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2022 (III) ILR - CUT-321

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

W.P.(C) NO. 23399 OF 2013

KHATUA MALLICK & ORS. …. Petitioners

.V.

UNION OF INDIA & ORS. ….Opp.Parties

CONSTITUTION OF INDIA,1950 – Article 341 – Entry 24 of 1950 Order r/w Scheduled Castes and Scheduled Tribes Orders (Amendment) Act, 2002 – The said order challenged in view of inclusion KEUTA, KAIBARTA & DHIBAR in the list of SCs – Power of Court to interfere – Held, the Court should not entertain any plea either for inclusion or exclusion of a community from the list of SCs – It is the Parliament alone, which can, by law include or exclude from the list. (Paras 19, 20)

Case Laws Relied on and Referred to :

1. 1979 SCC OnLine (Orissa)138 : Narayan Behera v. State of Orissa.
2. AIR 1996 SC 2306 : Nityanand Sharma v. State of Bihar.
3. AIR 1996 SC 1728 : Pankaj Ku. Saha v. The Sub-Divisional Officer Islampur.
4. AIR 1996 SC 1182 : S.Swvigaradoss v. Zonal Manager, FCI.
5. AIR 1995 SC 1506 : Director of Tribal Welfare, Govt.of A.P. v. Laveti Giri.
6. AIR 1990 SC 991 : Srish Kumar Choudhury v. State of Tripura.
7. AIR 2001 SC 393 : State of Maharashtra v. Milind.
8. 1996 (3) SCC 585 : A Chinnappa v. V.Venkatamuni.
9. AIR 1996 SC 1962 : Prabhudev Mallikarjunaiah v. Ramachandra Veerappa.
10. (2014) 9 SCC 236 : Puducherry Scheduled Caste People Welfare Association v. Chief Secretary to Government, Union Territory of Pondicherry.
11. (2007) 5 SCC 360 : Shree Surat Valsad Jilla K.M.G Parishad v. Union of India.
12. 1969 1 SCC 20 : Parsram v. Shivchand.
13. 2018 10 SCC 312 : Bir Singh v Delhi Jal Board.
14. (1994) 1 SCC 359 : Palghat Jilla Thandan Samudhaya Samrakshna Samithi v. State of Kerala.
15. (1965) 1 SCR 316 : B. Basavalingappa v. D. Munichinnappa.
16. AIR 1965 SC 1557 : Bhaiyalal v. Hari Kishan Singh.

For Petitioners : Mr. Prakash Chandra Sethi

For Opp.Parties: Mr. Bimbisar Dash, Central Government Counsel
Mr. Ishwar Mohanty, ASC,
Mr. Budhadev Routray, Sr. Adv, Mr. Gautam Misra, Sr. Adv,
Mr. Upendra Kumar Samal

JUDGMENT Date of Judgment : 30.09.2022

Dr. S. MURALIDHAR, C.J.

1. The prayer in the present writ petition is for a declaration that Entry 24 in the Constitution (Scheduled Castes) Order 1950 ('the 1950 Order') inserted by virtue of the Constitution (Scheduled Castes) Orders (Second Amendment) Act, 2002 ('the 2002 Act') published in the Gazette of India on 18th December 2002 is ultra vires Article 341 of the Constitution of India. The further prayer is for a direction to the Opposite Parties, i.e., the Union of India (Opposite Party No.1), Registrar General and Census Commissioner of India (Opposite Party No.2), National Commission for Scheduled Castes (Opposite Party No.3), the State of Orissa (Opposite Party No.4), the Director, Scheduled Castes and Scheduled Tribes Research and Training Institute, Bhubaneswar (Opposite Party No.5) and the Director, Nabakrushna Choudhury Center for Development Studies, Bhubaneswar (Opposite Party No.6), to revoke all the Scheduled Caste (SC) certificates issued in favour of persons belonging to the Keuta, Kaibarta and Dhibara communities in State of Odisha and to remove the persons in service belonging to the said communities who had been employed on the basis of reservations.

2. The three Petitioners belong to the SC and state that all of them are involved in protection of the rights of the SC people. The challenge to the inclusion of the above three castes in the list of SCs by virtue of the 2002 Act inserting Entry 24 in the 1950 Order is that the said castes do not belong to the 'untouchable category' in Orissa, which according to the Petitