. 608 OF 2022

RAMA CHANDRA NAYAK .....Petitioner

.V.

JADU SIMADRI & ORS. .....Opp. Parties

TRANSFER OF PROPERTY ACT, 1882 – Section 52 – An appeal was filed assailing the judgment passed in a suit – Before the appeal was taken up for admission, Respondent sold some portion of the suit land – When the appeal was admitted sale transaction was already over – Whether the sale in question can treated as lispendens under section 52 of the Act?– Held, Yes – Even if a transaction taken place in respect of the suit property after dismissal of the suit and before filing of the appeal, the same would be governed under Section 52 of the Act.

(Para-5)

Case Laws Relied on and Referred to :-

1. (2015) 9 SCC 356 : Kirpal Kaur Vs. Jitender Pal Singh & Ors.
2. (2017) 7 SCC 342 :T Ravi and another Vs. B. Chinna Narasimha & Ors.

For Petitioner : Mr. Manoj Mishra, Sr. Adv., Mr. Tanmay Mishra
For Opp. Parties:

ORDER Date of Order: 06.09.2022

K.R. MOHAPATRA, J.

1. This matter is taken up through Hybrid mode.

2. Petitioner in this CMP seeks to assail the order dated 12th September, 2009 (Annexure-7) passed in RFA No. 2 of 2019, whereby learned District Judge, Ganjam at Berhampur rejected an application filed by the Petitioner-Appellant under Order VI Rule 17 CPC to incorporate the prayer *'to declare the Regd. Sale deed being document No. 11841900780 of 2019 be decreed as null and void'*.

3. The petition under Order VI Rule 17 CPC was taken up along with a petition under Order I Rule 10 CPC to implead the *lis pendens* purchasers as parties to the appeal in whose favour the aforesaid sale deed was executed by the Respondent No. 20. Both the petitions were disposed by a composite order dated 12th September, 2019 rejecting both the applications. The order in respect of rejection of petition under Order I Rule 10 CPC was assailed

before this Court in CMP No.1127 of 2019, which was disposed of on 19th May, 2022 with the following direction:-

> *"5. In the circumstance, this Court finds, there is no proper application of mind in considering the application by the lower appellate court. In the process and as there is necessity of inclusion of such party at least for the purpose of injunction, this Court allowing the application for bringing the new party as Respondent nos. 21 & 22, also directs the Appellants to file amended cause title in the memorandum of appeal at least within a period of seven working days. Upon bringing the amended cause title, the lower appellate court shall issue notice to such parties in appeal so also involving him in interlocutory matters. Since this CMP does not involve rejection of the amendment, in the event there is just requirement of new pleadings, it shall be open to the Petitioner to file a fresh C.M.P."*

Accordingly, the *lis pendens* purchasers were impleaded as parties to the appeal. In view of the observation made by this Court as aforesaid, this petition has been filed assailing rejection of application under Order VI Rule 17 CPC.

4. Mr. Mishra, learned Senior Advocate for the Petitioner submits that the judgment in the suit (C.S. No. 92 of 2017) was passed on 15th November, 2018. Assailing the same, the appeal (R.F.A. No. 2 of 2019) was filed on 2nd January, 2019. Before the appeal was taken up for admission, the Respondent No.20 sold some portion of the suit land to Respondent-Opposite Party Nos. 21 and 22 (newly impleaded) vide RSD dated 20th March, 2019. It is submitted that before its admission, there was no appeal in the eye of law. The appeal was admitted only on 23rd April, 2019. As such, the sale in question cannot be said to be *lis pendens* in nature. Thus, Section 52 of the Transfer of Property Act, 1882 (for convenience referred to as 'the Act') has no application to the case at hand. As such, the amendment sought for is imperative for just adjudication of the suit. However, learned appellate Court rejected the petition for amendment holding that as the Court already held that presence of the *lis pendens* purchasers is not required to adjudicate the issue involved in the suit, the amendment to declare the sale deed executed in favour of the *lis pendens* purchasers as null and void, is not necessary. It is submitted that since the prayer for impletion of *lis pendens* purchasers has already been allowed, there is no difficulty in allowing the application for amendment by the appellate Court. He, therefore, prays for setting aside the impugned order and to issue a direction to the appellate Court to permit the Petitioner to amend the plaint accordingly.

4. In course of hearing, an issue cropped up for consideration as to whether the sale in question can be treated to be *lis pendens* under Section 52 of the Act.

4.1 Hon'ble Supreme Court has already explained the doctrine of lis pendens on many occasions. In ***Jagan Singh (dead) through LRs. Vs. Dhanwanti and another,*** reported in (2012) 2 SCC 628, the Hon'ble Supreme Court held as under:-

> *"32. The broad principle underlying Section 52 of the TP Act is to maintain the status quo unaffected by the act of any party to the litigation pending its determination. Even after the dismissal of a suit, a purchaser is subject to lis pendens, if an appeal is afterwards filed, as held in Krishanaji Pandharinath v. Anusayabai. In that matter the respondent (original plaintiff) had filed a suit for maintenance against her husband and claimed a charge on his house. The suit was dismissed on 15-7-1952 under Order 9 Rule 2, of the Code of Civil Procedure, 1908 for non- payment of process fee. The husband sold the house immediately on 17-7-1952. The respondent applied for restoration on 29-7-1952, and the suit was restored leading to a decree for maintenance and a charge was declared on the house. The plaintiff impleaded the appellant to the darkhast as purchaser. The appellant resisted the same by contending that the sale was affected when the suit was dismissed. Rejecting the contention the High Court held in para 4 as follows:*
>
> *"… In Section 52 of the Transfer of Property Act, as it stood before it was amended by Act 20 of 1929, the expression 'active prosecution of any suit or proceeding' was used. That expression has now been omitted, and the Explanation makes it abundantly clear that the 'lis' continues so long as a final decree or order has not been obtained and complete satisfaction thereof has not been rendered. At p. 228 in Sir Dinshah Mulla's 'Transfer of Property Act', 4th Edn., after referring to several authorities, the law is stated thus:*
>
> *'Even after the dismissal of a suit a purchaser is subject to "lis pendens", if an appeal is afterwards filed.'*
>
> *If after the dismissal of a suit and before an appeal is presented, the 'lis' continues so as to prevent the defendant from transferring the property to the prejudice of the plaintiff, I fail to see any reason for holding that between the date of dismissal of the suit under Order 9 Rule 2 of the Civil Procedure Code and the date of its restoration, the 'lis' does not continue.'*
>
> *33. It is relevant to note that even when Section 52 of the TP Act was not so amended, a Division Bench of the Allahabad High Court had following to say in Moti Chand v. British India Corpn. Ltd.:*
>
> *"10… The provision of law which has been relied upon by the appellants is contained in Section 52, TP Act. The active prosecution in this section must be deemed to continue so long as the suit is pending in appeal, since the proceedings in the appellate court are merely continuation of those in the suit."*
>
> *34. If such a view is not taken, it would plainly be impossible that any action or suit could be brought to a successful termination if alienations pendente lite were permitted to prevail. The explanation to this section lays down that the pendency of a suit or a proceeding shall be deemed to continue until the suit or a proceeding is disposed of by final decree or order, and*

complete satisfaction or discharge of such decree or order has been obtained or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.

35. In the present case, it would be canvassed on behalf of the respondent and the applicant that the sale has taken place in favour of the applicant at a time when there was no stay operating against such sale, and in fact when the second appeal had not been filed. We would however, prefer to follow the dicta in Krishanaji Pandharinath (supra) to cover the present situation under the principle of lis-pendens since the sale was executed at a time when the second appeal had not been filed but which came to be filed afterwards within the period of limitation. The doctrine of lis-pendens is founded in public policy and equity, and if it has to be read meaningfully such a sale as in the present case until the period of limitation for second appeal is over will have to be held as covered under section 52 of the T.P. Act." (emphasis supplied)

In ***Kirpal Kaur Vs. Jitender Pal Singh and others***, reported in (2015) 9 SCC 356, the Hon'ble Supreme Court relying upon ***Jagan Singh*** (supra) held as under:-

21. The execution of the alleged gift deed by the deceased-first defendant in favour of the second defendant is also hit by Section 52 of the Transfer of Property Act, 1882, as the said deed in respect of 'B' schedule property by the deceased first defendant, which property has been devolved in his favour, to the notice of this Court as provided under Order 22 Rule 10 of the C.P.C. and defended his right as required under the law as laid down by this Court in a catena of cases.

xxx xxx xxx

26. The legality of the alleged gift deed executed in favour of the second defendant by the deceased-first defendant in respect of the schedule 'B' property has been further examined by us and the same is hit by Section 52 of the of the Transfer of Property Act, 1882, in the light of the decision of this Court in the case of Jagan Singh v. Dhanwanti[3], wherein this Court has laid down the legal principle that under Section 52 of the Transfer of Property Act, 1882, the 'lis' continues so long as a final decree or order has not been obtained from the Court and a complete satisfaction thereof has not been rendered to the aggrieved party contesting the civil suit. It has been further held by this Court that it would be plainly impossible that any action or suit could be brought to a successful termination if alienations pendente lite were permitted to prevail.

In the case of ***T Ravi and another Vs. B. Chinna Narasimha and others***, reported in (2017) 7 SCC 342, it has been held as follows:-

"37. In Parmeshari Din Vs. Ram Chran, reported in (1937)39 BOMLR 2019, it was held : (SCC ONLine PC) It is clear that the question of the active prosecution of a suit is one of fact, but it was not suggested in either of the courts in Indi that the plaintiffs had not actively prosecuted the suit, and ere consequently debarred from availing themselves of the rule of lis pendens. The learned Judges of the Court of Appeal had, therefore, no opportunity to express their opinion on this point; and their Lordships cannot entertain an objection, which depends upon a question of fact not delat with below. Upon the record before them, there is no indication of any delay or remissness in the prosecution of the suit, for which the plaintiffs

can be held responsible. Their Lordships, therefore, agree with the High Court that the transfer relied upon by the appellant cannot prejudice the rights of the decree-holders, and that he cannot resist the decree obtained by them."

38. The abovesaid principle of law settled in the year 1937 by the Privy Council is still valid as discerned from the latest judgment of this Court rendered in Kirpal Kaur Vs. Jitender Pal Singh and others, (2015) 9 SCC 356."

5. In view of the ratio decided by the Hon'ble Supreme Court in the case, there remains no iota of doubt that even if a transaction taken place in respect of the suit property after dismissal of the suit and before filing of the appeal, the same would be governed under Section 52 of the Act. It is further clarified that even if the appeal is filed beyond the period of limitation, the transaction in question will attract the provision of Section 52 of the Act, in the event the delay is condoned. In the instant case, the sale in question took place after the appeal is filed, but before it was formally admitted. In that view of the matter, the sale in question is covered under the principles of *lis pendens*. As such, the relief to declare the RSD No.11841900780 of 2019 to be null and void is not required to be considered for just adjudication of the suit/appeal. Hence, the amendment sought for is not necessary for proper adjudication of the suit/appeal.

6. Accordingly, the order dated 12th September, 2009 (Annexure-7) passed by learned District Judge, Ganjam at Berhampur in RFA No.2 of 2019 warrants no interference even after changed circumstances of impletion of parties.

7. Accordingly, the CMP being devoid of any merit stands dismissed.

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2022 (III) ILR - CUT- 158

K.R. MOHAPATRA, J.

CMP NO. 529 OF 2022

BIJAY KUMAR ROUT & ORS. ……..Petitioners

.V.

ASHOK KUMAR MAITY & ORS. ……..Opp. Parties

CODE OF CIVIL PROCEDURE, 1908 – Order VIII Rule 1 – Whether in a non-commercial suit, the statutory period provided under Order VIII

Rule 1 C.P.C. for filing of the written statement is mandatory or directory? – Held, in non-commercial suit the provision of Order VIII Rule 1 C.P.C. is directory in nature. (Para-8)

Case Laws Relied on and Referred to :-

1. AIR 2019 SC 2691 : M/s. SCG Contracts India Pvt. Ltd. Vs. K.S. Chamankar Infrastructure Pvt. Ltd.
2. (2020) 2 SCC 708 : Desh Raj Vs. Balkishan (D) through L.R. M. S. Rohini.
3. 2022 (I) OLR (SC) 1099 : Bharat Kalra Vs. Raj Kishan Chabra.
4. (2005) 6 SCC 705 : Smt. Rani Kusum Vs. : Smt. Kanchan Devi & Ors.
5. 2019 (II) ILR-CUT 750 : Amulya Kumar Biswal Vs. Bijaylaxmi Biswal.
6. 2019 (II) ILR-CUT- 345 : Mamata Tripathy Vs. Arcon Retreat Owners Welfare Association.
7. 2007 (56) AIC 12 (S.C.) : M/s. R.N. Jadi and Brothers & Ors Vs. Subhashchandra.
8. 2016 SCC Online Del 6601:Oku Tech Private Limited Vs. Sangeet Agarwal & Ors.
9. 2020 (213) AIC 409 : Sivella Yadaiah Vs. V. Pruthvi.
10. 2016 (I) ILR-CUT- 106 : State of Orissa & Anr. Vs. Smt. Sitanjali Jena.

For Petitioners : Mr. Prasanta Kumar Satapathy

For Opp. Parties: Mr. Sushant Kumar Pradhan

ORDER Date of Order: 07.09.2022

K.R. MOHAPATRA, J.

1. This matter is taken up through hybrid mode.

2. The Petitioners in this CMP seek to assail the order dated 6th February, 2020 (Annexure-1) passed in C.S. No.506 of 2014, whereby learned Civil Judge (Senior Division), Bhadrak while setting aside the *ex parte* order, refused to accept the written statement filed by the Petitioners.

3. Mr. Satapathy, learned counsel for the Petitioners submits that C.S. No. 506 of 2014 has been filed by the Plaintiff- Opposite Party No.1 in which the Petitioners are Defendant Nos.1 to 4. The Petitioners could not appear in the suit for which they were set ex parte on 7th March, 2018. Subsequently, on appearance, they filed an application on 5th May, 2018 to set aside the ex parte order dated 7th March, 2018 and to accept their written statement. Learned trial Court although set aside the ex parte order but refused to accept the written statement relying upon the ratio decided in the case of ***M/s. SCG Contracts India Pvt. Ltd. –v- K.S. Chamankar Infrastructure Pvt. Ltd., reported in AIR 2019 SC 2691***. He further submits that hearing of the suit has not yet commenced. The ratio decided in ***M/s.***

SCG Contracts India Pvt. Ltd. (Supra) relates to a commercial suit, where the statutory period provided for filing of the written statement is mandatory. But, in non-commercial suit, like the present one, the same is directory as has been held in the case of ***Kailash –v- Nanhku and others***, reported in 2005 (4) SCC 480. Learned trial Court without appreciating this material aspect and by misconstruing the law has passed the impugned order under Annexure-1. Hence, the impugned order refusing to accept the written statement filed by the Defendant Nos.1 to 4 is not sustainable in the eyes of law and the same is liable to be set aside. He further prays for a direction to learned trial Court to accept the written statement filed by the Defendant Nos.1 to 4- Petitioners.

3.1. In support of his contention, Mr. Satpathy learned counsel relied upon the case of ***Desh Raj –v- Balkishan (D) through L.R. M. S. Rohini***, reported in (2020) 2 SCC 708, ***Bharat Kalra -v- Raj Kishan Chabra***, reported in 2022 (I) OLR (SC) 1099, ***Smt. Rani Kusum –v- Smt. Kanchan Devi and others***, reported in (2005) 6 SCC 705 and ***Kailash -v- Nanhku*** (supra).

4. Mr. Pradhan, learned counsel for the Plaintiff-Opposite Party No.1 vehemently objects to the same. He submits that this Court relying upon the decision in the case of ***M/s. SCG Contracts India Pvt. Ltd.*** (supra) has clearly held in the case of ***Amulya Kumar Biswal –v- Bijaylaxmi Biswal***, reported in 2019 (II) ILR-CUT 750, that provision of Order VIII Rule 1 C.P.C. is no longer directory. It can only be said to be mandatory. He further submits that in the case of Kailash (supra), the Hon'ble Apex Court has made it clear that in exceptional circumstances, the written statement may be accepted in a non-commercial suit after the statutory period. While accepting the written statement, the Court has to record its reason for doing so. In the instant case, the Defendant Nos.1 to 4 were thoroughly negligent in appearing in the suit pursuant to the summons received by them and filing their written statement within the statutory period. The explanation provided by the Defendant Nos. 1 to 4 is not at all satisfactory. Accordingly, learned trial Court has committed no error in refusing to accept the written statement while setting aside ex parte order and allowing the Petitioners to participate in the hearing of the suit.

4.1. To buttress his contention, Mr. Pradhan learned counsel relied upon **Amulya Kumar Biswal** (supra), ***Mamata Tripathy - v- Arcon Retreat Owners Welfare Association, reported in 2019 (II) ILR-CUT- 345, M/s.***

R.N. Jadi and Brothers and others –v- Subhashchandra, reported in 2007 (56) AIC 12 (S.C.), Oku Tech Private Limited –v- Sangeet Agarwal and others, reported in 2016 SCC Online Del 6601, Sivella Yadaiah –v- V. Pruthvi, reported in 2020 (213) AIC 409 and State of Orissa and another –v- Smt. Sitanjali Jena, reported in 2016 (I) ILR-CUT- 106.

5. Upon hearing learned counsel for the parties and on perusal of the case record, the question that requires consideration is that whether in a non-commercial suit, the statutory period provided under Order VIII Rule 1 C.P.C. for filing of the written statement is mandatory and not directory. In the case of ***M/s. SCG Contracts India Pvt. Ltd***. (supra), the Hon'ble apex Court has held that the provision under Order VIII Rule 1 C.P.C. is mandatory in nature.But, the said observation was made by Hon'ble Apex Court while dealing with a commercial suit. Thus, the principle decided therein is not applicable to a non-commercial suit. It has been clarified in the subsequent decision in the case of ***Desh Raj*** (supra), wherein it is held as under:

> *"11. Hence, it is clear that post coming into force of the aforesaid Act, there are two regimes of civil procedure. Whereas commercial disputes [as defined under Section 2(c) of the Commercial Courts Act, 2015] are governed by CPC as amended by Section 16 of the said Act; all other non-commercial disputes fall within the ambit of the unamended (or original) provisions of CPC.*
>
> *12. The judgment of Oku Tech (P) Ltd. v. Sangeet Agarwal, 2016 SCC OnLine Del 6601] relied upon by the learned Single Judge is no doubt good law, as recently upheld by this Court in SCG Contracts (India) (P) Ltd. v. K.S. Chamankar Infrastructure (P) Ltd., (2019) 12 SCC 210 but its ratio concerning the mandatory nature of the timeline prescribed for filing of written statement and the lack of discretion with courts to condone any delay is applicable only to commercial disputes, as the judgment was undoubtedly rendered in the context of a commercial dispute qua the amended Order 8 Rule 1 CPC.*
>
> *13. As regards the timeline for filing of written statement in a non-commercial dispute, the observations of this Court in a catena of decisions, most recently in Atcom Technologies Ltd. v. Y.A. Chunawala & Co., (2018) 6 SCC 639 holds the field. The unamended Order 8 Rule 1 CPC continues to be directory and does not do away with the inherent discretion of courts to condone certain delays."*

5.1. In ***Bharat Kalra*** *(supra), it is also held as under:*

> *"Admittedly, the suit for injunction filed by the plaintiff is not the one which is governed by the Commercial Court Act, 2015. Therefore, the time limit for filing of the written statement under Order VIII Rule 1 of C.P.C.is not mandatory in view of the judgment of this Court reported as 'Kailash v. Nanhku and others.' reported in (2005) 4 SCC 480."*

5.2. In ***Kailash*** (supra), Apex Court while dealing with scope of Order VIII Rule 1 C.P.C. held as under:

> *"46. We sum up and briefly state our conclusions as under:*
>
> *xxx xxx xxx*
>
> *(iv) The purpose of providing the time schedule for filing the written statement under Order8 Rule 1 CPC is to expedite and not to scuttle the hearing. The provision spells out a disability on the defendant. It does not impose an embargo on the power of the court to extend the time. Though the language of the proviso to Rule 1 Order 8 CPC is couched in negative form, it does not specify any penal consequences flowing from the non- compliance. The provision being in the domain of the procedural law, it has to be held directory and not mandatory. The power of the court to extend time for filing the written statement beyond the time schedule provided by Order 8, Rule 1 CPC is not completely taken away.*
>
> *(v) Though Order 8 Rule 1 CPC is a part of procedural law and hence directory, keeping in view the need for expeditious trial of civil causes which persuaded Parliament to enact the provision in its present form, it is held that ordinarily the time schedule contained in the provision is to be followed as a rule and departure therefrom would be by way of exception. A prayer for extension of time made by the defendant shall not be granted just as a matter of routine and merely for the asking, more so when the period of 90 days has expired. Extension of time may be allowed by way of an exception, for reasons to be assigned by the defendant and also be placed on record in writing, howsoever briefly, by the court on its being satisfied. Extension of time may be allowed if it is needed to be given for circumstances which are exceptional, occasioned by reasons beyond the control of the defendant and grave injustice would be occasioned if the time was not extended.*
>
> *Costs may be imposed and affidavit or documents in support of the grounds pleaded by the defendant for extension of time may be demanded, depending on the facts and circumstances of a given case."*

5.3. In ***Smt. Rani Kusum*** (supra), the Hon'ble Supreme Court relying upon ***Kailash*** (supra) held as under:

> *"16. It is also to be noted that though the power of the court under the proviso appended to Rule 1 Order VIII is circumscribed by the words "shall not be later than ninety days" but the consequences flowing from non-extension of time are not specifically provided for though they may be read in by necessary implication. Merely because a provision of law is couched in a negative language implying mandatory character, the same is not without exceptions. The courts, when called upon to interpret the nature of the provision, may, keeping in view the entire context in which the provision came to be enacted, hold the same to be directory though worded in the negative form."*

6. The case laws relied upon by Mr. Pradhan, learned counsel for the Opposite Party No.1 in ***Amulya Kumar Biswal*** (supra) and ***Mamata Tripathy*** (supra) have no application to the case hand, as it cannot be held to be good law in view of the ratio in the case of ***Desh Raj*** (supra), which was apparently not taken into consideration, while laying down the ratio therein.

The rest of the case laws relied upon by him relate to commercial suits and thus, have no application to the case at hand.

7. It is submitted by Mr. Satapathy, learned counsel that the Petitioners did not receive the summons of the suit from the trial Court. They only came to know about the pendency of the suit and that they were set *ex parte* on 7th March, 2018, from the villagers. It further appears that while finding sufficient cause for their non-appearance, learned trial Court has already set aside the *ex parte* order dated 7th March, 2018. Thus, there is no reason to deny the acceptance of the written statement filed by the Defendant Nos.1 to 4-Petitioners.

8. In view of the discussion made above, it is crystal clear that the provision of Order VIII Rule 1 C.P.C. is directory in nature in non-commercial suit. It appears that learned trial Court rejected the prayer for acceptance of the written statement relying upon the case law in ***M/s. SCG Contracts India Pvt. Ltd***. (Supra), which has no application to a non-commercial suit. Accordingly, this Court has no hesitation to set aside the impugned order refusing to accept the written statement of the Defendant Nos.1 to 4-Petitioners under Annexure-1.

9. Accordingly, the impugned order under Annexure-1 to that extent is set aside. Learned trial Court is directed to accept the written statement filed by the Defendant Nos.1 to 4-Petitioners and proceed with the matter in accordance with law.

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2022 (III) ILR - CUT- 163

B.P. ROUTRAY, J.

CRLA NOS.572, 709, 710, 711 AND 712 OF 2021

SIBA SHANKAR DASH @ SIVA @ PINTU .....Appellant

.V.

STATE OF ODISHA & ANR. .....Respondents

CODE OF CRIMINAL PROCEDURE, 1973 – Section 439 Cr.P.C. read with Section 14-A of the SC & ST(Prevention of Atrocities) Act – Offences alleged are under Sections 448/420/386/ 387/294/506/467/468/471/120-B/34 of the I.P.C. r/w Section 25(1B)/ 27 of

the Arms Act and Section 3(1)(iv)(r)/3(2)(v) of the SC & ST (PoA) Act – The petitioner has already incarcerated for more than 4 ½ years till date as an Under Trial Prisoner – More than twenty months have been elapsed from the date of registration of P.S. Case No.338 of 2020 – The Appellant is undisputedly not a charge-sheeted accused in the said case – Whether petitioner can be released on bail? – Held, Yes – subject to certain conditions. (Para-10)

Case Laws Relied on and Referred to :-

1. (2017) 5 SCC 702 : Hussain & Anr. Vs. Union of India & Anr.
2. (2012) 8 SCC 495 : Ranjan Dwivedi Vs. Central Bureau of Investigation.
3. (1992) 1 SCC 225 : Abdul Rehman Antulay & Ors. Vs. R.S.Nayak & Anr.
4. (2009) 3 SCC 355 : Vakil Prasad Singh Vs. State of Bihar.
5. (2008) 16 SCC 117 : Pankaj Kumar Vs. State of Maharashtra & Ors.
6. (1980) 1 SCC 81 : Hussainara Khatoon & Ors. vrs. Home Secretary, State of Bihar.
7. 2022 SCC OnLine SC 825: Satender Kumar Antil Vs. Central Bureau of Investigation & Anr.

For Appellant : Mr. S.D.Das, Sr. Adv.

For Respondents : Mr. S.K.Nayak, A.G.A.,Mr.B.Pradhan

ORDER Date of Order: 11.8.2022

B.P. ROUTRAY, J.

1. The Appellant seeks bail under Section 439 Cr.P.C. read with Section 14-A of the SC & ST (PoA) Act.

2. The offences alleged are under Sections 448/420/386/387/ 294/ 506 /467/468/471/120-B/34 of the I.P.C., Section 25(1B)/ 27 of the Arms Act and Section 3(1)(iv)(r)/3(2)(v) of the SC & ST (PoA) Act in five Cases Viz., G.R. Case No. 22/2017, 27/2018, 6/2019, 7/2019 & 8/2019 pending before the learned 2nd Additional Sessions Judge-cum-Spl. Judge, Berhampur. Present appeals are arising out of those five G.R.Cases.

3. It is submitted on behalf of the Appellant that he is inside custody since 18th January,2018 in G.R.Case No.22/2017,17th January, 2019 in G.R.Case No.27/2018, 2nd April, 2019 in G.R.Case No.6/2019 and 18th June, 2019 in G.R.Case No.7 of 2019. It is further submitted that his prayer for bail was earlier rejected twice by this Court in CRLA Nos.672, 195, 470, 670 & 919 of 2019; and CRLA Nos. 192, 193, 194, 195 and 196 of 2020 respectively. On those last two occasions this Court while rejecting the prayer for bail

has categorically directed the trial court to complete the trial as expeditiously as possible in terms of the principles prescribed by the Hon'ble Supreme Court in the case of ***Hussain and another Vrs. Union of India and another***, (2017) 5 SCC 702 and in spite of such directions of this Court, the trial did not progress substantially and is still pending. It is therefore submitted that keeping in view the delay in completion of trial, the Appellant should be released on bail.

4. Mr.Nayak, learned Additional Government Advocate submitted on behalf of the State that in CRLA No.572 of 2011 and CRLA No.711 of 2021, the informant died in the meantime and his L.Rs did not accept notice from the police. He further submitted that all such trials before the learned Special Judge are at the verge of completion and will be completed very shortly. He further added that this Appellant is a notorious gangster of the locality involved in fifty seven cases at Berhampur including many heinous offences like murder etc. His father was also a habitual offender of the locality. The Appellant is operating his gang despite being inside the jail and B.N.Pur P.S.Case No.205 dated 29th September, 2019 and Golanthara P.S.Case No.338 dated 19th November,2020 have been registered relating to threat posed to different witnesses of the case.

5. Mr. Pradhan, learned counsel appearing for the Informant in CRLA Nos.709, 710 & 712 of 2021 objected the prayer for bail supporting the submissions of the learned Additional Government Advocate. He further added that repeated attempts of threat are put on the witnesses and the delay in completion of trial is not due to laches on the part of the informant or the prosecution and thus no benefit can be given to the Appellant in that aspect.

6. Mr.Das, learned Senior Advocate appearing for the Appellant submitted in his reply that admittedly, the delay is not due to any reason attributable to the present Appellant. Rather, an analysis of sequence of examination of the witnesses before the trial court would reveal how the prosecution is delaying production of the witnesses tactfully only to deprive of the Appellant for granting bail. He further emphasizes that the allegations of putting threat to the witnesses at the instance of the Appellant is not at all correct since the Appellant has neither been arrayed as an accused in B.N.Pur P.S.Case No.205 of 2019 nor Golanthara P.S.Case No.338 of 2020. As per him, during the interim release of the Appellant on bail for the period from 8th

March, 2022 to 4th April, 2022 on account of thread ceremony of his son, no such allegations of disturbances or overt activities was made either with regard to commission of any offence or his behavior. Therefore based on two unfounded allegations made during the year 2019 and 2020, the Appellant should not be deprived of the benefits of bail.

7. Two respective charts have been filed from the side of the Appellant as well as the State showing the position of the trial in all those five G.R.Cases pending before the learned Special Judge, Berhampur and admittedly, as per both the charts, no negligence on the part of the Appellant is found attributable for the cause of delay in trial. It is found that only in G.R.Case No.22 of 2017 (Corresponding to CRLA No.712 of 2021), examination of all the prosecution witnesses are complete. But in rest of the cases the evidence from the side of the prosecution are yet to complete.

8. It is true that there are number of criminal antecedents against the Appellant suggesting the Appellant as a habitual offender in the locality. But for the said reason only, it would be inappropriate to keep him behind the bars indefinitely as an UTP. The principles of speedy trial are stated in several of decisions of the Hon'ble Supreme Court, which need not be discussed here in detail. (See:- ***Ranjan Dwivedi vrs. Central Bureau of Investigation,*** (2012) 8 SCC 495, ***Abdul Rehman Antulay and others vrs. R.S.Nayak and another*****,** (1992) 1 SCC 225, ***Vakil Prasad Singh vrs. State of Bihar,*** (2009) 3 SCC 355, ***Pankaj Kumar vrs. State of Maharashtra and others*****,** (2008) 16 SCC 117, ***Hussainara Khatoon and others vrs. Home Secretary, State of Bihar***, (1980) 1 SCC 81 and ***Satender Kumar Antil vrs. Central Bureau of Investigation and another,*** 2022 SCC OnLine SC 825)

9. The important factors to be taken into account while considering the prayer for bail are that, prima-facie case against the accused, the gravity of the allegations, position and status of the accused and his antecedents, the likelihood of the accused fleeing from the course of justice, likelihood of committing further offence upon his release, the possibility of tampering with evidence etc. It is also important to look into the period of custody of the accused vis-à-vis the maximum punishment prescribed for the offences alleged.

10. The earlier two orders of this Court rejecting the prayer for bail of the Appellant are dated 12th December, 2019 and 11th February, 2021

respectively. This Court earlier rejected the prayer for bail of the Appellant mainly on the ground of proclivity of the Appellant in committing offences. Taking the period of custody of the Appellant from 18th January, 2018, he has already incarcerated for more than 4 ½ years till date as an UTP. There is no allegation made against him with regard to any mischief or disturbances in the locality during the period of his interim release. More than twenty months have been elapsed from the date of registration of Golanthara P.S. Case No.338 of 2020 though the Appellant is undisputedly not a charge-sheeted accused in the said case. Considering all such factors and the period of detention of the Appellant inside custody vis-à-vis the maximum punishment prescribed for the offences alleged, I am inclined to release the Appellant on bail subject to conditions.

11. Accordingly, it is directed to release the Appellant on bail in all the Appeals, i.e. Golanthara P.S.Case No.204 of 2018 corresponding to G.R.Case No.27 of 2018 (arising out of 1CC Case No.4 of 2018), Golanthara P.S.Case No.62 of 2019 corresponding to G.R.Case No.6 of 2019 (arising out of 1CC Case No.2 of 2018), Golanthara P.S.Case No.63 of 2019 corresponding to G.R.Case No.7 of 2019 (arising out of 1CC Case No.3 of 2018), Golanthara P.S.Case No.64 of 2019 corresponding to G.R.Case No.8 of 2019 (arising out of 1CC Case No.5 of 2018) and Golanthara P.S.Case No.182 of 2017 corresponding to G.R.Case No.22 of 2017 by the learned 2nd Addl. Sessions Judge, Berhampur subject to following conditions:-

(i) The Appellant shall furnish two sureties for Rs.50,000/- each in each case, out of which one shall be his relative;

(ii) The Appellant shall not be involved in any other offence while on bail;

(iii) The Appellant shall not dissuade any witness directly or indirectly by way of inducement, threat or promise acquainted with the facts of the case from disclosing such fats before the court or tamper with the evidence;

(iv) The Appellant shall not create any untoward situation in public and shall not be involved in any political activities, directly or indirectly;

(v) The Appellant shall appear before the IIC, Golanthara Police Station once in every week till completion of trials in all the cases.

12. It is made clear that violation of any such conditions shall entail cancellation of bail of the Appellant and in such event the trial court shall be

competent to decide the question of cancellation. It is further made clear that if anything is discovered or revealed against him to reasonably believe that he is conspiring for commission of any cognizable offence, the prosecution is at liberty to apply for immediate cancellation of bail before the learned trial court.

13. With the aforesaid directions, all the Appeals are disposed of.

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2022 (III) ILR - CUT- 168

B.P. ROUTRAY, J.

MACA NOS. 815 & 677 OF 2020

MANAGER LEGAL, M/s. FUTURE GENERALI INSURANCE COMPANY LTD. .....Appellant

.V.

MANJULATA ROUT & ORS. .....Respondents

MACA NO.677 OF 2020

MANJULATA ROUT & ORS. ..... Appellant

.V.

SUBASH CHANDRA SAHOO & ORS. .....Respondents

MOTOR VEHICLE ACT, 1988 – Section 145 (b), 147 (3) – A contractor's plant and machinery insurance policy (CMP) was issued in respect of the offending vehicle – The policy is not a motor vehicular policy in terms of Chapter-XI of the M.V. Act – Whether the same be considered as a policy issued under Chapter-XI of the M.V.Act for the reason that it has been accepted to cover the third party risk? – Held, No, cannot be stretched at any imagination to cover a policy which is not a statutory policy issued in respect of motor vehicle in terms of Chapter-XI of the M.V. Act. (Para-10)

Case Law Relied on and Referred to :-

1. AIR 1957 SC 699 : State of Bombay Vs. R.M.D.Chamarbaugwala.

MACA NO.815 OF 2020

For Appellant : Mr.A.A.Khan.

For Respondents : Mr.S.B.Das

MACA NO.677 OF 2020

For Appellant : Mr.S.B.Das.
For Respondents : Mr.A.A.Khan

JUDGMENT Date of Judgment: 23.8.2022

B.P. ROUTRAY, J.

1. Both the appeals are directed against the common judgment dated 18th February,2020 passed by the Presiding Officer, 3rd MACT, Jajpur in M.A.C. Case No.11 of 2013.

2. MACA No.815 of 2020 has been filed by the Insurance Company challenging the award whereas MACA No.677 of 2020 has been filed by the claimants praying for enhancement of the compensation amount.

3. The case of the claimants before the Tribunal is that the deceased namely, Biswanath Rout while returning to his house after completing his duty in Paradip Port, on the way at Paradip Port Prohibited Area No.II Jetty, all of a sudden one Hyva Dumper bearing Registration No.OR-21B-0833 loaded with lime stone dashed against him from backside being driven in a rash and negligent manner with high speed. As a result of said accident, the deceased died at the spot. The claimants are the wife and children of the deceased.

4. The specific case of the Insurer is that no motor vehicular policy was issued in respect of the offending vehicle but a CMP i.e., (contractor's plant and machinery insurance policy) was there. Therefore the accident being a motor vehicular accident, the indemnity in the policy does not cover the nature of risk. In other words, it is the contention of the Insurer that the present policy is not a policy covered under Section 147 of the Motor vehicle Act to indemnify the risk arising out of use of motor vehicle. The copy of the policy has been marked in Exhibit-B & C before the Tribunal. In the opinion of the Tribunal, even if the policy is a CMP Policy the insurer cannot escape from its liability to indemnify the compensation since premium for third party damage has been accepted.

5. It is submitted by Mr.Khan that the nature of policy does not cover a risk arising out of use of motor vehicle on public road.

6. Mr.Das on the other hand submits that keeping in view the nature of the policy particularly acceptance of premium for third party damages, the

policy covers the risk in the present case of accident in terms of Chapter-XI of the M.V.Act. In support of his contention, Mr.Das relies on the decisions reported in the case of ***State of Bombay vrs. R.M.D.Chamarbaugwala***, AIR 1957 SC 699, ***Harihar Polyfibres vrs.The Regional Director, ESI Corporation*** decided on 4th September, 1984 and the decision of the Madras High Court in the case of ***Mahboob Basha vrs. Tamil Nadu Wakf Board*** decided on 25th July, 2012.

7. Admittedly, the policies issued under Exts.B & C are CMP policies. The question falls for decision is that, even if the policy is not a motor vehicular policy in terms of Chapter-XI of the M.V.Act, whether the same can be extended to be considered as a policy issued under Chapter-XI of the M.V.Act for the reason that it has accepted to cover the third party risk.

8. In this regard, the definition as contemplated in Section 145 (b) postulates that "certificate of insurance" means a certificate issued by an authorized insurer in pursuance of Sub-section (3) of Section 147. Section 147 (3) speaks that a policy shall be of no effect for the purpose of Chapter-XI unless and until it is issued by the insurer in favour of the person by whom the policy is effected containing the prescribed particulars of any condition subject to which the policy is issued and for any other prescribed matter. Section 147(1) prescribes that, in order to comply with the requirements of this Chapter, a policy of insurance must be issued by an authorized insurer insuring a person or class of persons to the extent specified in Sub-Section 2. Sub-section (2) read with sub- section (1) of Section 147 says that a policy of insurance shall cover such liability incurred in respect of any accident to a third party caused by or arising out of the use of the motor vehicle in a public place up to such limits. Therefore a thorough examination of the provisions contained in Chapter-XI makes it clear that the policy of insurance and its limit shall be against such liability that may be incurred in respect of an accident arising out of use of a motor vehicle. Thus a thorough reading of all such provisions under Chapter-XI of the M.V. Act does not imply such a conclusion that a policy issued for plants and machineries would be treated or extended in respect of a motor vehicle.

9. In the instant case the Tribunal has assigned the reason that, despite Exts. B & C are undisputedly CPM policy and the offending vehicle is a motor vehicle and place of accident is a public place, the same would cover the risk involved in the accident because under the said policy, the

insured has paid premium of Rs.313/- for coverage of third party liability to the extent of Rs.1,25,000/-. As discussed in the above paragraph, this Court is unable to agree with such finding of the Tribunal in view of the clear provisions contained in Section 147 of the M.V. Act. The policy as in the present case is in respect of a machine cannot at any stretch be extended to use of a motor vehicle for which specific statutory provisions have been provided for issuance of valid insurance policy. Therefore the finding of the Tribunal to the extent that the CPM policy covers the risk of third party in respect of a motor vehicle to indemnify the liability is set aside.

10. It is pertinent to state here that the decisions cited by Mr. Das, learned counsel for the claimants are on different aspect i.e. on interpretation of the wordings 'or' and 'and' in a statute. Undoubtedly the provisions for compensation arising out of motor vehicular accident provided in the M.V. Act are beneficial provisions in favour of poor claimants. But the same cannot be stretched at any imagination to the extent to cover a policy which is not a statutory policy issued in respect of motor vehicle in terms of Chapter-XI of the M.V. Act.

11. In respect of the claim of applicants for enhancement of the compensation amount, the grounds raised are not found convincing to interfere with the same. As such, the same is rejected.

12. In the result, the appeal filed by the Insurer i.e. MACA No.815 of 2020 is allowed and the Appellant i.e., M/s. Future General Insurance Company Limited is exempted from its liability to indemnify the compensation amount. However, the claimants are at liberty to realize the compensation amount from the owner of the vehicle.

13. MACA No.677 of 2020 filed by the claimants is dismissed.

14. The statutory deposit made by the Insurer in MACA No.815 of 2020 with accrued interest thereon be refunded to him on proper application and on production of proof of deposit of the award amount before the learned Tribunal.

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2022 (III) ILR - CUT-172

S.K. PANIGRAHI, J.

BLAPL NO. 6498 OF 2021

AJAJ AHAMAD .....Petitioner

.V.

STATE OF ODISHA (CGST) .....Opp. Party

CENTRAL GOODS AND SERVICE TAX ACT, 2017 – Offences under Sections 132(1)(C) and 132(1)(b) – There is allegation that the petitioner misappropriated tax amount above the margin of Rs.5 crores – The Petitioner was forwarded into custody on 12.01.2021 – Application for bail – Held, bail cannot be refused in an indirect process of punishing the accused person before he is convicted – Bail application is allowed with certain conditions. (Para-10,11)

Case Laws Relied on and Referred to :-

1. (2009) 2 SCC 281 : Vaman Narain Ghiya Vs. State of Rajasthan.
2. (1978) 4 SCC 47 : Moti Ram Vs. State of M.P.
3. (2012) 1 SCC 40 : Sanjay Chandra Vs. CBI.
4. 84 (2000) DLT 854 : Anil Mahajan Vs. Commissioner of Customs.
5. CRL.M (BAIL) 459/2010 : H.B. Chaturvedi Vs. CBI.
6. (1978) 1 SCC 118 : Gurcharan Singh Vs. State (Delhi Administration).
7. (1978) 1 SCC 240 : Gudikanti Narasimhulu Vs. Public Prosecutor.
8. BLAPL No.of 2020 : Pramod Kumar Sahoo Vs. State of Odisha.

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

For Opp. Party : Mr. Choudhury Satyajit Mishra, SSC for CGST

JUDGMENT Date of Hearing: 31.03.2022: Date of Judgment: 04.04.2022

S.K. PANIGRAHI, J.

1. The present Petitioner, who is in custody since 12.01.2021, has filed the instant bail application under Section 439 of Cr.P.C. corresponding to 2(C)CC Case No.51 of 2020 pending in the court of the Learned S.D.J.M., Panposh, Rourkela for commission of offences under Sections 132(1)(C) and 132(1)(b) of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as "the CGST Act, 2017" for brevity). Prior to the instant application, the Petitioner had approached the learned 1st Additional Sessions Judge, Rourkela, for Bail, but it was rejected vide order dated 28.07.2021.

2. Shorn of unnecessary details, the prosecution's case is that after a search enquiry conducted on M/S Pacific Packing Industries, it was found that the firm of the petitioner namely, M/S Sony Iron and Steel Trading Co. was engaged in availing fraudulent ITC from the sham subsidiaries of M/S Pacific Packing Industries. Furthermore, ITC benefits to the tune of Rs.5,02,21,055 were acquired by the petitioner's firm and M/S Harihara Enterprises, by way of fake bills without the actual supply of goods.

3. Per contra, the learned counsel for the Petitioner earnestly submitted that the allegations made against the Petitioner in the prosecution report are bald allegations which lack the backing of any substantial evidence. It was contended that the Petitioner was held responsible for availing a total GST amount to the tune of Rs. 5, 02, 21,055 against M/S Sony Iron and Steel Trading Co and M/S Harihara Enterprises. However, the petitioner is the proprietor of only the former company and the later is under the proprietorship of Dhanjaya Suna. The petitioner has been arrayed as an accused for the acts and omission of M/S Harihara Enterprises as well, but solely on the basis of his own confession. Law is well settled that the confession of the accused cannot be used against him. It has been submitted that the investigation/enquiry officer has wrongly calculated that date sheet details and has thereby, erred in indicating the misappropriated tax amount above the margin of Rs.5 crores. Further, the payment of tax to the tune of Rs.19,29,972 by the petitioner has been overlooked by the investigating officer. It is submitted that the Petitioner has been duly cooperating with the authorities and has on multiple occasions appeared in the offices to assist the authorities with the investigation, but despite his bonafide actions, he was forwarded into custody on 12.01.2021. The Petitioner's family is on the brink of starvation due to his absence. Furthermore, the final charge sheet has been submitted and the documentary evidences have been seized, leaving no scope for the tampering of evidence. Learned counsel for the Petitioner finally urged that there is no risk of the Petitioner fleeing since he resides locally and he should be released on bail as the trial has not commenced and the petitioner has been advised by the doctor to undergo a bypass surgery.

4. Heard learned counsel for both parties and perused the records.

5. The core concept and philosophy of bail was discussed by the Hon'ble Supreme Court in ***Vaman Narain Ghiya v. State of Rajasthan***[1], wherein it was observed that:

> *"6. 'Bail' remains an undefined term in CrPC. Nowhere else has the term been statutorily defined. Conceptually, it continues to be understood as a right for assertion of freedom against the State imposing restraints. Since the UN Declaration of Human Rights of 1948, to which India is a signatory, the concept of bail has found a place within the scope of human rights. The dictionary meaning of the expression 'bail' denotes a security for appearance of a prisoner for his release. Etymologically, the word is derived from an old French verb 'bailer' which means to 'give' or 'to deliver', although another view is that its derivation is from the Latin term 'baiulare',meaning 'to bear a burden'. Bail is a conditional liberty. Stroud's Judicial Dictionary (4th Edn.,1971) spells out certain other details. It states:*
>
> *'… when a man is taken or arrested for felony, suspicion of felony, indicted of felony, or any such case, so that he is restrained of his liberty. And, being by law bailable, offereth surety to those which have authority to bail him, which sureties are bound for him to the King's use in a certain sums of money, or body for body,that he shall appear before the justices of goal delivery at the next sessions, etc. Then upon the bonds of these sureties, as is aforesaid, he is bailed—that is to say, set at liberty until the day appointed for his appearance.'*
>
> *Bail may thus be regarded as a mechanism whereby the State devolutes upon the community the function of securing the presence of the prisoners, and at the same time involves participation of the community in administration of justice.*
>
> *7. Personal liberty is fundamental and can be circumscribed only by some process sanctioned by law. Liberty of a citizen is undoubtedly important but this is to balance with the security of the community. A balance is required to be maintained between the personal liberty of the accused and the investigational right of the police. It must result in minimum interference with the personal liberty of the accused and the right of the police to investigate the case. It has to dovetail two conflicting demands, namely, on the one hand the requirements of the society for being shielded from the hazards of being exposed to the misadventures of a person alleged to have committed a crime; and on the other, the fundamental canon of criminal jurisprudence viz. the presumption of innocence of an accused till he is found guilty. Liberty exists in proportion to wholesome restraint, the more restraint on others to keep off from us, the more liberty we have. (See A.K. Gopalan v. State of Madras [AIR 1950 SC 27]).*
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> *8. The law of bail, like any other branch of law, has its own philosophy, and occupies an important place in the administration of justice and the concept of bail emerges from the conflict between the police power to restrict liberty of a man who is alleged to have committed a crime, and presumption of innocence in favour of the alleged criminal. An accused is not detained in custody with the object of punishing him on the assumption of his guilt."*

6. In ***Moti Ram v. State of M.P.***[2] the Hon'ble Supreme Court, while discussing pretrial detention, held:

1. (2009) 2 SCC 281, **2**. (1978) 4 SCC 47

> *"14. The consequences of pretrial detention are grave. Defendants presumed innocent are subjected to the psychological and physical deprivations of jail life, usually under more onerous conditions than are imposed on convicted defendants. The jailed defendant loses his job if he has one and is prevented from contributing to the preparation of his defence. Equally important, the burden of his detention frequently falls heavily on the innocent members of his family."*

Furthermore, the Hon'ble Supreme Court in ***Sanjay Chandra v. CBI***[3], dealing with a case involving an economic offence of formidable magnitude, touching upon the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is jurisprudentially neither punitive nor preventive. Although the Hon'ble Supreme Court sounded a caveat that any imprisonment before conviction does have a substantial punitive content. It was elucidated therein that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and that grant or denial of such privilege is regulated to a large extent by the facts and circumstances of each particular case. It was also held that detention in custody of under-trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted.

7. It would also be apposite at this juncture to reproduce the Hon'ble Delhi High Court's succinct elucidation of the legal position in matters pertaining to bail as laid down in ***Anil Mahajan v. Commissioner of Customs***[4] ***and H.B. Chaturvedi v. CBI***[5], whereinthe Hon'ble High Court after considering the judgments, inter alia, in ***Gurcharan Singh v. State (Delhi Administration)***[6] ***and Gudikanti Narasimhulu v. Public Prosecutor***[7], observed as follows:

> *"14. The legal position emerging from the above discussion can be summarised as follows:*
>
> *(a) Personal liberty is too precious a value of our Constitutional System recognised under Article 21 that the crucial power to negate it is a great trust exercisable not casually but judicially, with lively concern for the cost to the individual and the community. Deprivation of personal freedom must be founded on the most serious considerations relevant to the welfare objectives of society specified in the Constitution.*
>
> *(b) As a presumably innocent person the accused person is entitled to freedom and every opportunity to look after his own case and to establish his innocence. A man on bail*

3.(2012) 1 SCC 40 ,**4.** 84 (2000) DLT 854, **5.** (1978) 1 SCC 240, **6.** (1978) 1 SCC 118,
7. CRL.M (BAIL) 459/2010

has a better chance to prepare and present his case than one remanded in custody. An accused person who enjoys freedom is in a much better position to look after his case and properly defend himself than if he were in custody. Hence grant of bail is the rule and refusal is the exception.

(c) The object of bail is to secure the attendance of the accused at the trial. The principal rule to guide release on bail should be to secure the presence of the applicant to take judgment and serve sentence in the event of the Court punishing him with imprisonment.

(d) Bail is not to be withheld as a punishment. Even assuming that the accused is prima facie guilty of a grave offence, bail cannot be refused in an indirect process of punishing the accused person before he is convicted.

(e) Judges have to consider applications for bail keeping passions and prejudices out of their decisions.

(f) In which case bail should be granted and in which case it should be refused is a matter of discretion subject only to the restrictions contained in Section 437(1) of the Criminal Procedure Code. But the said discretion should be exercised judiciously.

(g) The powers of the Court of Session or the High Court to grant bail under Section 439(1) of Criminal Procedure Code are very wide and unrestricted. The restrictions mentioned in Section 437(1) do not apply to the special powers of the High Court or the Court of Session to grant bail under Section 439(1). Unlike under Section 437(1), there is no ban imposed under Section 439(1) against granting of bail by the High Court or the Court of Session to persons accused of an offence punishable with death or imprisonment for life. However while considering an application for bail under Section 439(1), the High Court or the Court of Sessions will have to exercise its judicial discretion also bearing in mind, among other things, the rationale behind the ban imposed under Section 437(1) against granting bail to persons accused of offences punishable with death or imprisonment for life.

(h) There is no hard and fast rule and no inflexible principle governing the exercise of such discretion by the Courts. There cannot be an inexorable formula in the matter of granting bail. The facts and circumstances of each case will govern the exercise of judicial discretion in granting or refusing bail. The answer to the question whether to grant bail or not depends upon a variety of circumstances, the cumulative effect of which must enter into the judicial verdict. Any one single circumstance cannot be treated as of universal validity or as necessarily justifying the grant or refusal of bail.

(i) While exercising the discretion to grant or refuse bail the Court will have to take into account various considerations like the nature and seriousness of the offence; the circumstances in which the offence was committed; the character of the evidence; the circumstances which are peculiar to the accused; a reasonable apprehension of witnesses being influenced and evidence being tampered with; the larger interest of the public or the State; the position and status of the accused with reference to the victim and the witness; the likelihood of the accused fleeing from justice; the likelihood of the accused repeating the offence; the history of the case as well as the stage of investigation, etc. In view of so many variable factors the considerations which should weigh with the Court cannot be exhaustively set out. However, the two paramount considerations are: (i) the likelihood of the accused fleeing from justice and (ii) the likelihood of the accused tampering with prosecution evidence. These two considerations in fact relate to ensuring a

fair trial of the case in a Court of justice and hence it is essential that due and proper weight should be bestowed on these two factors.

(j) While exercising the power under Section 437 of the Criminal Procedure Code in cases involving non-bailable offences except cases relating to offences punishable with death or imprisonment for life, judicial discretion would always be exercised by the Court in favor of granting bail subject to Sub-section (3) of Section 437 with regard to imposition of conditions, if necessary. Unless exceptional circumstances are brought to the notice of the Court which might defeat proper investigation and a fair trial, the Court will not decline to grant bail to a person who is not accused of an offence punishable with death or imprisonment for life.

(k) If investigation has not been completed and if the release of the accused on bail is likely to hamper the investigation, bail can be refused in order to ensure a proper and fair investigation.

(l) If there are sufficient reasons to have a reasonable apprehension that the accused will flee from justice or will tamper with prosecution evidence he can be refused bail in order to ensure a fair trial of the case.

(m) The Court may refuse bail if there are sufficient reasons to apprehend that the accused will repeat a serious offence if he is released on bail.

(n) For the purpose of granting or refusing bail there is no classification of the offences except the ban under Section 437(1) of the Criminal Procedure Code against grant of bail in the case of offences punishable with death or life imprisonment. Hence there is no statutory support or justification for classifying offences into different categories such as economic offences and for refusing bail on the ground that the offence involved belongs to a particular category. When the Court has been granted discretion in the matter of granting bail and when there is no statute prescribing a special treatment in the case of a particular offence the Court cannot classify the cases and say that in particular classes bail may be granted but not in others. Not only in the case of economic offences but also in the case of other offences the Court will have to consider the larger interest of the public or the State. Hence only the considerations which should normally weigh with the Court in the case of other non- bailable offences should apply in the case of economic offences also. It cannot be said that bail should invariably be refused in cases involving serious economic offences.

(o) Law does not authorise or permit any discrimination between a foreign National and an Indian National in the matter of granting bail. What is permissible is that, considering the facts and circumstances of each case, the Court can impose different conditions which are necessary to ensure that the accused will be available for facing trial. It cannot be said that an accused will not be granted bail because he is a foreign national."

8. This court has also had the prior occasion of dealing with a similar application for grant of bail in a case relating to prosecution under the provisions of the OGST Act, 2017 the case of ***Pramod Kumar Sahoo v State of Odisha***[8] wherein this court had the occasion to elaborately deal with the view taken by various other High Courts in such matters.

8. BLAPL No.4125 of 2020

9. Bail, as it has been held in a catena of decisions, is not to be withheld as a punishment. Bail cannot be refused as an indirect method of punishing the accused person before he is convicted. Furthermore, it has to be borne in mind that there is as such no justification for classifying offences into different categories such as economic offences and for refusing bail on the ground that the offence involved belongs to a particular category. It cannot, therefore, be said that bail should invariably be refused in cases involving serious economic offences. It is not in the interest of justice that the Petitioner should be in jail for an indefinite period. No doubt, the offence alleged against the Petitioner is a serious one in terms of alleged huge loss to the State exchequer, that, by itself, however, should not deter this Court from enlarging the Petitioner on bail when there is no serious contention of the Respondent that the Petitioner, if released on bail, would interfere with the trial or tamper with evidence.

10. Having regard to the entire facts and circumstances of the case, especially the fact that the bread earning son of a family has been in custody for over a year now I do not find any justification for detaining the Petitioner in custody for any longer. As a side note, it is observed that more and more such cases are brought to the fore where the mere pawns who have been used as a part of larger conspiracy of tax fraud have been brought under the dragnet by the prosecution. It is perhaps time that the prosecution will do well to follow the trial upstream and bring the "upstream"parties who are the ultimate beneficiaries who are the gainers in these evil machinations.

11. In view of the above discussion, it is directed that the Petitioner be released on bail by the court in seisin over the matter in the aforesaid case on such terms and conditions as deemed fit and proper by him/ her with the following conditions:

(i) The Petitioner shall co-operate with the trial and shall not seek unnecessary adjournments on frivolous grounds to protract the trial;

(ii) The Petitioner shall not directly or indirectly allure or make any inducement, threat or promise to the prosecution witnesses so as to dissuade them from disclosing truth before the Court;

(iii) In case of his involvement in any other criminal activities or breach of any other aforesaid conditions, the bail granted in this case may also be cancelled.

(iv) The Petitioner shall submit his passports, if any, before the learned trial court and shall not leave India without prior permission of this Court.

(v) Any involvement in similar offences of under the GST Act will entail cancellation of the bail.

12. With the above directions, the instant bail application is allowed. However, expression of any opinion hereinbefore may not be treated as a view on the merits of the case and that the assessment of the tax liability of the Petitioner shall be carried out strictly in accordance with the applicable provisions of applicable law.

13. The bail application is, accordingly, disposed of along with any pending applications (if any).

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2022 (III) ILR - CUT- 179

S.K. PANIGRAHI, J.

W.P.(C) NOS. 38329 AND 38405 OF 2021

JYOTIRANJAN JENA & ORS. .....Petitioners

.V.

GOVT. OF ODISHA & ORS. .....Opp. Parties

IN W.P.(C) NO.38405 OF 2021

BIJAYAKETAN BIDYADHAR SAHOO ....Petitioner

.V.

GOVT. OF ODISHA AND ORS. ....Opp. Parties

CONSTITUTION OF INDIA, 1950 – Articles 14,16 – Appointment – Discrimination due to artificial classification – The Government of Odisha has decided to fill up the vacancies of different posts of Contractual Trained Graduate Teachers and Telugu Teachers in Government Secondary Schools of the State of Odisha in 2021 – The Petitioners candidature have been allegedly excluded from the merit list merely on the ground that they have completed their graduation degree in Commerce (B.Com) and the B. Com degree course does not have any school subjects – Whether such artificial classification tenable under law? – Held, No – The Subject Economics takes under its purview, the subjects of Macro Economics and Micro Economics and thus Business Economics is the same as the subject of Economics – The action of the opposite parties in not allowing the petitioners, despite possessing all requisite and essential qualifications and after qualifying the computer-based Test (CBT), is erroneous and arbitrary.

(Para-19)

Case Laws Relied on and Referred to :-

1. 1996 SCC On Line Kar 430 : B. Shamasundar Vs. University of Mysore.
2.(1995) 5 scc 482 : LIC of India Vs. Consumer Education & Research Centre.
3. 2019 SCC On Line Raj 3443 : Priyanka Menaria Vs. State of Rajasthan.
4. (1974) 1 SCC 19 : State of J&K Vs. Triloki Nath Khosa.

For Petitioners : Mr. Satyabrata Mohanty.

For Opp. Parties : Mr.Biswajit Mohanty, SC (for S & ME Deptt.)

JUDGMENT Date of Hearing: 18.04.2022: Date of Judgment: 06.05.2022

S.K. PANIGRAHI, J.

1. In both the above writ petitions, the petitioners have assailed the arbitrary action of the authority by not considering their candidature in the draft merit list. The petitioners have been allegedly excluded from the merit list merely on the ground that they have completed their graduation degree in Commerce (B.Com) and the B. Com degree course does not have any school subjects.

2. The case, in a nutshell, is that, the School and Mass Education Department, Government of Odisha has decided to fill up the vacancies of different posts of Contractual Trained Graduate Teachers and Telugu Teachers in Government Secondary Schools of the State of Odisha in 2021.Accordingly,the Director of Secondary Education, Odisha Bhubaneswar-opposite party No.2 issued Advertisement/Notice on 28.08.2021.This notification carried the details of the conditions and norms which are applicable for the intending eligible candidates for recruitment against the existing vacancies of contractual Trained Graduate Teachers in Government Secondary Schools of Odisha.

3. As per the advertisement, online registration would commence from 04.09.2021 and would continue till 30.09.2021 up to 6.00 P.M. The minimum academic and professional qualification as prescribed under clause-5B of the said Advertisement for the post of Trained Graduate Teachers Arts reads as follows:

> ***"1. Bachelor Degree in Arts / Commerce or a Shastri (Sanskrit) Degree from a recognized university with two school subjects (school subjects as defined in the proviso here under) from a recognized university having 50% marks in aggregate (45% for SC/ST/PWD/ SEBC candidates) and Bachelor in Education (B. Ed)/ 3 years integrated B.Ed-M.Ed from a NCTE recognized institution.***
>
> Or

> 2. Four-year integrated B.A. B. Ed from a NCTE recognized institution with two school subjects (school subjects as defined in the proviso here under) having 50% marks in aggregate (45% for SC/ST/PWD/SEBC candidates).
>
> Provided that:
>
> In any case the candidate must have passed the Bachelor Degree with any two school subjects offered as Pass/ Hons/Elective/ Optional/Compulsory subject out of the following:
>
> English, Odia, Sanskrit, History, Geography, Economics, Political Science, Indian Economy, Landmarks in Indian History, Indian Geography, Indian Polity."

4. Accordingly, the petitioners applied for the post by the due date and the examination was held on the scheduled date. As the petitioners fulfilled all the criteria i.e. educational qualifications as prescribed in the Advertisement, after completion of the examination, the petitioners participated in the process of verification of documents. Subsequently, the opposite parties issued notice on 26.11.2021 to intimate the candidates regarding the post-wise draft merit list and post-wise draft rejection list for candidates who had appeared in the online test of C.B.T held from 25.10.2021 to 28.10.2021 and had gotten their documents verified from 18.11.2021 to 23.11.2021.

5. On verification of the said draft list, the present petitioners found themselves featuring on the post- wise draft rejection list and the ground of rejection as assigned to them, is noted to be *"not having two school subjects in Bachelor Degree as prescribed" and "lack of two school subjects in B.com".*

6. Learned counsel for the petitioners submitted that after coming to know of their rejection, the petitioners raised their objections stating therein that the ground for rejection is arbitrary, illegal and unsustainable. The learned counsel for the petitioners further submitted that the petitioners held a Bachelors degree in Commerce i.e. a B.Com Degree, wherein in the syllabus of the Bachelors Course there is a subject called Business Economics which has the same syllabus of Economics, which is a compulsory subject in the course and this is common in all B.Com degrees throughout the State of Odisha. Thus, they studied Economics as one of the compulsory subjects in their Bachelors Course, however, the same has not been considered. They also submitted that in the year 2019, the Director Secondary Education, State of Odisha, issued a notification for recruitment in

the post of Contractual Trained Graduate Teachers in Government Secondary School, wherein in the TGT Arts Category, the prescribed minimum academic qualification was Bachelor Degree in Arts/ Commerce or Sastri (Sanskrit) Degree from a recognized university with two school subjects, knowing very well that in commerce stream, Economics is known as Business Economics in the Syllabus of the B.Com Course. It was further clarified that, there are 2 compulsory papers and 2 elective subjects (pass paper) and 2 honour papers in the first two semesters of the 1st Year. Then in the two semesters of the 2nd Year, there are two elective subjects (pass paper) and 4 honour papers and finally there are 2 compulsory papers and 4 honour papers in 2 semesters of the 3rd Year. It is also ardently submitted that the Economics paper is known as Business Economics in the Commerce stream throughout the State in all the Universities and the Autonomous Colleges.

7. The learned counsel for the petitioners further submitted that as per the Advertisement, the candidates should have two compulsory school subjects from amongst English, Odia, Hindi, Sanskrit, History, Geography, Economics etc. and the petitioners fulfilled the said requirement by having English which is known as Communicative English in the B.Com stream across the State of Odisha and Economics which is known as Business Economics in the B.Com stream across the State of Odisha. It was further pointed out that, even though the compulsory subject English and Economics are nomenclatured as Communicative English and Business Economics, rejection of the petitioners otherwise successful application on this hyper technical ground is incorrect and unjust. It is submitted that this reflects a complete non-application of mind. It was further brought to this Court's notice that, in the year 2016- 2017 the Syllabus introduced by the Utkal University and the State Model Syllabus for Under Graduate Course in Commerce under the Choice Based Credit System (CBCS), has clearly spelt out that in the 1st year in semester Nos.1 and 2 the Economics subject will be known as Micro Economics and Macro Economics in the Arts Stream and whereas the same was available under the name of Business Economics in the Commerce Stream, also the courses, despite their names being different, deal with the same topics unit wise.

8. Learned counsel for the petitioners submitted that all the petitioners present before this Court are B. Com graduate students having the necessary B.Ed qualification and have completed their post-graduation in the commerce

stream. More particularly, petitioner No.1 in W.P.(C) No.38329 of 2021 has the qualification of M. Com. with M.Ed. and a disability Certificate from the Competent Authority. Despite the petitioners possessing such a high level of qualifications, the candidatures of the petitioners has been rejected on hyper technical grounds which shows the non- application of mind and apathetic attitude of the Authority which leads to prejudicially affecting the career of the petitioners.

9. *Per contra*, Learned counsel for the opposite parties-Department of School and Mass Education submitted that the petitioners do not have any of the school subject in Bachelor Degree as exactly listed in the resolution or the particular paragraph of the advertisement i.e. English, Odia, Hindi, Sanskrit, History, Geography,Economics, Political Science, Indian Economy, Landmarks in Indian History, Indian Geography, Indian Polity. Therefore their candidatures were rejected at the time of verification of documents. It was further submitted that in the school subject column of the online application, the petitioners have filled in two of the aforesaid schools subjects (English and Economics as prescribed in the advertisement) but at the time of verification of documents it was found that in Bachelor Degree they had not studied the subjects which they had mentioned in the online application (they had studied Communicative English and Business Economics). According to the learned counsel for the opposite parties, this clearly indicates that the petitioners had given false information in the application forms and on the basis of this false information, their applications were inadvertently accepted by the computer system and they have been allowed to appear in the Computer Based Recruitment Examination. Their candidatures were liable to be rejected as per the condition prescribed in Para 15(vii) of the Advertisement which talks about providing false information in the application forms. That apart, it is the contention of the learned counsel that the petitioners never challenged the eligibility conditions made in the Advertisement dated 28.08.2021. They have accepted the eligibility conditions prescribed in the said Advertisement with eyes wide open and applied online for the post of contractual TGT. However, the learned counsel conceded that Business Economics is similar to Economics and stated that the similarity of the two subjects albeit bearing different nomenclature can be examined and ascertained by academicians/subject experts but this exercise of taking opinion from subject experts/academicians may be required before taking a decision on the subjects to be prescribed in the advertisement for the recruitment.

10. The learned counsel for the opposite parties further contended that, this argument of two subjects being similar is vague and irrelevant after the selection process. Insofar as the condition in the advertisement is concerned, the question of accepting any subject similar/identical/equivalent etc. does not arise. It was also submitted that the State being the employer has every right to fix eligibility conditions for selection and recruitment of its employees. It is essential for the employer to fix some eligibility conditions as per the requirement of a job. It is not possible for the State authorities to study all possible subject combinations available at Degree level in all branches and all institutions/ universities across the country and accordingly include all such subjects in the advertisement so as to satisfy all candidates. So, some common standard subjects have been prescribed keeping in view the teaching requirement in schools. The petitioners may have many other subjects at Graduation level apparently similar to the prescribed subjects, but which do not fulfill the exact specification and requirement for the post as set by the State as employer.

11. Heard learned counsel for the parties.

12. In ***Special Courts Bill, 1978, In re***[1] Chandrachud, C.J. as he then was, speaking for majority of the Court, adverted to large number of judicial precedents involving interpretation of Article 14 and culled out several propositions including the following:

> *"72. (2) The State, in the exercise of its governmental power, has of necessity to make laws operating differently on different groups or classes of persons within its territory to attain particular ends in giving effect to its policies, and it must possess for that purpose large powers of distinguishing and classifying persons or things to be subjected to such laws.*
>
> *(3) The constitutional command to the State to afford equal protection of its laws sets a goal not attainable by the invention and application of a precise formula. Therefore, classification need not be constituted by an exact or scientific exclusion or inclusion of persons or things. The courts should not insist on delusive exactness or apply doctrinaire tests for determining the validity of classification in any given case. Classification is justified if it is not palpably arbitrary.*
>
> *(4) The principle underlying the guarantee of Article 14 is not that the same rules of law should be applicable to all persons within the Indian territory or that the same remedies should be made available to them irrespective of differences of circumstances. It only means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation, and there should be no discrimination between one person and another if as regards the subject-matter of the legislation their position is substantially the same.*
>
> ***1.*** *(1979) 1 SCC 380*

(5) By the process of classification, the State has the power of determining who should be regarded as a class for purposes of legislation and in relation to a law enacted on a particular subject. This power, no doubt, in some degree is likely to produce some inequality; but if a law deals with the liberties of a number of well-defined classes, it is not open to the charge of denial of equal protection on the ground that it has no application to other persons. Classification thus means segregation in classes which have a systematic relation, usually found in common properties and characteristics. It postulates a rational basis and does not mean herding together of certain persons and classes arbitrarily.

(6) The law can make and set apart the classes according to the needs and exigencies of the society and as suggested by experience. It can recognise even degree of evil, but the classification should never be arbitrary, artificial or evasive.

(7) The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others; and (2) that that differentia must have a rational relation to the object sought to be achieved by the Act."

13. The Hon'ble High Court of Kerala in ***B. Shamasundar v. University of Mysore***[2], observed that:

"6. Equality before law and equal protection of laws is the heart and soul of the Constitutional system adopted by this country. The right to equality and equal protection of laws under Article 14 are genus and the right to non-discrimination are the species. Equality as contemplated under the Constitutional scheme means equality among equals. The doctrine of equality is considered to be a corollary to the concept of Rule of Law which postulates that every executive action, if it is to operate to the prejudice of any person must be fair and referable to legal authority. What Article 14 prohibits is the class legislation and not reasonable classification. If classification is based upon reasonable criteria and the persons belonging to well-defined class are treated equally, the vice of discrimination would not be attracted. In order to pass the test of reasonable classification the impugned Statute, order or notification is required to pass the twin tests of permissible classification viz.,

(i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and;

(ii) that, that differentia must have a rational relation to the object sought to be achieved by the impugned statute or order.

7. It is not conceived that the classification should be scientifically perfect or logically complete. The Court would not interfere unless it is shown that the classification resulted in inequality amongst the persons similarly situated. The reasonable classification expected to stand the test of the Constitutional guarantees requires that such classification was real and substantial which contemplated some just reasonable relation to the job of the legislation. The Courts have not to determine as to whether the impugned action has resulted in inequality but have to decide whether there was some differentia which had an object to be

2. *1996 SCC On Line Kar 430*

achieved by the impugned action. Mere differentiation per se does not amount to discrimination attracting the operation of the guarantee of equality. The purpose and object of the impugned action has to be ascertained from the attending circumstances in each case."

14. It therefore flows, that Article 14 forbids class legislation but permits reasonable classification provided that it is founded on an intelligible differentia which distinguishes persons or things that are grouped together from those that are left out of the group and the differentia has a rational nexus to the object sought to be achieved by the action in question.

15. In ***LIC of India v. Consumer Education & Research Centre***[3], the Hon'ble Supreme Court reiterated the above noted principle in the following words:

"30. … The doctrine of classification is only a subsidiary rule evolved by the courts to give practical content to the doctrine of equality, overemphasis on the doctrine of classification or anxious or sustained attempt to discover some basis for classification may gradually and imperceptibly erode the profound potency of the glorious content of equality enshrined in Article 14 of the Constitution. The overemphasis on classification would inevitably result in substitution of the doctrine of classification to the doctrine of equality and the Preamble of the Constitution which is an integral part and scheme of the Constitution. Maneka Gandhi v. Union of India [(1978) 1 SCC 248] ratio extricated it from this moribund and put its elasticity for egalitarian pathfinder lest the classification would deny equality to the larger segments of the society. The classification based on employment in government, semi-government and reputed commercial firms has the insidious and inevitable effect of excluding lives in vast rural and urban areas engaged in unorganised or self-employed sectors to have life insurance offending Article 14 of the Constitution and socio-economic justice."

16. The petitioners, who are otherwise eligible, are now excluded on the basis of an artificial classification introduced in the impugned advertisement. There is no nexus sought to be achieved with the intent or object of the State Government, as the excluded candidates also fulfill the requirement of a trained graduate teacher and have studied two of the required subjects albeit named differently. When all across the State, the course of English is called Communicative English in the B.Com Degree and Economics is called Business Economics in the B.Com Degree, then denying all B.Com graduates the opportunity to be successful in being appointed as a trained graduate teacher using this hyper-technical approach is wholly arbitrary and amounts to an artificial discrimination which cannot hold in law. If prima facie, unit wise the contents of the subject are similar, no matter what it is called, then the position of all such candidates are substantially the same with

3. (1995) 5 scc 482

respect to the object sought to be achieved by the State is prescribing prior education in these subjects as the minimum qualification. The idea behind the State introducing a requirement as such is just to ensure that the candidate has adequate knowledge in the subject. If in fact the said qualification was for any other purpose and meant to be so narrow then the State would not have allowed education in the school subjects in any of the "Pass/ Hons/ Elective/Optional/Compulsory"manner.If the present Petitioners are otherwise eligible and they have studied the subject during their graduation course, then the object of the said qualifying criteria is satisfied.

17. Recently in ***Priyanka Menaria v. State of Rajasthan***[4], the Hon'ble High Court of Rajasthan was pleased to hold under similar circumstances that:

> *"20. The syllabus (Annex.13) produced by the petitioner fortifies the contention of having studied Economics as such during course of her graduation and, therefore, the action of the respondents in rejecting the candidature of the petitioner by mere reference to the fact that the mark-sheets produced by the petitione indicated Banking and Business Economics instead of Economics, cannot be sustained.*
>
> *21. The above aspect also finds support from the fact that for subject Science the candidates having studied Bio-Technology and Bio-Chemistry have been held eligible, which are also specialized subjects within broader subject Science and, therefore, as the petitioner has studied Banking& Business Economics, the same can very well be treated as part of Economics.*
>
> *22. Consequently, the writ petition filed by the petitioner is allowed. It is held that the petitioner, who has studied Banking and Business Economics in her graduation (B.Com) would be eligible for appointment on the post of Teacher Gr.III (Level-II) in subject Social Science.*
>
> *23. The respondents would take steps for according appointment to the petitioner, in case, the petitioner is found otherwise eligible. The petitioner would be entitled to all consequential benefits regarding her seniority etc. However, monetary benefits would be paid to the petitioner from the date of her appointment."*

18. The Hon'ble Supreme Court in ***State of J&K v. Triloki Nath Khosa***[5], held that:

> *"30. Since the constitutional code of equality and equal opportunity is a charter for equals, equality of opportunity in matters of promotion means an equal promotional opportunity for persons who fall, substantially, within the same class. A classification of employees can therefore be made for first identifying and then distinguishing members of one class from those of another.*

4. 2019 SCC On Line Raj 3443 **5.** (1974) 1 SCC 19

31. Classification, however, is fraught with the danger that it may produce artificial inequalities and therefore, the right to classify is hedged in with salient restraints; or else, the guarantee of equality will be submerged in class legislation masquerading as laws meant to govern well marked classes characterized by different and distinct attainments. Classification, therefore, must be truly founded on substantial differences which distinguish persons grouped together from those left out of the group and such differential attributes must bear a just and rational relation to the object sought to be achieved.

32. Judicial scrutiny can therefore extend only to the consideration whether the classification rests on a reasonable basis and whether it bears nexus with the object in view. It cannot extend to embarking upon a nice or mathematical evaluation of the basis of classification, for were such an inquiry permissible it would be open to the Courts to substitute their own judgment for that of the legislature or the Rule-making authority on the need to classify or the desirability of achieving a particular object."

19. It is apparently evident to any reasonable man from the averments placed and the submissions advanced that the subject Communicative English and English implicate the same subject. Additionally, the Subject Economics takes under its purview, the subjects of Macr Economics and Micro Economics and thus Business Economics is the same as the subject of Economics. Therefore, the action of the opposite parties in not allowing the petitioners, despite possessing all requisite and essential qualifications and after qualifying the computer-based Test (CBT), to be appointed as a trained graduate teacher is erroneous and arbitrary.

20. Accordingly, while allowing both the aforesaid writ petitions, this Court sets aside the rejection of the candidatures of the petitioners in the selection process and directs the opposite parties to consider the candidatures of the petitioners in the light of the fact that they possess all requisite qualifications and have qualified in the CBT.

21. Both the writ petitions are disposed of being allowed.

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2022 (III) ILR - CUT- 188

MISS. SAVITRI RATHO, J.

CRREV NO. 179 OF 2001

RABINDRA SAHU ……..Petitioner

.V.

STATE OF ODISHA ……Opp. Party

PREVENTION OF FOOD ADULTERATION ACT, 1954 – Section 16(1) (a) (i) read with Rule-7 (1) and 32 of the Prevention of Food Adulteration Rule – The cash memo does not show the brand name and Mandatory provisions in Rule -7 (i), 14 to 18 have not been complied – Effect of – Held, when the prosecution witnesses themselves do not speak about absence of label on the mixture packets at the time of alleged purchase and seizure, it would be unsafe to sustain the conviction of the petitioner for the offence of misbranding. (Para-12)

Case Laws Relied on and Referred to :-

1. (2000) 9 SCC 56 : Consumer Action Group Vs. Cadbury Industries.
2. 1993 FAJ 95 Delhi : MDH Pvt. Ltd. Vs. State.
3. 1992 FAJ 110 : Uma Shankar Agarwala Vs. Municipal Corporation of Calcutta & Ors.
4. (1993) 6 OCR 569 : Satyanarayan Choudhury Vs. State of Orissa.
5. (1996) 4 SCC 513 : Krishna Gopal Sharma Vs. Govt of NCT.

For Petitioner : Mr. S.S.Rao

For Opp. Party : Mr. Sibani Shankar Pradhan, Addl. Govt. Adv.

JUDGMENT Date of Judgment: 11.08.2022

MISS. SAVITRI RATHO, J.

1. The petitioner has filed this Criminal Revision challenging his conviction and sentence under Section 16(1) (a) (i) of the Prevention of Food Adulteration Act (in short "PFA Act") read with Rule–7 (1) and 32 of the Prevention of Food Adulteration, Rules (in short the "PFA Rules"), by the learned S.D.J.M., Berhampur in 2 (c) CC No.164/1994 (T.R. No.585 of 1994), which has been confirmed by the learned 2nd Addl. Sessions Judge, Berhampur in Criminal Appeal No.48 of 1997/Criminal Appeal No.183/96-GDC,vide judgement and order dated 31.3.2001.The petitioner had been sentenced to undergo rigorous imprisonment for six months and to pay a fine of Rs.1000/- in default to undergo rigorous imprisonment for six months more.

2. The brief facts of the prosecution case is that the petitioner is the owner of a sweet shop named and styled as "Srikhetra Mistanna Bhandar" located at Janana Hospital Road, Berhampur. On 11.12.1992 the Food Inspector of Berhampur Municipality visited the sweet shop of the petitioner and found the accused was selling sweets and mixture for human consumption. On demand the petitioner failed to produce the food licence.

The Food Inspector inspected the sweets and mixture which were exposed for sale and suspected them to be adulterated and misbranded and wanted to take sample of the same for analysis by Public Analyst. Therefore, after observing all formalities, he purchased 1500 grams of Kamala Bhog and 3 packets of mixture each containing 200 grams. Then he divided the purchased Kamala Bhog into three equal parts and then he sent the same to the Public Analyst in accordance with the Act and Rules. After analysis, the Public Analyst furnished his report that the sample of Kamala Bhog is up to the standard, but the sample of mixture is misbranded as there was no label on the packets and violative of Rule 32 of the P.F.A. Rules. Then, the Food Inspector prepared the prosecution report against the petitioner for selling misbranded articles and placed the report before the C.D.M.O.-cum-Local health Authority, Ganjam, for sanction. After obtaining sanction, prosecution report was filed before the Court of the learned S.D.J.M., Berhampur.

3. In order to prove its case, the prosecution examined two witnesses. The defence examined two witnesses. The prosecution exhibited sixteen documents. The prosecution also proved two material objects. M.Os.I and II which are the two sealed packets containing mixture.

P.W.1 Ashok Kumar Choudhary is the Food Inspector and the complainant. P.W.2. Raghunath Pradhan is the health worker/vaccinator of Berhampur Municipality. D.W.1 is the accused Rabindra Sahu. D.W.2 is Narayan Jena, a neighbouring betel shop owner.

Ext.1 is the copy of notice, Ext.2 is the money receipt, Exts.3 and 4 are the office copy of memorandum, Exts.5 and 6 are the postal receipts, Exts.7 and 15 are the postal A.D, Ext.8 is the intimation bearing letter no.281 dated 11.12.1992. Ext.9 is the receipt granted by C.D.M.O., Ext.10 is the report of public analyst, Ext.11 is the forwarding report of CDMO, Berhampur, Ext.12 is the written consent of CDMO, Ganjam, Berhampur, Ext.13 is the notice issued to the accused under Section 13(2) of P.F.A. Act. Ext.14 is the postal receipt. Ext 15 is the postal AD card and Ext.16 is the letter of the CDMO.

4. The learned S.D.J.M., Berhampur after taking into account the materials available on record vide judgment and order dated 22.7.1996 passed in 2 (C) C.C. No.164 of 94 (T.R. No.585 of 94), convicted the petitioner for commission of the offence under Section 16 (1) (a) (i) of the

Prevention of Food Adulteration Act and to undergo R.I. for six months and to pay a fine of Rs.1,000/-, in default of payment of fine to undergo R.I. for one month more.

5. The learned Addl. Sessions Judge, Berhampur dismissed Criminal Appeal No.48 of 1997/Criminal Appeal No.183/96-GDC vide judgment and order dated 31.03.2001 and confirmed the judgment and order passed by the learned SDJM holding that the minimum sentence had been awarded to the petitioner by the learned trial Court.

6. Learned counsel for the petitioner has submitted that:

a) Section 2 (xi) of the P.F.A. Act defines 'misbranding' to mean that if some other brand is reflected to represent the goods belonging to another brand. In the instant case, there was no label at all. The offence of misbranding is therefore not attracted. Ext.2 is the receipt under which inspector said to have purchased the mixture. Assuming the document to be a cash memo, there is no mention of any brand therein. He has relied on the case ***Consumer Action Group vs. Cadbury Industries reported in (2000) 9 SCC 56,*** stating that the Supreme Court has observed that when the cash memo does not show the brand name, there is no question of misbranding. He has also relied on the case of ***MDH Pvt. Ltd. vs. State reported in 1993 FAJ 95 Delhi.***

b) The petitioner had got valid food licence at the time of occurrence and he only dealt with sweets and does not sell khara items like mixture. His hotel was running in a room of his own residential house where he lived with his wife and three children and 3 packets of mixture was kept by him on the window frame of his residential house meant for consumption of his children. They were not meant for sale but the Food Inspector while purchasing "Kamala Bhog" forcibly took those three packets of mixture and compelled the petitioner to put his signature in some papers. As the prosecution has not been able to prove that the mixture was kept for sale, his conviction is liable to be set aside.

c) Prosecution cannot be based solely on the report of the Analyst as prosecution has not been able to prove that the mixture was kept for sale. He has relied on the decision in the case of ***Uma Shankar Agarwala vs. Municipal Corporation of Calcutta & Others*** *reported in* ***1992 FAJ 110***, in support of his submission.

d) Mandatory provisions in Rule -7 (i), 14 to 18 have not been complied and therefore it cannot be stated with certainty that the packets of mixture sent to the Public Analyst where in the fact the mixture packets which were taken from his shop. He has relied on the decision in the case of ***Satyanarayan Choudhury vs. State of Orissa*** *reported in* ***(1993) 6 OCR 569***.

e) In case this Court is not inclined to interfere with the conviction of the petitioner, as the offence is a technical one and the food items were not found to be adulterated and hence not injurious to human health, the sentence should be modified to fine and the petitioner should not be sent back into custody thirty years after the occurrence. He has relied on the decision of ***Krishna Gopal Sharma vs. Govt of NCT*** *reported in* ***(1996) 4 SCC 513***, in support of his submission.

7. Mr. S.S. Pradhan, learned Additional Govt. Advocate has submitted that the prosecution has proved through P.W.1 and P.W.2 that the petitioner had kept the mixture packets for sale and in fact the same have been purchased by P.W.1 and he has been granted a receipt vide Ext.12. For proving the offence of misbranding, it is not necessary to prove that name of some friend was being used by the accused and absence of any label of the manufacturer and manufacturing date will also amount to misbranding. He however admitted that the report of the Public Analyst did not show that the petitioner was selling adulterated food stuff.

8. Section 2 (ix) (k) of the PFA Act, an article of food is misbranded if it is not labeled in accordance with the requirements of the PFA Act or PFA Rules made thereunder. Section 7 (ii) of the PFA Act, prohibits a person by himself or by any person on his behalf manufacture for sale, or store, sell or distribute any misbranded food. Rule 32 of the PFA Rules provides that every package of food shall carry a label and unless otherwise provided, in the Rules, there shall be specified on every label the information as enumerated in (a) and (b).

9. The Supreme Court in the case of ***Municipal Corporation of Delhi vs. Laxmi Narain Tandon and others (supra***), has held that the expression "store" in Sec.7 means "storing for sale" and consequently held that storing of an adulterated article of food for purposes other than for sale would not constitute an offence under Section 16 (1) (a) of the PFA Act.

In the case of Tilak Raj (supra), the Food Inspector intercepted the accused who was not a milk seller but was carrying milk for his father who was a licensed milk seller, and took samples of milk from him which was found to be adulterated. His acquittal was confirmed as it was found that he was not selling milk to anybody.

10. In the present case, the evidence of P.Ws.1 and 2 has to be scanned carefully in order to find out if the prosecution has been able to prove that the mixture packets in question were kept for sale and the packets did not have any label on them will not be necessary to go into the second aspect i.e. absence of labels or the other points raised by the learned counsel for the petitioner.

11. P.W.1 is his evidence has stated that at the time of inspection of the sweet meat shop of the petitioner in the name and style of "Srikhetra Mistan Bhandar", he suspected the kamala bhog and Mixture to be adulterated and misbranded, so he wanted to take the sample for chemical analysis. Being asked the accused told him that was preparing mixture in his shop and he did not ascertain from any other person that the accused was preparing mixture. The persons present there refused to be witnesses for which he took P.W.2, D.N. Pradhan, vaccinator as a witness. He has also stated that each packet of mixture purchased by him was containing 200gm. He has not stated anywhere that the mixture packets did not have any label, when they were exposed for sale or when he bought them at the time of purchase or seizure.

P.W.2 has stated that suspecting the mixture and Kamala bhog to be adulterated, P.W.1 purchased them and took samples of the same for chemical analysis. But he has not stated anywhere that the mixture samples did not have any label. In fact in cross-examination he has stated that he cannot say if there was any label on the mixture packets.

During his examination under Section 313 of the Cr.P.C., the petitioner has stated that he was only selling sweets and not mixture and that he had kept the mixture in his house for his own use.

The petitioner who examined himself as D.W.1 has stated that he had kept the mixture on the window frame of his residential house for consumption of his children.

D.W.2 Narayan Jena who has a nearby betel shop has stated that the petitioner only sells sweets in his shop and stays with his family in the same house where the shop is situated.

12. In view of the nature of the evidence referred to above, when the prosecution witnesses themselves do not speak about absence of label on the mixture packets at the time of alleged purchase and seizure, it would be unsafe to sustain the conviction of the petitioner for the offence of misbranding. The impugned judgments are therefore liable for interference. The conviction of the petitioner for commission of the offence under Section – 16 (1) (a) (i) of the Prevention of Food Adulteration Act (in short "PFA Act") read with Rule–7 (1) and 32 of the Prevention of Food Adulteration Rules (in short the "PFA Rules") is set aside.

13. The Criminal Revision is allowed.

14. Lower court records be sent back forthwith.

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2022 (III) ILR - CUT-194

MISS. SAVITRI RATHO, J.

TRP(C) NO. 324 OF 2017

ANUVA CHOUDHURY ……..Petitioner

.V.

BISWAJIT MISHRA ……..Opp. Party

CODE OF CIVIL PROCEDURE, 1908 – Section 24 – Transfer of matrimonial Case – Convenience of parties – Whether the convenience of one party should be considered? – Held, No. (Para-11)

Case Laws Relied on and Referred to :-

1. 2016 (II) CLR (SC) 43 : Tejalben Vs. Mihirbhai Bharatbhai Kothari.
2. 2017 (II) CLR (SC) 122 : Bhartiben Ravibhai Rav Vs. Ravibhai Govindbhai Rav.
3. 2016 (II) CLR (SC) 478 : Vaishali Shridhar Jagtap Vs. Shridhar Vishwanath Jagtap.
4. 2016 (I) CLR (SC) 501 : Vanka Neeraja Vs. Veerina Sai @ Sairam.
5. AIR 2000 SC 3572 : Raj Laxmi Vs. Dillip Kumar Ghosh.
6. AIR 2002 SC 396 : Sumita Singh Vs. Kumar Sanjaya.
7. AIR 2000 SC 3351 : Shyamali Ghosh Vs. Sumit Kumar Ghosh.
8. 2005 (II) OLR SC 190 : Pratibha Khenka Vs. Sanjay Kumar Khenka.

9. 2017 (II) CLR (SC) 981 : Santhini Vs. Vijaya Venketesh.
10. 2016 (I) OLR 824 : Anita Pattnayak Vs. Arabinda Sukla.
11. 2009 (II) OLR 966: Bishnu Priya Panda Vs. Braja Mohan Panda.
12. 2013 (I) OLR 934 : Jhunu Biswal Vs. Ratan Biswal.
13. AIR 2010 SC (Supp) 51 : D.A.V. Boys Sr. Sec. School Vs. DAV College Managing Committee.
14. (2004) 13 SCC 405 : Kanagalakshmi Vs. A.Venkatesan.
15. (2005) 11 SCC 446 : Gargi Konar Vs. Jagjeet Singh.
16. 2005 (II) OLR 374 : Urvashi Govind Advani Vs. State of Karnataka.
17. 2005 (II) OLR 535 : Preeti Sharma Vs. Manjit Sharma.
18. 2006(1) OLR SC 456 : Kamaljit Kaur Vs. Prince Singh Chhabra.
19. AIR 2007 SC 3151 : Y.A. Ajit Vs. Sofana Ajit.
20. 2014 AIR CC 1799 (Ori.) : Banita Das Vs. Akshaya Kumar Mallick.
21. 2012 25.10.2021 : Indira Priyadarshini Vs. Prabir in LPA No.4.
22. AIR 2002 SC 396 : Sumita Singh Vs. Kumar Sanjay and Anr.
23. (1996) 11 SCC 96 :Kalpana Devi Prakash Thakur Vs. Dr. Devi Prakash Thakur.
24. (2005) 11 SCC 186 : Anju Vs. Pramod Kumar.
25. (2005) 11 SCC 433 : Deepika Vs. Maruthi Kathare.
26. (2002) 10 SCC 693 : Laxmi Devi Vs. Rajesh Kumar Sanadhya.

For Petitioner : Mr. T.K. Mishra

For Opp. Party : Mr. S. Udgata

JUDGMENT Date of Judgment: 05.09.2022

MISS. SAVITRI RATHO, J.

1. I have heard Mr. T.K. Mishra, learned counsel for the petitioner and Mr. S.Udgata, learned counsel for the opposite party through hybrid mode.

2. This transfer application under Section 24 of C.P.C. has been filed by the petitioner-wife for transfer of MAT Case No.128 of 2016 filed by the opposite party – husband under Section 13 of the Hindu Marriage Act, 1955 read with Section 5 of the Family Courts (Court) Rules, 2010 in the Court of learned Judge, Family Court, Sambalpur, to the Court of learned Judge, Family Court, Berhampur. Vide order dated 14.11.2017, notice had been issued to the sole opp. party and further proceedings in the MAT Case stayed till the next date and the interim order had been extended from time to time. I.A. No.359 of 2021 has been filed for extension of interim order stating therein that six months had elapsed since extension of the order and pursuant to order dated 09.12.2021,mediation had been held in the High Court, Mediation Centre and as per report dated 7.1.2022, both parties were present

with their counsel before the Mediator and mediation was unsuccessful as the husband was not agreeable to live with the petitioner-wife.

3. Pleadings are complete as counter, rejoinder affidavit and written notes of submission have been filed by both counsels. The matter is taken up for final disposal on consent of the counsels.

4. The parties have made a number of allegations and counter allegations against each other and I have gone through the same. The allegations/contentions which are relevant for deciding the transfer application are referred to.

5. Mr. Mishra, learned counsel for the petitioner-wife has submitted that that marriage of the petitioner and opposite party was solemnized on 17.02.1995 at Gandhinagar, Berhampur as per Hindu Rites and Customs. The opposite party has filed MAT Case No.128 of 2016 in the Court of the learned Judge, Family Court, Sambalpur, but notice of the same was not served on her. She learnt about the case from a notice under Order 5, Rule 20 of C.P.C., published in the daily newspaper 'Sambad' on 26.07.2017. He further submits that the petitioner has appeared once in the case on 21.09.2017 and the case had been adjourned to 18.11.2017 for filing of objection as well as conciliation. By order dated 14.11.2017 further proceedings have been stayed by this Court. He further submits that the distance between Berhampur to Sambalpur is more than 460 kms. and the petitioner is working as a lecturer in the IRPM Department, Berhampur University and is partially hearing disabled and there is nobody else to accompany her to Sambalpur to contest the legal proceedings, as her father is aged about 87 years and their son is presently in the United State for which it would be difficult on her part to go to Court of the learned Judge, Family Court, Sambalpur alone to contest the case. But there should be no difficulty for the opposite party to come to Berhampur as he goes on tours in connection with his job.

Learned counsel for the petitioner relies the following judgments in support of his prayer for transfer:-

(i) ***Tejalben vs. Mihirbhai Bharatbhai Kothari*** *reported in* ***2016 (II) CLR (SC) 43***.

(ii) ***Bhartiben Ravibhai Rav vs. Ravibhai Govindbhai Rav*** *reported in* ***2017 (II) CLR (SC) 122***.

(iii) ***Vaishali Shridhar Jagtap vs. Shridhar Vishwanath Jagtap*** *reported in* ***2016 (II) CLR (SC) 478***.

(iv) ***Vanka Neeraja vs. Veerina Sai @ Sairam*** *reported in* ***2016 (I) CLR (SC) 501.***

(v) ***Sumita Singh vs. Kumar Sanjaya*** *reported in* ***AIR 2002 SC 396***.

(vi) ***Raj Laxmi vs. Dillip Kumar Ghosh*** *reported in* ***AIR 2000 SC 3572 (supra).***

(vii) ***Shyamali Ghosh vs. Sumit Kumar Ghosh*** *reported in* ***AIR 2000 SC 3351.***

(viii) ***Pratibha Khenka vs. Sanjay Kumar Khenka*** *reported in* ***2005 (II) OLR SC 190***.

(ix) ***Santhini vs. Vijaya Venketesh*** *reported in* ***2017 (II) CLR (SC) 981***.

(x) ***Anita Pattnayak vs. Arabinda Sukla*** *reported in* ***2016 (I) OLR 824.***

(xi) ***Bishnu Priya Panda vs. Braja Mohan Panda*** *reported in* ***2009 (II) OLR 966***

(xii) ***Jhunu Biswal vs. Ratan Biswal*** *reported in* ***2013 (I) OLR 934***.

6. Mr. Udgata, learned counsel for the opposite party opposed the prayer for transfer and has submitted that on account of the physical and mental cruelty meted out to him by the petitioner – wife, he has filed MAT Case No.128 of 2016 in the Court of the learned Judge, Family Court, Sambalpur praying for dissolution of their marriage by a decree of divorce. After entering appearance in the case, the petitioner had gone to Mumbai where the opp. party was working and humiliated him before his colleagues and threatened his parents who were staying with him for which he has lodged report in the Police Station and filed an application bearing Case No. Petition B/100020/2019 in the Court of the learned Judge, Family Court, Bandra, Mumbai for restraining the petitioner from coming to his place of work and residence at Mumbai. He is under treatment for cancer, for which he has been transferred from Mumbai to Sambalpur by his employer on humanitarian ground. He has further submitted that as the petitioner is working as an Associate Professor in Berhampur University and has been travelling to many places alone in connection with seminars and other related work and she belongs to a business family of Berhampur has two brothers and one sister, she can easily go to Sambalpur to attend the case where she has already entered appearance through counsel. But the opposite party is

apprehensive of going to Berhampur as the petitioner and her family members have on many occasion threatened him of dire consequences, if he goes to Berhampur. The petitioner has filed MC No.334 of 2019 under Section 12 of the Protection of Women from Domestic Violence Act (in short "the DV Act") in the Court of the learned SDJM., Berhampur, Ganjam, to harass him. On account of distance and threats given by the petitioner and his health condition it will be highly inconvenient for him to go to Berhampur to contest the case. He has therefore filed TRP (CRL) No.98 of 2021 for transfer of the DV Case filed by the petitioner to Sambalpur as he cannot go to Berhampur to attend the case. He has relied on the following decisions in support of his case :

(i) ***D.A.V. Boys Sr. Sec. School vs. DAV College Managing Committee*** *reported in* ***AIR 2010 SC (Supp) 51 :***

(ii) ***Kanagalakshmi vs. A. Venkatesan*** *reported in* ***(2004) 13 SCC 405*** :

(iii) ***Gargi Konar vs. Jagjeet Singh*** *reported in* ***(2005) 11 SCC 446*** :

(iv) ***Urvashi Govind Advani vs. State of Karnataka*** *reported in* ***2005 (II) OLR 374*** :

(v) ***Preeti Sharma vs. Manjit Sharma*** *reported in* ***2005 (II) OLR 535***:

(vi) ***Kamaljit Kaur vs. Prince Singh Chhabra*** *reported in* ***2006(1) OLR SC 456:***

(vii) ***Y.A. Ajit vs. Sofana Ajit*** *reported in* ***AIR 2007 SC 3151***:

(viii) ***Banita Das vs. Akshaya Kumar Mallick*** *reported in* ***2014 AIR CC 1799 (Ori***.) :

(ix) ***Indira Priyadarshini vs Prabir in LPA No.4 of 2012 decided on 25.10.2021***.

7. Both learned counsels have submitted that irrespective of the place where the case is transferred, they may be allowed to adduce their evidence through Video Conferencing Mode, in case of necessity.

8. While deciding an application for transfer of a matrimonial case, it has been the usual practice to consider the inconvenience which is likely to be faced by the wife while turning a deaf ear and blind eye to the difficulties faced by the husband, on account of the accepted position of law that convenience of the wife is of paramount consideration in matrimonial cases.

This is because women were considered to belong to the weaker sex and dependent on a male for their survival and security, be it the father, brother, husband or son. But now, after 75 years of independence, the situation has changed and the emancipation of women is clearly visible. Women are being given equal opportunity and representation in all spheres. They have become self dependent and many are no longer dependent on their husband/parents/brothers or sons for their survival and security. They have become the sole breadwinners in some families. They are able to bring up a child on their own. Some are part of the law making and law enforcing agencies. They are able to travel alone in connection with their work and recreation. Unfortunately, there are still many exceptions, as many women are still dependent on their family members for their survival on account of lack of education, lack of support and as some men still have not learnt to respect women for which women are still victims of eve teasing and sexual harassment in educational institutions, public transport and even in their work place. Travelling alone for long distances by road or train for a woman is often fraught with risk. Likewise, due to a variety of reasons, the role and responsibilities of men have undergone a sea change. Many men have to single handedly take care of aged and ailing parents and young children, for which there are sometimes constraints on their time and movement. Their job requirements may also be a stumbling block. So in the present situation, an application for transfer of a matrimonial case has to be considered on its own facts without mechanically or blindly allowing the application of the wife. For the same reasons, the earlier decisions have also to be viewed in the same light. A balance has to be struck, so that each party is able to fight/defend his/her case in the trial court. Many Courts have been provided with video conferencing facilities, which can also be utilised by all the parties for their convenience.

9. Cases relied on by the parties.

A. Cases relied on by the petitioner- wife

In the case of **Tejalben** (supra), the Supreme Court had transferred the divorce case from Rajkot to Jamnagar as other proceedings were pending there.

In the case of **Bhartiben** (supra), the Supreme Court taking note of the submission that the wife was not well acquainted with Gujarati, transferred the case from Ahmedabad, Gujarat to Dungarpur, Rajasthan as other cases were pending there.

In the case of ***Vaishali Shridhar*** (supra), the Supreme Court allowed the prayer for transfer of the wife as four cases were pending in Barshi, holding that the comparative hardship was more for the wife.

In the case of ***Vanka Neerjaa*** (supra), the Supreme Court transferred the case from West Godavari District to the Family Court at Hyderabad without citing any reason.

In the case of ***Sumita Singh*** (supra) taking note of the submission of the wife that she is staying with her parents in Gurgaon and working in Delhi and distance between Ara and Delhi is 1100 Kms and there is nobody with whom she can stay with in Ara and the wifes convenience has to be looked into as the husband had filed the suit, allowed the prayer for transfer of the matrimonial proceedings to Delhi.

In the case of ***Raj Laxmi Sharma*** (supra), taking note of the submissions that wife had two minor sons and cannot travel alone, the Supreme Court transferred the proceedings from Ranchi to Agra.

In the case of ***Shyamali Ghosh*** (supra), in spite of notice husband had not appeared to contest the application. The Supreme Court taking note of the submissions of the wife that she was employed in Delhi and could not attend the case in Calcutta, transferred the case to the District Judge at Goutam Budhnagar NOIDA (U.P.) to decide it himself or allot to a competent court.

In the case of ***Pratibha Khenka*** (supra) the Supreme Court took note of the submissions of the wife, that the distance between the two places was 600 k.m., had undergone a cataract operation recently, she had a small son and aged parents and her mother had suffered heart attack recently as well as the submission of the husband that he had been threatened to be killed if he went to Barabanki; and transferred the case from Satna M.P. to Lucknow instead of Barabanki.

In the case of ***Santhini*** (supra), Chief Justice Mishra speaking for the majority answered the reference as follows :

> *54. We have already discussed at length with regard to the complexity and the sensitive nature of the controversies. The statement of law made in Krishna Veni Nagam (supra) that if either of the parties gives consent, the case can be transferred, is absolutely unacceptable. However, an exception can be carved out to the same. We may repeat at the cost of repetition that though the principle does not flow from statutory silence, yet as we*

find from the scheme of the Act, the Family Court has been given ample power to modulate its procedure. The Evidence Act is not strictly applicable. Affidavits of formal witnesses are acceptable. It will be permissible for the other party to cross-examine the deponent. We are absolutely conscious that the enactment gives emphasis on speedy settlement. As has been held in Bhuwan Mohan Singh (supra), the concept of speedy settlement does not allow room for lingering the proceedings. A genuine endeavour has to be made by the Family Court Judge, but in the name of efforts to bring in a settlement or to arrive at a solution of the lis, the Family Court should not be chained by the tentacles by either parties. Perhaps, one of the parties may be interested in procrastinating the litigation. Therefore, we are disposed to think that once a settlement fails and if both the parties give consent that a witness can be examined in video conferencing, that can be allowed. That apart, when they give consent that it is necessary in a specific factual matrix having regard to the convenience of the parties, the Family Court may allow the prayer for videoconferencing. That much of discretion, we are inclined to think can be conferred on the Family Court. Such a limited discretion will not run counter to the legislative intention that permeates the 1984 Act. However, we would like to add a safeguard. A joint application should be filed before the Family Court Judge, who shall take a decision. However, we make it clear that in a transfer petition, no direction can be issued for video conferencing. We reiterate that the discretion has to rest with the Family Court to be exercised after the court arrives at a definite conclusion that the settlement is not possible and both parties file a joint application or each party filing his/her consent memorandum seeking hearing by videoconferencing.

56. In view of the aforesaid analysis, we sum up our conclusion as follows :-

(i) In view of the scheme of the 1984 Act and in particular Section 11, the hearing of matrimonial disputes may have to be conducted in camera. (ii) After the settlement fails and when a joint application is filed or both the parties file their respective consent memorandum for hearing of the case through videoconferencing before the concerned Family Court, it may exercise the discretion to allow the said prayer. (iii) After the settlement fails, if the Family Court feels it appropriate having regard to the facts and circumstances of the case that videoconferencing will sub-serve the cause of justice, it may so direct.

(iv) In a transfer petition, video conferencing cannot be directed.

(v) Our directions shall apply prospectively.

(vi) The decision in Krishna Veni Nagam (supra) is overruled to the aforesaid extent.

Justice D.Y Chandrachud in his dissenting opinion has held as follows :

9. The High Courts have allowed for video conferencing in resolving family conflicts. A body of precedent has grown around the subject in the Indian context. The judges of the High Court should have a keen sense of awareness of prevailing social reality in their states and of the federal structure. Video conferencing has been adopted internationally in resolving conflicts within the family. There is a robust body of authoritative opinion on the subject which supports video conferencing, of course with adequate safeguards. Whether video conferencing should be allowed in a particular family dispute before the Family Court, the stage at which it should be allowed and the safeguards which should be followed should best be left to the High Courts while framing rules on the subject. Subject to such rules, the use of video conferencing must be left to the careful exercise of discretion of the Family Court in each case.

10. The proposition that video conferencing can be permitted only after the conclusion of settlement proceedings (resultantly excluding it in the settlement process), and thereafter only when both parties agree to it does not accord either with the purpose or the provisions of the Family Courts Act 1984. Exclusion of video conferencing in the settlement process is not mandated either expressly or by necessary implication by the legislation. On the contrary the legislation has enabling provisions which are sufficiently broad to allow video conferencing. Confining it to the stage after the settlement process and in a situation where both parties have agreed will seriously impede access to justice. It will render the Family Court helpless to deal with human situations which merit flexible solutions. Worse still, it will enable one spouse to cause interminable delays thereby defeating the purpose for which a specialised court has been set up.

II. The reference should in my opinion be answered in the above terms."....

In the case of ***Anita Pattnayak*** (supra), this court took note of the distance between the places and referring to the decision of the Apex Court in the case of ***Sumita Singh v. Kumar Sanjay and another*** *reported in* ***AIR 2002 SC 396*** held that it is the wife's convenience that must be looked at and inconvenience of the husband is of no ground to refuse the application for transfer, and transferred the case from Cuttack to Jeypore.

In the case of ***Bishnu Priya Panda*** (supra) the prayer for transfer of the proceedings Bhubaneswar to Cuttack was allowed taking note of the fact that petitioner No.1 was a young lady with nobody to accompany her and the husband had already appeared in the proceeding under Section – 125 Cr.P.C at Cuttack.

In the case of Jhunu Biswal (supra) relying on the decision of Sumita Singh and that the wife would be subjected to expenses and others hazards, this Court transferred the divorce proceeding from Balangir to Sonepur.

B. Cases relied on by the opposite party - husband.

D.A.V. Boys Sr. Sec. School (supra) did not deal with the transfer of a matrimonial case.

In the case of ***Kanagalakshmi*** (supra) as the husband was willing to bear the expenses of travel and stay of the wife and an accompanying person to and in Mumbai, the prayer of the wife for transfer of the matrimonial dispute from Mumbai to Tirunelivelli in Tamil Nadu was disallowed by the Supreme Court.

In the case of ***Gargi Konar*** (supra) the prayer of the wife for transfer of the matrimonial case from Bhatinda to Burdwan or Durgapur on the ground that the wife was a helpless woman totally dependent on her father, was disallowed holding that the husband can be directed to pay the to and fro expenses and stay of the wife and her companions.

In ***Urvashi Govind Advani*** (supra), keeping in mind the advanced age of the petitioner and as she was suffering from cancer, the Supreme Court transferred the criminal case from Bangalore to Bombay.

In the case of ***Preeti Sharma*** (supra), the prayer of the wife for transfer of the divorce case from Muzzafar Nagar, U..P to Delhi on the ground that the wife was an unemployed lady and totally dependent on her uncle was rejected, but the husband was directed to pay the expenses for travel and stay of the wife and a companion at Muzzafar Nagar for each date.

In the case of ***Kamaljit Kaur*** (supra), the prayer of the wife for transfer of the matrimonial case from Rourkela to Dhanbad was turned down, but the husband was directed to pay in advance (by sending demand drafts) all expenses for travel in reserved second class and stay in a 3 star hotel, of the wife and a companion.

In the case of ***Y.A. Ajit*** (supra) the High Court had allowed the wife's application under Section 24 of the C.P.C. and transferred the matrimonial proceeding from Kanyakumari at Nagercoil to the Court of Family Judge, Chennai. Referring to its earlier decision reported in (2004 ***(8) SCC 100),*** where the husband's prayer for quashing the criminal proceedings had been allowed on the ground of lack of territorial jurisdiction, the Supreme Court remanded the case to the High Court to reconsider the matter.

In the case of ***Smt. Banita Das*** (supra) this Court declined to allow the prayer of the wife for transfer, holding interalia as follows :

> *"…. The aforesaid discussion, therefore, makes it clear that ordinary jurisdiction of the court, which the plaintiff has chosen, should not be disturbed lightly , if there is no pressing circumstance or/and if justice is likely to suffer by not allowing such transfer. Convenience of the wife as stressed by the learned counsel for the petitioner cannot be the convenience as supposed by the petitioner herself. The convenience of the wife means the convenience as perceived and gathered by the court from the facts and circumstances of each case.*
>
> *11. In the present case, when the wife is able to go to Berboi daily to attend her duties, it may not be difficult on her part to go to Puri to attend the court. Similarly, the threat perception*

canvassed by the petitioner-wife is only, an after-thought, as that is not at all a ground in the transfer petition, and it is well known to civil law that civil proceeding is bounded by strict pleadings"…

In the case of ***Indira Priyadarshini*** (supra), without allowing prayer for transfer, this court permitted the appellant to make a suitable application to seek to appear virtually before the Family Court.

C. Other cases

In the case of ***Kalpana Devi Prakash Thakur v. Dr. Devi Prakash Thakur : (1996) 11 SCC 96***, the Supreme refused the prayer of the wife for transfer of the matrimonial proceedings from Mumbai to Palanpur, Gujarat taking into account the submission of the husband that he was a medical practitioner and his absence from Mumbai would cause inconvenience to his patients, his old and ailing mother who lived with him needed constant care and regular medical check up and the husband was ready to bear the travelling expenses of the wife and an escort.

In the case of ***Anju v. Pramod Kumar, (2005) 11 SCC 186***, two counter transfer petitions were filed by the spouses. The wife prayed for transfer of the case filed by the husband in Agra, U.P., to Nainital, Uttaranchal. The husband prayed for transfer of the case instituted by the wife at Nainital (Uttaranchal) to Agra. As both parties expressed their apprehension to go to the other place, the Supreme Court transferred the two cases to Bareilly (U.P.).

In the case of ***Deepika v. Maruthi Kathare, (2005) 11 SCC 433***, the wife had prayed to transfer of the divorce case filed by the husband at Chennai, to Hubli, Karnatka. As the husband submitted that he apprehended danger to his life in Hubli, the Supreme Court transferred the case to a nearby district, Gadak in Karnataka.

In the case of ***Laxmi Devi v. Rajesh Kumar Sanadhya***, (2002) 10 SCC 693, the wife had prayed for transfer of the divorce petition filed by the husband in Udaipur to Mathura where she was living with her father and her children. Divorce petition as well as maintenance proceedings were transferred to Agra and the husband was asked to pay the travel expenses.

10. From the aforesaid cases, it is apparent that although the Supreme Court have held that the convenience of the wife is of paramount consideration, but prayers for transfer have been considered taking into

account the facts of the particular case. In other words, the convenience of one party only should not be considered. But a balanced view should be adopted, keeping in mind the convenience of both the parties, but giving more weightage to the convenience of the wife.

11. In the present case, both parties are educated and employed. Both have health issues and both apprehend danger if TRP (C) No. 324 of the case is transferred or remains in the place where the other spouse stays i.e., Berhampur or Sambalpur. Hence, after considering the submissions of the counsel and in view of the aforesaid discussion, I feel that the ends of justice would be served, if MAT Case No.128 of 2016 filed by the opp. party – husband under Section 13 of the Hindu Marriage Act, 1955 is transferred from the Court of the learned Judge, Family Court, Sambalpur, to the Court of the learned Judge, Family Court-II, Bhubaneswar.

It is further directed that the learned Court shall not insist on the personal appearance of the parities and liberty is granted to the parties to apply to the Court for adducing their evidence through Video Conferencing mode, in case of necessity.

12. The learned Judge, Family Court, Sambalpur is directed to transmit the records of MAT Case No.128 of 2016 (***Biswajit Mishra vs Anuva Choudhury***) to the Court of the learned Judge, Family Court-II, Bhubaneswar by 22nd September, 2022. The parties undertake to appear before the Court in Bhubaneswar on 12th October, 2022. The petitioner shall file her written statement, if not already filed within two weeks of her appearance. Both parties shall cooperate for expeditious disposal of the proceeding.

13. With the aforesaid observations, the TRP (C) is disposed of.

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2022 (III) ILR - CUT- 205

SANJAY KUMAR MISHRA, J.

W.P.(C) NO. 26789 OF 2021

BIJAY KUMAR PATRA .....Petitioner

.V.

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

CIVIL SERVICES (CLASSIFICATION, CONTROL & APPEAL) RULES, 1962 – Rule 24 – Limitation to file Appeal – Whether can be condoned – Held, Yes – This Court is of the view that the Authority concerned ought to have exercised his power vested under Rule 24 of the 1962 Rule to condone the delay and consider the Appeal of the Petitioner in terms of the Proviso under the Rule. (Para-10)

For Petitioner : M/s. Amit Prasad Bose, Mr. H.B. Mangaraj, Mr. R.K. Routray.

For Opp. Parties: Mr. S.K. Samal, AGA.

JUDGMENT Date of Hearing and Judgment: 02.09.2022

SANJAY KUMAR MISHRA, J.

This Writ Petition has been preferred by the Petitioner being aggrieved by the impugned Order dated 03.08.2021, as at Annexure-5, vide which Appeal of the Petitioner was rejected by the Appellate Authority solely on the ground of limitation in terms of Rule-24 of the Odisha Civil Services (Classification, Control & Appeal) Rules, 1962, shortly, OCS (CCA) Rules, 1962.

2. The factual matrix leading to filing of the present Writ Petition is that, vide Office Order dated 25.05.2017, the Petitioner along with 102 nos. of employees, in order of merit/seniority, were absorbed in regular Group-D Posts in different designations in Nandankanan Zoological Park, Nandankanan.

While the Petitioner was continuing as such, he was placed under suspension, vide Office Order 21.07.2007, for alleged collection of money from Group-D employees for their regularization.Subsequently, the Petitioner was charge- sheeted for the said misconduct and an enquiry was conducted against him.

During pendency of Enquiry Proceeding, the Petitioner was reinstated in service and posted to Store Range vide Office Order dated 29.06.2018 and consequent of the Order, he was relieved from the Post of Watchman and joined in the new Post of Store Range,Nandankanan Zoological Bark, Nandankanan on 01.07.2018.

Finally, basing on the Enquiry Report submitted by the Enquiring Officer, the Deputy Director, Nandankanan Zoological Park, Nandankanan,

passed the final Order of punishment dated 16.01.2020, as at Annexure-1, vide which it was ordered that he is censured and the suspension period of the Petitioner shall be treated as leave due.

Due to out-break of Pandemic Covid-19, the Nandankanan Zoo was closed from 15.03.2020 to 03.10.2020. During the said period, against the said Order of punishment, as at Annexure-1, the Petitioner sent an application on 04.07.2020 to the Deputy Director, Nandankanan Zoological Park, Nandankanan, to absolve him from all the charges.

However, in response to the application of the Petitioner dated 04.07.2020, after a long gap of about 4 months, i.e.11.11.2020, a communication was made to the Petitioner by the Dy. Director, Nandankanan Zoological Park, Nandankanan, intimating him that he may prefer an Appeal before the Director, Nandankanan Biological Park, Bhubaneswar to absolve him from all the charges.

After being so communicated, the Petitioner preferred an Appeal on 28.11.2020 before the Director,Nandankanan, Biological Park, Bhubaneswar, vide Annexure-4. However, without applying mind so also without exercising power conferred under the Proviso in Rule-24 of the Odisha Civil Services (Classification, Control & Appeal) Rules, 1962, with regard to entertaining an Appeal beyond the period prescribed under the said Rule-24, the Appellate Authority mechanically rejected the Appeal of the Petitioner on 03.08.2021 on the ground that the said Appeal is time barred in terms of the Rule-24 of the Odisha Civil Services (Classification, Control & Appeal) Rules, 1962.

It is further case of the Petitioner that though he received the copy of the said rejection Order dated 03.08.2021 on 10.08.2021, as the said Order was illegible, subsequently on his request a legible copy was supplied to him on 21.08.2021. Being aggrieved by the said Order dated 03.08.2021 passed by Director,Nandankanan Biological Park, as at Annexure-5, legible copy of which was communicated to the Petitioner on 21.08.2021, by the Deputy Director, Nandankanan Zoological Park, having no other alternative remedy, present Writ Petition has been preferred by the Petitioner.

3. Though this Court, vide Order dated 16.09.2021, ordered to issue notice to the Opposite Parties and the learned Counsel for the State

accepted notice on behalf of all the Opposite Parties and extra copies of the Writ Petition were served on the learned State Counsel to take instruction or file Counter, till date no Counter Affidavit has been filed.

4. Heard learned Counsel for the Petitioner, so also learned Counsel for the State. In view of limited point as to whether the Appellate Authority was justified to reject the Appeal of the Petitioner solely on the ground of delay, though Proviso in Rule-24 of the OCS (CCA) Rules, 1962 permits the Authority concerned to entertain an Appeal even after expiry of the period of three months, on consent of the learned Counsels for the Parties, the Writ Petition is taken up for final disposal at the stage of admission.

5. Though no Counter has been filed by the State-Opposite Parties, the learned Counsel for the State submitted that the Authority concerned was justified to pass the Order impugned, as at Annexure-5, the period of limitation to prefer an Appeal being three months from the date on which the Appellant receives a copy of Order appealed against. He further contend that the present Petitioner admittedly, preferred Appeal before the Dy. Director, Nandankanan Zoological Park on 04.07.2020, vide Annexure-2, though he is the Disciplinary Authority. The said mistake being pointed out by the concerned Authority, the Petitioner submitted a fresh Appeal to the Appellate Authority only on 28.11.2020, which is almost after around 7 months beyond the period of limitation prescribed under Rule-24 of the OCS (CCA) Rules,1962.

6. The learned Counsel for the Petitioner submitted that because of the out-break Pandemic Covid-19, the Government of Odisha took a decision to close the Nandankanan Zoological Park, Bhubaneswar for about 7 months i.e. from 15.03.2020 to 03.10.2020. That apart, because of the restrictions imposed by the Government of Odisha as well as Government of India from time to time , the Petitioner could not prefer an Appeal in time and also by mistake preferred the Appeal before the Dy. Director, Nandankanan Zoological Park, and the said mistake was pointed out by the Authority only after a long gap of about 4 months on 11.11.2020, instead of forwarding the said Appeal to the concerned Appellate Authority for consideration, for which the Petitioner had to submit an Appeal afresh on 28.11.2020.Hence, the delay caused was neither intentional nor deliberate and the Authority concerned, in terms of the power vested under Proviso in Rule-24 of the OCS (CCA) Rules, 1962, should have entertained the Appeal

of the Petitioner even beyond prescribed period of three months. However, the Appellate Authority failed to exercise the said power conferred on him in terms of the said Rules. Therefore, this Court should interfere with regard to the impugned order and set aside the same, it being illegal, arbitrary and unreasonable.

7. Rule-24 of the Odisha Civil Services (Classification, Control & Appeal) Rules, 1962 reads as follows:

> "**24. Period of limitation for Appeal** – No appeals under these rules shall be entertained unless it is submitted within a period of three months from the date on which the appellant receives a copy of the order appealed against:
>
> Provided that the Appellate Authority may entertain the appeal after the expiry of the said period, if it is satisfied that the appellant had sufficient cause for not submitting the appeal in time."

8. Usually the word "may" is an enabling word. It gives discretion to the person, who is given the option to act in a particular manner mentioned in the Section. But, it is well recognized that the word "may" in the context can mean "shall". If statutes authorize any specified person to do acts for the benefit of others, the authority conferred is coupled with an obligation to discharge a duty by the statutes themselves; and in such a case, the intention is to impose an obligation on the authority to discharge his duty, with the result that the word "may" in the context means "must" or "shall". Whether the authorized person is given discretion or under a compulsion or obligation to do a particular act would inevitably depend on the context in which the word "may" has been used.

9. In the present case, despite there is a provision to entertain the Appeal, after expiry of the period of limitation, the Appellate Authority failed to exercise such power. Further, the impugned Order does not disclose any cogent reason justifying to refuse exercise such power in terms of the said Proviso under Rule-24 of the OCS (CCA) Rules, 1962.

10. Admittedly, there is no dispute, as to the averments made in the Writ Petition with regard to the various dates, so also the reasons of delay in preferring the Appeal, which was finally submitted before the Appellate Authority on 28.11.2020. Taking in to consideration the pleadings made in the Writ Petition as well as submissions made by the learned Counsels for the parties and in view the Covid-19 situation prevalent during the relevant

period, so also the restrictions imposed by the State Government as well as Government of India and order passed by the Apex Court from time to time with regard to extension of period of limitation, this Court is of the view that the Authority concerned ought to have exercised his power vested under Rule 24 of the OCS (CCA) Rules, 1962 to condone the delay and consider the Appeal of the Petitioner in terms of the Proviso under the said Rules, 1962. However, as is evident from the impugned Order, as at Annexure-5, the Authority concerned, without applying mind and without taking into consideration the Covid-19 situations so also power vested on him to condone the delay, has mechanically rejected the Appeal of the Petitioner on the ground of limitation.

11. In view of the above observation, the impugned Order dated 03.08.2021 passed by the Director, Nandankanan Biological Park, Bhubaneswar, being illegal and unjustified, deserves interference. Accordingly, the said Order dated 03.08.2021, as at Annexure-5, is hereby set aside. The matter is remitted back to the Appellate Authority i.e. Opposite Party No.3, to re-consider the Appeal of the Petitioner, as at Annexure-4, afresh on merit and pass a reasoned and speaking order thereon within a period of six weeks from the date of communication/production of the certified copy of this order.

12. Accordingly, the Writ Petition stands disposed of. No order as to cost.

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2022 (III) ILR - CUT- 210

R.K. PATTANAIK, J.

CRLMC NO. 4249 OF 2009

Dr. SUDHIR KUMAR BRAHMA ……Petitioner

.V.

STATE OF ODISHA ……Opp. Party

CRLMC NO.3251 OF 2012

Dr. SINDHU CHARAN MOHANTY ……..Petitioner

.V.

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

CRLMC NO.3729 OF 2012

Dr. AJAY KUMAR MISHRA & ANR. ……Petitioners

.V.

Dr. NILAMADHAB MISHRA & ANR. ……..Opp. Parties

CRLMC NO.172 OF 2017
DR. BIPIN BIHARI PANIGRAHI ……..Petitioner
.V.
STATE OF ODISHA ……Opp. Party

CRLMC NO.1733 OF 2015
Dr. GOPAL KRISHNA PARIDA & ANR. ……Petitioners
.V.
STATE OF ODISHA ……Opp. Party

CRLMC NO.1548 OF 2017
Dr. SANDHYARANI PANIGRAHI ……Petitioner
.V.
STATE OF ODISHA & ANR. ……Opp. Parties

CRLMC NO.682 OF 2017
Dr. BHUBANESWAR SUKLA & ORS. ……Petitioners
.V.
STATE OF ODISHA ……..Opp. Party

CRLMC No.1547 of 2017
Dr. J. ANURADHA ….. …Petitioner
.V.
STATE OF ODISHA & ANR. ……Opp. Parties

CRLMC NO.904 OF 2013
Dr. SANJUKTA PATTNAIK ……Petitioner
.V.
STATE OF ODISHA & ANR. ……...Opp. Parties

CRLMC NO.1546 OF 2017
SMT. SONALI PANIGRAHI ……...Petitioner
.V.
STATE OF ODISHA & ANR. ……Opp. Parties

CRLMC NO.2086 OF 2012
Dr. SURENDRA MOHANTA ……Petitioner
.V.
STATE OF ODISHA & ANR. ……Opp. Parties

(A) CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Inherent jurisdiction when can be exercised? – Held, if there is an express legal bar engrafted in any of the provisions of the Cr.P.C. or in the Special Act to the institution and continuance of the proceedings, inherent jurisdiction of the High Court can be exercised.

(Para-6)

(B) PRE-CONCEPTION & PRE-NATAL DIAGNOSTIC TECHNIQUES ACT, 1994 – Section 17(3)(a)(b) and Section 28(1)(a) – On a conjoint reading of Section 17(3)(a)(b) and Section 28(1)(a) of the PC&PNDT Act makes it is profoundly clear that a complaint is to be filed by the AA or any such officer, who has been so authorized – The proceeding initiated basing on a complaint by the AA or authorized officer – Whether such proceeding are sustainable in the eyes of law? – Held, Not sustainable – When a statute provides for a thing to be done in a particular manner, it has to be accomplished in that manner only.

(Para-14)

Case Laws Relied on and Referred to :-

1. AIR 1992 SC 604 : State of Haryana & Ors. Vs. Ch. Bhajan Lal & Ors.
2. (2014) 3 SCC 502 : Dipak Babaria & Anr. Vs. State of Gujarat & Anr.
3. (2019) 6 SCC 283 : Federation of Obstetrics and Gynaecological Societies of India (FOGSI) Vs. Union of India
4. (2019) 7 SCC 486 : Orissa Vs. Mamata Sahoo & Ors.

For Petitioners : Mr. B.P. Tripathy, Mr. D.P.Dhal Sr. Adv.
Mr. A. Patnaik, Mr. D.P. Nanda, Mr. B.S. Das
Mr. P.K. Panda & Mr. Basudev Mishra

For Opp. Parties : Mrs. S. Patnaik, AGA.

JUDGMENT Date of Judgment: 19.09.2022

R.K. PATTANAIK, J.

1. In the present batch of cases, a common question of law is involved which is as to the following:

> (i) Whether the criminal prosecutions vis-à-vis the petitioners under Sections 23 and 25 of the Pre-Conception & Pre-Natal Diagnostic Techniques Act, 1994 (hereinafter referred to as 'the PC&PNDT Act') are legally tenable?
>
> (ii) Whether such individual prosecution is by the designated authority and if consistent with Sections 17 and 28 of the PC&PNDT Act?

2. The impugned proceedings are challenged on the grounds *inter alia* that the prosecutions ought to have been launched by the respective District

Magistrate (DM) as per and in accordance with the Government's Office Memorandum (in short 'OM') dated 27th July, 2007 and not by other officials like the Chief District Medical Officer (CDMO)/Additional District Medical Officer (ADMO)/Executive Magistrate (EM). It is pleaded that the learned courts below should not have entertained the complaints which were filed not by the 'Appropriate Authority' (AA) in accordance with the provisions of the PC&PNDT Act and the OM and therefore, the proceedings should be quashed in exercise of the Court's inherent jurisdiction.

3. It would be appropriate to reflect upon and discuss the relevant provisions of the PC&PNDT Act before adverting to the rival claims of the parties. In fact, the term AA is defined in Section 2(a) of the said Act which means an authority appointed under Section 17 thereof. The pre-natal diagnostic procedures have been prescribed in Section 4 with certain restrictions imposed. Section 5 specifies that no person referred to in Section3(2) of the PC&PNDT Act shall conduct the pre-natal diagnostic procedure without the consent of the pregnant woman. The determination of sex is fully prohibited in view of Section 6. An elaborate procedure has been specified in the PC&PNDT Act for regulation on pre-natal diagnostic techniques and the manner in which, they shall have to be conducted, the intent and purpose being to prevent its misuse in the sex determination. Section 17 deals with the AA and functions an AA is required to discharge stands clearly mentioned in sub- section (4) thereof. The powers of the AA in certain matters have been indicated in Section 17(A) which is with regard to summoning of persons in possession of any information relating to violation of the provisions of the PC&PNDT Act; production of documents or material objects; issuance of search warrant for any place suspected to be indulged in sex selection techniques or pre-natal sex determination etc. Chapter VII of the PC&PNDT Act deals with the offences and penalties. A reverse presumption is attached in view of Section 24 of the PC&PNDT Act as to absence of consent of the pregnant woman unless contrary is proved while following the pre-natal diagnostic techniques for the purposes of the said Act. The offences under the PC&PNDT Act are cognizable in nature as per Section 27. In fact, Section 28 specifies that no court shall take cognizance of any offence except on a complaint filed by the AA or such other officer duly authorized by the AA or the appropriate Government. As already indicated herein before, the ground of challenge is that the prosecutions have been initiated at the instance of the

CDMO/ADMO/EM other than the AA which needs a threadbare discussion with reference to the provisions of the PC & PNDT Act.

4. It is contended on behalf of the petitioners that the actions taken under the PC&PNDT Act is not by the AA but instead by the CDMO/ADMO/EM are not as per and in accordance with Section 28 which mandates that a criminal prosecution shall have to be through a complaint filed by the AA. In some cases, it is made to suggest that CDMOs have filed the complaints being authorized by the respective DMs, who have been appointed as the AAs for each district within the State by the OM superseding earlier notification No.3058 dated 24th January, 2002 of the Health and Family Welfare Department of the Government of Orissa, whereby, CDMO of a district was the AA under the PC&PNDT Act. For better appreciation, the aforesaid OM is reproduced herein below.

"Government of Orissa
Health and Family Welfare Department

No.19077/H. Dt.27/7/07

OFFICE MEMORANDUM

In pursuance of the Office Memorandum vide No.24026/iii/06-PNDT dtd.12th Feb. 2007 of Ministry of Health and Family Welfare, Government of India the District Magistrate had been declared as District Appropriate Authority under Section 17(2) of the Pre-Conception and Pre-Natal Diagnostic TechniquesAct, 1994 amended in 2002. Accordingly, the State Government do hereby appoint the Appropriate Authority for the District and Sub-District (Sub-Division) as follows for smooth enforcement of the provision under the said Act.

1. District Appropriate Authority

The District Magistrate of each district is hereby appointed as District Appropriate Authority for the District under the above Act.

He may nominate an Executive Magistrate of the District is his/her nominee to assist him/her in monitoring the implementation of the PC&PNDT Act as deemed necessary.

2. Sub-District Appropriate Authority

The Sub-Divisional Magistrate (Sub-Collector) of each Sub- Division is hereby appointed as Appropriate Authority for the Sub-District (Sub-Division) for smooth implementation of the provision under this Act.

The Notification of this Department vide No.3058 dtd.24.1.02 appointing the CDMO of each district as the Appropriate Authority under the above Act is hereby superseded.

Principal Secretary to Government"

5. From the provisions of the PC&PNDT Act, it is made to appear that the offences under the said Act are triable by a court upon a complaint being filed by the AA or any such official authorized by the Government or the AA in that behalf. The primary and common ground of challenge is that the petitioners have been prosecuted without valid complaints for the fact that they have not been filed by the AAs. It is urged that the complaints were filed by the CDMO/ADMO/EM instead of the DMs and hence, the learned courts below committed a fundamental error in entertaining the same being oblivious of Sections 17 read 28 of the PC&PNDT Act.

6. This Court is fully conscious of the law vis-a-vis exercise of inherent jurisdiction under Section 482 Cr.P.C. If there is a wrong or illegality apparent on the face of record, or there appears a legal or jurisdictional error, or to prevent abuse of process of law, or to secure the ends of justice, the Court may exercise such power to set things right which however depends on the facts and circumstances of a particular case. The celebrated judgment of the Supreme Court in ***State of Haryana and others Vrs. Ch. Bhajan Lal and others reported in AIR 1992 SC 604*** is a legal classicus on the point which outlined the broad parameters for exercising the inherent jurisdiction under Section 482 Cr.P.C. and writ powers under Article 226 of the Constitution of India. In other words, the Apex Court in the decision (supra) laid down the principles for the purpose of exercising such jurisdiction while dealing with quashing of criminal proceedings. In the aforesaid case, apart from other situations described, it has been held and observed that where if there is an express legal bar engrafted in any of the provisions of the Cr.P.C. or the Special Act to the institution and continuance of the proceedings, jurisdiction by the High Court could be exercised.

7. Turning to the PC&PNDT Act and its provisions, Section 28 begins with a non-obstante clause and goes on to say that cognizance of the offences has to be based on a complaint by the AA or authorized officer. On a conjoint reading of Section 17(3)(a)(b) and Section 28(1)(a) of the PC&PNDT Act makes it is profoundly clear that a complaint is to be filed by the AA or any such officer, who has been so authorized. It is submitted at the Bar that in view of the above provisions, it has to be the AA to file the complaint in view of the OM dated 27th July,2007 which allows him to do so besides to nominate an EM for monitoring the implementation of the provisions of the PC&PNDT Act. It is contended on behalf of the petitioners that a procedure is prescribed under the PC&PNDTAct which is to be scrupulously

followed without any departure. In this regard, a judgment of the Supreme Court in the case of ***Dipak Babaria and another Vrs. State of Gujarat and another reported in (2014) 3 SCC 502*** is relied upon to contend that when a statute provides for a thing to be done in a particular manner, it has to be accomplished in that manner only. The contention is that if a statute confers a power and lays down a procedure for exercise of such power, it has to be exercised in the manner so prescribed and in the present case, since the complaints have been filed not by the AAs but by other officials, the learned courts below should not have entertained it. In support of such contention, a judgment of the Bombay High Court in the case of ***Dr. Paayal Vrs. State of Maharastra and others*** (Criminal Writ Petition No.250 of 2015) disposed of on 16th October, 2015 is cited, wherein, it is held that when the complaint has not been filed by the AA as per the PC&PNDT Act, the court cannot take cognizance of the offence in view of Section 28 of the Act and in such eventuality, the proceeding shall have to be terminated while making a reference to Article 21 of the Constitution of India which mandates that a person shall not be deprived of his life or liberty except according to the procedure established by law. A decision of the M.P. High Court in the case of ***Mukesh Rathore Vrs. State of M.P. and another*** decided in MCC No.3154 of 2020 and disposed of on 26th June, 2020 is also placed reliance, wherein, it is held that AA as defined under the PC&PNDT Act shall have to initiate the action and no one else or by any such officer duly authorized by the Government or the AA. As to the exercise of authority by the AA and maintainability of the prosecution under the PC&PNDT Act, a decision of the Supreme Court in the case of ***M.P. Vrs. Manvinder Singh Gill*** decided in SLP (Criminal No.2226 of 2014) dated 3rd August, 2015 is also referred to while contending that the Court shall have to take cognizance according to the provisions of the PC&PNDT Act and in the manner prescribed and not otherwise. In the said case, the challenge was to the notification of the State Government to delegate powers to initiate prosecution for offences under the Prevention of Food Adulteration Act, 1954. Herein essentially the contention is that the prosecutions have not been set in motion through complaints filed by the AAs and therefore, they are to be terminated since it touches upon and hits the jurisdiction to entertain the same. The argument is that only if the complaint is a valid one and as per the PC&PNDT Act, only then, it can be maintained by a court and not otherwise.

8. On the other hand, the learned AGA strenuously urged that the complaints have been filed at the behest of the AAs and therefore,

instead of adhering to the technicality rather considering the spirit of the law and its legislative intent, the proceedings should not be quashed. In that regard, a decision of the Supreme Court in the case of ***Federation of Obstetrics and Gynaecological Societies of India (FOGSI) Vrs. Union of India reported in (2019) 6 SCC 283*** is relied upon. In the aforesaid case, the Apex Court was seized of a matter where some of the provisions of the PC&PNDT Act were challenged as *ultra vires* which was repelled and rejected with a conclusion that they have been incorporated to give effect to the aim and objective of the statute. One more judgment in the matter of State of ***Orissa Vrs. Mamata Sahoo and others reported in (2019) 7 SCC 486*** is cited by the learned AGA, wherein, the Apex Court declined to interfere with a proceeding which was challenged on the ground that the inspection under the PC&PNDT Act was conducted by an EM and not the AA. The sum and substance of the argument by the learned AGA is that even though, in the cases at hand, the complaints have not been filed by the AAs but having regard to the intent and purport of the PC&PNDT Act and its legislative design, the proceedings vis-à-vis the petitioners should not be terminated on such ground rather the effort must be to ensure to penalize the perpetrators of the crime. In the decision of FOGSI (supra), the Supreme Court examined validity of some provisions of the PC&PNDT Act and finally dismissed it with a conclusion that they are indeed intra vires. The learned AGA contended that the PC&PNDT Act has been incorporated with a purpose and the same was analyzed by the Apex Court in the aforesaid case, wherein, it has been concluded that the real aim and objective of the statute is to prevent the menace of female foeticide.

9. The relevant excerpt of the decision in FOGSI is reproduced herein below:

> "26. Before we dilate upon various aspects, we take note of provisions of the Act. The Act was introduced by Parliament with the following Statement of Objects and Reasons:
>
> "STATEMENT OF OBJECTS AND REASONS It is proposed to prohibit prenatal diagnostic techniques for determination of sex of the foetus leading to female foeticide. Such abuse of techniques is discriminatory against the female sex and affects the dignity and status of women. A legislation is required to regulate the use of such techniques and to provide deterrent punishment to stop such inhuman act.
>
> The Bill, inter alia, provides for:—
>
> (i) prohibition of the misuse of prenatal diagnostic techniques for determination of sex of foetus, leading to female foeticide;

(ii) prohibition of advertisement of prenatal diagnostic techniques for detection or determination of sex;

(iii) permission and regulation of the use of prenatal diagnostic techniques for the purpose of detection of specific genetic abnormalities or disorders;

(iv) permitting the use of such techniques only under certain conditions by the registered institutions; and

(v) punishment for violation of the provisions of the proposed legislation.

2. The Bills seeks to achieve the above objectives." The concern of the Legislature was that the female child is not welcomed with open arms in most of Indian families and the diagnostic technique is being used to commit female foeticide."

The Apex Court in the aforesaid decision examined the constitutional validity of the provisions of the PC&PNDT Act with reference to Part III of the Constitution of India and observed as under:

"71. The Act intends to prevent mischief of female foeticide and the declining sex ratio in India. When such is the objective of the Act and the Rules and mischief which it seeks to prevent, violation of the rights under Part III of the Constitution is not found. This Court in Hamdard Dawakhana v. The Union of India AIR 1960 SC 554 has laid down the following principles:

"8. Therefore, when the constitutionality of an enactment is challenged on the ground of violation of any of the articles in Part III of the Constitution, the ascertainment of its true nature and character becomes necessary i.e. its subject matter, the area in which it is intended to operate, its purport and intent have to be determined. In order to do so it is legitimate to take into consideration all the factors such as history of the legislation, the purpose thereof, the surrounding circumstances and conditions, the mischief which it intended to suppress, the remedy for the disease which the legislature resolved to cure and the true reason for the remedy; Bengal Immunity Co. Ltd. v. State of Bihar, 1955 2 SCR 603 at pp. 632, 633 (S) AIR 1955 SC 661 at p.674); R.M.D. Chamarbaughwala Union of India, 1957 SCR 930 at p. 936: ((S) AIR 1957 SC 628 at p.631);Mahant Moti Das v. S.P. Sahi , AIR 1959 SC 942 at p. 948.

9. Another principle which has to borne in mind in examining the constitutionality of a statute is that it must be assumed that the legislature understands and appreciates the need of the people and the laws it enacts are directed to problems which are made manifest by experience and that the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is, therefore, in favour of the constitutionality of an enactment. Charanjit Lal v. Union of India, 1950 SCR 869: (AIR 1951 SC 41); State of Bombay v. F.N. Bulsara, 1951 SCR 682 at p. 708: (AIR 1951 SC 318 at p. 326); AIR 1959 SC 942."

72. The mischief sought to be remedied is grave and the effort is being made to meet the challenge to prevent the birth of the girl child. Whether Society should give preference to male child is a matter of grave concern. The same is violative of Article 39A and ignores the mandate of Article 51A(e) which casts a duty on citizens to renounce practices derogatory to the dignity of women. When sex selection is prohibited by virtue of

> provisions of Section 6, the other interwoven provisions in the Acts to prevent the mischief obviously their constitutionality is to be upheld."

10. According to the Apex Court in the FOGSI case, the PC&PNDT Act is a comprehensive social legislation having been conceived to avoid the consequences of skewed sex ratio in India which could propel to serious incidents of violence against women. The Court is well aware of the significance of such a statute which is enacted to obviate illegal acts of pre-natal diagnostic procedures being adopted for the purpose of ascertaining the sex of an unborn child. Against the above backdrop, the Court is to appreciate whether the plea of the petitioners challenging the prosecutions on the ground of invalid complaints should be accepted.At the same time, the ratio of the judgment in ***Dipak Babaria***(supra) is to be borne in mind since if a statute has conferred a procedure to do an act, it necessarily bars the doing of such act in any other manner than the one specified. Thus, the pertinent question is, whether, the CDMO/ADMO/EM could have filed the complaints and the courts concerned should have entertained the same for having not been filed by the DMs?

11. As per Section 17(4)(e) of the PC&PNDT Act, the AA shall have the authority to take appropriate legal action against the use of any sex selection technique by any person at any place either suo motu or being brought to notice and also to initiate independent investigation in such matters. So it is the AA who is to initiate the prosecution after taking up investigation. In other words, the AA is to file the complaint only upon which the court shall take cognizance of the offences. Section 28 (1) of the PC&PNDT Act clearly mandates that a court shall not take cognizance of any offence except on a complaint being filed by the AA or by any officer authorized by him or the appropriate Government.Whether the AA can delegate the power to any other officer for filing of a complaint? The reply to the above question is not in the affirmative. The PC&PNDT Act does not provide any such authority for theAA to delegate the responsibility. However, the AA can authorize an officer for the aforesaid purpose which is evident from Section 28(1)(a) of the Act. In so far as the OM of the State Government dated 27th July, 2007 is concerned, the AA may nominate an EM of the district as his nominee to assist him in monitoring implementation of the PC&PNDT Act. The petitioners contend that for a limited purpose, an EM is nominated so as to render assistance to the AA, who is primarily responsible for the execution and overall implementation of the provisions of the PC&PNDT Act. In other words, according to the petitioners, an EM if

nominated by the AA shall be responsible for offering his assistance and therefore, cannot and shall not be eligible to register a complaint which has to be done by the AA only. In the decision of Mamata Sahoo (supra), the Apex Court held that when an EM inspected a clinic, the proceeding has not been vitiated as he was authorized for the said purpose. The above decision has been relied upon by the learned AGA while contending that the filing of the complaints by the CDMO/ADMO/EM since a part of the implementation process notwithstanding the fact that the DMs have not filed such complaints, in view of the said authority of the Apex Court, the proceedings cannot be held as bad in law. But the PC&PNDT Act is very clear which speaks of the manner in which the complaints are to be filed and it must have to be by the AA which is conspicuously evident from Section 28(1) of the said Act. If the CDMO of a district files a complaint, he cannot file it not being the authority under the PC&PNDT Act. In some of the cases, it has been found that instead of a complaint being filed, FIR has been registered. For taking of cognizance of offences punishable under the PC&PNDT Act, no doubt an investigation may be undertaken by the police but for initiating a criminal prosecution, it shall have to be through a complaint filed by the AA. From the aforesaid discussion, the conclusion which is drawn by the Court stands summarized herein below:

> (i)AA is the authority who is to file the complaint as per Section 17(4)(e) read with Section 28 of the PC&PNDT Act read with the OM of the State Government dated 27th July,2007 and no other official;
>
> (ii) In view of the OM, DM is the AA in respect of a district and SDM (Sub-Collector) shall be the authority vis-à-vis Sub- District (Sub-Division) who shall file the complaint under the PC&PNDT Act;
>
> (iii) For the purpose of rendering assistance, an EM may be nominated by the DM for monitoring the implementation of the PC&PNDT Act which is by virtue of the OM of 2007;
>
> (iv) The authority to file the complaint cannot be shifted by the AA, inasmuch as, there is no such provision in the PC&PNDT Act for delegation of power for the said purpose;
>
> (v) A complaint cannot be filed by any other official as a substitute of the AA or in the guise of or on behalf of the AA in derogation to the OM;
>
> (vi) For the purpose of inspection, investigation etc. any other officer may be engaged by the orders of the DM in accordance with the OM which is for assisting the authority in due implementation of the PC&PNDT Act and not beyond;

(vii) Any such complaint filed other than by the AA cannot be held as a valid prosecution in accordance with law;

(viii) The OM is issued by the State Government whereby the DM/SDM is to file the complaint and not the CDMO anymore after supersession of the notification of 2002 and if at all, he is treated as an EM, he can only be said to render help and assistance to the DM and not to usurp the jurisdiction of the AA.

12. With the above conclusion, the Court proceeds to decide the fate of the cases which is described herein below:

(i) CRLMC No.4249 of 2009, CRLMC No.682 of 2017: In both the cases, chargesheets have been filed under Sections 312,315,316,109 and 34 IPC and Sections 23 and 25 of the PC&PNDT Act, Section 5(3)(4) of Medical Termination of Pregnancy Act, 1971 and Section 16(1) of the Orissa Clinical Establishment Act, 1990. In so far as offences under the PC&PNDT Act are concerned, though investigation is permitted being cognizable in nature, however, the complaints were needed to be filed by the DMs which is the statutory mandate and therefore, the courts below could not have taken cognizance of the offences under Sections 23 and 25 thereof on the strength of the chargesheets, whereas, taking cognizance of offences under the IPC and other Special Acts is tenable in law and hence, it calls for no interference;

(ii) CRLMC No.172 of 2017, CRLMC No.3729 of 2012, CRLMC No.3251 of 2012 and CRLMC No.2086 of 2012: In all the above cases, since the complaints have been filed by the CDMOs and consequential orders passed, the proceedings for offences under Sections 23 and 25 of the PC&PNDT Act cannot be sustained for not being filed by the DMs;

(iii) CRLMC No.1548 of 2017, CRLMC No.1547 of 2017, CRLMC No.1733 of 2015 and CRLMC No.1546 of 2017: In the aforesaid cases, the ADMOs have filed the complaints and not the concerned DMs and therefore, the proceedings for the offences under Sections 23 and 25 of the PC&PNDT Act are to be held as not maintainable in law;

(iv) CRLMC No.904 of 2013: In the present case, the EM has initiated the prosecution under Sections 23 and 25 of the PC&PNDT Act by filling the complaint and therefore, the same is legally untenable.

13. The conclusion in respect of CRLMC No.4249 of 2009 and CRLMC No.682 of 2017 is in agreement with an earlier decision of this Court in CRLMC No.2082 of 2010 in case of ***Ramesh Chandra Naik and others Vrs. State of Odisha*** decided and disposed of on 3rd April, 2018, wherein, it has been concluded that Section 27 of the PC&PNDT Act stipulates that every offence under the said Act being cognizable and Section 154 Cr.P.C. since provides that every information relating to the commission of cognizable

offence has to be registered as an FIR and as per Section 156 Cr.P.C. when an OIC of the P.S. can investigate any cognizable case committed within its local jurisdiction even without the orders of a Magistrate, however, in view of the special provision in the PC&PNDT Act, lodging of an FIR and submission of chargesheet for such offences is impermissible as any such cognizance shall have to be based on a complaint moved by the authority empowered to do so. Hence, therefore, in both the cases since the cognizance of the offences under Sections 23 and 25 of the PC&PNDT Act has been taken on the basis of chargesheets and not on the strength of complaints as envisaged in Section 28 of the PC&PNDT Act, the Court has therefore held that the impugned proceedings cannot stand and shall have to be terminated. In the said decision, the concerned authority was granted the liberty to file complaint before the appropriate court. However, in the present case, the Court does not wish and is not inclined since no real and worthy purpose would be served by granting such liberty after so long. With regard to the challenge as to the constitution of the AA by the State Government as per the OM not to be consistent with Section 17(3) of the PC&PNDT Act, it has remained so and survived till now and though raised by the learned counsel appearing for some of the parties but the Court is of the view that said question should be left open for determination in such other proceedings at appropriate point of time.

14. Assimilating the points, the Court observes that the State Government declared the AAs for the district and sub-division under the OM dated 27th July, 2007 for exercising jurisdiction under Section 17(2) of the PC&PNDT Act amended in 2002. If a CDMO/ADMO is treated as an EM, then also in the considered view of the Court, they shall have a limited role to play so as only to assist the DM but not to substitute the latter as the AA for the purpose of filing complaint under the PC&PNDT Act. The DM/SDM is only to initiate legal action by filling complaint against persons who are directly or indirectly involved in sex determination. Though the OM authorizes the EM to have the role of assisting the DM, however, by no stretch of imagination, he can be permitted to file the complaint which shall have to be by the DM at the district level and SDM/Sub-Collector at the level of Sub-Division. So, at the cost of repetition, it has to be held that in all the above cases, the procedure which has been laid down and the mechanism in place as stipulated in the PC&PNDT Act read with the OM was not followed, rather, the officials who did not have the authority to file complaints for the offences punishable under Sections 23 and 25 of the said Act initiated

the prosecutions which cannot be sustained in law. To reiterate and while referring to the decision of the Apex Court in the case of ***Dipak Babaria*** (supra) and applying its ratio, the Court reaches at a logical conclusion that a complaint shall have to be filed by the DM and the procedure so prescribed in the PC&PNDT Act must be followed in view of the rule of interpretation *'expressio unius est exclusio alterius'* which stipulates that when something is mentioned expressly in a statute, it leads to the presumption that the things not mentioned are excluded. Thus, the Court is of the final opinion that even assuming that the CDMOs/ADMOs have been nominated as the EMs, they could not have filed the complaints. Any such authorization in favour of the CDMOs/ADMOs by the DMs shall have to be read in terms of the OM which only nominates them as the EMs to assist the respective DMs in the monitoring and implementation of the PC&PNDT Act and not to cross the line especially when the OM replaced the earlier notification of 2002 which had appointed the CDMOs as the AA.

15. The end result is restated:

(i) CRLMC No.4249 of 2009 and CRLMC No.682 of 2017: Both the petitions stand allowed to the extent indicated above.As a logical sequitur, the orders of cognizance vis-à-vis offences under Sections 23 and 25 of the PC&PNDT Act are hereby set aside. But, in so far as other offences under the IPC and Special Acts are concerned, the proceedings are to continue wherein the petitioners shall have the opportunity to defend during the enquiry and trial since it would require examination of the materials to find out existence of a prima facie case; and

(ii) CRLMC No.172 of 2017, CRLMC No.3729 of 2012, CRLMC No.3251 of 2012, CRLMC No.1548 of 2017, CRLMC No.1547 of 2017, CRLMC No.1733 of 2015, CRLMC No.2086 of 2012, CRLMC No.904 of 2013 and CRLMC No.1546 of 2017: The aforesaid petitions stand allowed. As a necessary corollary, the orders of cognizance, framing of charge as well as the criminal proceedings in the whole pending before the respective courts are hereby quashed.

16. Accordingly, it is ordered.

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2022 (III) ILR - CUT- 224

SASHIKANTA MISHRA, J.

WPC(OAC) NO. 171 OF 2013

SATYA NARAYAN PANDA ……...Petitioner

.V.

STATE OF ODISHA & ORS. ……Opp. Parties

ODISHA PHARMACIST SERVICE (METHOD OF RECRUITMENT AND CONDITIONS OF SERVICE) RULES, 2019 – Rule 4 & 5 – The petitioner has rendered six years of service as a contractual employee – The State Government passed an order on 09.01.2013 to terminate the services of the petitioner on the ground that no advertisement was issued – Effect of – Held, It is the settled position of law that where a person has been appointed bonafide without any fault on his part and has continued in the concerned position for a long time, notwithstanding the fact that his appointment is subsequently found to be invalid, it is not always necessary to remove him from service or to treat the said period of engagement as non-est – The writ petition is disposed with a direction to the opposite party to consider the case of the petitioner for regularization.

Case Laws Relied on and Referred to :-

1. AIR 1992 SC 2130 : State of Haryana & Ors. Vs. Piara Singh & Ors.
2. 2013(II) OLR 210 : Dillip Kumar Baral Vs. Biju Patnaik University of Technology & Ors.
3. (2009) 1 SCC 768 : (2009) 2 SCC (L&S) 119 Tridip Kumar Dingal Vs. State of W.B.

For Petitioner : M/s. K.K. Swain, P.N. Mohanty,U. Chhotray, P.K. Mohapatra.

For Opp. Parties: Mr. N.K. Praharaj,Addl. Govt. Adv.

JUDGMENT Date of Judgment: 29.09.2022

SASHIKANTA MISHRA, J.

1. Pursuant to an advertisement dated 03.11.2007 for filling up the post of Pharmacist in respect of Singhapur PHC in the district of Jajpur under the Rogi Kalyan Samiti (RKS), the petitioner applied for the same, attended a selection test, was selected for appointment and joined in the post on 21.11.2007. The petitioner has a Diploma in Pharmacy and is duly registered under the Odisha State Board of Pharmacy. Such appointment was contractual in nature initially for a period of one year with consolidated

salary of Rs.1000 per month. The said contract was renewed from time to time. An advertisement was issued by the Chief District Medical Officer (CDMO) on 14.12.2009 to fill up 12 posts of Pharmacists on contractual basis. The petitioner challenged the said advertisement before the Odisha Administrative Tribunal in O.A. No. 3077 (C) of 2009 on the ground that he, being appointed as a contractual Pharmacist, cannot be replaced by another contractual employee. The O.A. was disposed of by order dated 01.10.2010 and 30.11.2010 by granting liberty to the petitioner to submit a representation to the CDMO. The petitioner submitted representation accordingly but no action was taken for which he filed a contempt application being CP No. 434(c) of 2010. During pendency of the said contempt application, the government, vide letter dated 28.12.2010 directed the CDMO to implement the order of the tribunal by considering the representation of the petitioner for his engagement on contractual basis as Pharmacist against vacancy if available under his control to avoid legal complication. Such letter was followed by another letter dated 04.1.2011 of the State Government reminding the CDMO to implement the order of the Tribunal.Again, the State Government wrote to the CDMO on 01.02.2011 directing him to implement the order. Accordingly an order was issued on 15.02.2011 by the CDMO for appointing the petitioner as a contractual Pharmacist. Pursuant to such order, the petitioner has been continuing as a Contractual Pharmacist with his contractual period being renewed from time to time. While continuing as such, the State Government passed an order on 09.01.2013 to terminate the services of the petitioner on the ground that no advertisement was issued for the five posts of Contractual Pharmacist against which the petitioner and four others were appointed and therefore such appointments are ab initio void. Such order of the Government was passed pursuant to the order passed by the Tribunal in O.A.No.1819(C) of 2012 and batch,wherein the petitioner nor the other four contractual Pharmacist were parties. It is stated that the Tribunal in the said case had simply directed the Government to consider the representation of the applicants but the Government issued the impugned order directing termination of the services of the petitioner and four others. It is further stated that as the petitioner has already rendered six years of service as a contractual employee, as per the scheme of the State Government he is entitled to be regularized in service. On such facts and grounds, the petitioner approached the erstwhile Odisha Administrative Tribunal in O.A. No. 171 (C) of 2013 seeking the following relief:

"Under the above circumstances, it is humbly prays that the Original Application be allowed:-

And

(a) the impugned order dated 09.01.2013 passed by the State Government under Annexure-16 may be quashed/set aside and the applicant may be allowed to continue in the post of Contractual Pharmacist with all service benefits;

And

(b) any other order/orders or direction/directions be issued so as to give complete relief to the applicant."

The said OA has since been transferred to this Court and registered as the instant writ application.

2. Counter affidavit has been filed by the CDMO. After referring to the undisputed facts averred in the writ application, it has been stated in the counter that challenging the order of appointment issued by the CDMO in favour of the petitioner and four other persons, three candidates namely, Bikash Kumar Mishra, Kaibalya Tripathy and Susant Kumar Panda approached the erstwhile Odisha Administrative Tribunal in O.A. No. 1395 (C) of 2011 with a prayer to quash the same. The said applicants also filed O.A. Nos. 1819 (C) of 2012, 1820 (C) of 2012 and 855 (C) of 2012 with prayer for their engagement on similar footing. As per order passed by the Tribunal on 22.03.2012, the appointing authority after going through the Government guidelines was unable to appoint the said applicants within the procedure and disposed of the same within the timeframe. The Principal Secretary to Government in H & FW Department after necessary enquiry passed order to terminate the servicesof the petitioner and the other employees but allowed them to continue with their earlier engagement under the RKS.

3. The petitioner has filed rejoinder to the counter filed by the opposite party No.3. It is basically stated that the petitioner has put in more than eight years of service in the capacity of Contractual Pharmacist under the RKS and Contractual Pharmacist under the Government. Therefore, under the scheme of the Government he is entitled to be regularized in service.

4. The petitioner also filed an additional affidavit. It is stated that the Original Applications, being O.A. Nos. 1304(C) of 2013, 1303 (C) of 2013 and 1305 (C) of 2013 filed by the three persons before the Tribunal claiming parity with the petitioner for appointment as Contractual Pharmacist and the

State Government, were transferred to this Court after abolition of the Tribunal. By order dated 03.03.2022, all the said cases were disposed of.

5. Heard Mr.K.K.Swain, learned counsel appearing for the petitioner and Mr.N.K. Praharaj, learned Additional Government Advocate for the State.

6. It is argued by Mr. Swain that the petitioner was appointed by the authorities in compliance of the order of the Tribunal in O.A. No. 3077 (C) of 2009 without any misrepresentation or forgery committed by him. Only when he was threatened to be replaced by another contractual employee that he approached the Tribunal. It is well settled that one contractual employee cannot be replaced by another set of contractual employee. Mr. Swain has relied upon the decision of the Apex Court in the case of ***State of Haryana and others vs. Piara Singh and others*** reported in AIR 1992 SC 2130 and of this Court in the case of ***Dillip Kumar Baral vs. Biju Patnaik University of Technology and others*** reported in 2013(II) OLR 210. It is further argued that once the authorities have appointed the petitioner pursuant to order passed by the Tribunal, they are estopped from terminating him on the ground that his appointment was not valid. Even assuming that the petitioner was wrongly appointed then also he cannot be terminated after having rendered more than 15 years of service. The decision of this Court in the case of the ***Pratima Sahoo vs. State of Odisha*** reported in 2021(I) ILR-CUT-150 is relied on by Mr. Swain in this regard. Alternatively, it is contended by Mr. Swain that even otherwise, as per Rule-4 of Odisha Pharmacist Service (Method of Recruitment and Conditions of Service) Rules, 2019 all Contractual Pharmacists, who have been duly recruited by the concerned Societies/Schemes and have completed 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. The petitioner was engaged as Contractual Pharmacist under the RKS Scheme in the year 2007 and therefore, as on the date of coming into force of the 2019 Rules he is eligible to be regularized in service as per Rule 4 and 5 thereof.

7. Mr. Praharaj, on the other hand, has argued that having been wrongly appointed to a post, it is not open to a person to claim any vested right thereon. There can be no estoppel against law. Since the petitioner was wrongly appointed, the authority rightly held the same to be invalid and

considered the cases of the eligible persons who had been wrongly left out. In any case, the petitioner has been allowed to continue as per his earlier status as a Contractual Pharmacist under the RKS Scheme and therefore, he cannot be said to have any legitimate grievance to raise before this Court.

8. Before proceeding to examine the merits of the rival contentions, it would be relevant to note that the petitioner has been continuing as Contractual Pharmacist under the State Government till date by virtue of order dated 04.02.2013 and 22.03.2022 passed by this Court in W.P.(C) No.2166 of 2013. Admittedly, the petitioner was engaged as Contractual Pharmacist under the RKS Scheme and joined as such on 21.11.2007. Since there was a move to engage Pharmacists on contractual basis the petitioner approached the Tribunal in O.A. No. 3077 (C) of 2013. It can only be said that the petitioner had a valid point to raise before the Tribunal. Be that as it may, the Tribunal, without entering into the merits of the case, disposed of the O.A. by granting liberty to the petitioner to submit a representation to the CDMO highlighting his grievance. The CDMO, being repeatedly instructed/reminded by the State Government issued appointment order in his favor. It must be kept in mind that the Tribunal never directed the CDMO to appoint the petitioner as a Contractual Pharmacist but had only granted liberty to the petitioner to submit a representation which would be considered in accordance with law within a stipulated time. What prompted the State Government to straightaway appoint the petitioner against the post of Contractual Pharmacist, which incidentally was advertised, without undertaking even a semblance of selection process is unable to be comprehended by this Court. It goes without saying that all public appointments are required to be made in an open and transparent manner in consonance with the extant rules. Viewed in light of the above position, it can hardly be said that the appointment of the petitioner by the CDMO in 2011 was valid in the eye of law. To such extent therefore the opposite party No. 1 cannot be faulted with for passing the impugned order in arriving at the same conclusion as referred above.

9. The opposite party No.1 has however observed in the impugned order that the petitioner can continue in his earlier status as Contractual Pharmacist under the RKS Scheme. The petitioner has been continuing on the strength of an interim order passed by this Court. However as has been held hereinbefore, the very appointment of the petitioner to the post of Contractual Pharmacist in the year 2011 was illegal. Of course, no fault can be attributed

to the petitioner for such appointment as he had simply raised a valid legal point questioning the advertisement on the ground that one contractual employee cannot be replaced by another contractual employee. The Tribunal, as already stated, never directed the authorities to appoint the petitioner in the post in question. Therefore, the appointment made by the CDMO on the direction of the State Government has to be treated as a wrong committed by them and not the petitioner. That apart, the petitioner's earlier appointment as Contractual Pharmacist with effect from 21.11.2007 under RKS scheme has not been interfered with by opposite party No. 1, rather he has endorsed the same in the impugned order by holding that the petitioner was continuing under the RKS prior to the contractual appointment and is allowed to continue under the said status. This Court finds nothing wrong in such observation. This observation/order however helps the petitioner when viewed in the background of the 2019 Rules. Rule 4 of the 2019 Rules is quoted hereinbelow for reference:

> *"**4. Conditions of taking over of existing contractual Pharmacists.- (A) (1)** On the date of commencement of these rules, all the contractual Pharmacists who have been 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 Pharmacists who are yet to complete six years of contractual service and having eligibility criteria as prescribed under rule-5 shall 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 Pharmacists, 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 regularization, such posts of contractual Pharmacists of the OHS & FW Society in sub-clause*
>
> *(1) shall be deemed to have been abolished from the date of such induction of contractual Pharmacists 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:*

10. Admittedly, the 2019 Rules came into force on 08.03.2019. On the said date, the petitioner was continuing as Contractual Pharmacist with reference to his appointment made in the year 2011. The opposite party

No.1, while holding that the petitioner's appointment as such is ab initio void, has also held that he is allowed to continue in his earlier status. Though technically the petitioner's appointment from the year 2011 can be treated as illegal, notwithstanding the interim order passed by this Court, yet his earlier spell of engagement that is, from the year 2007 under the RKS Scheme not having been interfered with, the question is, can it be said that he has completed six years of service as on the date of commencement of the Rules.It is the settled position of law that where a person has been appointed bonafide without any fault on his part and has continued in the concerned position for a long time, notwithstanding the fact that his appointment is subsequently found to be invalid, it is not always necessary to remove him from service or to treat the said period of engagement as non-est. In the case of ***Tridip Kumar Dingal v. State of W.B.,*** *reported in* ***(2009) 1 SCC 768 : (2009) 2 SCC (L&S) 119***, the Apex Court observed as follows:

> *"52. In M.S. Mudhol (Dr.) v. S.D. Halegkar [(1993) 3 SCC 591 : 1993 SCC (L&S) 986 : (1993) 25 ATC 91] the petitioner sought a writ of quo warranto and prayed for removal of a Principal of a school on the ground that he did not possess the requisite qualification and was wrongly selected by the Selection Committee. Keeping in view the fact, however, that the incumbent was occupying the office of Principal since more than ten years, this Court refused to disturb him at that stage.*
>
> *53. In our considered opinion, the law laid down by this Court in aforesaid and other cases applies to the present situation also. We are of the considered view that it would be inequitable if we set aside appointments of candidates selected, appointed and are working since 1998-1999. We, therefore, hold that the Tribunal and the High Court were right in not setting aside their appointments."*

11. This is a case where the petitioner has been continuously discharging the duties of Contractual Pharmacist, admittedly without any blemish for as long as 15 years. This Court has already held that the petitioner's subsequent appointment as Contractual Pharmacist, though invalid, was not on account of any fault on his part but on the part of the authorities. It can be reasonably supposed that had he not been engaged as a Contractual Pharmacist in the year 2011 he would have continued as a Contractual Pharmacist under the RKS Scheme. There is a Rule in place being the 2019 Rules which provides for regularization of such employees who have completed six years of service as on the date of coming into force of the said rules. For the reasons indicated hereinbefore, this Court finds no reason as to why the beneficial provisions of Rule 4 and 5 of the 2019 Rules shall

not be extended to the petitioner. These Rules, it must be remembered, require that the employee must have rendered six years continuous service under any Scheme as on the date of commencement of the Rules. The petitioner was engaged under the RKS Scheme from 20.11.2007 and his subsequent appointment as Contractual Pharmacist under the State Government was from 2011. This Court has already held that such subsequent appointment was illegal. However taking note of the fact that the petitioner had no fault in being so appointed and he having continued in service, even till date, on the strength of interim order passed by this Court, it would be iniquitous to ignore such spell of engagement (from 2011 till the Rules came into place in 2019). Had he not been so appointed, he would have continued under the RKS and thereby, been eligible for being considered for regularization as per the 2019 Rules.Therefore,the aforementioned period of engagement (2011 to 2019)must also be notionally counted only for the purpose of considering his case for regularization as per Rules 4 and 5 of the 2019 Rules.

12. For the foregoing reasons, therefore, this Court is of the view that the impugned order insofar as it relates to terminating the services of the petitioner as Contractual Pharmacist under the Government is not liable to be interfered with. However, the writ application is disposed of by directing the opposite party authorities to consider the case of the petitioner for regularization of his services having regard to the relevant provisions of the 2019 rules by treating him as having completed six years of service as Contractual Pharmacist under the RKS Scheme continuously as on the date of commencement of the said Rules.The above exercise shall be completed within a period of three months from the date of communication of this order or on production of certified copy thereof by the petitioner.

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2022 (III) ILR - CUT- 231

SASHIKANTA MISHRA, J.

W.P.(C) NO. 9243 OF 2018

CHANDAN PRADHAN .....Petitioner

.V.

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

INTERPRETATION OF STATUTE – Whether the executive instruction can run contrary to the administrative instruction? – Held, No – The benefits which are intended to be conferred as a matter of policy by the State cannot be curtailed or restricted in any manner by way of the guidelines. (Para-15)

Case Laws Relied on and Referred to :-

1. (2010) 1 SCC 647 : CBI Vs. D.P. Singh.
2. AIR 1989 SC 2138 : Narendra Kumar Maheswari vs. Union of India.
3. (1996) 8 SCC 666 : Mills Douglas Michael Vs. Union of India.
4. (1994) 2 SCC 723 : U.P. Public Service Commission Vs. Alpana.
5. (1972) 4 SCC 765 : Major N.C. Singhal Vs. Director General,Armed Forces Medical Services.
6. (2008) 1 SCC 318 : Balakrushna Behera Vs. Satya Prakash Dash.

For Petitioner : M/s. Satyabrata Mohanty,S.S. Mohapatra, A.K. Jena, S.K. Das, P.K. Das & P. Sinha.

For Opp. Parties : Mr. H.K. Panigrahi,Addl. Standing Counsel. Mr. P.K. Panda,Standing Counsel (S& M.E. Department)

JUDGMENT Date of Judgment: 29.09.2022

SASHIKANTA MISHRA, J.

1. The Government in School and Mass Education Department issued a Resolution dated 26th December, 2016 laying down guidelines for engagement of Sikshya Sahayaks. On the same day, an advertisement was issued inviting applications from eligible candidates for engagement against 14087 posts of Sikshya Sahayaks in different districts. The last date of submission of application was 9th December,2017. The Petitioner submitted his application citing his first preference District as Angul and the second as Kalahandi. The Petitioner was selected for appointment in the district of Kalahandi, but by letter dated 3rd May, 2018 issued by the District Project Coordinator, Sarva Sikshya Abhiyan (D.P.C. SSA), Kalahandi (Opposite Party No.4), the State Project Director, OPEPA was intimated that the documents of the Petitioner were verified at the district level and it was found that he could not produce Identity Card issued by Director of Sports which is essentially required to claim reservation under the sports category as per Resolution No.24808/Gen dated 18th November, 1985 of G.A. Department. Hence, his candidature was rejected. The Petitioner claims that he had duly participated in the National Level Competitions for which valid certificates were issued by the Organizers, which was duly countersigned by

the concerned authority and therefore, rejection of his candidature is entirely illegal. On such basis, the Petitioner has approached this Court seeking the following relief:-

> *"It is therefore humbly prayed that this Hon'ble Court may be graciously pleased to admit the writ application, issue Rule Nisi by calling upon the Opp.Party as to why the order of rejection under Annexure-4 dated 3.5.2018 will not be quashed and the Petitioner will be given appointment as Sikshya Sahayak in the interest of justice.*
>
> *And pass necessary order/orders as Lordships'deem fit and proper for the interest of justice."*

2. A counter affidavit has been filed on behalf of Opposite Party No.4 in which it is stated that the Petitioner had applied under sports category as provided under the Resolution dated 18th November, 1985. As per clause-4 of the said Resolution, recognized Associations/Federations, Organizing Bodies may issue Sports Certificates to the candidates who participated or represented the State in the open national events and championships. Further, the Director of Sports shall issue Identity Card to the deserving sportsmen on the basis of such certificates. As per Annexure-5, the sportsmen are required to produce the Identity Card at the time of their appointment against the post reserved. The Petitioner had produced an Identity Card issued by the National School Games showing his participation in 54th National School Games, 2008 at Sagar (M.P) for participating in Throw Ball and Kho-Kho Championship from 12th to 17th October, 2008, but the same is not an Identity Card issued by the Director of Sports as required under Resolution dated 18th November, 1985. Accordingly, his candidature was rejected.

3. The Petitioner filed a rejoinder to the counter filed by Opposite Party No.4 stating that his participation in the 54th National School Games in 2008 being selected by the Odisha State Schools Sports Association has been duly acknowledged by the Asst. Director, Physical Education, Directorate of Secondary Education, Odisha by issuing a certificate in his favour on 25th June, 2018. The Petitioner therefore, claims that he is eligible and should not be deprived of appointment on technical grounds.

4. The Opposite Party No.4 filed a reply to the rejoinder filed by the Petitioner mainly stating that instructions were sought for from the Director of Sports vide letters dated 13th July, 2018 and 8th January, 2021 as to whether the Petitioner could be engaged as Sikshya Sahayak

under sports reservation by virtue of such certificate, but there has been no response from the Director of Sports so far.

5. The Petitioner filed an additional affidavit indicating that during pendency of Writ Petition and being permitted by this Court, he again applied for issue of Identify Card on 17th February, 2022 through Online mode. It is further stated that similarly situated sports persons placed below the Petitioner have been appointed.

6. The Director, Sports (Opposite Party No.5) has filed a counter affidavit and two further affidavits. It is stated that the Petitioner's application for grant of Sports Identity Card was considered and he was found to be ineligible for which the same was rejected and communicated to him through his registered mobile number. It is also stated in the further affidavit that the Petitioner is not entitled to be issued with Sports Identity Card in view of the Resolution dated 18th November, 1985 read with Resolution dated 1st May, 2017 of the Government in Sports and Youth Services Department. It is stated that as per Resolution dated 1st May, 2017 the sports in which the Petitioner participated, that is Kho-Kho, belongs to Category 'B' and the National School Games in which he represented the State of Odisha is not a Senior National event and, therefore, his application was rightly rejected.

7. The Petitioner filed a rejoinder to the counter affidavit filed by Opposite Party No.5 stating that similarly situated persons placed below the Petitioner and having identical sports certificates namely, the candidate placed at Sl. No.119 as against Sl.No.33 of the Petitioner has been given appointment.This according to the Petitioner, amounts to discrimination.

8. The Opposite Party No.5 filed a further affidavit stating that no such Identify Card has been issued to any other sports person as claimed by the Petitioner.

9. Heard Mr. Satyabrata Mohanty, learned counsel for the Petitioner, Mr. H.K.Panigrahi, learned Addl. Standing Counsel for the State and Mr. P.K.Panda, learned Standing Counsel appearing for the School and Mass Education Department.

10. Mr. S. Mohanty would argue that admittedly the Petitioner had participated in the National School Games, 2008 in Throw Ball and Kho-

Kho representing Odisha. There is no dispute that it is a National Level Championship. The Petitioner was duly issued with participating certificates, which were countersigned by the Asst. Director, Physical Education of the Directorate of Secondary Education. This, according to Mr. Mohanty, fulfils the criteria laid down in the Resolution dated 18th November, 1985 and therefore, the Director of Sports was duty bound to issue Sports Identify Card in his favour. As regards the Resolution dated 1st May, 2017, Mr. Mohanty contends that the same cannot be made applicable to the case of the Petitioner because the advertisement was issued much prior to the said date. Moreover, the Petitioner having been found eligible for appointment, he cannot be deprived of the same on the technical ground of non-production of Sports Identity Card, more so as there is clear evidence showing his participation in a National Level Sports event as a representative of the State.

11. Mr. P.K.Panda, learned Standing counsel for the School and Mass Education Department argues that the selection committee is bound by the terms of the Resolution dated 18th November, 1985, which mandates production of Identify Cards issued by the Director of Sports without which the candidature of a person cannot be considered. Therefore, despite the fact that the Petitioner was otherwise found suitable for engagement, he having applied under the sports quota, non-fulfillment of the conditions referred to above, disentitles him from such appointment.

12. Mr. H.K.Panigrahi, learned Addl. Standing Counsel for the State, has argued that participation in the National School games is not adequate to confer eligibility on a sports person to be issued with the Sports Identity Card as the rules require that the sports person should have participated in two Senior National events. Moreover, the sports in which the Petitioner participated is a category 'B' sports and therefore, he is not eligible to be issued with the Identity Card.

13. From the rival pleadings and contentions raised before this Court, it is evident that the issue involved in the case boils down to the question, whether the participation of the Petitioner in National School games confers eligibility on him to be issued with the Sports Identity card as per the relevant Resolution of the Government.

It would be apposite to first refer to the Resolution dated 26th December, 2016 issued by the Government in School and Mass Education

Department (enclosed asAnnexure-2) laying down guidelines for engagement of Sikshya Sahayaks. Paragraph-8 deals with reservation and 8.1 reads as follows:-

> *"The Orissa Reservation Vacancies (in posts and services for ST and SC) Act, 1975 along with rules made there under and OCS (Reservation of Vacancies for Women in Public Services) Rules, 1994 and such other principles of reservation as prescribed by the State Government from time to time shall be followed".*

The Government in General Administration Department issued a Resolution on 18th November,1985.Paragraphs-4 and 5 of the said Resolution read as follows:

> *"4. Recognized Associations/Federations/ Organizing Bodies may issue the Sports Certificate to the candidates who participated or represented in the open national events and championships. The Director, Sports shall issue Identity Card to the deserving sportsmen on the basis of the above certificates.*
>
> *5. The sportsmen shall produce the Identify Cards issued in their favour by the Director, Sport at the time of their appointment against the post reserved for."*

From a bare reading of the Resolution, it is clear that the requirement of issuance of Identify Card is participation/representation in 'Open National Events and Championships'. It is to be noted that the said expression 'Open National Events and Championship' has not been qualified in any manner. Surprisingly however, the guidelines purportedly appended to the Resolution, which lays down the criteria, inter alia, provides as under:-

> *"(ii) He/She should have represented the State in Senior National Championship/Tournament in any one of the recognized sports disciplines as approved by the Government from time to time. The participation certificate needs to be issued by the recognized Association/Federation/ Organizing Body. Certificate in the letter head of the concerned Federation/Association shall not be entertained for consideration."*

14. It is apparent that the criteria laid down under the guidelines have restricted the eligibility criteria to participation/representation in Senior National Championship/ Tournaments and further to the recognized sports disciplines as approved by the Government from time to time. To appreciate the above, a reference to the Resolution dated 18.11.1985 again becomes necessary. The relevant portion of the Resolution reads as follows:

> ***"Government of Orissa***
> ***General Administration Department***
> ***RESOLUTION***

No. 24808/Gen Bhubaneswar, Dated 18.11.1985

Sub:– Reservation of vacancies for Sports man in Class II, III & IV services in State Govt.

In their Resolution No. 1099-SC dt.16.02.85 the Tourism, Sports & Culture (Sports & Culture) Department have decided to adopt a Sports Policy broadly in keeping with the National Policy guidelines for ensuing systematic and concerted efforts for development of sports and games in the State. Besides certain other facilities provided for the sportsmen under the Sports Policy, a decision has also been taken that one per cent of the jobs in the Government and public sector organizations will be kept reserved for deserving sportsmen representing the State subject to their meeting the minimum educational requirement.

2. In order to implement this decision in a systematic manner, it has now been decided by Government that one per cent of vacancies arising in year to each of the categories of Class- II and Class -III services/Posts and in Class -IV posts filled by direct recruitment should be reserved for the sportsmen. Further it has been decided that the 8th Vacancy in cycle of 100 vacancies should be reserved for sportsmen.

3. A cell shall be constituted in the Directorate of Sports to register the names of the sportsmen and one of the Asst. Director will remain in charge of this Deptt. The Asst. Director in-charge shall receive applications from the sportsmen for registration. Application shall be accompanied with certificates relating to educational qualification and training, etc. and also with a certificate to the effect that the candidate is a sportsman and participates and represents the State in regular Open National Events and Championships.

4. Recognized Associations/Federations/ Organising bodies may issue the Sports Certificates to the candidates who participated or represented in the Open National Events and Championships. The Director, Sports shall issue Identity Card to the deserving Sportsmen on the basis of the above certificates.

5. The sportsmen shall produce the identity cards issued in their favour by the Director, Sports at the time of their appointment against the posts reserved for.

6. The above instructions may be followed by different Departments and Heads of Departments and the relevant recruitment rules framed by the Departments of Government may be amended accordingly

xx xx xx"

It is evident that this Resolution was issued in pursuance of Resolution No. 1099/ SC dated 06.02.1985 of the Department of Tourism, Sports & Culture (Sports and Culture) laying down the Sports Policy of the State. The introduction of the said Resolution is as follows:

"RESOLUTION No. 1099/SC.
GOVERNMENT OF ORISSA
Department of Tourism, Sports & Culture
(Sports & Culture).
Bhubaneswar, Dated the 6th February, 1985
Sub : SPORTS POLICY

The State Government considered it necessary to formulate and adopt a Sports policy, broadly in keeping with the National Policy Guidelines, for ensuring systematic and concerted efforts to develop sports and games, so as to achieve the high standards of excellence and help the State to take its rightful place in the sports arena of the country. Accordingly after careful consideration, Government have taken the following decisions for promotion of Sports and Games in the State."

It would also be useful to quote certain relevant paragraphs of the Resolution for better appreciation of the issue.

"(III) ***Training and Coaching facilities****.*

xx xx xx

(b) A series of Sports Schools will be established all over the State with emphasis on individual games and sports in each school. These schools will provide specialised training in games and sports to students from Class VIII to XIIth and develop skilled and talented athletes and sportsmen.

xx xx xx

(IV) ***Incentives and promotional schemes***

(a) Scholarships will be provided to talented sportsmen, athletes from the school level up to the University level.

(b)(i) One percent of the jobs in the Government and Public Sector Organisations will be kept reserved for deserving sportsmen and athletes representing the State subject to their meeting minimum educational requirements. Age restrictions may be condoned in respect of sportsmen and athletes.

xx xx xx

(iiC) <u>All sportsmen representing the State in the junior or senior levels will be provided jobs in the Government, public sector or private sector.</u>

(Emphasis supplied)

xx xx xx

(e) Special scholarship to be awarded to students who represent the State will be 50% more than the normal sports scholarships given to students.

15. Two things are apparent on a conjoint reading of the aforequoted paragraphs of the policy. Firstly, the Sports Policy of the State itself does not make any distinction between sports persons representing the State in the

junior or senior levels, rather, paragraph-IV(iiC) specifically provides that all sportsmen representing the State in the junior or senior levels will be provided jobs in the Government, public sector or private sector. Secondly what constitutes the senior level and junior level has not been specifically differentiated in the Policy. However, the Policy having provided for establishment of sports schools all over the State to provide specialized training to students from Class-VIII to XII, it can be reasonably inferred that junior level includes sports persons from schools also. Such being the specific Policy of the State, the question that arises for consideration is, whether the guidelines appended to the Resolution dated 18.11.1985 in restricting the applicability thereof to only sports persons participating in senior National Events can be treated legally valid.

It goes without saying that the Resolutions referred to hereinbefore can be classified as administrative instruction and in the absence of statutory provisions or rules governing the field, the same are applicable. It is well settled that in interpreting the provisions of administrative instructions the principle of statutory interpretation are to be adhered to as was held by the Apex Court in the case of ***CBI v. D.P. Singh, reported in (2010) 1 SCC 647.***

As already stated, neither the Sports Policy nor the Resolution dated 18.11.1985 provides for any distinction between junior and senior level sports persons. The guideline appended to the Resolution dated 18.11.1985 does so.

In the case of ***Narendra Kumar Maheswari vs. Union of India reported in AIR 1989 SC 2138,*** the Supreme Court observed as follows:

> *"Guidelines are issued by Governments and statutory authorities in various types of situations. Where such guidelines are intended to clarify or implement the condition and requirements precedent to the exercise of certain rights conferred in favour of citizens or persons and a deviation therefrom directly affects the rights so vested the persons whose rights are affected have a clear right to approach the court for relief…….. A Court, however, would be reluctant to interfere simply because one or more of the guidelines have not been adhered to even where there are substantial deviations, unless such deviations are, by nature and extent such as to prejudice the interests of the public which it is their avowed object to protect. Per contra, the court would be inclined to perhaps overlook or ignore such deviations, if the object of the statute or public interest warrant, justify or necessitate such deviations in a particular case. This is because guidelines, by their very nature, do not fall into the category of legislation, direct, subordinate or ancillary. They have only an advisory role to play and non-adherence to or deviation from them is*

necessarily and implicitly permissible if the circumstances of any particular fact or law situation warrants the same. Judicial control takes over only where the deviation either involves arbitrariness or discrimination or is so fundamental as to undermine a basic public purpose which the guidelines and the statute under which they are issued are intended to achieve." (Emphasis supplied)

So, when neither the Sports Policy or the Resolution dated 18.11.1985 providing for reservation to sports persons distinguish between junior and senior level sports persons for granting the intended benefits, how can the guideline do so? In other words, the benefits which are intended to be conferred as a matter of policy by the State cannot be curtailed or restricted in any manner by way of the guidelines. It would have been a different case altogether had such restriction been embodied in the policy decision or in the Resolution dated 18.11.1985, but the same not being the case, a mere guideline cannot be invoked to nullify the intended benefits. Just as an executive instruction cannot supplant but only supplement the statutory rules, the guideline, which is a creature of the executive instruction, cannot obviously supplant or run contrary to the administrative instruction itself. In such view of the matter, this Court has no hesitation in holding that non-grant of the sports identity card to the petitioner on the ground that he had not participated in any Senior National Event, cannot be sustained in the eye of law.

16. In the additional counter affidavits, it is stated that the Petitioner was found to be ineligible in view of the Resolutions dated 18th November, 1985 and 1st May, 2017. As held earlier, the Resolution dated 18th November, 1985 per se does not in any manner restrict its applicability only to persons participating/representing the State in Senior National Championships/Tournament and therefore, cannot be invoked to refuse issuance of Sports Identity Card to the Petitioner. In so far as the circular dated 1st May, 2017 is concerned, it is to be noted that the same was issued after the last date fixed for receipt of applications for the post of Sikshya Sahayak. There is no provision as such in the advertisement or the guideline dated 26th December, 2016 fixing any cut-off date for determination of eligibility of the candidates. It is well settled that if no such date is prescribed the eligibility criteria shall be applied by reference to the last date appointed for receiving the application. In the case of ***Dr. M.V. Nair v. Union of India;*** reported in (1993) 2 SCC 429, the Supreme Court held that suitability and eligibility have to be considered with reference to the last date for receiving the applications, unless, of course, the notification calling for

applications itself specifies such a date. The principle of last date of receipt of filing of the application as being the cut-off date for determination of eligibility has been reiterated by the Apex Court in several decisions namely, ***Mills Douglas Michael v. Union of India;*** reported in (1996) 8 SCC 666, ***U.P. Public Service Commission v. Alpana***; reported in (1994) 2 SCC 723 and many other cases. Therefore, the last date of receipt of applications being 9th February, 2017, the Resolution dated 1st May, 2017 can have no application. Even otherwise, it is well settled that an administrative instruction or an executive order cannot be made with retrospective effect to the prejudice of an employee or to adversely affect accrued rights. Reference may be had to the decision of the Apex Court in the case of ***Ex-Major N.C. Singhal v. Director General, Armed Forces Medical Services***, reported in (1972) 4 SCC 765.

17. Coming to the facts of the case, it appears that the Petitioner participated in the 54th National School games organized by the Government of M.P., Directorate of Public Instruction under the aegis of School Games Federations of India. The certificate issued by the organizers is enclosed to the Writ Petition duly countersigned by the Asst. Director, Physical Education, Directorate of Secondary Education, Odisha. In the said games, the Petitioner had participated in National School Kho-Kho Championship.

18. Undoubtedly, the National School Games is a national event because of participation of sports persons (School Students) from all over the country. A reference to the Resolution dated 18th November, 1985 would show that the same was issued with the pious intent of promoting development of sports and games in the State as delineated in the opening paragraph thereof and quoted hereunder:

> *"In their Resolution No.1099 SC dt.16.2.1985 the Tourism, Sports and Culture (Sports & Culture) Department have decided to adopt a Sports Policy broadly in keeping (sic) with the National Policy Guidelines for ensuing systematic and concerted efforts for development of sports and games in the State. Besides certain other facilities provided for the sportsmen under the sports policy, a decision has also been taken that one percent of the jobs in the Government and public sector organizations will be kept reserved for deserving sportsmen representing the State subject to their meeting the minimum educational requirements."*

A plain reading of the above paragraph would suggest that the policy decision was taken with a view to ensure development of sports and

games in the State as also to incentivize the sports persons by providing reservation in jobs in the Government/private sector organizations. There is not a whisper that such benefit was intended only for sports persons, who had participated in the Senior National events. Such an interpretation would run entirely contrary to the very spirit of the resolution itself which does not lay down any such restrictions. Even otherwise, it does not stand to reason that while a sports person participating in Senior National events would be given the benefit, a person at the Junior Level will be deprived of the same. It would be a fallacious proposition.

19. On a conspectus of the analysis made herein before, this Court is of the considered view that the Petitioner having participated in the 54th National School Games held in the State of M.P. in the year, 2008 must be held to have fulfilled the eligibility criteria laid down in the Resolution dated 18th November, 1985 for being issued with the necessary Identity Card by the Director, Sports. As already stated, the decision of the Government in the Department of Sports to reject the application of the Petitioner by referring to the provisions of Resolution dated 1st May, 2017 cannot be countenanced in law as the same can have no retrospective application to the facts of the present case. For such reasons, therefore, the impugned orders dated 3rd May, 2018 and 11th May, 2022 cannot be sustained in the eye of law.

20. Given the facts of the case and the law involved therein the question that now arises is what relief can be granted to the petitioner. Obviously, this Court having held that the impugned order dated 03.05.2018 followed by order dated 11.05.2022 cannot be sustained in the eye of law for the reasons spelt out in detail in the preceding paragraphs. Resultantly, the said orders are quashed. The opposite party No.5 is directed to issue Sports Identity Card in favour of the petitioner within a period of four weeks. The petitioner has also prayed for direction to appoint him as Sikshya Sahayak. It is stated at the bar that the Scheme of Sikshya Sahayak has in the meantime been abolished by the Government w.e.f. 2019. Law is well settled that the High Court cannot direct the State Government by a writ of mandamus to appoint a person against a post which has been abolished. Reference may be had to the decision of the Apex Court in the case of ***Balakrushna Behera v. Satya Prakash Dash***, reported in (2008) 1 SCC 318. In such view of the matter, despite finding that the petitioner was wrongly denied appointment, this Court unfortunately cannot grant the desired relief to him because of abolition of the post in the meantime.

21. In the facts and circumstances of the case and particularly, having regard to the fact that despite being found suitable for appointment as Sikshya Sahayak at the relevant time he was prevented from being so appointed not due to any fault of his own but because of an erroneous interpretation of the relevant Resolution of the Government, this Court directs the opposite party authorities to consider the case of the petitioner sympathetically for his appointment against any equivalent post if he is found otherwise eligible for the same.

22. The writ petition is disposed of accordingly.

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2022 (III) ILR - CUT- 243

A.K. MOHAPATRA, J.

CRLREV NO. 437 OF 2021

YASWIN KUAMR WAGHELA .....Petitioner

.V.

STATE OF ODISHA .....Opp. Party

CRLREV NO.285 OF 2021

SANA NAG @ SANA .....Petitioner

.V.

STATE OF ODISHA .....Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 167 (2) r/w Section 36 A (4) of Narcotics Drugs and Psychotropic Substances Act and Article 21 of the Constitution of India – Commission of offences punishable under section 20 (b)(ii)(c) of the NDPS Act – Legislative intention behind engagement of section 167(2) of Cr.P.C and duty of the Court – Enumerated and case laws discussed. (Para 24-29)

Case Laws Relied on and Referred to :-

1. (2021) 2 SCC 485 : M. Ravindran Vs. Intelligence Officer, Directorate of Revenue Intelligence.
2. 2001 (5) SCC 453 : Udaya Mohanlal Acharya Vs. State of Maharashtra.
3. 1994 (5) SCC 410 : Sanjay Dutt Vs. State Through C.B.I. Bombay.
4. 1996 SCC(4) 602 : Hitendra Vishnu Thakur Vs. State of Maharashtra.
5. (1996) 1 SCC 432 : State through CBI Vs. Mohd. Ashraft Bhat & Anr.
6. 1996 SCC(1) 718 : Dr. Bipin Shantilal Panchal Vs. State of Gujrat.

7. (1996) 1 SCC 722 : Mohd. Iqbal Madar Sheikh Vs. State of Maharashtra.
8. (2017) 15 SCC 67 : Rakesh Kumar Paul Vs. State of Assam.
9. (2021) 81 OCR-694 : Naresh Digal Vs. State of Odisha.
10. A.I.R. 1979 SC 1377 : Hussainara Khatoon Vs. Home Secretary.
11. A.I.R. 1994 S.C. 2623 : Hitendra Vishnu Thakur Vs. State.
12. 2001(II) OLR 290 : Udaya Mohanlal Vs. State of Maharashtra.
13. (2017) 68 OCR (SC) : Rakesh Kumar Vs. Paul Vs. State of Assam.
14. (2021) 2 SCC485 : M.Ravidran Vs. Intelligence Officer, directorate of Revenue Intelligence.

CRLREV NO.437 OF 2021

For Petitioner : Mr. P.K. Sahoo,S.K. Baral, S.P. Sahoo & J. Sahoo
For Opp. Party : Mr. P.C. Das, Addl. Standing Counsel

CRLREV NO.285 OF 2021

For Petitioner : Mr. Asit Kumar Jena & S. Rout
For Opp. Party : Mr. P.C. Das, Addl. Standing Counsel

JUDGMENT Date of Hearing :19.05.2022 :Date of Judgment :30.09.2022

A.K. MOHAPATRA, J.

On consent of learned counsels for both the parties, both the Criminal Revisions are taken up for disposal by the common judgment.

1. The present criminal revision petitions have been filed by the petitioner under Section 401 read with Section 397 of the Code of Criminal Procedure, 1973 (in short 'the Cr.P.C.') challenging the order dated 09.07.2021 passed by the learned Additional Sessions Judge-cum-Special Judge, Malkangiri thereby rejecting the petition under Section 167(2), Cr.P.C. for their release on default bail in connection with Malkangiri P.S. Case No.122 of 2017 corresponding to C.T. Case No.67 of 2017 pending in the court of learned Additional Sessions Judge-cum-Special Judge, Malkangiri for commission of offence punishable under Section 20(b)(ii)(C) of the N.D.P.S. Act.

2. The prosecution story, as revealed from the F.I.R. in gist, is that on 10.08.2017 the I.I.C. Malkangiri P.S. lodged a plain paper F.I.R. inter alia alleging that on 10.08.2017 at about 10.10 P.M. on getting reliable information from reliable sources that a huge quantity of contraband ganja is being transported in a Oil Tanker, which is coming from the side of Padmagiri towards Sukuma via Malkangiri, he made Station Diary Entry by S.D.E. No.21 dated 09.08.2017. Thereafter, the informant along with the

police team went to the spot to verify the authenticity of the information. While leaving the Police Station, he had taken two independent witnesses, namely, Rajaram Suna and Kalidas Sagaria along with him. At about 6.30 A.M., the informant along with his police team intercepted one Oil Tanker bearing Registration No.GJ-6-TT-6696. Thereafter raid was conducted and no member would accused persons to escape from the spot. On search, the informant found three persons inside the vehicle. On being asked the driver of the vehicle disclosed his identity as Yaswin Kumar Waghela and the other two persons disclosed their identity as Sana Nag and Raghunath Kalakura. Further, on being questioned the accused persons admitted that they were transporting the contraband ganja, which were kept concealed in the said Tanker. It is further stated in the plain paper F.I.R. that while conducting search and seizure, the informant had followed mandatory requirements under Section 50(1) of the N.D.P.S. Act. Further search was conducted in presence of the Executive Magistrate. On the search of the vehicle, the informant recovered bulk quantities of contraband ganja in the Tanker and after weighment it was found that total quantity of 1533 Kgs. 500 grams of contraband ganja were kept in different packets inside the Tanker. Further it is stated in the F.I.R. that after drawing samples from the seized contraband ganja, the same were sent for chemical examination by following proper procedure. After complying with the procedure of the requirement, the informant drawn plain paper F.I.R. which was later on registered as Malkangiri P.S. Case No.122 of 2017.

3. As is revealed from the aforesaid facts, the occurrence took place on 10.08.2017 and the F.I.R. was registered for commission of offence punishable under Section 20(b)(ii)(C) of the N.D.P.S. Act on 10.08.2017, the petitioners along with others were arrested at the spot and forwarded to the court on 11.08.2017. While the petitioners were in custody, the investigation of the case is continuing. However, charge-sheet could not be filed within the statutory prescribed time limit of 180 days as has been prescribed under Section 36-A(4) of the N.D.P.S. Act, 1985. Therefore, pursuant to the proviso to Section 36-A(4) of the N.D.P.S. Act, the Investigating Officer filed a petition on 07.02.2018 seeking extension of time for submission of charge-sheet.

4. While the matter stood thus, the learned counsel appearing for the petitioners moved an application on 13.02.2018 under Section 167(2), Cr.P.C. seeking release of the petitioners on default bail. Learned Additional

Sessions Judge-cum-Special Judge, Malkangiri rejected the prayer of the petitioner vide his application dated 13.02.2018 by order dated 21.02.2018 and further went on allowing the Investigating Officer ninety days additional time to complete the investigation finally on 03.07.2018, the Investigating Officer submitted final charge-sheet against the present petitioners as well as other accused persons.Vide order dated 09.07.2021, the learned Additional Sessions Judge-cum-Special Judge, Malkangiri has again rejected the prayer of the petitioners for their release on default bail. The present revision applications have been filed challenging the order dated 09.07.2021 whereunder the applications of the petitioners under Section 167(2), Cr.P.C. for releasing them on default bail have been rejected by the learned court below.

5. For better understanding of the facts of the case, the relevant dates which are to be kept on while considering the present applications and while applying the law are presented in a tabular form herein below:-

Sl. No.	Date	Events
01.	10.08.2017	F.I.R. registered and petitioners arrested
02.	11.08.2017	Petitioners along the co-accused persons forwarded to the court
03.	07.02.2018	Application under Section 36-A(4) Proviso-II applications have filed for seeking extension of time.
04.	13.02.2018	Petition under Section 167(2), Cr.P.C. filed by the petitioners
05.	21.02.2018	167(2), Cr.P.C. petitions rejected and time to conclusion for investigation extended by 90 days
06.	03.07.2018	Final charge-sheet filed
07.	09.07.2021	Prayer for default bail rejection again

6. Heard Mr. A. K. Jena, learned counsel appearing for the petitioners as well as Mr. P.C. Das, learned Additional Standing Counsel for the State. Perused the case record and other relevant materials placed before this Court for consideration.

7. Mr. Jena, learned counsel appearing for the petitioners, at the outset, submits that admittedly the charge-sheet has not been filed within the statutory stipulated time of 180 days. Therefore, he can be safely concluded that the investigation has not been completed with the statutorily mandatory time period. He further submits that the statutory period of 180 days was completed on 08.02.2018, however, the Investigating Officer, who could not

complete the investigation by 08.02.2018 filed an application under Section 36-A(4) proviso for extension of time on 13.02.2018. He further contends that the application under Section 36-A(4) proviso had been filed by the Investigating Officer almost seven days after the petition filed by the petitioners under Section 167(2), Cr.P.C. Therefore, he further submits that by the time, the application for extension of time to submit charge-sheet was filed, a valuable right as accrued crystallized in favour of the petitioners to be released on default bail in view of the provisions contained under Section 167(2), Cr.P.C. It is further contended by Mr. Jena, learned counsel appearing for the petitioners submits that the law is fairly well settled that the provisions contained in Section 167(2), Cr.P.C. is applicable to the case registered under the N.D.P.S. Act.

8. Learned counsel for the petitioners further contends that before Investigating Officer could make a prayer on 13.02.2018 seeking extension of time and before time could be extended by the trial court, an indefeasible right had accrued in favour of the petitioners on presentation of application under Section 167(2), Cr.P.C. on 07.02.2018. He further emphatically submits that while considering the application for extension of time under Section 36-A(4) proviso, the learned court below is under legal obligation to provide an opportunity of hearing to the petitioners, however, the same has not been done in the present case as no opportunity of hearing was given to the petitioner before extending the time to submit the final charge-sheet by further period of 90 days. He further contends that the court which is duty bound to inform the petitioners upon expiry of 180 days of their valuable right to be enlarged on default bail, has failed to do so in the present case. Therefore, learned counsel for the petitioners submits that the learned court below has acted in a manner which is gross violation of the procedure prescribed by law. On such ground, learned counsel for the petitioners urges before this Court that the order passed by the learned court below is bad in law and infringes the valuable right of the petitioners to be released on default bail subject to petitioners protesting the bail bond as would be fixed by the learned court below. He further contends that the extension of time granted by the learned trial court to complete the investigation and to file charge-sheet by further period of 90 days which is also gross violation of statutory provision and the procedure and as such, the same is liable to be set aside by this Court. It is further contended by Mr. Jena, learned counsel for the petitioners that the learned court below has failed in its duty by not releasing the petitioner on default bail and by not considering the facts of the

present case in the light of the statutory provisions and as such, the impugned order which has been passed in a mechanical manner by rejecting the application of the petitioner is liable to be set aside.

9. Per contra, learned Additional Standing Counsel appearing for the State-opposite party submits that the petitioners along with other co-accused persons were remained to the judicial custody on 11.08.2017 and therefore, in view of the provisions contained in Section 36-A(4), proviso charge-sheet should have been submitted within a period of 180 days from the date of remand. Therefore, according to him, the charge-sheet should have been filed on or before 08.02.2018. Since the Investigating Officer could not complete the investigation and he could not submit final charge-sheet in time i.e. 08.02.2018, the Investigating Officer made an application under Section 36-A(4) proviso for extension of time to conclude the investigation and to submit the final charge-sheet. Such prayer for extension of time, at the behest of the Investigating Officer was duly considered by the learned court below and vide order dated 21.02.2018 the time to complete the investigation to file final charge-sheet was extended by further period of 90 days. Thereafter, the charge-sheet has been filed within the extended period. As such, learned counsel for the State submits that the trial court has not committed any illegality whatsoever in rejecting the application of the petitioners under Section 167(2), Cr.P.C. and further refusing to release the petitioners on default bail.

10. Further relying upon the judgments of the Hon'ble Supreme Court of India in the case of ***M. Ravindran vs. Intelligence Officer, Directorate of Revenue Intelligence***, reported in ***(2021) 2 SCC 485***, learned counsel for the State submits that where accused fails to apply for default bail when right accrues to him and subsequently charge-sheet additional complaint or report seeking extension of time as granted by Magistrate, right to default bail would be extinguished.

11. In ***M. Ravindran's case*** (supra) relied upon by the learned counsel for the State that the accused person was remanded to judicial custody on 04.08.2018 and after completion of 180 days from the date of remand, i.e. on 31.01.2019, the Petitioner filed application for bail u/s.167(2) of Cr.P.C. on 01.02.2019 before the trial court on the ground that the investigation was not completed and the charge-sheet has not been filed. Accordingly, on 05.02.2019, the trial court enlarged the accused Petitioner on bail u/s.167(2)

of Cr.P.C., which was challenged before the High Court of judicature at Madras. Hon'ble High Court of Madras by its judgment allowed the appeal and subsequently cancelled the order granting default bail to the accused Petitioner. Being aggrieved by the order of the Madras High Court, Hon'ble Supreme Court of India after analyzing the provision of Section 167(2) of Cr.P.C. as well as Section 36-A(4) of N.D.P.S. Act and relying upon the case of ***Udaya Mohanlal Acharya vs. State of Maharashtra***, reported in ***2001 (5) SCC 453***, allowed the appeal and upheld the release of the accused under Section 167(2), Cr.P.C.

> 12. In the case of ***M. Ravindran*** (supra), Hon'ble Supreme Court in paragraph 17.1 of the said judgment held that "*Article 21 of the Constitution of India provides that 'no person shall be deprived of his life or personal liberty except according to procedure established by law*". It has been settled by the Constitution Bench of this Court in ***Maneka Gandhi vs. Union of India***, reported in ***(1978) 1 SCC 248***, that such a procedure cannot be arbitrary, unfair or unreasonable. Further it has been held that the history of the enactment of Section 167(2) Cr.P.C. and the safeguard of "default bail" contained in the proviso thereto is intrinsically linked to Article 21 and is nothing but a legislative exposition of the constitutional safeguard that no person shall be detained except in accordance with rule of law. While saying so, the Hon'ble Supreme Court of India has relied upon paragraph-13 of the judgment in the case of ***Uday Mohanlal Acharya*** (supra), which is extracted herein below: "13. … it is also further clear that indefeasible right does not survive or remain enforceable on the challan being filed, if already not availed of, as has been held by the Constitution bench in Sanjay Dutta case. The crucial question that arises for consideration, therefore, is what is the true meaning of the expression "if already not availed of"? Does it mean that an accused files an application for bail and offers his willingness for being released on bail or does it mean that a bail order must be passed, the accused must furnish the bail and get him released on bail? In our considered opinion it would be more in consonance with the legislative mandate to hold that an accused must be held to have availed of his indefeasible right, the moment he files an application for being released on bail and offers to abide by the terms and conditions of bail. To interpret the expression "availed of" to mean actually being released on bail after furnishing the necessary bail required would cause great injustice to the accused and would defeat the very purpose of the proviso to Section 167(2) of the Criminal Procedure Code and further would make an illegal custody to be legal, inasmuch as after the expiry of the stipulated period the Magistrate 28 had no further jurisdiction to remand and such custody of the accused is without any valid order of remand. That apart, when an accused files an application for bail indicating his right to be released as no challan had been filed within the specified period, there is no discretion left in the Magistrate and the only thing he is required to find out is whether the specified period under the statute has elapsed or not, and whether a challan has been filed or not. If the expression "availed of" is interpreted to mean that the accused must factually be released on bail, then in a given case where the Magistrate illegally refuses to pass an order notwithstanding the maximum period

> stipulated in Section 167 had expired, and yet no challan had been filed then the accused could only move to the higher forum and while the matter remains pending in the higher forum for consideration, if the prosecution files a chargesheet then also the so-called right accruing to the accused because of inaction on the part of the investigating agency would get frustrated. Since the legislature has given its mandate it would be the bounden duty of the court to enforce the same and it would not be in the interest of justice to negate the same by interpreting the expression "if not availed of" in a manner which is capable of being abused by the prosecution…. There is no provision in the Criminal Procedure Code authorising detention of an accused in custody after the expiry of the period indicated in proviso to sub-section (2) of Section 167 excepting the contingency indicated in Explanation I, namely, if the accused does not furnish the bail. It is in this sense it can be stated that if after expiry of the period, an application for being released on bail is filed, and the accused offers to furnish the bail and thereby avail of his indefeasible right and then an order of bail is passed on certain terms and conditions but the accused fails to furnish the bail, and at that point of time a challan is field, then possibly it can be said that the right of the accused stood extinguished. But so long as the accused files an application and indicates in the application to offer bail on being released by appropriate orders of the court then the right of the accused on being released on bail cannot be frustrated on the off chance of the Magistrate not being available and the matter not being moved, or that the Magistrate erroneously refuses to pass an order and the matter is moved to the higher forum and a challan is filed in interregnum. This is the only way how a balance can be struck between the so-called indefeasible right of the accused on failure on the part of the prosecution to file a challan within the specified period and the interest of the society, at large, in lawfully preventing an accused from being released on bail on account of inaction on the part of the prosecuting agency."

Accordingly, the Hon'ble Supreme Court while setting aside the judgment passed by the Hon'ble Madras High Court has affirmed the judgment of the trial court and the judgment granting the benefit of default bail to the accused in the reported case was affirmed by the Hon'ble Supreme Court of India. Therefore, the judgment in ***M. Ravindran's case*** (supra) no way helps the argument advanced by the learned counsel appearing for the State. On the contrary, the same supports the case of the Petitioners in the instance revision petition.

13. It is apt to mention here that the law with regard to default bail i.e. indefeasible right accruing in favour of the accused Petitioners to be released on bail in the event the Investigating Agency fails to conclude the investigation and file the charge-sheet within the time stipulated by the statute. The law in this regard is no more res integra. The law laid down by the Hon'ble Supreme Court in the case of ***Sanjay Dutt vs. State Through C.B.I. Bombay***, reported in ***1994 (5) SCC 410***, ***Hitendra Vishnu Thakur vs. State of Maharashtra***, reported in ***1996 SCC(4) 602***, State through ***CBI vs***

.Mohd. Ashraft Bhat & anr., reported in ***(1996) 1 SCC 432***, in the case of ***Dr. Bipin Shantilal Panchal vs. State Of Gujrat***, reported in ***1996 SCC(1) 718***, in the case of ***Mohd. Iqbal Madar Sheikh vs. State of Maharashtra***, reported in ***(1996) 1 SCC 722***. Further, the Hon'ble Supreme Court of India while considering the scope and ambit and the rights of the accused u/s.167(2) of Cr.P.C. and while laying down certain seminal principles with regard to interpretation of Section 167(2) of Cr.P.C. in the case of ***Rakesh Kumar Paul vs. State of Assam***, reported in ***(2017) 15 SCC 67***, Hon'ble Supreme Court of India in paragraphs-29 and 41 of the said judgment held as under:

> 29. Notwithstanding this, the basic legislative intent of completing investigations within twenty-four hours and also within an otherwise time-bound period remains unchanged, even though that period has been extended over the years. This is an indication that in addition to giving adequate time to complete investigations, the Legislature has also and always put a premium on personal liberty and has always felt that it would be unfair to an accused to remain in custody for a prolonged or indefinite period. It is for this reason and also to hold the investigating agency accountable that time limits have been laid down by the Legislature. There is a legislative appreciation of the fact that certain offences require more extensive and intensive investigations and, therefore, for those offences punishable with death or with imprisonment for life or a minimum sentence of imprisonment for a term not less than 10 years, a longer period is provided for completing investigations.
>
> 41. We take this view keeping in mind that in matters of personal liberty and Article 21 of the Constitution, it is not always advisable to be formalistic or technical. The history of the personal liberty jurisprudence of this Court and other constitutional courts includes petitions for a writ of habeas corpus and for other writs being entertained even on the basis of a letter addressed to the Chief Justice or the Court.

14. In the case of ***S. Kasi vs. State through the Inspector of Police, Samaynallur Police Station, Madurai District*** (Criminal Appeal No.452 of 2020), the Hon'ble Supreme Court of India was again considering the scope, ambit and right of the accused under Section 167(2) of Cr.P.C. After carefully analyzing the facts of that case and after taking note of several Supreme Court judgments, finally the Apex Court observed that the indefeasible right to default bail under Section 167(2) Cr.P.C. is intrinsically linked to Article 21 and is nothing but a legislative exposition of the constitutional safeguard that no person shall be detained except in accordance with rule of law and further the said right to bail cannot be suspended even during the situation as is prevailing currently. Further it was emphasized by Hon'ble Apex Court that the right of the accused to be set at liberty takes the

precedent over the right of the State to conduct the investigation and submit the charge-sheet.

15. Learned counsel for the Petitioners has relied upon the following judgment in support of his contention as has been raised in the present case:

(i) Suo Motu ***W.P.(C) No.3 of 2020***, decided on 23.03.2020;

(ii) In the case ***of S. Kasi vs. State through the Inspector of Police, Samaynallur P.S., Madurai District***, decided on 19.06.2020;

(iii) In the case of ***Lambodar Bag vs. State of Odisha, BLAPL No.7337 of 2017***, decided on 16.05.2018;

(iv) Judgment in the case of ***Iswar Tiwari vs. State of Orissa in BLAPL No.10152 of 2019***;

(v) Judgment in the case of ***Naresh Digal vs. State of Odisha in BLAPL No.4652 of 2020***, decided on 27.01.2021

16. Reverting back to the facts of the present case and upon perusal of the case record in C.T. Case No.67 of 2017 this Court observed that the accused persons were forwarded and produced before the learned court below on 11.08.2017 and thereafter by a judicial order he was remanded to jail custody. Further, perusal of the order-sheet of the case record bearing C.T. Case No.67 of 2017, it is seen that the order dated 07.02.2018, the following order was passed:-

> "07.02.2018 The case record is put up today on the receipt of the petitioner from the I.O. wherein it is prayed for extension of time for investigation of the case for another 180 days on the grounds stated therein.
>
> Copy of the petition has been served upon the ld. Spl. P.P. P.O. is out on training. Put up on 20.2.18 before the P.O. for consideration of petition.
>
> (Dictated)
> S.J., Mkg I/c."
>
> On 13.02.2018, leaned Special Judge, In-charge, Malkangiri passed the following orders:-
>
> "13.2.18. Accused persons are produced from jail custody F.F. not yet received. All on 26.2.18 for awaiting F.F. P.O. is out on training.
>
> Accused persons are remanded to jail custody till date.
>
> (Dictated)
> S.J., Mkg I/c."

"Later

13.2.18 Advocate for the accused persons, namely A Waghel and two others have filed a petition u/s. 167(2) Cr.P.C. praying to release the said accused persons on bail on the grounds stated therein. Copy of the petition has been served upon the ld. Spl. P.P. is out on training. Put up on 20.2.2018 for consideration of petition.

(Dictated)
S.J., Mkg I/c."

On further scrutiny of the order-sheet it appears that although the case was posted to 20.02.2018 for consideration of the petition filed by the I.O. on 07.02.2018 and the bail petition filed by the accused persons to release them on default bail. However, learned advocate for the accused persons filed petition praying for time on the grounds stated therein.

Accordingly, the case was adjourned to 21.2.18.

21.2.18. The petitions were heard and the order was reserved.

"Later
21.02.18 The petition filed by the I.O. was allowed and the time to conclude the investigation was extended by further period of 90 days. Further petition filed by the accused petitioner under Sectgion 167(2), Cr.P.C. was rejected."

On close scrutiny of the order dated 21.02.2018 it appears that the petition filed by the petitioners under Section 167(2), Cr.P.C. was taken up first and the same was rejected by non-speaking order. Further, by composite order dated 21.08.2018, the petition filed by the I.O. for extension of time to complete the investigation has been allowed without hearing the petitioner. On such extension petition and further while allowing the said petition and extending the period by further period of 90 days, learned court below has not discussed anything.

17. Upon perusal of the entire order-sheets, this Court found that the petitioners were initially remanded to judicial custody on 11.08.2017. Thereafter, the trial could not be concluded within the stipulated period of time of 180 days. Further the I.O. filed an application for extension of time on 07.02.2018. While the said petition was pending, the accused persons filed an application under Section 167(2), Cr.P.C. on 13.02.2018 for their release on default bail. The said bail applications as well as extension petitions were taken up on 21.02.2018. By order dated 21.02.2018, learned court below had rejected the prayer of the petitioners while extending the time by a further period of 90 days. Further, taking into consideration the extension of period of time, the charge-sheet should have been filed by 7th of

May, 2018. On 02.05.2018, learned counsel for the petitioners again filed a petition to release the accused persons on bail, which was also rejected by the learned trial court on the very same day. On perusal of the order dated 16.05.2018, it appears that the accused persons were produced from jail custody before the learned trial court. Further by then, the final form had not been received. Therefore, the case was adjourned to 30.05.2018 awaiting final form.

18. On verification of the order-sheets, it is also seen that on 19.05.2018, another petition was filed by the I.O. seeking extension of time by another 90 days. A copy of which had been served on learned Spl. P.P. Thereafter, the matter was posted to 30.05.2018 for hearing by the said petition. On perusal of the order dated 30.05.2018, it reveals that the final form had also not filed by then. Therefore, the matter was posted to 02.06.2018 awaiting F.F. The accused persons were remanded to jail custody. On 30.05.2018, later on another order has been passed by the learned trial court, which reveals that the learned trial court has mechanically extended the time to complete the investigation as prayed for by the Investigating Officer in exercise of power under Section 36(D)(ii) of the N.D.P.S. Act. On careful consideration of the said order, this Court is of the considered view that the learned trial court has dealt with the matter in a very casual and callous manner inasmuch as no reason has been given as to why the time was extended by a further period of 90 days. Further said order also does not reveal as to whether before granting such extension, leaned court below had provided any liberty to the accused as well as learned Spl. P.P.. Moreover, the provision of law quoted in the said order is not applicable to the present scenario and circumstances. Finally, the order dated 10.07.2018 reveals that the charge-sheet was filed and accepted by order dated 10.07.2018. Thereafter vide order dated 06.09.2018, the learned Sessions Judge-cum-Special Judge, Malkangiri transferred the case to the court of Additional Sessions Judge, Malkangiri for disposal in accordance with law, which was received by the transferee court on 07.09.2018. Further, it appears from the order dated 26.10.2018, the hearing of charge took place and accordingly, charge has been framed under Section 20(b)(ii)(C) of the N.D.P.S. Act and explained by the Additional Sessions Judge-cum-Special Judge, Malkangiri.

19. While the matter was being adjourned from time to time, on different grounds including on the ground outbreak of Covid-19, 09.07.2021 a petition was filed under Section 167(2), Cr.P.C. on behalf of the accused Yaswin

Kumar Waghela and Sana Nag @ Sana to release them on default bail. The said petition was taken up for hearing on 09.07.2021 and vide order dated 09.07.2021, the petition filed by the petitioner under Section 167(2), Cr.P.C. was rejected on the ground that earlier petition of the petitioner had been rejected vide order dated 21.02.2018.Therefore, the petition dated 09.07.2021 is not maintainable and accordingly, the same was rejected.

20. The present revision petition has been filed as against the order dated 09.07.2021 passed by the learned Additional Sessions Judge-cum-Special Judge, Malkangiri. On perusal of the order dated 09.07.2021, it appears that the learned counsel appearing for the petitioner took the ground(i) charge-sheet has not been filed within the statutory prescribed time limit (ii) neither copy of the extension petition was served on learned counsel for the petitioner nor he was provided any opportunity of hearing while extending the time to complete the investigation, (iii) while passing the impugned order, the learned court below has not taken note of law laid down by this Court in the case of ***Naresh Digal vrs. State of Odisha*** ; reported in ***(2021) 81 OCR-694***. Without dealing the points raised by learned counsel for the petitioner that the specifically it appears the learned trial court has rejected the petition filed by the learned counsel for the petitioner under Section 167(2), Cr.P.C.

21. This Court on a detailed scrutiny of the trial court record and the order-sheet it is found that extension of time to complete the investigation was sought for by the Investigating Officer on two occasions. On both the occasions, copy of the petition seeking extension of time has not been served on learned counsel for the petitioner, at least there is no record to come to a conclusion that copy of such petition was in fact served either on the petitioner or on the counsel. Further on perusal of the order-sheet, this Court has absolutely no doubt in mind that no opportunity of hearing was provided to the petitioner appeared granting extension of time to the Investigation Officer to conclude the investigation. Further this Court is also of the considered view that the court below has failed in this duty to inform the accused petitioner of his right to be released on default bail under Section 167(2), Cr.P.C. when the final form was not submitted within the statutory prescribed period or even accepting that the first extension of time was valid for the sake of argument within such extended time.

22. So far as the duty of the court to inform the accused petitioner about his right under Sub-section (2) of section 167(2) of the Cr.P.C. the

observation of the Hon'ble Supreme Court in the case of ***Hussainara Khatoon vrs. Home Secretary*** : reported in ***A.I.R. 1979 SC 1377*** is very relevant. In the above mentioned case, it was held by the Hon'ble Supreme Court that when an U.T.P. is produced before the Magistrate and he has been in any confinement more than a statutory period, the Magistrate must before passing any order, further remand to judicial custody point out to the Under Trial Prisoner that he is entitled to be released on bail. The Hon'ble Apex Court further observed that the State Government must also provide on its own cost a lawyer to the UTP with a view to enable him to apply for bail in exercise of his right under the proviso to Section 167(2)(1), Cr.P.C. and the Magistrate must take care to ensure that the right of UTP to get legal assistance as provided to him at States expanses. Similarly, in the case of ***Hitendra Vishnu Thakur vrs. State*** ; reported in ***A.I.R. 1994 S.C. 2623***, the Hon'ble Apex Court has held that report as submitted by the Public Prosecutor to the designated court for grant of extension of time, it is **made clear that** notice should be issued to the accused before granting such extension so that the accused may have an opportunity to oppose the extension of legitimate and legal grounds available to him. While coming to such a conclusion, the Hon'ble Apex Court is quite conscious of the fact that no such provision is in the TADA Act to provide any opportunity to the accused or to be an accused in notice before granting extension of time to conclude the investigation. However in the interest of justice and to maintain fairness and transparency in the trial, the Hon'ble Supreme Court deemed it proper to laid down the aforesaid principle whereby the trial court before granting extension is duty bound to provide an opportunity of hearing to the accused. This Court, at this juncture, also made in the aforesaid context that by granting extension of time to complete the investigation the right which has been conferred an opportunity on an accused under Section 167(2), Cr.P.C. is being curtailed or taken away. Further, said right is very valuable right since the same deals with the opportunity of U.T.Ps. under a given scenario. Therefore, it would be just, fair and proper that an opportunity of hearing is required to be given to the U.T.Ps. while taking away or curtailing his right to release on default bail in the event investigation is not concluded within the statutory prescribed time limit. The aforesaid principle has also been followed by this Court in the case of ***Lambodar Bag vrs. State of Orissa*** in ***BLAPL No.7337 of 2017*** and decided on 16.05.2018.

23. Similarly, Hon'ble Supreme Court in the case of ***Udaya Mohanlal vrs. State of Maharashtra*** : reported in ***2001(II) OLR 290*** has held that on

expiry of period of 90 days or 60 days as the case may be indefeasible right accrued in favour of the petitioner of release on bail on account of default by the Investigating Agency in completion of within the period prescribed and the accused is entitled to be released on bail, if he required to furnish bail bond as directed by the Magistrate. It was also held by the Apex Court in the aforesaid judgment that expiry of the statutory period under Section 167(2), Cr.P.C., if the accused files an application for bail and offers to furnish bail bond, then it has to be held that the accused as availed indefeasible right even though the court has not considered the said application and has not indicated the terms and conditions of bail and the accused has not furnished the same. It was also held that if an accused is entitled to be released on bail, Section 167(2) Cr.P.C., makes an application before the Magistrate, but the Magistrate erroneously refuses the same and rejects the application and then the accused moves higher forum and while the matter remain pending before the higher forum for consideration, charge-sheet is filed, the so-called indefeasible right of the accused would not stand extinguish thereby and on the other hand, the accused has to be released on bail. In a recent decision of the Hon'ble Supreme Court of India in the case of ***Rakesh Kumar vrs. Paul vrs. State of Assam*** : reported ***(2017) 68 OCR (SC)***[1] a similar view has been taken and it has been observed that in the matter of prisoner liberty, the court cannot and should not be to tangle and most lean in favour of prisoner liberty. Consequently, whether the accused makes a return application for default bail or an oral application for default on bail is of no consequences. The concerned court must deal with such application by considering the statutory requirement, namely, whether the statutory period of filing of charge-sheet for challan has expired? Whether the charge-sheet or challan has been filed? Whether the accused is prepared to furnish bail? It is observed in the very same judgment that in the matters concerning the prisoner liberty and penal status, it is an obligation of the court to individually court he or she is entitled to legal assistance as a matter of right. The Hon'ble Apex Court reported the contention raised since the charge-sheet having been filed against the petitioner, he is not entitled to default bail and further, it was on held that the court is concerned that the period during which the charge-sheet was supposed to be filed and the same has not been filed. Further, it is observed things should have been different while the accused not supplied for default bail whatever reason during the said interregnum partly. It was also observed that when the accused on voluntarily case up indefeasible right of default bail and having forfeited their rights,

some accused grant after the final form or challan has been filed claimed **rejection** of the indefeasible right.

24. In a very recent judgment, while dealing with identical issue, the Hon'ble Supreme Court held in a case of ***M.Ravidran vrs. Intelligence Officer, directorate of Revenue Intelligence*** : reported in ***(2021) 2 Supreme Court Cases-485*** as discussed issue threadbare by taking into consideration the legislative intention behind engagement of Section 167(2), Cr.P.C. further in the said context they have also referred to the report of the Law Commission arrived at the following conclusion:-

"**Conclusion**

24. In the present case, admittedly the appellant-accused had exercised his option to obtain bail by filing the application at 10:30 a.m. on the 181st day of his arrest, i.e., immediately after the court opened, on 01.02.2019. It is not in dispute that the Public Prosecutor had not filed any application seeking extension of time to investigate into the crime prior to 31.01.2019 or prior to 10:30 a.m. on 01.02.2019. The Public Prosecutor participated in the arguments on the bail application till 4:25 p.m. on the day it was filed. It was only thereafter that the additional complaint came to be lodged against the appellant.Therefore, applying the aforementioned principles, the appellant-accused was deemed to have availed of his indefeasible right to bail, the moment he filed an application for being released on bail and offered to abide by the terms and conditions of the bail order, i.e. at 10:30 a.m. on 01.02.2019. He was entitled to be released on bail notwithstanding the subsequent filing of an additional complaint.

24.1. It is clear that in the case on hand, the State/the investigating agency has, in order to defeat the indefeasible right of the accused to be released on bail, filed an additional complaint before the concerned court subsequent to the conclusion of the arguments of the appellant on the bail application. If such a practice is allowed, the right under Section 167(2) would be rendered nugatory as the investigating officers could drag their heels till the time the accused exercises his right and conveniently files an additional complaint including the name of the accused as soon as the application for bail is taken up for disposal. Such complaint may be on flimsy grounds or motivated merely to keep the accused detained in custody, though we refrain from commenting on the merits of the additional complaint in the present case. Irrespective of the seriousness of the offence and the reliability of the evidence available, filing additional complaints merely to circumvent the application for default bail is, in our view, an improper strategy. Hence, in our considered opinion, the High Court was not justified in setting aside the judgment and order of the trial court releasing the accused on default bail.

24.2. We also find that the High Court has wrongly entered into merits of the matter while coming to the conclusion. The reasons assigned and the conclusions arrived at by the High Court are unacceptable.

25. Therefore, in conclusion:

25.1 Once the accused files an application for bail under the Proviso to Section 167(2) he is deemed to have "availed of" or enforced his right to be released on default bail, accruing after expiry of the stipulated time limit for investigation. Thus, if the accused applies for bail under Section 167(2), CrPC read with Section 36-A (4), NDPS Act upon expiry of 180 days or

> the extended period, as the case may be, the Court must release him on bail forthwith without any unnecessary delay after getting necessary information from the public prosecutor, as mentioned supra. Such prompt action will restrict the prosecution from frustrating the legislative mandate to release the accused on bail in case of default by the investigative agency.
>
> 25.2. The right to be released on default bail continues to remain enforceable if the accused has applied for such bail, notwithstanding pendency of the bail application; or subsequent filing of the charge-sheet or a report seeking extension of time by the prosecution before the Court; or filing of the charge-sheet during the interregnum when challenge to the rejection of the bail application is pending before a higher court.
>
> 25.3. However, where the accused fails to apply for default bail when the right accrues to him, and subsequently a charge-sheet, additional complaint or a report seeking extension of time is preferred before the Magistrate, the right to default bail would be extinguished. The Magistrate would be at liberty to take cognizance of the case or grant further time for completion of the investigation, as the case may be, though the accused may still be released on bail under other provisions of the CrPC.
>
> 25.4 Notwithstanding the order of default bail passed by the Court, by virtue of Explanation I to Section 167(2), the actual release of the accused from custody is contingent on the directions passed by the competent court granting bail. If the accused fails to furnish bail and/or comply with the terms and conditions of the bail order within the time stipulated by the court, his continued detention in custody is valid."

25. Keeping in view the aforesaid analysis of law particularly law laid down by the Hon'ble Supreme Court in the case of ***M.Ravidran vrs. Intelligence Officer, directorate of Revenue Intelligence***(supra) wherein the Hon'ble Supreme Court was called upon to consider the validity of Section 167(2), Cr.P.C. vis-à-vis provisions of N.D.P.S. Act, this Court now proceeds to apply the principle of law laid down by the Hon'ble Supreme Court on the facts of the present case at the outset.

26. At this juncture, it is made clear that learned counsel for the petitioners have not challenged the order dated 21.02.2018 for which the present revision application what he has challenged subsequent order dated 09.07.2021 rejecting the application under Section 167(2), Cr.P.C., however, while exercising the jurisdiction under Section 397 read with Section 401, Cr.P.C., this Court is not devoid of scope and jurisdiction to analyze the entire issues and come to a conclusion just and fair **conclusion**. This is more or so, when the issue involved in the present case deals with prisoner liberty of U.T.Ps. which has been guaranteed to him under Article 21 of the Constitution of India.

27. As discussed hereinabove, the investigation of the case was not completed within the statutorily stipulated period of time of 180 days. On

07.02.2018 an extension was sought for by the Investigating Officer before the court, the same was taken up and the accused filed an application under Section 167(2), Cr.P.C. and exercising his right to be released on default bail. Further, this Court, upon careful consideration of the record observed that the accused-petitioners were not informed about his right to be released on default bail and further, he was not served with a copy of the petitioners seeking extension of time was also not provided with an opportunity of hearing. Further, while passing order extending the time on 21.02.2018, the learned court below has also not taken note of the prosecution report. Similarly, the final form could not be filed within the extended time of 90 days which had expired on 19th May, 2018. Similarly, the accused was not informed of his right to be released on default bail and further neither a copy of the extension petition was served on the accused or their counsel, nor any opportunity of hearing was provided to the accused-petitioners. Moreover, no prosecution report was also called for as their mandatory provision under Section 36(A)(4) of the N.D.P.S. Act. Therefore, this Court is of the considered view that the learned trial court has miserably failed to follow the statutory procedure as well as the procedure laid down by the judgments of the Hon'ble Apex Court as well as this Court and as such, it has committed gross illegality of passing the order dated 21.02.2018 as well as 09.07.2021.

28. In such view of the matter, this Court is also of the considered view that the order dated 21.02.2018 as well as 09.07.2021 are unsustainable in law and therefore, the same are liable to be set aside and hereby the same are set aside, as the consequence, it is directed that the petitioners be released on default bail

29. In view of the above analysis of the factual position as well as analysis of relevant legal provisions and various judgments on the applicability of Section 167(2), Cr.P.C. to the facts of the present case, this Court is of the considered view that the learned court below has not acted in a manner as has been prescribed under Section 167(2), Cr.P.C. Further, keeping in view the position of law as has been analyzed and clarified by a catena of decisions of the Hon'ble Supreme Court of India as well as of this Court, this Court has no hesitation in setting aside the impugned order dated 21.02.2018 as well as 09.07.2021 passed by the learned Additional Sessions Judge-cum-Special Judge, Malkangiri in C.T. Case No.67 of 2017 and as such the present criminal revisions are hereby allowed. Further, it is directed that both the petitioners be released on bail by furnishing a bail bond of

Rs.50,000/- (rupees fifty thousand) each with two local solvent sureties each for the like amount to the satisfaction of the learned court in seisin over the matter subject to conditions that :-

I. The petitioners shall not indulge similar nature of criminal activities while on bail;

II. they shall not make any default in attending the court during trial on each date without fail;

III. they shall not tamper with the prosecution evidence or try to threaten or influence the witnesses in any manner whatsoever;

IV. they shall appear before the concerned Police Station and involve whereabouts on every fortnight and shall provide their addresses, mobile/telephone numbers and other details to the concerned IIC of the concerned Police Stations from time to time;

V. they shall not leave the jurisdiction of the Court in seisin over the matter without specific permission of the concerned court; and

VI. they shall file affidavits before the learned court below that he has not issued any passport or any other travel documents.

Violation of any of the terms and conditions shall entail cancellation of bail.

30. It is open for the court in seisin over the matter to impose other conditions as may be deemed just and proper.

31. With the aforesaid observation/direction, both the CRLREVS are allowed.

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2022 (III) ILR - CUT- 261

A.K. MOHAPATRA, J.

W.P.(C) NO. 4105 OF 2020

Dr. ANTARYAMI SAHOO .....Petitioner

.V.

COMMISSIONER-CUM-SECRETARY TO GOVERNMENT OF ODISHA, HEALTH AND FAMILY WELFARE DEPARTMENT & ANR. .....Opp. Parties

APPOINTMENT – Odisha Medical And Health Services (Method of Recruitment And Condition of Service) Rules, 2017 – Rule 7(a)(b) r/w clause 3 along with proviso of Advertisement No 13 of 2019-20 – The petitioner is overage for a period less than one and half year – He was rendering service under Government for four years – Whether entitled to get age relaxation in view of such earlier service? – Held, Yes –

The statutory authorities cannot deviate from the conditions of service; such overage can be condoned as per the provision made in Advertisement and Rules, 2017. (Para-14-17)

Case Laws Relied on and Referred to :-

1. AIR 1970 P &H 351: Arijit Singh Vs. State.
2. AIR 1975 SC 1331 : (1975) 1 SCC 421 : Sukhdev Singh Vs. Bhagat Ram.
3. AIR 1987 SC 1073 : (1987) 1 SCC 213 : Ambica Quarry Works Vs. State of Gujarat.
4. AIR 1973 SC 855 : Sirsi Municipality Vs. Cecelia Kom Francis Tellis.
5. (1993) 2 SCC 213 : M.A. Haque Vs. Union of India.
6. (1999) 6 SCC 49 : Purushottam Vs. Chairman, Maharashtra State Electricity Board.

For Petitioner : Mr. S.N. Pattnaik, P.Mohapatra and C.S. Panda

For Opp. Party : Mr. Y.S.P. Babu, A.G.A. (for Party No.1)
Mr. S.B. Jena (Opp.Party No.2)

JUDGMENT Date of Hearing :04.07.2022 :Date of Judgment :30.09.2022

A.K. MOHAPATRA, J.

1. The petitioner, who is a doctor, has filed this writ petition seeking to quash the notice dated 24.01.2020 under Annexure-12, so far as it relates to rejection of his application bearing Roll No. 100163 and Registration ID No.131920202612 mentioned at Serial 05 on the ground of overage, and to issue direction to the opposite parties to relax his overage for a period of less than one and half year as on 01.01.2020 and consider his application for recruitment to the post of Medical Officer (Assistant Surgeon) in Group-A (Junior Branch) of the Odisha Medical & Health Services Cadre under Health and Family Welfare Department, pursuant to advertisement no. 13 of 2019-20.

2. The factual matrix of the case, in a nutshell, is that the petitioner, having a brilliant academic career in matriculation examination and +2 examination, got himself admitted into MBBS course and passed the same in the year 2012 from the S.C.B. Medical college and Hospital, Cuttack. He completed the compulsory Rotating Housemanship for a period of 12 months from 18.10.2012 to 17.10.2013. After acquiring such qualification, the petitioner registered his name in the Orissa Council of Medical Registration, Bhubaneswar on 22.11.2013 and obtained the registration certificate vide Regd. No. 19046 of 2013. The petitioner served as Medical Officer on ad hoc basis vide Govt. Notification dated 01.03.2014 for a period of about four

years from 29.03.2014 to 22.04.2018 at Itamati PHC of Badapandusar CHC. Thereafter, the petitioner continuing as Junior Resident from 23.04.2018 in M.C.H. Baripada as a Government service by the last date of submission of application.

2.1. The Odisha Public Service Commission issued advertisement no. 13 of 2019-20 for recruitment to the post of Medical Officer (Assistant Surgeon) in Group-A (Junior Branch) of the Odisha Medical & Health Services cadre under Health and Family Welfare Department inviting online applications from the prospective candidates for recruitment to 3278 posts of Medical Officers. Pursuant to such advertisement, the petitioner applied for, but his application was rejected on the ground of "overage". Hence, this application.

3. Learned counsel for the petitioner argued with vehemence and contended that rejection of the application filed by the petitioner for recruitment to the post of Medical Officer (Assistant Surgeon) in Group-A (Junior Branch) of the Odisha Medical & Health Services cadre on the ground of overage is totally outcome of non-application of mind and, as such, contrary to the advertisement issued. He further contended that as per second proviso to Clause3 of the advertisement, the petitioner is eligible and entitled for age relaxation as he has served four years as Medical Officer and then Junior Resident from 23.04.2018 under the State Government. It is further contended that on receipt of application form, along with relevant documents, the same was scrutinized and the petitioner was allowed to participate in the written examination where he successfully qualified. In such eventuality, his application should not have been rejected. Therefore, rejection of the petitioner's application on the ground of "overage" after he comes out successful in the written test is not only illegal and arbitrary but also contrary to the guidelines issued in the advertisement itself. As such, the notice dated 24.01.2020 under Annexure-12 rejecting the application of the petitioner for recruitment to the post of Medical Officer may be quashed and opposite parties may be directed to recommend the name of the petitioner for recruitment to the post of Medical Officer.

4. Learned Government Advocate appearing for opposite party no.1 contended that pursuant to Rule-6 of the Odisha Medical and Health Services (Method of Recruitment and Conditions of Service) Rules, 2017 (for short "Rules, 2017"), the Government of Odisha, Health and Family Welfare Department, vide letter dated 28.10.2019, requested the opposite party no.2-

OPSC for recruitment of 3278 Asst. Surgeons in the rank of Group-A (Junior Branch) of the Odisha Medical & Health Services cadre during Page 6 of 23 the year 2019-20. Consequentially, opposite party no.2 issued the advertisement under Annexure-6. It is contended that Sub-rules (4) and (7) of Rule -6 of the Rules, 2017 require opposite party no.2 to prepare a list of candidates after adjudging the suitability of candidates in order of merit on the basis of career marking and written test which shall be equal to the number of advertised vacancies. Accordingly, opposite party no.1 received a list of 1403 selected candidates from opposite party no.2, vide OPSC letter dated 28.01.2020, and all selected candidates were given appointments vide Health and Family Welfare Department Notifications dated 04.03.2020 and 21.03.2020. It is contended that the OPSC- opposite party no.2, being the recruiting agency, has evaluated the suitability and eligibility of the petitioner in consonance with the advertisement under Annexure-6. It is further contended that in Rule-7 of the Rules 2017, for the candidates seeking relaxation of upper age limit, it is clearly provided that the upper age limit up to five years shall be given to the doctors serving on ad hoc or contractual basis under State Government/State Government undertaking. In that regard, opposite party no.2-OPSC, being the recruiting agency, is the appropriate authority for considering the applicability of the rules as mentioned in Rule 7 of the Rules, 2017 visà-vis the stipulations made in the advertisement under Annexure-6. Thereby, opposite party no.2 is the appropriate authority to mitigate the grievance of the petitioner as claimed in the writ petition.

5. Learned counsel for opposite party no.2 argued with vehemence and contended that the advertisement no. 13 of 2019-20 for recruitment to the post of Medical Officers (Assistant Surgeon) in Group-A (Junior Branch) of the Odisha Medical & Health Services cadre was issued on receipt of requisition from the Government in Health and Family Welfare Department, as the requisitioning and appointing authority. The last date of filling up of the online application by the candidates was fixed to 05.12.2019. The objective of keeping the last date is that a candidate shall be declared eligible by 05.12.2019 for filling up of online application. As per Clause-9 (vii) of the said advertisement, only those candidates, who are within the prescribed age limit and fulfill the requisite qualification etc. by the closing date of submission of online application, will be considered eligible. The petitioner, after knowing all the conditions of advertisement, submitted online application for the said post. Accordingly, roll number was assigned to him

and prior to scrutiny of documents, all the applicants, who had submitted their applications for the said post through online, were allowed to appear in the written examination provisionally and after written examination, 1582 candidates, including the petitioner, were asked to attend the verification of original documents on 07.01.2020. It was noticed that the petitioner had submitted service experience certificate that he was working as Medical Officer from 29.03.2014 to 22.04.2018 and is continuing his PG from 23.04.2018 and till that date he is continuing as Junior Resident. It is thus contended that since the petitioner was continuing as Junior Resident from 23.04.2018 till that date, but was not in government service by the last date of submission of his previous service experience certificate as Medical Officer, his case was not taken into consideration for relaxation of age. Thus, he being found as overage, his candidature was rejected on that ground for such recruitment, vide OPSC notice dated 24.01.2020 under Annexure-12. Thereby, the OPSC has not committed any illegality or irregularity in rejecting his application on the ground of overage. It is further contended that as per Rule 7(b) of Rules, 2017 relaxation of upper age limit up to 5 years shall be given to the doctors serving on ad hoc or contractual basis under State Government/State Government undertaking. Since the petitioner had continue as Junior Resident and not a doctor serving on ad hoc/contractual basis, thereby relaxation of age is not applicable to him. Therefore, the Page 10 of 23 OPSC examined his case and did not extend him the benefit of condonation of age as the existing rule did not so provide. Thereby, the relief sought by the petitioner cannot be granted and the writ petition should be dismissed.

6. This Court heard learned counsel for the petitioner; learned Government Advocate appearing for the State; and learned counsel appearing for opposite party no.2-OPSC by hybrid mode. Pleadings having been exchanged between the parties and with the consent of the learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

7. The factual matrix, as delineated above, is not in dispute. Therefore, the only question to be determined in this case is that opposite party no.2, having entertained the application submitted by the petitioner, pursuant to advertisement issued under Annexure-6, and having permitted the petitioner to appear in the written examination, where he was qualified, can subsequently reject his application on the ground of overage.

8. The Government of Odisha in Health and Family Welfare Department issued a notification on 9th August, 2017 that in exercise of powers conferred by the proviso to Article 309 of the Constitution of India and in supersession of the Odisha Medical and Health Services Rules, 2013 except as things done or omitted to be done before such supersession, the Governor of Odisha was pleased to make the rules to regulate the method of recruitment and conditions of service of the persons appointed to the Odisha Medical and Health Services, called, "Odisha Medical and Health Services (Method of Recruitment and Conditions of Service) Rules, 2017". Part-I of the said Rules deals with general, Part-II deals with method of recruitment, PartIII deals with direct recruitment, Part-IV deals with promotion, Part-V deals with other conditions of Page 12 of 23 service, Part-VI deals with miscellaneous. In Part-III, which deals with direct recruitment, Rule-7 (a) and (b) read as follows:

> "**7. Eligibility Criteria for direct recruitment**- In order to be eligible for direct recruitment to the service, a candidate must, -
>
> (a) be a citizen of India.
>
> (b) have attained the age of 21 years and must not be above the ge of 32 years on the first day of January of the year in which application are invited by the Commission:
>
> Provided that the upper age limit in respect of reserved category of candidates referred to in rule 5 shall be relaxed in accordance with the provisions of the Act. Provided further that the upper age limit up to 5 years shall be given to the doctors serving on ad hoc or contractual basis under State Government/State Government undertaking."

The aforesaid provisions clearly indicate that in order to be eligible for direct recruitment to the service, a candidate must have attained the age of 21 years and must not be above the age of 32 years on the first day of January of the year in which applications are invited by the Commission. The second provision of Sub-rule(b) makes it clear that the upper age limit up to 5 years shall be given to the doctors serving on ad hoc or contractual basis under State Government / State Government undertaking. Thereby, relaxation of five years is applicable to the doctors serving in ad hoc or contractual basis under the State Government or State Government undertaking.

9. On the basis of the requisition received from the State Government in Health and Family Welfare Department as the requisitioning and appointing

authority of Medical Officers (Assistant Surgeon), the Odisha Public Service Commission issued advertisement No.13 of 2019-20 for recruitment to the post of Medical Officer (Assistant Surgeon) in Group-A (Junior Branch) of the Odisha Medical & Health Services Cadre under Health & Family Welfare Department in Annexure-5. The last date of submission of online application was fixed to 05.12.2019. The objective behind fixing the last date to 05.12.2019 for filling up of online application was to declare a candidate as eligible by that date. Clause-3 of the advertisement reads as follows:

> *"**3. AGE**:*
>
> *A candidate must have attained the age of 21 (Twenty one) years and must not be above 32 (Thirty two) years as on 1st day of January, 2020 i.e., he/she must have been born not earlier than 2nd January, 1988 and not later than 1st January, 1999. The upper age limit prescribed above shall be relaxable by 5 (five) years for candidates belonging to the categories of Socially & Educationally Backward Classes (S.E.B.C.), Scheduled Castes (S.C.) Scheduled Tribes (S.T.) Woken, Ex-Servicemen and by cumulative 10 (Ten) years for candidates belonging to Physically Handicapped category, whose permanent disability is 40% and more.*
>
> *Provided that, a candidate who comes under more than one category mentioned above, he/she will be eligible for only one age relaxation benefit, which shall be considered most beneficial to him/her.*
>
> *Provided that person with past service as Medical Officers under the State Government to their credit, shall be given preference and in their case, the period of service so rendered by the last date of submission of applications shall be added to the age limit for entry into the service and it is up to maximum period of 05 years."*

On perusal of the above, it is made clear that a candidate must have attained the age of 21 years and must not be above 32 years as on the 1st day of January 2020, i.e., he/she must have been born not earlier than 2nd January, 1988 and not later than 1st January, 1999. The second proviso to clause-3 clearly indicates that the candidates with past service as Medical Officer under the State Government to their credit, shall be given preference and in their case, the period of service so rendered by the last date of submission of applications shall be added to the age limit for entry into the service and it is up to maximum period of 05 years.

10. There is no dispute that the petitioner is overage for a period less than one and half year as on 01.01.2020. Meaning thereby, he has already attained the maximum age of 32 years. Therefore, as on 01.01.2020, he was 33 years

6 months and there is also no dispute with regard to the fact that the petitioner was rendering service under the Government from 29.03.2014 to 22.04.2018 at Itamati PHC of Badapandusar CHC on ad hoc basis by Government notification dated 01.03.2014 and from 23.04.2018, he was continuing as Junior Resident. Therefore, the petitioner was in government service for a period of four years as Medical Officer and thereafter he remained continuing as Junior Resident. As per the second proviso to clause-3 of the advertisement read with second proviso to Rule 7(b) of Rules, 2017, for the past service rendered by the petitioner under the State Government, he shall be entitled to get the benefit of relaxation of upper age limit for a period of four years as Medical Officer. Therefore, if four years will be added to 32 years, the upper age limit for the petitioner will be enhanced to 36 years. Thereby, his application could not have been rejected on the ground of overage.

11. Considering from other angle, as per the second proviso to Rule 7(b) of Rules, 2017, relaxation of upper age limit up to five years shall be given to the doctors serving on ad hoc or contractual basis under State Government/ State Government undertaking. It is admitted fact that the petitioner has served from 29.03.2014 to 22.04.2018 as a Medical Officer at Itamiti PHC of Badapandusar CHC on ad hoc basis vide Govt. Notification dated 01.03.2014 and from23.04.2018, he was continuing as Junior Resident under State Government. Therefore, the word "serving" used in second proviso of Rule 7(b) of Rules, 2017 means, holding employment, as distinguished from actual performing the duties of service.

12. In ***Arijit Singh v. State****, AIR 1970 P &H 351*, the Full Bench of the Court, while construing Section 9 of the Air Force Act, 1950, held that a member of Air Force on leave is "serving" within the meaning of the section. Therefore, the petitioner, who was rendering service as a Government Servant and was granted study leave, comes well within the meaning of "serving" and is thus entitled to get benefits of such provision.

Therefore, it can be safely construed that the petitioner, as on 1st day of January, 2020, was "serving" as a doctor on ad hoc basis under the State Government. Thus, he was entitled to get the upper age limit relaxation of five years.

13. On conjoint reading of the second proviso to Rule 7(b) of Rules, 2017 and to clause-3 of the advertisement, the petitioner is entitled to get age

relaxation up to five years. Admittedly, when the petitioner submitted his application, he was overage by less than one and half year only and such overage can be condoned in view of the above mentioned provisions contained in second proviso to clause-3 of the advertisement and second proviso to Rule 7(b) of Rules, 2017. Non-consideration of the same by opposite party no.2 in proper perspective, is in gross violation of the statutory provisions governing the field.

14. In ***Sukhdev Singh v. Bhagat Ram****, AIR 1975 SC 1331 : (1975) 1 SCC 421*, the Constitution Bench of the apex Court observed as under :-

> "The statutory authorities cannot deviate from the conditions of service. ***Any deviation will be enforced by legal sanction of declaration by Courts to invalidate actions in violation of rules and regulations***."
>
> xx xx xx
>
> The Court has repeatedly ***observed*** that whenever a man's rights are affected by decision taken under statutory powers, the Court would presume the existence of duty to ***observe the rule of natural justice and compliance with rule and regulations imposed by statute***."

Similar view has also been taken by the Supreme Court in ***Ambica Quarry Works v. State of Gujarat***, AIR 1987 SC 1073 : (1987) 1 SCC 213.

15. In ***Sirsi Municipality v. Cecelia Kom Francis Tellis***, AIR 1973 SC 855, the Apex Court observed that "the ratio is that the rules or the regulations are binding on the authorities."

16. In ***M.A. Haque v. Union of India***, (1993) 2 SCC 213, the apex Court observed as under:-

> *"…….. We cannot lose sight of the fact that the recruitment rules made under* article *309 of the Constitution have to be followed strictly and not in breach."*

17. In ***Purushottam v. Chairman, Maharashtra State Electricity Board***, (1999) 6 SCC 49, the apex Court held that appointment should be made strictly in accordance with the statutory provisions and a candidate who is entitled for appointment, should not be denied the same on any pretext whatsoever as usurpation of the post by somebody else in any circumstances is not possible.

18. In view of the factual and legal aspects, as discussed above, this Court is of the considered view that rejection of petitioner's application on the

ground of overage, vide notification dated 24.01.2020 under Annexure-12, so far as it relates to the petitioner having Roll No. 100302 and Registration ID No. 131920202612, cannot be sustained and the same is accordingly quashed. As the petitioner has already qualified in the written examination, it is incumbent upon the OPSC-Opposite Party No.2 to take further course of action by recommending his name to the Government for giving him appointment against one of the available vacancies, as it was brought to the notice of this Court that as against total posts of 3278, only 1403 selected candidates have been recommended by the OPSC to the State. Ordered accordingly. The above exercise shall be completed within a period of two months from the date of communication of this judgment.

19. The writ petition is thus allowed. No order to costs.

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2022 (III) ILR - CUT- 270

V. NARASINGH ,J.

W.P.(C) NO.13495 of 2019

JAGAN JALLY .....Petitioner

.V.

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

CENTRAL CIVIL SERVICES (CONDUCT) RULE, 1964 –Rule-3(i) (vi) r/w Section 8 &10 of Central Industrial Security Force Act, 1968 – Whether the conduct in personal life can form the basis of initiation of departmental proceeding, keeping in view the duties of the Force as stated in Section 10 of the Act? – Held, No – The conduct of the petitioner does not come within the ambit of duties of members of the force as stated in Section 10 of the Act, so as to warrant initiation of proceeding and imposition of penalty of removal as envisaged under Section 8 of the Act – The impugned order set-aside with consequential benefits. (Para-21)

Case Law Relied on and Referred to :-

1. (2020) 10 SCC 766 : Shanti Devi Vs. Union of India.

For Petitioner : Mr. Lalatendu Samantaray

For Opp. Parties : Mr. Bimbisar Dash, Sr. Panel Counsel for the Union of India (for Opp. Parties 1 to 4)

JUDGMENT Date of Hearing & Judgment: 01.08.2022

V. NARASINGH, J.

1. The petitioner, joining the CISF as Constable on 8.03.2010 was assigned the number 107341064.

2. Being aggrieved by the Order of Revisional Authority (I.G. Western Circle,CISF)-Opposite Party No.2 at Annexure-5 dated 07.02.2018 confirming the order passed by the Disciplinary Authority and the Appellate Authority, dated 19.06.2017 and 24.07.2017 at Annexure-3 &4 respectively, removing the petitioner from service, the present Writ Petition has been filed.

3. Brief facts germane for just adjudication are stated hereunder;

During the incumbency of the petitioner as constable he was posted in CISF Unit, MBPT (Mumbai Port Trust) and deputed to work at Reliance Industries Limited, Jamnagar.

While working as such the petitioner was put under suspension in contemplation of Departmental Proceeding on the allegation was that the present petitioner had kept physical relationship with a lady, with an assurance to marry but subsequently he resiled.

4. It is stated that in spite of opportunities given by the Authority, the petitioner failed to resolve the matter at his level for which initiation of departmental proceeding was warranted, keeping in view the nature of duties discharged by the petitioner as a member of a disciplined post like CISF.

5. The imputation of charges in respect of which inquiry was conducted is quoted hereunder;

"ARTICLE

> CISF No. 107341064 CT/GD Jaganjally of CISF Unit RIL Jamnagar established sexual relationship with Miss Vidhya Pandharinath Shinde resident of Mumbai with an assurance of marriage which continued for 06 six years but he didn't marry her. Owing which said lady submitted a written complaint being aggrieved. After that the member of the force was provided sufficient opportunity to resolve his personal matter but he failed to resolve his personal matter and created administrative crises to the department in his solely personal matter. The said act of member of the force is not according to provisions mentioned in Central Civil Services (conduct) rule 1964 and is an indicative of unethical behavior & unethical turpitude.

> Being a member of the disciplined armed force, the commission of the act done by the force member is in the category of grave misconduct and is not suitable to the expected decorum of a disciplined member of the force. Hence it is charge."

6. After thorough inquiry the Inquiry Officer returned with finding that the "charge is proved".

7. On being given an opportunity the petitioner preferred a representation for exoneration.

8. On consideration of the same by Order dtd. 19.06.2017 (Annexure-3) the petitioner was found guilty and order of removal was passed. Thereafter he preferred the statutory appeal and revision which are dismissed vide Annexure -4 and 5 respectively and accordingly the present Writ Petition has been filed.

9. Learned counsel for the petitioner, Sri Samantray relying on the Provisions of C.I.S.F. Act dealing with dismissal, removal etc. and relying on Section-10 thereof submitted that the charge ex-facie does not in any way come within the ambit of dereliction of duties so as to warrant even initiation of proceeding what to speak of an order of dismissal.

10. Mr. Dash, Learned Senior Panel Counsel for the Union of India relying on the Counter Affidavit submits that, it cannot be lost sight of that the C.I.S.F. personnel discharge onerous responsibility and keeping in view the overall discipline of the force who are engaged in safeguarding, sensitive installation, the conduct of the petitioner is not at all acceptable and when the petitioner even after being given sufficient opportunity to put his house in order did not succeed, there was no option left with the authorities to initiate the proceeding.

11. It is submitted by Mr. Dash, learned counsel for the Central Government Counsel that on perusal of the proceeding it can be seen that the petitioner was given ample opportunity to defend himself and after following norms of natural justice, the impugned order of removal was passed by the Disciplinary Authority and which has been rightly affirmed by the Appellate Authority as well as Revisional Authority. As such the writ petition is liable to be rejected.

12. It is apt to note here that though question of territorial jurisdiction of this Court to entertain the present writ petition(c) was stated in the

counter affidavit. Learned Senior Panel Counsel in his wisdom referring to the law laid down by the Apex Court in the case of ***Shanti Devi Vrs. Union of India:*** (2020) 10 SCC 766 did not press the same, at the time of hearing. Accordingly, it is held that the Court has the territorial jurisdiction to adjudicate the lis.

13. Section-8 of the Act thereof deals with dismissal, removal etc. of enrolled members of the Force which reads as follows.

> "Dismissal, removal etc. of enrolled members of the Force:- Subject to the provisions of article-311 of the Constitution and to such rules as the Central Government may make under this Act supervisory officer may:-
>
> (i) Dismiss, remove, order of compulsory retirement or reduce in rank any enrolled member of the Force whom he thinks remiss or negligent in the discharge of his duty, or unfit for the same; or
>
> (ii) award any one or more of the following punishments to any enrolled member of the Force who discharges his duty in a careless or negligent manner, or who by any act of his own renders himself unfit for the discharge thereof, namely:
>
> (a) Fine to any amount not exceeding seven days pay or reduction in pay scale
>
> (b) Drill, extra guard, fatigue or other duty.
>
> (c) Removal from any office of distinction or deprivation of any special emolument.
>
> (d) Withholding of increment of pay with or without cumulative effect.
>
> (e) Withholding of promotion. (f) Censure."

14. The Charge of imputation has already been extracted herein above. Learned counsel for the petitioner Mr. L.Samantaray placed on record the statement of the complainant who deposed in the proceeding as P.W.1 and that of one Raghunath Patra cited as D.W.1. Gist of both the statements as recorded during the enquiry is noted hereunder for convenience of ready reference.

> **P.W.1-Miss Vidhya Pandharinath Sindhe**
>
> She stated that the petitioner had kept physical relation with her for more than six years with assurance to marry but he did not do so in spite of several request and the petitioner used to abuse her in filthy languages, finding no other alternative she made a complaint before the authorities.

D.W.1-Raghunath Patra

He stated that he along with the petitioner went to Bandra Station where they met with the compliant and his mother and gave proposal of marriage but the complainant's mother refused to the marriage proposal on the ground of caste, language and culture and also stated that the marriage of her daughter will be solemnized within 8 days.

15. It is stated by the learned counsel for the petitioner that the allegation even if accepted at its face value relates to the personal life of the Petitioner and admittedly there is nothing on record that the same has affected his discharge of duties as a disciplined personnel of the Force.

16. It is further submitted that the Disciplinary Proceeding for imposition of penalty as envisaged under Section-8 can only be initiated in the event, the duties enjoined as per Section-10 of the Act are violated and it is stated that on the face of it as there was no violation of the duties a member of the force is supposed to carry out, the very initiation of proceeding is thoroughly misconceived and the orders passed by the Disciplinary Authority, Appellate Authority as well as the Revisional Authority at Annexure-3, 4 and 5 are liable to be set aside.

17. For convenience of reference the duties of the members of the Force as in Section-10 of the Act is extracted hereunder.

"Duties of member of the Force-It shall be the duty of every member of the Force-

(a) Promptly to obey and execute all orders lawfully issued to him by his superior authority;

(b) To protect and safeguard the Industrial Undertaking owned by the Central Government together with such other installations as are specified by that Government to be vital for the carrying on of work in those Undertakings, situate within the local limits of his jurisdiction;

Provided that before any installation not owned or controlled by the Central Government is so specified, the Central Government shall obtain the consent of the Government of the State in which such installation is situate;

(c) To protect and safeguard any joint venture, private industrial undertaking and such other Industrial Undertakings and installation for the protection and security of which he is deputed under section-14 ;

(d) To protect and safeguard the employees of the Industrial Undertakings and installations referred to in clauses (b)(c)

(e) To do any other act conducive to the better protection and security of the industrial undertakings and installations referred to in clauses(b) and (c) and the employees referred in clause (d);

(f) To provide technical consultancy services relating to security of any private sector industrial establishment under section -14-A.

(g) To protect and safeguard the organizations owned orfunded by the Government and the employees of such organizations as may be entrusted to him by the Central Government,

(h) Any other duty within and outside India which may be entrusted to him by the Central Govt. from time to time."

18. While considering the imputation as against the petitioner neither the Disciplinary Authority nor the Appellate or the Revisional Authority have addressed themselves to the questions raised by the petitioner as to whether the conduct in personal life can form the basis of initiation of departmental proceeding, keeping in view the duties of the Force as stated in Section 10 of the Act.

19. It is also submitted by the learned counsel for the Union of India that the procedure as envisaged under CCS (conduct) Rules, 1964 were followed in the matter of the Departmental Proceeding and it is submitted that the Act complained of is indicative of "unethical behavior and unethical turpitude". Hence it is stated that in terms of Rule-3(i) (vi) of the Conduct Rules, 1964 as the petitioner was not able to "maintain high ethical standards and honesty", there was no illegality in the approach of the authorities in passing the order of removal, keeping in view the peculiar nature of duties discharged by the petitioner.

20. This Court perused the statements of the D.W.1 in the inquiry proceeding which were part of the pleadings, wherein the D.W.1 has stated that the proposal of the petitioner to the complainant to join him in matrimony was negated by her family members.

21. Be that as it may, this Court is persuaded to hold that even if the entire allegation against him is accepted at its face value even then the conduct of the petitioner does not come within the ambit of duties of members of the force as stated in Section-10 of the Act, so as to warrant initiation of proceeding and imposition of penalty of removal as envisaged under Section-8 of the Act.

21.1 The Disciplinary Authority as well as the Appellate Authority and Revisional Authority failed to address the issue in its proper perspective and were swayed away by the fact that the petitioner had a relationship with a civilian lady, admittedly a major, for six (6) years on promise of marriage. This Court cannot lose sight of the fact that there is no finding on record that such conduct of the petitioner has in any way affected his discharge of duty as a C.I.S.F. personnel in terms of the duties as enumerated in Section-10 of the C.I.S.F. Act.

22. As such, while passing the impugned Order of removal which was subsequently confirmed in Appeal and Revision, the authorities have allowed their decision to be clouded by materials which are not germane for just consideration while failing to take into account the factors which have a direct bearing on the point at issue.

23. As such the impugned orders passed by the Disciplinary Authority, Appellate Authority and Revisional Authority at Annexure-3, 4 and 5 respectively, being outcome of gross non-application of mind suffer from the vice of malafide and therefore, set aside, with consequential benefits.

24. The Writ Petition is accordingly allowed.

25. No order as to costs.

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2022 (III) ILR - CUT- 276

M.S. SAHOO, J.

W.P. (C) NO. 33644 OF 2020

PRAMILA MISHRA & ORS. .....Petitioners

.V.

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

GENERAL CLAUSES ACT, 1897 – Section 27 r/w Rule 11 of Orissa High Court Rule, 1948 – When a notice would be treated as sufficient – Indicated with case laws.

Case Laws Relied on and Referred to :-

1. (2004) 8 SCC 774: AIR 2005 SC 109 : V. Raja Kumari Vs. P. Subbarama. Naidu & Anr.

For Petitioner : Mr. Subash Chandra Acharya

For Opp. Parties : Mr. S.K. Samal, AGA & Mr. P.K. Panda, Standing Counsel (School & Mass Education)

ORDER Date of Order: 11.07.2022

M.S. SAHOO, J.

1. This matter is taken up through hybrid mode.

2. Mr. S.C. Acharya, learned counsel for the petitioner, Mr. S.K. Samal, learned AGA and Mr. P.K. Panda, learned Standing Counsel for the School and Mass Education Department are heard at length.

3. None appears for the other appearing opposite parties apart from the learned AGA for State and learned Standing Counsel for the School and Mass Education Department. The matter has been listed under the heading for admission i.e. after notice admission hearing with office note dated 08.07.2022 which refers to the earlier office note dated 18.04.2022.

4. The Office note (iv), put up by Registry dated 18.04.2022 indicates *"Neither A.D. nor undelivered notice received from O.P. Nos. 11, 12, 13, 16, 18, 19, 20, 24, 26, 27, 28, 29, 32, 34, 35 and 36".*

Prior to the said office note dated 18.04.2022, the earlier office note dated 06.01.2021 which at (iii) indicates the following:-

> *"Neither A.D. nor undelivered notice received from O.P. Nos.11, 12, 13, 16, 18, 19, 20, 24, 26, 27, 28, 29, 32, 34, 35 and 36".*

5. It is submitted by the learned counsel for the petitioners that such office note regarding non-service of the notice upon the opposite parties as indicated above has to be ignored by the Court in judicial side and notice to the said opposite parties is to be treated to be sufficient in view of the Section 27 of the General Clauses Act, 1897.

6. Learned AGA as well as learned Standing Counsel, School and Mass Education Department in response to the submissions regarding Section 27 of the General Clauses Act, submit that the requirement of Section 27 have not been satisfied/complied in the present case inasmuch as the Section itself is very specific to the extent that *"... the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post ...".*

7. It is submitted by the learned AGA as well as learned Standing Counsel, School and Mass Education Department that instead of properly addressing the opposite parties, the opposite parties have been only mentioned as "Principal, Dhenkanal Higher Secondary School (Erstwhile Dhenkanal Junior College), Dhenkanal", which has lead to a situation where the notices have not yet been served.

8. At this juncture, it has to be noted that notices were issued by this Court way back on 06.01.2021 as follows:-

> *"Issue notice to the opposite party nos. 7 to 39 by Registered Post with A.D./Speed Post with A.D. fixing a short returnable date. Requisites for issuance of notice shall be filed within a week...."*

9. It is therefore, submitted by the learned AGA as well as learned Standing Counsel that the direction for issuance of notice has to be complied in the proper perspective by giving the address of the opposite parties 11, 12, 13, 16, 18, 19, 20, 24, 26, 27, 28, 29, 32, 34, 35 and 36.

10. It is contended on behalf of the petitioner by the learned counsel that in view of the law laid down by the Hon'ble Supreme Court in the case of V. Raja Kumari Vrs. P. Subbarama Naidu & another: reported (2004) 8 SCC 774: AIR 2005 SC 109 (at para-14 of SCC), notices have to be treated sufficient on opposite parties 11, 12, 13, 16, 18, 19, 20, 24, 26, 27, 28, 29, 32, 34, 35 and 36.

11. On a closer scrutiny reliance on the decision: V. Raja Kumari (Supra), rendered by the Hon'ble Supreme Court by the learned counsel for the petitioners is misplaced in view of the fact in that case there was a return of service of notice indicating that *"door of the house was locked"*. The facts were that statutory notices were sent to the correct address of the drawer of the Negotiable Instrument but returned with the endorsement as noted here.

12. In the case at hand, neither any such correct address has been given nor there has been any return of service with endorsement that door of the house was locked.

13. Learned AGA as well as learned Standing Counsel, School and Mass Education Department also submit that the decision relied upon by the petitioner deals with a matter pertaining to Section 138 and 142 of the

Negotiable Instruments Act i.e. a *lis inter partes* between the drawer of the Negotiable Instruments and the endorsee, whereas in the present case, the notices were issued by the High Court through the Registry i.e. governed by a specific statute i.e. the Rules of the High Court of Orissa, 1948.It is further submitted that since the Registry is guided by the specific rules of the High Court, the noting of the Registry has to be considered in the fact situation of each case and in the case at hand, there is no evidence of any service nor any un-served notice has been returned back. Rule-11 of the Rules of the High Court of Orissa, 1948 provides the following:-

> "**Rule-11**. *Every person referred to in a petition or affidavit shall be describes therein in such manner as will serve to identify him clearly, that is to say by the statement of his correct name and address and such further description as may be necessary for his identification*."

In view of specific provisions of the Rules of the High Court of Orissa, 1948, it cannot be held that the notices were sent to correct address and in any event un-served notice has not been received back.

14. The learned counsel for the petitioners further relies upon the decision of the Hon'ble High Court of Kerala reported in AIR 1971 Kerala 231:1970 SCC online Kerala 41 in the case of Ayisabeevi and another vrs. Aboobacker, to contend that in view of the said decision, notices issued to the aforesaid opposite parties 11, 12, 13, 16, 18, 19, 20, 24, 26, 27, 28, 29, 32, 34, 35 and 36 are treated to be sufficient.

15. Having gone through the decision of the Hon'ble High Court of Kerala, it has to be observed that the contention of the petitioner has to be rejected regarding sufficiency of notice.

16. It is submitted by the learned AGA as well as learned Standing Counsel that the decision of the High Court of Kerala does not lay down the proposition that even without correct address and without the unserved notice having been received by the Registry of this Court and obviously without any noting regarding service, it can be presumed that notice is sufficient.

17. Learned counsel for the petitioner relies on paragraph-3 last sub-para of Ayisabeevi (supra) i.e. a quotation *from Woodroff's Ameer Ali's Law of Evidence, 11th Edition, Vol.3. page- 2248.*

"If a letter properly directed, containing a notice to quit, is proved to have been put into the post office, it is presumed that the letter reached its destination at the proper time according to the regular course of business of the post office and was received by the person to whom it was addressed. The posting in due course of a letter raised a presumption that it has reached the addressee. A post office seal on an envelope which has been posted may be presumed to be genuine, at any rate where its genuineness is not expressly questioned. If the postmark be taken as genuine, it is evidence that the cover bearing it was stamped on the date the impression bears. The postmark is evidence that the place or office mentioned therein was actually the place where it was affixed. The presumption is that the notice was served at the time when it would be delivered in the ordinary course of post."

18. In view of such submissions of the learned counsel for the petitioners, the context of the quotation has to be noted. Para-3 of the decision the High Court of Kerala refers to the contentions raised by the landlord in that particular case regarding sufficiency of notice and in any case the said decision is not an authority to indicate that without return of service or any noting regarding the service, the notice is to be treated as sufficient.

19. This Court notices that in the decision of Hon'ble High Court of Kerala, the Hon'ble Court have noted the contentions of the landlord at Para-3, the contentions of the tenant at para-4 and they go on to conclude, i.e. quoted herein (page-234 of AIR 2nd column):-

"The rule has been to make lame and inaccurate notices sensible where the recipient cannot have been misled as to the intention of the giver, A liberal construction is therefore put upon a notice to quit in order that it should not be defeated by inaccuracies either in the description of the premises, or the name of the tenant or the date of expiry of the notice. The Privy Counsel has said these English authorities are applicable to cases arising in India and that "they establish that notices to quit, though not strictly accurate or consistent in the statements embodied in the, may still be good and effective in law; that the test of their sufficiency is not what they would mean to a stranger ignorant of all the facts, and circumstances touching the holding to which they purport to refer, but what they would mean to tenants presumably conversant with all those facts and circumstances; and, further, that they are to be construed, not with a desire to find faults in them which would render them defective, but to be construed ut res magis valeat quam pareat." (Vide Mulla's Transfer of Property, 5th Edn. P.666). "

Thus in any view of the matter it must be held that the requirement of Sec. 106 of the Transfer of Property Act has fully been complied with in the present case."

Thus in any view of the matter it must be held the requirement of Section 106 of the Transfer of property Act has duly been complied with in the present case.

20. It cannot be lost sight of the fact that again in the decision rendered by the Hon'ble High Court of Kerala, the issue was not whether, notices sent by the Court can be treated to be sufficient in absence of any return of service nor any endorsement from the postal authority.

In that particular case, there was claim and counter claim regarding sufficiency of notice between the landlord and tenant, that was adjudicated in the context of Section 106 of the Transfer of Property Act.

21. In the case at hand, this Court is not dealing with any dispute between any competing claims regarding sufficiency of notice rather the Court has to take note of the office note put up by the Registry as per the High Court Rules pursuant to the notices issued by its order dated 06.01.2021. It has to be inferred whether the notices have been sufficient or not as per the Rules of the High Court of Orissa, 1948.

22. In considered opinion of this Court, the notices to opposite parties 11, 12, 13, 16, 18, 19, 20, 24, 26, 27, 28, 29, 32, 34, 35 and 36 has not yet been sufficient as per the Rules of High Court of Orissa, 1948.

23. It is therefore specifically asked to the learned counsel for the petitioners whether he wants to take steps for issuance of notice afresh in present correct address to those opposite parties or if he wants to delete them at the risk of the petitioners.

24. In response, it is submitted by the learned counsel for the petitioners that he shall take fresh steps for issuance of notice by Speed Post with A.D./Registered Post with AD in present correct address of the opposite parties 11, 12, 13, 16, 18, 19, 20, 24, 26, 27, 28, 29, 32, 34, 35 and 36. Requisites for which be filed within two weeks.

Registry to act accordingly for issuance of notice afresh.

25. It is submitted by the learned counsel for the petitioners, counter affidavit on behalf of opposite parties 1 to 6 have not yet been filed.

Learned AGA and learned Standing Counsel pray for further time.

26. As prayed for by the learned counsel for the parties, list on 6th September, 2022.

Interim Order dated 06.01.2021 shall continue till the next date of listing.

2022 (III) ILR - CUT- 282

MURAHARI SRI RAMAN, J.

WPC (OA) NO. 1791 OF 2017

DEBENDRANATH SAHOO
SON OF LATE NARAYAN SAHOO ……..Petitioner

.V.

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

REGULARIZATION – Work charged employee – Prayer to regularize the services with retrospective effect and extend all benefits including pensionary benefits – Whether admissible? – Held, Yes.

Case Laws Relied on and Referred to :-

1. 104 (2007) CLT 445 = 2007 (II) OLR 533 = 2007 SCC OnLine Ori 166 : Meera Piri Vs. State of Orissa & Ors.
2. 2014 (I) OLR 734 = 2014 SCC OnLine Ori 738 = 118 (2014) CLT 282 : Chandra Nandi Vs. State of Odisha & Ors.
3. (2019) 4 SCC 376 : Khoday Distilleries Limited Vs. Sri Mahadeshwara Sahakara Sakkare Karkhane Limited.
4. 1983 SCC OnLine AP 232 = (1994) 1 ALT 227 (DB) = (1988) 63 Comp Cas 376 = (1987) 67 STC 424 = (1988) 170 ITR 15 = (1988) 72 FJR 166 : Koduru Venka Reddy Vs. The Land Acquisition Officer & Revenue Divisional Officer, Kavali.
5. (2006) 3 SCC 1 = 2006 SCC OnLine SC 258 : Bharat Sanchar Nigam Limited Vs. Union of India.
6. (2015) 8 SCC 265 : Amarkant Rai Vs. State of Bihar.
7. OJC No. 12017 of 2000 : State of Odisha Vs. Jugal Kishore Sahoo.
8. 2001 SCC OnLine Ori 131 = (2002) 94 FLR 318 : State of Odisha Vs. Chaitantya Gouda.

For Petitioner : Mr. Prasanta Kumar Mishra
For Opp. Parties : Mr. Lalatendu Samantaray,AGA.

JUDGMENT Date of Hearing: 30.08.2022 &Date of Judgment: 02.09.2022

MURAHARI SRI RAMAN, J.

This matter is taken up by virtual/physical mode.

"The State to secure a social order for the promotion of the welfare of the people.—

The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

The State shall, in particular, strive to minimize the inequalities in income, and endeavour to eliminate inequalities in status,P.T.O.facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations."

— Article 38, the Constitution of India, 1950

2. The petitioner-WATCHMAN UNDER THE WORK CHARGED ESTABLISHMENT, as applicant before the Odisha Administrative Tribunal in O.A. No.1791 of 2017 filed under Section 19 of the Administrative Tribunal Act, 1985, which is later renumbered as WPC (OA) No.1791 of 2017 being transferred to this Court, at the verge of retirement in the year 2017, came up with grievance that his representation to bring his service over to regular establishment was not paid due attention, as a consequence, he would be deprived of service benefit including pensionary benefits. Therefore, the petitioner has sought for the following reliefs:

"The Hon'ble Tribunal may be pleased to declare that the action of the respondents in not regularizing the service of the applicant in regular establishment despite of vacancies is illegal and arbitrary;

The Hon'ble Tribunal may be pleased to direct the respondent to absorb the service of the applicant in regular establishment prior to date of his superannuation and extend all benefits including pensionary benefits as due admissible to him within a time to be stipulated;

Pass any other relief(s) the Hon'ble Tribunal deems fit and proper for the interest of justice."

3. The fact as set forth by the petitioner reveals that having qualification of Class IX and being qualified as "welder" from Industrial Training Institute, he was initially engaged as Nominal Muster Roll (NMR) employee under the Executive Engineer, Minor Irrigation Division, Khurda on 01.12.1983. Since his service along with many others was not regularized, the Employees Union approached the Government. Instead of bringing the petitioner over to regular establishment, he was brought over to work charged establishment at the age of about 53 years having rendered around 33 years of service vide Office Order bearing No.1451/CMIC/Bhubaneswar, dated 23rd April, 2010 (Annexure-2) which runs as follows:

*"In pursuance of Lr. No.5330, dated 19.04.2010 of Chief Engineer, Minor Irrigation, Orissa, Bhubaneswar Sri Debendranath Sahoo, NMR is hereby brought over as a watchman under work charged establishment in the scale of pay Rs.4440-7440 (pay band-1S) with Grade Pay Rs.1,500.00 and other allowances sanctioned by the Government of Odisha from time to time and posted as such under Junior Engineer, M.I. Mech. Section, Bhubaneswar under Asst. Executive Engineer, S&M (MI) Sub-Division, Bhubaneswar under MI Division, Khurda as is where is basis until further order from his date of joining as a watchman. ***"*

3.1. It is claimed by the petitioner that as he complied with the terms and conditions envisaged in the Government of Odisha in Finance Department Resolution dated 15th May, 1997 (Annexure-1) his service is liable to be regularized. The petitioner laid stress on said Resolution which runs as follows:

"No.WFI-24/97-22764/F
Government of Orissa Finance Department
***
Resolution
Bhubaneswar, dated, the 15th May, 1997

Sub.: Scheme for absorption of NMR/DLR/Job Contract Workers under Regular Establishment.

It has been brought to the notice of Finance Department by the different Departments of Government that directives from Hon'ble Supreme Court, High Court and Orissa Administrative Tribunal have been received for preparation of a scheme to absorb the above categories of workers under regular establishment.

As per the above directions, Government have been pleased to formulate the following norms and conditions for the NMR/DLR/Job Contract Workers:

1. Separate Gradation/Seniority list shall be prepared by the Appointing Authority for each category of workers determining the length of engagement of a particular person. The workers should have worked under the administrative control of the Department concerned directly for a minimum period of 10 years. The engagement of 240 days in a year shall be construed as a complete year of engagement for this purpose.

2. The workers should have been engaged prior to 12.04.1993 i.e. prior to promulgation of ban on engagement of NMR/DLR/Job Contract Workers etc. vide Finance Department Circular No. WF-II- 180/92-17815/F., dated 12.04.1993.

3. They should have the minimum educational/technical qualification prescribed for the post against which they would be absorbed.

4. They should be within the age limit prescribed for 1st appointment to Government service after deduction of the number of years they have worked under the Department concerned.

Provided that the age limit can be further relaxed with the approval of Appointing Authority.

5. Absorption against the post for which regular recruitment rules have been framed will be made in relaxation of the relevant provisions by the competent authority.

6. Vacancies reserved for SC/ST/OBC/Women candidate/Physically Handicapped etc. will be filled up according to reservation rules issued by Government from time to time.

7. Absorption in Class-III & IV posts against the vacant posts shall be made keeping in view the austerity measures issued in Finance Department OM No.50791/F., dated 10.12.1996 read with OM No.4986 dated 07.02.1997.

8. While filling up the regular vacant posts preference shall be given to work charged employees first. Where no suitable work charged employees are available to man the post preference shall be given in the following order i.e. NMR, DLR, Job Contract Workers and others.

9. On absorption in a regular establishment the worker shall draw the minimum of the time scale attached to the post and other allowances as admissible under rules from time to time.

10. The date of regularization shall be reckoned as the 1st appointment to the service for pension and other service benefits.

11. The authority competent who shall issue the order of regularization shall certify that the person(s) who are being regularized in this order were engaged as ____prior to 12.04.1993 i.e. prior to promulgation of ban issued by Finance Department and this has been agreed to by the Financial Advisor of the Department.

12. This order shall supersede all the orders/resolutions/notifications etc. issued by various Departments of Government for regularization of NMR/DLR/Job Contract and other such category of workers. Copy of all regularization order issued in this connection shall be forwarded simultaneously to the Administrative Department concerned and Finance Department.

Order: Ordered that this should be published in the next Issue of Orissa Gazette for general information."

By order of the Governor
P.K. Mishra
Principal Secretary to Government"

3.2. It is highlighted by learned counsel for the petitioner that the petitioner was under impression that before his retirement from service i.e., 30.11.2017, he would be brought to regular establishment so as to be entitled for pension. But the authority has paid deaf ears which compelled him to file this case on 01.11.2017.Though the learned Odisha Administrative Tribunal vide Order dated 02.11.2017 issued notice to the opposite parties and passed interim order to the effect that "pendency of the Original Application is not a bar for consideration of the grievance of the applicant", the opposite parties have not been kind enough to consider the same knowing fully well that the petitioner would get retired from service on attaining the age of superannuation on 30.11.2017.

4. *Per contra*, Mr. Lalatendu Samantaray, Additional Government Advocate vehemently argued that as per policy decision taken in the Government, the petitioner was brought over to work charged establishment by virtue of Notification No.7323-FE-IV-(NMR)-30/08/WR, dated 28.02.2009 issued in consideration of the instructions contained in the Work Charged Employees (Appointment and Conditions of Service) Instructions, 1974 and in absence of vacant posts, the service of the petitioner was not entitled for being regularized in terms of Finance Department Resolution No.WFI-24/97-22764/F., dated, the 15th May, 1997. He further argued that though the Chief Engineer, Minor Irrigation, Odisha, Bhubaneswar vide Letter No.17125-OE.WM.05/2016/MI, dated 19th December, 2016 (Annexure-4) suggested 110 numbers of work charged employees belonging to Group-D category for being brought over to regular (wages) establishment, the Government upon consideration of such suggestion decided to bring over 65 numbers of work charged employees to regular (wages) establishment against vacant posts vide Government of Odisha in Departmenent of Water Resources Letter No.7798/WR, dated 29th March, 2017 in File No.FE-IV- WC-03/2017 (Annexure-5). It is also submitted that the petitioner being retired since 30th November, 2017, no relief as prayed for can be granted to him.

5. It is relevant to extract the following paragraph from the counter filed on behalf of the opposite parties:

"That in reply to paragraph 6.2 of the Original Application, it is humbly submitted that, the applicant was initially engaged as NMR worker under the Executive Engineer, Minor Irrigation Division, Khordha on 01.12.1983. As per the policy decision of the Government in Department of Water Resources, Odisha, Bhubaneswar he has already been brought over to work

charged establishment vide Notification No.7323 dated 28.02.2009 (Annexure-A). The applicant has joined in work charged establishment as watchman (work charged) on 01.05.2010 F.N. vide Office Order No.1451 dated 23.04.2010 (Annexure-2 of O.A.) of the Superintending Engineer, Central Minor Irrigation Circle, Bhubaneswar and retired as such on attaining the age of superannuation i.e. on 30.11.2017 (AN) as per Office Order No.3583 dated 09.10.2017 (Annexure-7 of O.A.)."

5.1. In the instant case, undisputed fact remains that the petitioner has worked uninterruptedly since 01.12.1983 till 28.02.2009 (joined on 01.05.2010) when he was brought over to work charged establishment and continued as such till his retirement on 30.11.2017. Thus, total period of service he has rendered is around 33 years.

6. Learned counsel for the Petitioner referring to coordinate Bench Judgment dated 17.12.2021 rendered in the case of Sadananda Setha Vrs. State of Odisha & others, WPC(OAC) No.865 of 2018, reported at 2021 SCC OnLine Ori 2111 submitted that in identical factual matrix, this Court allowed the relief(s) akin to that are claimed in the present case.

6.1. This Court recorded the following fact and conclusion in *Sadananda Setha (supra):*

> *"3. The factual matrix, in brief, is that the Petitioner had joined as 'Khalalsi' on 1st March, 1989 under the provision of Rehabilitation Assistance Scheme (in short 'R.A.S.') under work charged establishment instead of regular establishment. In course of his employment, the Petitioner had submitted several representations to the authorities to bring him over to the regular establishment but the grievance of the Petitioner remained unheard by the authorities till the date of his retirement on 30th June, 2016. The Petitioner has, therefore, stated that it is due to the sheer negligence and latches on the part of the authorities he was not given appointment in regular establishment.Since at the time of retirement, the service of the Petitioner was not regularized, he has been denied pensionary and other retiral benefits by his employer, which is illegal, arbitrary and discriminatory.*
>
> ***
>
> *9. The counter affidavit filed on behalf of the Opposite Parties states that DOWR Resolution dated 7th September, 1995 wherein it has been stipulated that employees completing ten years in work charged establishment are eligible to be brought over to the regular establishment. …*
>
> ***
>
> *14. The Petitioner's case is that although he was appointed as R.A.S. on 1st March, 1989 i.e. much prior to the cut off date fixed by the Hon'ble Supreme Court of India i.e. 13th April,1993, the Petitioner should have been brought over to the regular establishment before his retirement from service.The State Government counter does not reveal as to whether any scheme pursuant to the Hon'ble Supreme*

Court of India's direction was ever prepared or not and if such a scheme was prepared whether the list was prepared on the basis of seniority of the work charged employees. In the absence of any such information, this Court is constrained to accept the fact that the State Government has not acted in a manner as directed by the Hon'ble Supreme Court of India concerning the work charged employees. Moreover, the Petitioner was exploited by a model employer like the State for several decades as a work charged employee without giving him the service benefits of the regular establishment.

15. Moreover, even accepting the argument for Opposite Parties that the DOWR resolution dated 7th September, 1995 provides that on completion of ten years of service in work charged establishment, the work charged is eligible to be brought over to regular establishment. In the present case, the Petitioner joined as 'Khalalsi' on 1st March, 1989. It is not known as to what prevented the authorities to bring the Petitioner to regular establishment for such a long time as such the same has caused injustice to the Petitioner in the present case.

16. Since the Petitioner has retired from service on attaining age of superannuation, the question of his regularization against the regular post does not arise for consideration in the present writ petition. It is a case of pensionary benefits payable to the Petitioner i.e. required to be considered in the present writ petition. Since the benefits have been granted to other similarly placed work charged employees by notionally considering them as regular establishment employee and as such the pensionary benefits have been given to them, the same benefit needs to be extended to the Petitioner for services rendered by him under the State Government for several decades continuously that too on payment of a paltry amount every month. The whole objective of the pension scheme is to support an employee and his family after retirement which is in recognition of his relentless service to the Govt. and such benefits are provided under the Rules on humanitarian considerations."

7. In identical case where the NMR employees were brought to the work charged establishment, this Court in the Judgment dated 07.04.2022 delivered in the matters of ***Ramesh Chandra Biswal & Others Vrs. State of Odisha & Others, WPC (OAC) No. 1067 of 2018*** analysed the applicability of the Finance Department Resolution dated 15.05.1997 and held:

"13. Having examined the aforesaid resolution, this Court finds that nowhere it mandates that the NMR/DLR/Job Contract workers are to be first brought over to the work-charged establishment before regularization of their services. Such being the position, it is not understood nor adequately clarified by the opposite parties as to on what basis the petitioners were brought over to the work-charged establishment in the year 2009, which is after the judgment passed in Umadevi [State of Karnataka and others Vrs. Umadevi and others, AIR 2006 SC 1806], even though they had put in nearly three decades of uninterrupted service and were, therefore, otherwise eligible to be considered for absorption in the regular establishment as per the ratio of Umadevi and even as per the resolution dated 15.05.1997. Reference has been made to the

Resolution No.21828 dated 07.09.1995 of the Government in Water Resources Department, enclosed as Annexure-C to the counter, which provides for regularization of services of NMR and work- charged employees but then, after coming into force of the FD resolution dated 15.05.1997, the same stood automatically superseded. Therefore, reliance placed on the said resolution to justify the action of the authorities in bringing over the petitioners to the work-charged establishment in the year 2009 is entirely fallacious and untenable.

14. The Opposite Parties have also referred to the Instructions 1974 to contend that the petitioners having accepted and acquiesced to being brought over to the work-charged establishment without any challenge to their service conditions as provided in the said instruction, cannot now seek a relief de hors the provisions in Instructions 1974. This is a fallacious argument inasmuch as when the Constitution Bench of the highest Court of the land has placed a definite obligation on the Government (in Umadevi) to act in a particular manner in respect of such category of employees and it has not done so, how can it turn around to question the so-called conduct of the employees by raising the plea of acceptance and acquiescence? To reiterate, the Apex Court in Umadevi as explained in M.L. Keshari [State of Karnataka Vrs. M.L. Kesari & Ors., AIR 2010 SC 2587], mandated that every department of the Government should undertake a one-time exercise of verification of such employees to consider if they are eligible to be regularized, and if so, to regularize them. This being the law of the land has to be followed in letter and spirit by all concerned. The concerned department in the instant case has however, acted as per its own decision overlooking the mandate of the Apex Court to simply bring the petitioners (and similarly placed other employees) to the work-charged establishment instead of undertaking the exercise as mandated in Umadevi. The stand of the opposite parties is therefore, untenable.

This Court is also unable to agree with the other contention raised by the opposite parties that the petitioners being governed by the Instructions 1974 cannot seek any relief de hors such instructions. This is for the reason that undoubtedly Instructions 1974 are applicable to all work- charged employees but the same does not speak of regularization of such employees, but lays down their various service conditions. As already stated, even apart from Umadevi, the FD Resolution dated 15.05.1997 holds the field in the matter of regularization of not only NMF/DLR/Job Contract employees but also the work- charged employees. Significantly, the opposite parties have themselves stated so in their counter affidavit under paragraph-9, the relevant portion of which is extracted herein below:

*"9. ****

Moreover, it is humbly submitted that the FinanceDepartment in a subsequent resolution dated15.5.1997 on the scheme for absorption of NMR/DLR/Job Contract Workers under Regular establishment vide Annexure-B have in supersession to all the orders/resolution/notification etc. issued by various department of Government for regularization of such category of workers issued norms and conditions for absorption in regular establishment. The Para-8 of the said resolution clearly states that while filling the regular vacant posts preference shall be given to work charged employees first. Where no suitable work charged employees are available to man the post, preference shall be given in the following order, i.e., NMR/DLR/Job Contract Workers. Thus, there is existing scheme for absorption in regular establishment as Finance Department Resolution dated 15.5.1997 vide Annexure-B which supersedes

all previous resolutions including Finance Department Resolution dated 22.1.1965 dated 6.3.1990 issued in the subject matter of absorption.

****"*

However, the provisions of the Resolution were never applied in case of the petitioners.

15. It is also seen that the claim of regularization of the petitioners is sought to be repelled by the opposite parties by contending that they have made a backdoor entry into Government service without being sponsored by the employment exchange or undergoing any recruitment procedure. In this context, it is significant to refer to the averments made under paragraph-6.10 of the writ petition to the effect that the petitioners were duly appointed against existing vacant posts in the regular establishment. Such averment has not been controverted in any manner in the counter affidavit. Even assuming for a moment that the petitioners were not validly engaged, the question is, how could they be retained for such an inordinately long period of time and secondly, how could a gradation list of such employees be prepared and finalized and thirdly, how could they be taken over to the work-charged establishment? Of course, this court is conscious of the proposition that mere continuance for a long period per se does not confer any right on the person concerned to claim regular appointment de hors the Constitutional requirement, but then the observations of the Constitution Bench in Umadevi under paragraph-53 thereof as referred to hereinbefore, cannot also be overlooked. The long and short of the issue at hand is, the petitioners claim to have fulfilled the criteria laid down in Umadevi and therefore, should at least have been considered for regularization of their services within six months of the passing of judgment in Umadevi.

16. From the facts narrated hereinbefore, it is apparent that the petitioners, despite having put in merely three decades of continuous service to the State have been left in the lurch. Some of them have also retired in the meantime. The fact that the petitioners have continued for so long proves that there was work for them. If such be the case then, taking work from them for such a long period of time, but depriving them from the wages and other benefits payable/being paid to their counter-parts in the regular establishment is nothing but exploitation of the labour force by the Government, which is not expected from it, as it is supposed to be a model employer. The direction of the Constitution Bench in Umadevi, as amplified in M.L. Kesari is clear and unambiguous and places an obligation on the Government to regularize as one-time measure, all eligible casual employees who fulfill the criteria laid down therein within a period of six months. Alas, sixteen long years have passed since the date of judgment in Umadevi and yet there are no materials to suggest that the case of the petitioners was considered in pursuance of the ratio of Umadevi. It would therefore, be in the fitness of things to remit the matter to the opposite parties to first take a decision with regard to regularization of the services of the petitioners with due regard to all relevant factors like availability of posts, seniority etc."

8. In ***Meera Piri Vrs. State of Orissa and Ors., 104 (2007) CLT 445 = 2007 (II) OLR 533 = 2007 SCC OnLine Ori 166*** this Court laid down as follows in the case of NMR employees who have worked for considerable length of time:

> *"12. Law is well settled that main concern of the Court in the above situation is to see that the executive acts fairly and gives a fair deal to its employees consistent with the requirements of Article 14 and 16 of the Constitution of India. It also means that the State should not exploit its employees nor should it seek to take advantage of the helplessness and misery of either the unemployed persons or the employees, as the case may be. Since the State is a model employer it is for this reason equal pay must be given for equal work which is indeed one of the directive principles of the Constitution. The person should not be kept in temporary or ad hoc status for long time. Where a temporary or ad hoc appointment is continued for long the Court presumes that there is need and warrant for a regular post and accordingly directs regularization. If an ad hoc or temporary employee is continued for a fairly long spell, the authorities must consider his case for regularization provided he is eligible and qualified according to the rules and his service record is satisfactory and his appointment does not run counter to reservation policy of the State. The normal rule of course is regular recruitment through the prescribed agency but exigencies of administration may sometimes call for an ad hoc and temporary appointment to be made.*
>
> *13. The question of regularization in any service including any Government service arises in two contingencies.*
>
> *Firstly, if on any available clear vacancies which are of a long duration, appointments are made on ad hoc basis or daily wage basis by a competent authority and are continued from time to time and if it is found that the incumbent concerned have continued to be employed for a long period of time with or without any artificial break and their services are otherwise required by the institution which employs them, a time may come in service career of such employees who are continued on ad hoc basis for a given substantial length of time to regularize them so that the employee concerned can give their best by being assured security of tenure. But this would require one pre- condition that the initial entry of such employee must be made against an available sanctioned vacancy by following the rules and regulations governing such entry.*
>
> *The second type of situation in which the question of regularization may arise would be when the initial entry of the employee against an available vacancy is found to have suffered from some flaws in the procedural exercise though the person appointing is competent to effect such initial recruitment and has otherwise followed due procedure for such recruitment. The Petitioner's case comes under first category."*

8.1. In the case at hand, the opposite parties have not disputed nor set forth in the counter denying the fact of vacancy position at the initial entry of the petitioner in the service or on the date of completion of requisite number of years in terms of Resolution in vogue at the relevant point of time. It is manifest from the counter that for around 33 years the model employer-State has utilized the service of the petitioner as watchman.

9. In a case where an employee has served for 32 years in the work charged establishment, this Court *vide Judgment dated 26.04.2022 in the case of Biswanath Gouda Vrs. State of Odisha & Others, WPC(OA) No.2359 of*

2013, observed the following with regard to entitlements regarding service benefits:

> *"8. Reading the above this Court finds, one must have completed five years of continuous service and there was likelihood of continuance of him in future and the post where the Petitioner is placed must be a sanctioned and permanent in nature and in such contingency, if considered suitable, one should be absorbed in the corresponding post created in regular establishment. The Opposite Parties though took the plea that the Petitioner has served in different projects, therefore, there is no application of above condition, this Court, however, finds, it is the State Government who had engaged the Petitioner though in a different establishment, but in particular scale of pay. The State utilized the services of the Petitioner for long 32 years that too continuously for more than three decades. Petitioner had no choice but to continue under the Public Establishment. Not only this establishment, but even considering the length of services of the Petitioner imparted, position of Law even after tempted to bring him to regular establishment. It is too late for the State-Opposite Parties to claim that since the Petitioner was engaged allthrough in work-charged establishment, he is not entitled to pension otherwise. This Court here again also finds, at some point of time considering the claim of the Petitioner, name of the Petitioner name was already empaneled and recommended to be brought into the regular establishment and as has also been communicated to the Petitioner vide Annexure-12 on 25.06.2010 i.e. the date the Petitioner was still in service. The entire gamut clearly establishes that there is exploitation of services of the Petitioner by none else than the State-Establishment. This person having continuously served for 32 years, was entitled to several promotions and while continuing as such, he was to entitled to different scale of pay. It is unfair and unbecoming on the part of the State to see that it's employees after providing so much of service even more than three decades of his career, does not get any protection to survive for the rest part of his life and there is clear obstruction by the State to see its employee after putting up so much of service at least to have a decent retired life. At a time when there is a class of people at State level so also Central level are entitled to pension even if they have not served one elected term. This Court is of view that the State has not performed its duty as a model employer.*

9. Now coming to decide; upon superannuation whether the Petitioner maintains a claim for being considered for pension, this Court here finds, the O.A. decided by the Tribunal bearing No.622 of 1999 in the case of Chaitanya Gouda & Ors. Vs. State of Orissa & Others, clearly involves a superannuated person like that of the Petitioner. The Tribunal deciding the above O.A. vide Annexure-13 has given the following direction in paragraph no.5 therein:

> *"5. I accordingly direct that the applicants shall be absorbed in any establishment posts from the time they completed five years continuous service till the date when they retired from service for the purpose of pension and other pensionary benefits. After such absorption, their pension and other pensionary benefits shall be computed on the basis of the notional fixation of pay in the regular establishment*

by adding annual increments which fell due and also taking into account various revisions of pay scales that were introduced. The process shall be completed within three months from the date of receipt of a copy of this order. Accordingly, the Original Application is allowed."

10. *In a further development this Court finds, for the order of the Tribunal hereinabove being challenged before the High Court in O.J.C. No.12087 of 1999, this Court by its Judgment dated 1.05.2001 had ultimately passed the following in confirmation with the order of the Tribunal* :

"2. Having heard learned counsel, we find no ground to interfere with the impugned order in view of the fact that the matter in dispute already stands concluded by two decisions of this Court in State of Orissa & others Vrs. Jhuma Parida & ors. (O.J.C. No.1162 of 1999, decided on 10.05.2000) and State of Orissa and others Vrs. Sudarsan Sahu and another (O.J.C. No.11028 of 1999 decided on 25.11.1999) in which similar challenge to the order of the Tribunal was made.

Admittedly opp. Parties 1 to 5 rendered their valuable services and considering this and in the light of the decision of the Apex Court in SLP No.11929-930 of 1998 the impugned direction was issued. Hence, we are of the view that no illegality has been committed by the Tribunal in its order.

Accordingly, the writ application is dismissed."

11. This matter again visited the Hon'ble apex Court and the Hon'ble apex Court in disposal of the SLP(C) ……/2003 CC 3196/2003 has come to dismiss the SLP observing as follows:

"It appears that some officers of the State have formed the habit of not filing the petition for special leave within a reasonable time. There is a delay of 578 days in filing the present petition for which no justifiable reason is mentioned in the application for condonation of delay. Hence this petition is dismissed on the ground of delay with Rs.5,000/- as costs to be paid to the Supreme Court Legal Services Committee."

12. This Court here finds, there has been compliance of the order of the Tribunal in O.A. No.622 of 1999 after final disposal of the matter in Hon'ble apex Court and further there has also been compliance of similar nature of relief involving similar issues disposed of by the Tribunal in O.A. No.425 of 2011. This Court again finds, there has been again disposal of number of writ petitions by this Court involving similar issue such as W.P.(C) No.19550 of 2011 and in one such writ petition while a Division Bench of this Court taking note of similar development through several writ petitions and also taking note of development through disposal of Civil Appeal No.10690 of 2017, finally directed the State to comply the direction in favour of the Petitioner within specific period. It is shocking to observe that even after the State's endeavor in Hon'ble apex Court in similar matters, the State does not realize the legal state of affairs in such matters and compelling the persons to avail till a command is given by the competent Court."

10. This Court in ***Anadi Sunai Vrs. State of Odisha, WPC (OA) No.302 of 2010*** vide Order dated 18th February, 2022 observed as follows:

> *"5. It is contended that one Narusu Pradhan, a similar circumstanced person like the petitioner had filed O.A. No.1189 (C) of 2006 praying for retrial benefits. The Tribunal allowed the retiral pensionary benefits in his favour vide order dated 11.06.2009, which was challenged by the State before this Court in W.P.(C) No. 5377 of 2010. This Court dismissed the writ petition on 19.12.2011 and confirmed the order passed by the Tribunal. Thereafter against the order passed by this Court, the State has preferred SLP in Civil Appeal No. 22498 of 2012, the same was also dismissed on 07.01.2013.*
>
> *6. In that view of the matter, the relief claimed by the petitioner is fully covered by the judgment of the Tribunal passed in the case of Narusu Pradhan, which has been confirmed by this Court as well as the apex Court. Thus the petitioner, having stood in similar footing, is entitled to get the benefits which have been extended to Narusu Pradhan and all the differential benefits and consequential benefits, as due and admissible to him, shall be granted to him in accordance with law within a period of four months from the date of communication of this order."*

11. At paragraph 6.10 of the writ petition (Original Application before the Odisha Administrative Tribunal), it has been stated by the petitioner that the petitioner is required to be granted same relief as that has been granted in the case of ***Chandra Nandi Vrs. State of Odisha & Others, 2014 (I) OLR 734 = 2014 SCC OnLine Ori* 738 = 118 (2014) CLT 282**. On the contrary, in reply to such contention by way of the counter filed on behalf of the opposite parties it has been submitted as follows:

> *"That in reply to paragraph 6.10 of the OA, it is humbly submitted that the decision of the Hon'ble High Court of Orissa passed in Sri Chandra Nandi Vrs. State of Odisha and Others, (2014 (I) OLR 734) is not applicable to the instant case as the direction of the Hon'ble Court were with reference to a particular case."*

11.1. Therefore, there arose need for ascertaining current position.

11.2. Holding that the petitioner-watchman is treated to have been regularized in service at least one day prior to his superannuation notionally, this Court in the case of ***Chandra Nandi Vrs. State of Odisha & Others, 2014 (I) OLR 734 = 2014 SCC OnLine Ori 738 = 118 (2014) CLT 282***, directed for calculation of entitlements including pension and arrear pension. Said matter being carried to the Hon'ble Supreme Court of India, in the case of ***State of Odisha Vrs. Chandra Nandi, (2019) 4 SCC 357***, the Order of this Court reported in 2014 (I) OLR 734 = 2014 SCC OnLine Ori 738 = 118 (2014) CLT 282 has been set aside on the following ground:

"11. The order [Chandra Nandi Vrs. State of Orissa, 2014 SCC OnLine Ori 738 = 118 (2014) CLT 282] impugned in this appeal suffers from the aforesaid error, because the High Court while passing the impugned order [Chandra Nandi Vrs. State of Orissa, 2014 SCC OnLine Ori 738 = 118 (2014) CLT 282] had only issued the writ of mandamus by giving direction to the State to give some reliefs to the writ petitioner (respondent) without recording any reason.

12. We are, therefore, of the view that such order is not legally sustainable and hence deserves to be set aside."

11.3. This Court upon rehearing the matter on remand by the Hon'ble Supreme Court vide (2019) 4 SCC 357 made the following Order on 03.02.2021:

"7. The said writ application was disposed of on 06.05.2004.

In paragraph-4 of the said order, it has been observed as follows:

*"In respect of work charged establishment the Government of Orissa vide Finance Department Office Memorandum No.5483/F dated 6th March, 1990 decided that consequent upon absorption of work charged employees in the corresponding post created in regular establishment, the period of service rendered by him in work charged establishment, shall count towards pensionary benefits under the Orissa Pension Rules, 1977 subject to the condition that the employees so absorbed should have served continuously for a minimum period of five years in the work charged establishment. This decision was not followed by the subordinate authorities. Thus, the fate of the work charged employees who rendered a quite good years of service remained in dark. ***"*

Accordingly the said writ application was allowed and direction was given to absorb the petitioner in any establishment post from the time he completed five years continuous service till the date he retired from service and thereafter his pension and other pensionary benefits shall be granted on the basis of notional fixation of pay in regular establishment as has been granted to the applicants in O.A. No. 622 of 1999 and other cases as reflected in the said order of this Court. The order passed by this Court, was confirmed by the Apex Court in Civil Appeal No. 5575 of 2007 dated 22.07.2015.

8. Such was the issue in case of one Narusu Pradhan, a work charged employee, wherein after the order passed by the Hon'ble Apex Court in S.L.P No. 22498 of 2012, the authorities passed an office order on 08.05.2013 by creating supernumerary post, regularized his service for the purpose of sanctioning pension.

9. This Court had also occasion to deal with this issue again in W.P.(C) No. 1534 of 2008, i.e. in the case of State of Orissa and others Vrs. Jyostna Rani Patnaik and others, wherein direction of the Tribunal to regularize the service of the applicant's husband by way of creating a supernumerary post, if necessary from the time he had completed 5 years of service as work-charged employee by bringing him over to regular establishment was challenged before this Court by the State authorities. The said case was disposed of vide judgment dated 19.12.2016, affirming the view expressed by the Tribunal.

***

13. It was also brought to the notice of this Court about the order dated 02.04.2018 passed in OJC No. 12017 of 2000, wherein it has been observed/ directed as follow:

Having heard learned counsel for the parties and on perusal of the record, more particularly the order impugned herein, it appears that the Government in Finance Department vide resolution dated 22.01.1965 decided for absorption of such employees to regular establishment after completion of five years in the Work Charged Establishment. Subsequently vide memorandum dated 06.03.1990, Finance Department has also extended the pensionary benefit to work charged employees. Learned Tribunal in O.A. No. 2389 of 1997 vide order dated 23.02.1999 has already disposed of a case of similar nature. Even learned Tribunal has gone on to adjudicate one dispute in O.A. No. 1819 of 1996 regarding extension of pensionary benefit to such work charged employees, who have already retired. The plea of Additional Government Advocate to the effect that the opposite party could not have been brought over to regular establishment, as there was no vacancy, is not sustainable in law, as it has already been held in a catena of decisions that even if there is no clear vacancy, a work charged employee can be brought over to regular establishment for at least one day by creating a supernumerary post to make him entitled for pensioanry benefit.

In view of the above, we modify the order of learned Tribunal to the extent that the opposite party shall be brought over to the regular establishment for at least one day by creating a supernumerary post, if necessary and accordingly, he shall be extended with the pensionary benefit as would be admissible to him. The entire exercise shall be completed within a period of two months hence.

14. It was also contended that relying on such decision, may other writ petitions, such as OJC No. 12017 of 2000 (decided on 16.04.2019), W.P.(C) No. 12017 of 2000 (decided on 16.04.2019) have also been disposed of.

15. While dealing with the matter, this Court deprecates the action of the state-opposite parties. The state-opposite parties have not fair enough to comply the directions given by the Hon'ble Apex as indicated above and has only dragging such employees into multiple litigations. The State-authorities are also misleading this Court as well the Hon'ble Apex Court on each and every occasions in case of such types of work-charged employees, inspite of law settled in this regard and as well as specific circulars/resolutions/ orders have been passed by the State Authorities in terms of the direction of this Court."

11.4. The said matter was carried to the Hon'ble Supreme Court of India again in ***SLP(C) No. 21180 of 2021 [State of Odisha & Ors. Vrs. Chandra Nandi]*** by the State of Odisha, which came to be disposed of on 06.05.2022 with the following order:

"1 In the facts and circumstances of the present case, we are not inclined to entertain the Special Leave Petition under Article 136 of the Constitution.

2 The Special Leave Petition is accordingly dismissed.

3 However, the question of law is kept open to be resolved in an appropriate case.

4 Pending application, if any, stands disposed of."

11.5. It is said in ***Khoday Distilleries Limited Vrs. Sri Mahadeshwara Sahakara Sakkare Karkhane Limited, (2019) 4 SCC 376***, as follows:

"26. From a cumulative reading of the various judgments, we sum up the legal position as under:

26.1. The conclusions rendered by the three Judge Bench of this Court in Kunhayammed [Kunhayammed Vrs. State of Kerala, (2000) 6 SCC 359] and summed up in paragraph 44 are affirmed and reiterated.

26.2. We reiterate the conclusions relevant for these cases as under:

'(iv) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(v) If the order refusing leave to appeal is a speaking order, i.e., gives reasons for refusing the grant of leave, then the order has two implications. Firstly,the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting the special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.

(vi) Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.

*(vii) On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before the Supreme Court the jurisdiction of High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Rule 1 of Order 47 CPC.'***"*

11.6. It may also be relevant to have regard to the following principle enunciated by the Hon'ble Andhra Pradesh High Court at Hyderabad in the case of ***Koduru Venka Reddy Vrs. The Land Acquisition Officer & Revenue Divisional Officer, Kavali, 1983 SCC OnLine AP 232 = (1994) 1 ALT 227 (DB) = (1988) 63 Comp Cas 376 = (1987) 67 STC 424 = (1988) 170 ITR 15 = (1988) 72 FJR 166*** with regard to binding effect of judgment of High Court:

> *"3. We are of the view that when a judgment of the High Court is the subject-matter of an appeal and the said judgment is suspended, the only effect of such suspension is that that judgment cannot be executed or implemented. But so long as the Full Bench judgment stands, the dicta laid down therein is binding on all Courts including Single Judges and Division Benches of this Court. The dicta laid down therein cannot be ignored unless the Court after hearing a particular case doubts the correctness of the dicta and thinks it appropriate that it should be reconsidered. ***"*

11.7. Applicability of parity and consistency in approach has been considered by the Hon'ble Supreme Court of India in Radhasoami Satsang Vrs. CIT, (1992) 1 SCC 659. After referring to said case, said Hon'ble Court in ***Bharat Sanchar Nigam Limited Vrs. Union of India, (2006) 3 SCC 1 = 2006 SCC OnLine SC 258*** laid down as follows:

> *"20. The decisions cited have uniformly held that res judicata does not apply in matters pertaining to tax for different assessment years because res judicata applies to debar courts from entertaining issues on the same cause of action whereas the cause of action for each assessment year is distinct. The courts will generally adopt an earlier pronouncement of the law or a conclusion of fact unless there is a new ground urged or a material change in the factual position. The reason why the courts have held parties to the opinion expressed in a decision in one assessment year to the same opinion in a subsequent year is not because of any principle of res judicata but because of the theory of precedent or the precedential value of the earlier pronouncement. Where facts and law in a subsequent assessment year are the same, no authority whether quasi-judicial or judicial can generally be permitted to take a different view. This mandate is subject only to the usual gateways of distinguishing the earlier decision or where the earlier decision is per incuriam. However, these are fetters only on a coordinate Bench which, failing the possibility of availing of either of these gateways, may yet differ with the view expressed and refer the matter to a Bench of superior strength or in some cases to a Bench of superior jurisdiction."*

11.8. Looking at the present matter in the above perspective, it can be safely said that this Court has been consistently taking view that long years of service rendered by lowly paid employees like NMRs and DLRs are required to be considered sympathetically for regularization and they are entitled to pensionary and other retiral benefits. The State has been accepting the view expressed by this Court on earlier occasion in respect of many NMR employees. On the same principle it is required to accept the present matter in order to maintain consistency.

12. This Court feels it apt to refer to the case of ***Amarkant Rai Vrs. State of Bihar, (2015) 8 SCC 265***. In this case the appellant therein was temporarily appointed in Class IV post of night guard by Principal of College who was not competent authority to make such appointment. The appellant served on said post for 29 years on daily wage basis. The appointment of

appellant was done out of necessity and concern for college, and duly intimated to the University in 1988. No issue was raised by the University pertaining to appointment of appellant as *ultra vires* the Bihar State Universities Act, 1976. Under such premises, it was held that the appointment of appellant cannot be termed as illegal but was only irregular. It has further been observed in the said reported case as follows:

> *"12. Applying the ratio of Umadevi's case, this Court in Nihal Singh & Ors. Vrs. State of Punjab & Ors., (2013) 14 SCC 65 directed the absorption of the Special Police Officers in the services of the State of Punjab holding as under:*
>
> *'35. Therefore, it is clear that the existence of the need for creation of the posts is a relevant factor with reference to which the executive government is required to take rational decision based on relevant consideration. In our opinion, when the facts such as the ones obtaining in the instant case demonstrate that there is need for the creation of posts, the failure of the executive government to apply its mind and take a decision to create posts or stop extracting work from persons such as the appellants herein for decades together itself would be arbitrary action (inaction) on the part of the State.'*
>
> 13. *In our view, the exception carved out in para 53 of Umadevi is applicable to the facts of the present case. There is no material placed on record by the respondents that the appellant has been lacking any qualification or bear any blemish record during his employment for over two decades. It is pertinent to note that services of similarly situated persons on daily wages for regularization viz. one Yatindra Kumar Mishra who was appointed on daily wages on the post of Clerk was regularized w.e.f. 1987. The appellant although initially working against unsanctioned post, the appellant was working continuously since 03.1.2002 against sanctioned post. Since there is no material placed on record regarding the details whether any other night guard was appointed against the sanctioned post, in the facts and circumstances of the case, we are inclined to award monetary benefits be paid from 01.01.2010.*
>
> 14. *Considering the facts and circumstances of the case that the appellant has served the University for more than 29 years on the post of night guard and that he has served the College on daily wages, in the interest of justice, the authorities are directed to regularize the services of the appellant retrospectively with effect from 03.01.2002 (the date on which he joined the post as per the direction of the Registrar)."*

12.1. The present case apparently turns on better footing inasmuch as the facts and circumstances discussed above does not reveal nor can it be said that the appointment of Sri Debendranath Sahoo was irregular much less illegal. Pertinent feature in the present case akin to that obtained in the case of ***Amarkant Rai*** (supra) is that there is no material placed on record regarding the details whether any other watchman was appointed against the

sanctioned post, in the facts and circumstances of the case. In the case at hand the authority has utilized the service of Sri Debendranath Sahoo for around 33 years since 1983.

13. In the case of ***State of Odisha Vrs. Jugal Kishore Sahoo, OJC No. 12017 of 2000,*** disposed of on 16.04.2019, this Court has been pleased to confirm the Order passed by the Odisha Administrative Tribunal by observing thus:

> *"2. By way of this writ petition, the petitioners Department have challenged the judgment/order dated 11.05.2000, passed by the Orissa Administrative Tribunal, Bhubaneswar, in O.A. No.2217 of 1999 under Annexure-1, directing the opposite party No.2 therein to sanction the pension and all pensionary benefits to which the applicant opposite party No.1 is entitled to in terms of the resolution of the Government within three month from the date of receipt of order.*
>
> *3. We have perused the impugned order in detail.*
>
> *4. Considering the submissions made and keeping in view the fact that the issue involved in the present case is squarely covered by the order dated 02.04.2018, passed by this Court in OJC No.8149 of 2000, wherein the work charged employee, similarly situated to the present applicant- opposite party No.1 in this case, was directed to be brought over to the regular establishment for at least one day by creating a supernumerary post, if necessary and accordingly, he should be extended with the pensionary benefit as would be admissible to him, the applicant- opposite party No.1 shall be extended the pensionary benefit as would be admissible to him as per the law settled by this Court on the date on which he attained superannuation. For ready reference, the said order dated 02.04.2018 is reproduced hereunder:*
>
> *'This writ petition has been filed on behalf of the State Government and its functionaries challenging the legality, validity and correctness of O.J.C. No. 12017 of 2000 order dated 14.10.1999 passed by the Orissa Administrative Tribunal, Principal Bench, Bhubaneswar in O.A. NO.1920 of 1999. Fact in nut shell giving rise to filing of the present writ petition is that though the opposite party was initially appointed on 01.02.1964 in the Work Charged Establishment under Water Resources Department and continued as such till his retirement on 31.03.1997, his services was not brought over to regular establishment. It was his case before learned Tribunal that pursuant to resolution of the Finance Department dated 22.01.1965, after completion of five years from the date of entry in the Work charged establishment he should have been regularized in service. Due to inaction of the authorities, he has been deprived of his pensionary benefits. Learned Additional Government Advocate for the petitioners-State submits that though Government in Finance Department vide resolution dated 22.01.1965 decided for absorption of such employees to regular establishment after completion of five years in the Work Charged Establishment, it has no application to the case of the opposite party as the job in which the opposite party was engaged was not permanent in nature. Moreover, the opposite party being a work charged employee is governed under Work Charged Employee (Appointment and Conditions of Service) Instruction, 1974, which only provides gratuity to such employees. Having heard*

learned counsel for the parties and on perusal of record, more particularly the order impugned herein, it appears that the Government in Finance Department vide resolution dated 22.01.1965 decided for absorption of such employees to regular establishment after completion of five years in the Work Charged Establishment. Subsequently, vide memorandum dated 06.03.1990, Finance Department has also extended the pensionary benefit to work charged employees. Learned Tribunal in O.A. No. 2389 of 1997 vide order dated 23.02.1999 has already disposed of a case of similar nature. Even learned Tribunal has gone on to adjudicate one dispute in O.A. No. 1819 of 1996 regarding extension of pensionary benefit to such work charged employees, who have already retired. The plea of Additional Government Advocate to the effect that the opposite party could not have been brought over to regular establishment, as there was no vacancy, is not sustainable in law, as it has already been held in a catena of decisions that even if there is no clear vacancy, a work charged employee can be brought over to regular establishment for at least one day by creating a supernumerary post to make him entitled for pensionary benefit. In view of the above, we modify the order of learned Tribunal to the extent that opposite party shall be brought over to the regular establishment for at least one day by creating a supernumerary post, if necessary and accordingly, he shall be extended with the pensionary benefit as would be admissible to him. The entire exercise shall be completed within a period of two months hence. With the aforesaid modification in the impugned order, the writ petition is disposed of."

5. In view of the above, we dispose of this writ petition in terms of the order quoted above. Accordingly, the same is allowed to the aforesaid extent only.

6. The arrears dues of the applicant will be cleared within a period of four months from today and if it is not done so, the applicant-opposite party No.1 will be entitled to interest @9% per annum."

14. In the case of ***State of Odisha Vrs. Chaitantya Gouda, 2001 SCC OnLine Ori 131 = (2002) 94 FLR 318***, this Court came to observe as follows in the case of work charged employee who were not extended the benefit of pensionary benefit:

"1. Opp. parties 1, 2 and 5 are working as work-charged employees from the year 1969, 1964 and 1963 respectively, whereas opp. parties 3 and 4 retired as work-charged employees after having worked from 1962 and 1965 respectively in the establishment in question. No pensionary benefits having been extended, they approached the Orissa Administrative Tribunal, Bhubaneswar by way of Original Application No. 622 of 1999 for a direction to the Respondents to grant them retirement and other benefits by declaring them to be regular employees.

2. By following decision in a batch of cases, the Tribunal allowed the Original Application in the following terms:

'I accordingly direct that the applicants shall be absorbed in any establishment posts from the time they completed five years continuous service till the date when they retired from service. After such absorption, their pension and other pensionary benefits shall be computed on the basis of the notional fixation of pay in the regular establishment by adding annual increments which fell due and also taking into account various revisions of pay scales that were introduced. The process shall be completed within three months from the date of receipt of a copy of this order. Accordingly the Original Application is allowed.'

3. Aggrieved therewith the State has preferred this writ petition.

4. Having heard learned counsel, we find no ground to interfere with the impugned order in view of the fact that the matter in dispute already stand concluded by two decisions of this Court in State of Orissa Vrs. Juma Parida (O.J.C. No. 1162 of 1999, decided on 10.05.2000) and State of Orissa Vrs. Sudarsan Sahu (O.J.C. No. 11028 of 1999 decided on 25.11.1999) in which similar challenge to the order of the Tribunal was made.

5. Admittedly opp. parties 1 to 5 rendered their valuable services and considering this and in the light of the decision of the Apex Court in SLP No. 11929-930 of 1998 the impugned direction was issued.

6. Hence we are of the view that no illegality has been committed by the Tribunal in its order.

7. Accordingly, the writ application is dismissed.

8. Application Dismissed."

15. In view of the aforesaid discussion on fact as well as in law, the writ petition is disposed of with a direction to the opposite parties to consider the case of the petitioner in the light of consistent view taken by different Courts in respect of similarly circumstanced employees and, if he is found eligible, steps be taken to extend all the benefits and consequential benefits, as due and admissible to him in accordance with law.

16. The above exercise shall be taken up and concluded within a period of three months from the date of the receipt of copy of this Judgment or on production of certified copy thereof by the petitioner, whichever is earlier. Parties are to bear their own costs.

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2022 (III) ILR - CUT- 302

BIRAJA PRASANNA SATAPATHY, J.

WPC(OAC) NO.1546 OF 2012

MADAN MOHAN BEHERA ……Petitioner

.V.

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

ORISSA CIVIL SERVICES (CLASSIFICATION, CONTROL & APPEAL) RULES, 1962– Non-compliance of provision contained under Rule 15 and no opportunity of hearing also given – Effect of – Held, this Court is inclined to quash the order of punishment passed by the authority

and directs the Opposite Parties to reinstate the Petitioner in the service with 50% back wages. (Para-33)

Case Laws Relied on and Referred to :-

1. 2015(Supp.-1) OLR-1010 : Tapan Kumar Kar Vs. Union of India & Ors.
2. AIR 1981 SC 136 : S.L. Kappor Vs. Jagmohan.
3. AIR 1991 SC 471 : Union of India Vs. Md. Ramzan Khan.
4. AIR 1983 SC 104 : Board of Trustees of the Port of Bombay Vs. Dillip Kumar Raghavendranath Nadkarni & Ors.
5. A.I.R. 1982 SC 710: A.K.Ray Vs. Union of India.
6. A.I.R 1983 SC 454 : Bhagat Ram Vs. State of Himanchal Pradesh.
7. I1993 LAB.I.C.521 : nspector- General of Police & Anr Vs. Sukanta Kumar Nayak
8. AIR 2000 SC 277 : Hardwari Lal Vs. State of U.P. & Ors.
9. A.I.R. 2006 SC 45 : Narendra Mohan Arya Vs. United India Insurance Co. Ltd. & Ors.
10. 2000(II) OLR 126 : Janardan MOhanty Vs. Union of India.
11. 2002(Suppl.) OLR-463 : Tapan Kumar Dalai Vs. Union of India & Ors.
12. 2015 (I) ILR-CUT-1150 : Jayanta Kumar Goswami Vs. Governing Body of Akhamandalamani College (+2) & Ors.
13. 2008 AIR SCW 7507 : State of Uttaranchal & Ors. Vs. Kharak Singh.

For Petitioner : M/s. Sadasiva Patra-1
For Opp. Parties: Mr. Y.S.P.Babu,AGA.

ORDER Date of Hearing: 23.09.2022 & Date of Order:30.09.2022

BIRAJA PRASANNA SATAPATHY, J.

1. This matter is taken up through Hybrid Mode.

2. Heard Mr. S.Patra-1, learned counsel for the Petitioner and Mr.Y.S.P.Babu, learned Addl. Government Advocate for the State-Opposite Parties.

3. The present Writ Petition has been filed by the Petitioner challenging the order of punishment passed on 08.08.2008 under Annexure-9 and confirmation of the same by the appellate authority vide his order dated 23.05.2011 under Annexure-11.

4. Mr. S. Patra-1, learned counsel for the Petitioner submitted that the Petitioner entered into service as a Village Agriculture Worker during October, 1995.

5. It is submitted that while so continuing and vide order dated 12.06.2006, the Petitioner was placed under suspension pending drawl of the disciplinary proceeding.

6. It is submitted that subsequently vide Memorandum dated 10.01.2007 under Annexure-1, the proceeding was initiated against him with different charges.

7. Learned counsel for the Petitioner submitted that on receipt of the charges, the Petitioner submitted his explanation/ written statement of defence on 5.3.2007 under Annexure-2.

8. It is submitted that when the Opposite Party No.4 was appointed as the Enquiry Officer to conduct the enquiry as against the Petitioner vide order dated 14.03.2007, the Petitioner made an application before the Opposite Party No.2 on 26.03.2007 with a request to change the said Enquiry Officer and to appoint another one as the Petitioner apprehends prejudice to be caused by the Opposite Party No.4.

9. It is submitted that the said request of the Petitioner was rejected with due intimation vide letter dated 29.05.2007 and the Petitioner was directed to attend the enquiry to be held on 12.06.2007.

10. Learned counsel for the Petitioner submitted that in the meantime another proceeding was initiated against the Petitioner on 28.07.2007 under Annexure-4 and the Petitioner on receipt of the charge memo submitted his written statement of defence on 21.08.2007 under Annexure-5.

11. It is submitted that once again vide order dated 21.08.2007, Opposite Party No.4 was appointed as the Enquiry Officer and the Head Clerk of the Office of Deputy Director of Agriculture was appointed as Presenting Officer.

12. It is submitted that subsequent to such appointment of the Enquiry Officer and the Presenting Officer, the Petitioner was never noticed to take part in the enquiry and the Enquiry Officer conducted the enquiry on different dates the last being conducted on dtd.26.02.2008.

13. It is submitted that the Petitioner was never noticed to take part in the Enquiry, and the Enquiry Officer proceeded with the Enquiry in absence

of the Marshalling Officer and various documents were exhibited being placed by the Presenting Officer.

14. It is also submitted that since the Petitioner at no point of time was noticed to appear, the Enquiry Officer also examined witnesses on behalf of the prosecution and after completing the same submitted the enquiry report on 26.06.2008 under Annexure-6 by holding the Petitioner guilty of the charges.

15. Learned counsel for the Petitioner submitted that on receipt of the enquiry report under Annexure-6, Opposite Party No.3 never issued the 1st show cause along with the enquiry report as provided under Rule-15 of the OCS (CC&A) Rules, 1962 by allowing him to submit his representation against the finding of the enquiry officer.

16. It is submitted that without providing a copy of the enquiry report, the disciplinary authority, the Opposite Party No.3 issued the 2nd show cause by proposing the punishment of dismissal from the Government service, which will also be a bar for his future employment on 02.07.2008 under Annexure-7.

17. It is submitted that on receipt of the 2nd show cause, though the Petitioner submitted his reply under Annexure-8, but without considering the same in its proper perspective, the disciplinary authority-Opposite Party No.3 passed the order of punishment vide order dated 6.8.2008 under Annexure-9.

19. It is further submitted that as against the said order of punishment though the Petitioner preferred an appeal under Annexure-10, but the appellate authority also without proper appreciation of the ground taken in the memo of appeal dismissed the same by confirming the order of punishment vide his order under Annexure-11.

20. In assailing both the orders under Annexures-9 & 11, Mr.S. Patra-1, learned counsel for the Petitioner submitted that since in the entire proceeding, the Petitioner was never given opportunity of hearing to prove his innocence and the disciplinary authority finalized the proceeding without following the provision contained under Rule-15 of the OCA (CC&A) Rules, 1962, the order of punishment passed against him under Annexure-9 and confirmed by the appellate authority under Annexure-11 are liable to interfered with by this Court.

21. In support of such submission Mr. Patra-1 relied on the decision of this Court in the case of ***Tapan Kumar Kar vs. Union of India and Others reported in 2015***(Supp.-1) OLR-1010. This Court relying on the decisions of the Hon'ble Apex Court as well as of this Court in ***S.L. Kappor v. Jagmohan, AIR 1981 SC 136***, ***Union of India v. Md. Ramzan Khan, AIR 1991 SC 471, Board of Trustees of the Port of Bombay v. Dillip Kumar Raghavendranath Nadkarni and others***, AIR 1983 SC 104, ***A.K.Ray v. Union of India***, A.I.R. 1982 SC 710, ***Bhagat Ram v. State of Himanchal Pradesh***, A.I.R 1983 SC 454, ***Inspector- General of Police and another v. Sukanta Kumar Nayak***, 1993 LAB.I.C.521, Hardwari Lal v. State of U.P. and others, AIR 2000 SC 277, ***Narendra Mohan Arya v. United India Insurance Co. Ltd. and others***, A.I.R. 2006 SC 45, ***Janardan MOhanty v. Union of India***, 2000(II) OLR 126 and ***Tapan Kumar Dalai v. Union of India and others***, 2002(Suppl.) OLR-463. In Para-12 of the said judgment held as follows:-

> *"12. On the analysis of facts and law made above, this Court holds that the order of punishment imposed by the disciplinary authority vide order dated 20.9.2000 (Annexure-14) and confirmation thereof by the appellate authority vide order dated 04.01.2002 (Annexure-18) having been passed in gross violation of the principles of natural justice are vitiated. Accordingly, the same are quashed. The opposite parties are directed to reinstate the petitioner in service forthwith with all consequential financial and service benefits to him as due and admissible in accordance with law".*

22. Mr. S. Patra-1, also relied another decision of this Court in the case of ***Jayanta Kumar Goswami vs. Governing Bodyof Akhamandalamani College (+2) & Others*** reported in ***2015 (I) ILR-CUT-1150***. This Court in the aforesaid reported decision in Paragraph-15 to 20 has held as follows:-

> *"15. In Kumaon Mandal Vikash Nigam Ltd. (supra), the apex court held as follows:*
>
> *" The word 'Bias' in popular English parlance stands included within the attributes and broader purview of the work 'malice', which in common acceptation mean and imply 'spite' or 'ill-will' (stroud's Judicial Dictionary (5th Ed.) Volume 3) and it is not well settled that mere general statements will not be sufficient for the purposes of indication of ill-will. There must be cogent evidence available on record to come to the conclusion as to whether in fact there was existing a bias which resulted in the miscarriage of justice."*
>
> *16. The authority who has issued such draft charges had no authority to do so because of lack of resolution passed by the Governing Body. That itself indicates that the authority is biased against the Petitioner and proceeded without any authority of law. Therefore, the order of termination has been passed contrary to the provisions of law governing the field.*

17. The allegation of misappropriation of funds has been based on the audit report. The same has not been done in conformity with the provisions of law. On perusal of the audit report, it appears that no where it has been indicated that the petitioner had misappropriated the money. The audit having been done for the period from 21.7.1987 till 31.7.1998, which is inclusive of unaided and aided period and out of which during the period from 11.4.1997 to 31.7.1998 the college was aided and the petitioner as Principle-in-charge operated the account. But for the period from 21.7.1987 to o10.4.1997, which was unaided period, the account was not operated by the petitioner, rather one Bansidhar Khatua being the Secretary of the Governing Body operated the same and signed the resolution by maintaining the accounts as per law, thereby the entire process of proceeding was continuing with mala fide and biased manner and without application of any mind. As it appears, while causing such enquiry, the provisions of law has neither been taken into consideration nor principle of natural justice has been complied with, rather, the authorities have proceeded in a biased manner with mala fide intention, which is not permissible in the eye of law, consequence thereof, without any application of mind, the Director has approved the termination order under Annexure-25, which is nothing but an arbitrary and unreasonable exercise of power by the Director. The learned Education Tribunal in Appeal did not incline to interfere with the approval of the termination order. That itself also cannot sustain though the order itself indicates that the termination order was passed on 30.5.2005, but in effect, the same was passed on 30.5.2001 without prior approval of opposite party No.3, since the termination order has been approved by the Director contrary to the provisions contained in Section 10-A of the Orissa Education Act. Section 10-A(1)(a) of the Act reads as follows:-

"10-A. Service of teachers of aided institutions not to be terminated without approval- (1) The services of a teacher and other members of the staff of an aided Educational Institution shall not be terminated without obtaining the prior approval in writing of the

(a) Director in case of a teacher and other members of the staff of a college;

(b) xx xx xx"

18. On perusal of the above mentioned provisions, it appears that the services of a teacher of aided educational institution shall not be terminated without obtaining prior approval in writing of the Director in case of a teacher of a college. In the present case, the termination order having been passed on 30.5.2001 and decision was taken by the Governing Body regarding termination of his services pursuant to the resolution dated 28.5.2001, which has been approved by the Director vide letter dated 7.5.2005 under Annexure-25, it cannot be construed that there is prior approval with regard to the termination of the services of the petitioner and such order of termination has been passed due to non-compliance of the principle of natural justice.

19. The learned Education Tribunal committed gross error apparent on the face of the record by declining to interfere with the approval of the order of termination by the Director under Annexure-25.The learned Tribunal has committed gross error stating that final charges with imputations were served on the petitioner on 21.2.1999 along with relevant documents, basing upon which charges were framed and such statement has been made on the basis of the contentions raised by opposite party no.5. The opposite party no.5 has never filed any affidavit before the learned Tribunal to that extent. The contention raised that the petitioner was supplied with the final charges

with imputations with relevant documents on 21.2.1999 are backed by documents or materials available on record. But fact remains, on the basis of the draft charge under Annexure-4, prepared on 24.2.1999 since the documentswere not supplied to him as per Rule 22(3) of 1974 Rules, the petitioner called for all the documents pursuant to Annexure-25, but no such documents were supplied to him and on the basis of such draft charges, the proceeding continued. Therefore, without appreciating the facts in proper perspective, the learned Tribunal has passed the impugned order.

20. In view of the foregoing analysis, this Court is of the opinion that the impugned resolution of the Governing Body terminating the services of the petitioner under Annexure- 19, the subsequent approval made by the Director, Higher Education under Annexure-25 and the order passed by the learned Education Tribunal under Annexure-26 are contrary to the provisions of law and as the same have been passed without compliance of the principles of natural justice, the same are hereby set aside".

23. Mr. S. Patra-1, also relied another decision of the Hon'ble Apex Court in the case of ***State of Uttaranchal & Others vs. Kharak Singh reported in 2008 AIR SCW 7507***. Hon'ble Apex Court in Paragraph-11 of the said judgment has held as follows:-

"11. From the above decisions, the following principles would emerge:

i) The enquiries must be conducted bona fide and care must be taken to see that the enquiries do not become empty formalities.

ii) If an officer is a witness to any of the incidents which is the subject matter of the enquiry or if the enquiry was initiated on a report of an officer, then in all fairness he should not be the Enquiry Officer. If the said position becomes known after the appointment of the Enquiry Officer, during the enquiry, steps should be taken to see that the task of holding an enquiry is assigned to some other officer.

iii) In an enquiry, the employer/department should take steps first to lead evidence against the workman/delinquent charged, give an opportunity to him to cross-examine the witnesses of the employer. Only thereafter, the workman/delinquent be asked whether he wants to lead any evidence and asked to give any explanation about the evidence led against him.

iv) On receipt of the enquiry report, before proceeding further, it is incumbent on the part of the disciplinary/punishing authority to supply a copy of the enquiry report and all connected materials relied on by the enquiry officer to enable him to offer his views, if any".

24. Making all such submissions Mr. S. Patra-1 prayed for interference of this Court in the order of punishment passed under Annexure-9 and confirmed by the appellate authority under Annexure-11.

25. Mr. Y.S.P.Babu, learned Addl. Government Advocate for the State on the other hand made his submission basing on the stand taken in the counter affidavit.

26. It is submitted that since the Petitioner did not take part in the proceeding in spite of being noticed, the Enquiry Officer proceeded with the enquiry and submitted his enquiry report under Annexure-7 by holding the petitioner guilty of the charges.

27. It is further submitted that on receipt of the enquiry report, the Petitioner was issued with the 2nd show cause under Annexure-8 proposing the punishment of the dismissal and the Petitioner on receipt of the same also submitted his reply.

28. Mr. Babu further submitted that after considering the stand taken by the Petitioner in his reply under Annexure-8, the disciplinary authority – Opposite Party No.3 passed the order of punishment rightly against the Petitioner.

29. Mr. Babu also submitted that the appellate authority after taking into account the grounds taken in the appeal also rightly rejected the appeal by confirming the order of punishment.

30. Mr. Babu accordingly submitted that the Petitioner has been rightly dismissed from service and no interference is called for by this Court.

31. Heard learned counsel for the Parties.

32. Perused the materials available on record.This Court after going through the same finds that after receipt of the enquiry report, the Petitioner was never provided a copy of the same and given an opportunity to submit his reply against the said finding of the enquiry Officer with issuance of the 1st show cause as provided under Rule-15 of the OCS (CC&A) Rules, 1962. This Court also finds that even though the Enquiry Officer in his report indicated that the enquiry was held on different dates lastly on 26.02.2008, but no document has been filed by the State Counsel showing issuance of any notice to the Petitioner to take part in the enquiry. When the matter was finally heard by this Court on 23.09.2022, Mr. Babu filed notice issued by the Enquiry Officer vide letter dated 12.02.2008 through a Memo. This Court after going through the same finds that vide the

said letter, the Petitioner was directed to appear before the Enquiry Officer on 20.02.2008. But in the Enquiry Report no enquiry was conducted on 20.02.2008 and instead it was held on 26.02.2008. This Court further finds that in absence of the Marshalling Officer, the Enquiry Officer proceeded with the enquiry in presence of the Presenting Officer only. The said fact is also admitted in Para-6.12 of the counter affidavit. In the said para, it has been submitted that only once Sri Sahu, the Marshalling Officer attended the enquiry i.e. on the first day of enquiry on dtd. 23rd May, 07. All along the nominated Presenting Officer was presenting the case as the Marshalling Officer was transferred to other Range.

33. Therefore, this Court after going through the materials available on record finds that at no point of time the Petitioner was issued with a notice to take part in the enquiry and the Enquiry Officer proceeded with the enquiry in absence of the Marshalling Officer also.This Court also finds that the Petitioner was never provided with a copy of the enquiry report along with the 1st show-cause as provided under Rule-15 of the OCS(CC&A) Rules, 1962. Therefore, placing reliance on the decision cited by Mr. S. Patra-1 and after going through the materials available on record, this Court finds that the enquiry against the Petitioner has been conducted without giving opportunity of hearing to the Petitioner. Therefore, only on the ground of non-compliance of the principle of nature justice, this Court is inclined to quash the order of punishment passed under Annexure-9 and confirmed by the appellate authority in his order under Annexure-11. While quashing the same, this Court directs the Opposite Parties to reinstate the Petitioner in his service.

34. This Court is also of the view that since the Petitioner w.e.f. 08.08.2008 was kept out of employment due to the illegal order of dismissal passed under Annexure-9, the Petitioner in view of the decision of the Hon'ble Apex Court in the case of ***Allahabad Bank & Others vs. Avtar Bhushan Bhartiya*** in Special Leave Petition (Civil) No.32554 of 2018 decided on 22.04.2022 is entitled to get back-wages for the period he remained out of employment. Hon'ble Apex Court in the said decision confirmed the order passed by the High Court, wherein Hon'ble High Court had directed for payment of 50% back-wages for the period the Petitioner therein remained out of employment. Hon'ble Apex Court in the said decision in Paragraph-36 held as follows:-

"36. Therefore, even applying the ratio laid down in various decision, we do not think that the employee could be granted anything more than what the High Court has awarded".

35. Therefore, this Court held that the Petitioner is entitled to get 50% back-wages for the period from 08.08.2008 till his reinstatement in his service. While directing the Opposite Party No.3 to reinstate the Petitioner in his service within a period of one month from the date of receipt of this order, his entitlement to the extent of 50% back-wages be also released in his favour within a further period of two months.

36. With the aforesaid observations and directions,the WPC(OAC) stands disposed of. There shall be no order as to costs.

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2022 (III) ILR - CUT- 311

G. SATAPATHY, J.

CRLMC NO.1381 OF 2015

AKSHYA RAY & ANR .....Petitioners

.V.

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

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Offences U/Ss.452/379/427/323/307/34 of I.P.C. read with Section 9(B) of Indian Explosive Act and 127(A) of Representation of the People Act – Prayer to quash the criminal proceeding in view of the settlement of dispute amicably among the parties – But such settlement was not amongst the parties rather it was between the accused and informant – Hence such settlement between the informant and the accused questioned – Held, the allegation in this case for offence U/S. 307 of I.P.C. being heinous and serious in nature can be treated as a crime against the society but not against the individual alone and the petitioners having failed to produce any material to indicate about consent of other injured except the informant for settlement of dispute and compromise amongst them and taking into consideration the nature of allegation in this case to have a serious impact on the society, this Court does not consider it proper to exercise the power U/S. 482 of Cr.P.C. to quash the criminal proceeding instituted against the petitioners.

(Para-16)

Case Laws Relied on and Referred to :-

1. A.I.R. 2014 S.C. 3055 : Yogendra Yadav & Ors. Vs. State of Jharkhand.
2. (2019) 5 S.C.C. 688 : State of Madhya Pradesh Vs. Laxmi Narayan & Ors.
3. 1977 (4) SCC 551 : Madhu Limaye Vs. the State of Maharashtra.
4. 1992 Supp.(1) SCC 335 : State of Haryana and Ors. Vs.Bhajanlal & Ors.
5. 2022 Live Law (SC) 642 : Daxaben Vs. the State of Gujarat and Ors.
6. (2017) 68 OCR(SC) 982 : Parbathbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur & Ors. Vs. State of Gujarat & Anr.
7. (2021) 84 OCR (SC) 539: Ramgopal & Anr Vs. The State of Madhya Pradesh.

For Petitioners : Mr. B.B.Rath
For Opp. Parties: Mr. S.N.Das,ASC & Mr. A.K. Ray

ORDER Date of Hearing: :25.08.2022: Date of Order: 24.09.2022

G. SATAPATHY, J.

The petitioners herein by an application U/S. 482 Cr.P.C. have sought for to quash the criminal proceeding initiated against them in Bari Ramchandrapur P.S. Case No. 13(7) dated 14.02.2007 for commission of offences U/Ss. 452/379/427/323/307/34 of I.P.C. read with Section 9(B) of I.E. Act and 127(A) of R.P. Act on the ground of settlement dispute amicably amongst themselves.

2. The facts in synopsis are that on 14.02.2007 at about 9 A.M. in the morning, the petitioners called the informant to join in a political rally of Congress party but the informant replied that he is a sweet stall owner and should not join in any rally and being annoyed, the petitioners threw away some sweets (Rasogola) kept in two cauldron (Kadei) costing approximately Rs.2,000/- and broke away twenty five numbers of glass tumblers and also broke the Asbestos roof as well as damaged other goods of the sweet stall. They also took away cash of Rs.700/-to 800/- approximately and when the informant protested, they slapped and gave fist blows to him. The petitioners thereafter called upon Kailash Mallik(Kai) and Sarat Parida in loud voice to come immediately with crude bombs to kill the informant and on such call, the aforesaid two persons, accordingly, came with crude bombs and threw the bombs from the road aiming at the informant who concealed himself behind a pillar of the stall as a result his uncle Sanatan Sahoo sustained injury on his eye lid and uncle Banamali Sahoo sustained injury on his knee and he also sustained injury on his leg and right hand by the pebbles of the bombs. At the time of occurrence, the father, brother and

two uncles of the informant were present at the place of occurrence i.e. inside the sweet stall of the informant.

Basing on the report(F.I.R.) of the informant, Bari Ramchandrapur P.S. Case No. 13(7) of 2007 was registered which was investigated into, resulting in placing of charge sheet against the petitioners and another for commission of offences U/Ss. 452/379/427/323/307/34 of I.P.C. read with Section 9(B) of I.E. Act and 127(A) of R.P. Act and cognizance of aforesaid offences was taken, where after on commitment to the Court of Sessions, C.T.Case No.13 of 2015 was registered. Moreover, N.B.Ws. were issued against the petitioners and another co-accused on 17.05.2018 and now the case stands posted to 19.09.2022 for production of accused persons.

3. In order to get rid of the criminal case, the petitioners have filed the present CRLMC U/S. 482 Cr.P.C. to quash the criminal proceeding instituted upon them on the grounds,*inter alia*, settlement of dispute with the informant by intervention of local gentries and well wishers by arraying the informant and State as opposite parties.

In response to the notice of the CRLMC, the opposite party No.2 has entered appearance through his learned counsel and filed counter affidavit admitting about the settlement of the dispute amongst them.

4. In course of hearing of the CRLMC, learned counsel for the petitioners by relying upon the decision in ***Yogendra Yadav & Others Vrs. State of Jharkhand; A.I.R. 2014 S.C. 3055*** submits that since the parties have settled up their disputes by intervention of local gentries, there should not be any bar to quash the present Criminal Proceeding. Learned counsel for the petitioners by drawing attention of this Court to the above decision submits that even if the offences U/Ss. 307 of I.P.C. and 9(B) of I.E. Act are not compoundable in nature but in the present case, High Court in exercise of power U/S. 482 Cr.P.C. can quash the criminal proceeding instituted against the petitioners on the grounds that the petitioners and informant are neighbours and belong to same Grama Panchayat and they have already amicably settled up the dispute amongst themselves in presence of local gentries and well wishers and they being good neighbours, have already forgotten the mishap and are living in harmony.

5. In controverting the above submissions, learned counsel for the State submits that when the offences are non-compoundable and heinous in nature like offence U/S 307 of I.P.C and Section 9(B) of I.E. Act as alleged against the petitioners in this case, the Court should not quash the criminal proceeding. It is further submitted that the offences U/Ss. 307 of I.P.C. and 9(B) of I.E. Act being heinous and serious offences cannot be treated as a crime against any particular individual, rather a crime against the society and therefore, the present criminal proceeding for commission of offences involving offences U/S. 307 of I.P.C. and Section 9(B) of I.E. Act shall not be quashed. In order to buttress his submission, learned counsel for the State has also relied upon the decision of the Apex Court in ***State of Madhya Pradesh Vrs. Laxmi Narayan and Others; (2019) 5 S.C.C. 688.***

6. After hearing the parties upon perusal of record, it is noticed that the present petitioners have been charge sheeted for the commission of offences punishable U/Ss. 452/379/427/323/307/34 of I.P.C. read with Section 9(B) of I.E. Act and 127(A) of R.P. Act, out of which the offences U/S. 307 of I.P.C. and Section 9(B) of Indian Explosive Act are predominantly heinous and serious offences and have deep impact on the society. There is also no dispute that the offence U/S. 307 of the I.P.C. is non-compoundable in nature. In this case, a report was also called for from the learned Court concerned about the present status of the case and in response, learned District & Sessions Judge, Jajpur has submitted its report on 23rd August, 2022 indicating therein about issuance of N.B.Ws. against the petitioners, who are accused persons in the case, on 17.05.2018 and posting of case to 19.09.2022 for production of the accused persons.

7. The invocation of jurisdiction U/S. 320 of the Cr.P.C. for the purpose of compounding an offence is not the same, rather distinct from invocation of jurisdiction U/S. 482 of the Cr.P.C. to quash the criminal proceeding on amicable settlement of dispute by the parties and it is clear beyond doubt that the power to quash any criminal proceeding U/S. 482 of the Cr.P.C. can be invoked, even if for non-compoundable offences, provided that if on the face of complaint/F.I.R., or charge sheet together with accompanying documents, no offence is primafacie constituted. In other words, the test is that taking the allegations on record as they are, without adding or subtracting anything, if no offence is made out, such criminal proceeding may be quashed by the High Court in exercise of power U/S. 482

of Cr.P.C. to secure the ends of justice or to prevent the abuse of process of any Court.

8. Further, the principle that emerges for exercise of jurisdiction U/S. 482 of Cr.P.C. never makes it obligatory for the High Court to conduct any roving enquiry to find out the admissibility or reliability of any evidence, either documentary or oral at the stage of investigation or before commencement of trial to see reasonable possibility of accusations to be found unsustainable nor is it desirable at the same time to appreciate the evidence on record in support of the charge. However, in the present case, the sole and whole ground by which the petitioners have sought for to invoke the jurisdiction U/S. 482 of Cr.P.C. to quash the criminal proceeding instituted against them is settlement of dispute between themselves. The High Court while exercising its jurisdiction U/S. 482 of Cr.P.C. in a case where settlement of dispute amongst the parties have been advanced as a ground for quashing the criminal proceeding has to be more careful and cautious, especially when non-compoundable offence U/S. 307 of I.P.C. which is a heinous and serious offence and has deep impact on the society, is alleged but mere incorporation of such section in the F.I.R. or charge sheet without any primfacie materials would not come in the way of High Court to exercise its inherent power to quash the proceeding.

9. Since the petitioners herein have sought for to invoke the inherent jurisdiction of this Court to quash the criminal proceeding instituted against them for offences involving U/S. 307 of IPC and 9(B) of IE Act along with other offences on the sole ground of settlement of dispute amongst themselves, the only question crops up for consideration about justifiability of invocation of inherent power of this Court to quash the proceeding against the petitioners for offences involving non-compoundable offence like 307 of IPC on the basis of facts and circumstance of the present case. The underlying principle by which a criminal proceeding can be quashed on the ground of settlement of disputes between the parties is no more alien to law, which has already been clarified and enunciated by Apex Court in a plethora of decisions. In such cases, the High Court is not denuded of inherent power to quash a criminal proceeding where there is settlement of dispute amongst the parties to secure the ends of justice or to prevent abuse of process of Court, but such exercise of power must be invoked sparingly and cautiously. In ***Madhu Limaye Vrs. the State of Maharashtra; 1977 (4) SCC 551***, at the outset the Apex Court has noticed the principles to

the effect that the inherent power of the High Court should be exercised very sparingly to prevent abuse of process of any Court or otherwise to secure the ends of justice. In the oft quoted and most celebrated decision in the matter of exercise of jurisdiction U/S. 482 of Cr.P.C. in ***State of Haryana and others Vrs. Bhajanlal and others; 1992 Supp.(1) SCC 335***, the Apex Court had held that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases. The extra-ordinary or inherent powers do not confer any arbitrary jurisdiction on the Court to act according to its whim or caprice. The Court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegation made in the F.I.R. or the complaint.

10. In coming back to the cases of quashment of non-compoundable offences on the basis of compromise, it is felt apposite to refer to the most recent decision of the Apex Court in ***Daxaben Vrs. the State of Gujarat and others; 2022 Live Law (SC) 642***, wherein the Apex Court has held at paragraphs-38 , 39 and 40 as follows:-

> *"38. However, before exercising its power U/S. 482 of the Cr.P.C. to quash an F.I.R., criminal complaint and/or criminal proceedings, the High Court, as observed above, has to be circumspect and have due regard to the nature and gravity of the offence.* ***Heinous or serious crimes, which are not private in nature and have a serious impact on society cannot be quashed on the basis of a compromise between the offender and the complainant and/or the victim****. Crimes like murder, rape, burglary, dacoity and even abetment to commit suicide are neither private nor civil in nature. Such crimes are against the society.* ***In no circumstances can prosecution be quashed on compromise, when the offence is serious and grave and false within the ambit of crime against society****.*
>
> *39. Orders quashing F.I.Rs. and/or complaints relating to grave and serious offences only on basis of an agreement with the complainant, would set a dangerous precedent, where complaints would be lodged for oblique reasons, with a view to extract money from the accused. Furthermore, financially strong offenders would go scotfree, even in cases of grave and serious offences such as murder, rape, bride-burning, etc. by buying off informants/complainants and settling with them. This would render otiose provisions such as Sections 306,498- A,304-B etc. incorporated in the I.P.C. as a deterrent, with a specific special purpose.*
>
> *40. In criminal jurisprudence, the position of the complainant is only that of the informant.* ***Once an F.I.R. and/or criminal complaint is lodged and a criminal case is started by the State, it becomes a matter between the State and the accused****. The State has a duty to ensure that law and order is maintained in the society. It is for the State to prosecute offenders.* ***In case of grave and serious non-compoundable offences which impact society, the informant and/or complainant only has the right of hearing, to the extent of ensuring that justice is done by conviction and punishment of the offender. An informant has no***

> ***right in law to withdraw the complaint of a non- compoundable offence of a grave, serious and/or heinous nature, which impact society."***
>
> *(emphasis supplied by bold letters)*

11. True it is that quashing of criminal proceeding on the ground of settlement of dispute between the informant-victim and the accused persons has come up before different Courts more than often and it has come before the Apex Court once again in the case of ***Parbathbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur & others Vrs. State of Gujarat and another; (2017) 68 OCR(SC) 982***, wherein a three Judge Bench of Apex Court while summarizing the broad principles on which inherent power of High Court can be invoked has set out the principles for quashing of criminal proceeding on the ground of settlement of dispute at paragraph-15(v),(vii) and (vii) as follows:-

> *"(v) The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute,* ***revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;***
>
> *(vi) In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence.* ***Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute.*** *Such offences are, truly speaking, not private in nature but have a serious impact upon society.* ***The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;***
>
> *(vii) As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;"*

12. In coming to situations where and when criminal proceedings involving non-compoundable offences can be quashed by exercise of power U/S. 482 of Cr.P.C., the Apex Court in ***Ramgopal and another Vrs. The State of Madhya Pradesh; (2021) 84 OCR (SC) 539*** has held at paragraph-13 as follows:-

> *"13. It appears to us that criminal proceedings involving non-heinous offences or where the offences are predominantly of a private nature, can be annulled irrespective of the fact that trial has already been concluded or appeal stands dismissed against conviction. Handing out punishment is not the sole form of delivering justice. Societal method of applying laws evenly is always subject to lawful exceptions. It goes without saying, that the cases where compromise is struck post conviction, the High Court ought to exercise such discretion with*

rectitude, keeping in view the circumstances surrounding the incident, the fashion in which the compromise has been arrived at, and with due regard to the nature and seriousness of the offence, besides the conduct of the accused, before and after the incidence. The touchstone for exercising the extraordinary power under Section 482 Cr.P.C. would be to secure the ends of justice. There can be no hard and fast line constricting the power of the High Court to do substantial justice. A restrictive construction of inherent powers under Section 482 Cr.P.C. may lead to rigid or specious justice, which in the given facts and circumstances of a case, may rather lead to grave injustice. ***On the other hand, in cases where heinous offences have been proved against perpetrators, no such benefit ought to be extended, as cautiously observed by this Court in Narinder Singh & Ors. vs. State of Punjab & Ors. 2014(II) CLR(SC)722; (2014) 6 SCC 466 and Laxmi Narayan (Supra).”***

13. In this case the petitioners have relied upon the decision in the case of ***Yogendra Yadav*** (supra) to quash the criminal case on the ground of compromise, but the Apex Court at Paragraph-4 of the decision has held as follows:-

“xxx xx xx In which cases the High Court can exercise its discretion to quash the proceedings will ***depend on facts and circumstances of each case. Offences which involve moral turpitude, grave offences like rape, murder etc. cannot be effaced by quashing the proceedings because that will have harmful effect on the society. Such offences cannot be said to be restricted to two individuals or two groups. If such offences are quashed, it may send wrong signal to the society****. However, when the High Court is convinced that the offences are entirely personal in nature and, therefore, do not affect public peace or tranquility and where it feels that quashing of such proceedings on account of compromise would bring about peace and would secure ends of justice, it should not hesitate to quash them. In such cases, the prosecution becomes a lame prosecution. Pursuing such a lame prosecution would be waste of time and energy. That will also unsettle the compromise and obstruct restoration of peace.”*

14. Similarly on the other hand, the State has relied upon the decision in the case of ***Laxmi Narayan*** (supra) wherein in a similar situation like the present case, the Apex Court after noticing the law on the point and authorities laid down in a catena of decisions observed at paragraph-15.4 as follows:-

“Offences under Section 307 IPC and the Arms Act etc. would fall in the category of heinous and serious offences and therefore are to be treated as crime against the society and not against the individual alone, and therefore, the criminal proceedings for the offence under Section 307 IPC and/or the Arms Act etc. which have a serious impact on the society cannot be quashed in exercise of powers under Section 482 of the Code, on the ground that the parties

> ***have resolved their entire dispute amongst themselves***. *However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to framing the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used, etc. However, such an exercise by the High Court would be permissible only after the evidence is collected after investigation and the charge-sheet is filed/charge is framed and/or during the trial. Such exercise is not permissible when the matter is still under investigation. Therefore, the ultimate conclusion in paras 29.6 and 29.7 of the decision of this Court in the case of Narinder Singh (supra) should be read harmoniously and to be read as a whole and in the circumstances stated hereinabove".*

15. Adverting to the facts of the present case on the touchstone of the principle laid down by the Apex Court in the decisions referred to above, there appears little dispute that the petitioners have sought for exercise of power to quash the criminal proceeding instituted against them on the ground of compromise and settlement between the parties and accordingly, they have impleaded the informant who is one of the injured as opposite party No.2 who has stated by way of counter affidavit that more than eight years has elapsed since the date of occurrence and they (both the parties) have forgotten the mishap and living in perfect harmony and further continuance of the proceeding may lead to abuse of process of law. It is also stated by him in such counter affidavit that during pendency of the case, the matter was resolved between them(both the parties) in presence of local gentries and well-wishers in order to maintain harmony in our locality and now they (both the parties) are living peacefully without any disturbance. It is reminded here that mere settlement of disputes amongst the parties does not ipso facto enure to the benefit of parties seeking to quash the proceeding, unless the same is permissible in consonance with true spirit of law.

15(i). Admittedly, the informant is not only the sole injured in this case and the record indicates, besides the informant, his two uncles had also sustained injuries but neither they have been impleaded as parties in this case nor is there any document to evident their consent for compromise in this case. Besides, the present dispute cannot be given the flavor civil dispute nor the allegation raised against the petitioners disclose about the dispute amongst the parties to be individual in nature, rather the transaction having taken place in the sweet stall of the informant can be well said to

have had the transaction taken place in a public place. The allegation on record also discloses about the petitioners calling upon the informant to join a political rally which perse suggests the transaction to be against the society but not against an individual alone. Moreover, the allegation of throwing crude bomb by the petitioners aiming at the informant resulting in injuries to the informant as well as two other persons and damage to the shop of the informant cannot be brushed aside lightly nor the incorporation of offence U/S. 307 of I.P.C. in this case can be said to have incorporated for the sake of case only. Moreover, the certified copy of police papers produced on behalf of the petitioners itself indicate about submission of charge sheet against the petitioners for different offences including offences U/S. 307 of I.P.C./9(B) of I.E. Act showing accused Subash Ray and Kailash Mallik as absconder. Moreover, the report of the learned District & Sessions Judge, Jajpur in terms of order of this Court discloses about issuance of N.B.Ws. against the petitioners since 17.05.2018 awaiting production of accused persons by 19.09.2022 by itself speaks about the conduct of the petitioners. The above facts coupled with the allegation levelled against the petitioners in peculiar facts and circumstance of the case makes the case of the petitioners distinguishable from the facts of the case relied upon by the petitioners in ***Yogendra Yadav*** (supra) in asmuch as the offence U/S. 307 of IPC is not only heinous and serious offence but also is not a predominantly civil dispute in the peculiar facts and circumstances of the case nor against an individual alone.

16. A careful conspectus of the record of the case together with discussion made hereinabove, especially when the incorporation of offence U/S. 307 of I.P.C. in this case would lead to a conclusion that the allegation in this case for offence U/S. 307 of I.P.C. being heinous and serious in nature can be treated as a crime against the society but not against the individual alone and the petitioners having failed to produce any material to indicate about consent of other injured except the informant for settlement of dispute and compromise amongst them and taking into consideration the nature of allegation in this case to have a serious impact on the society, this Court does not consider it proper to exercise the power U/S. 482 of Cr.P.C. to quash the criminal proceeding instituted against the petitioners.

In the result, the CRLMC merits no consideration and is accordingly dismissed.

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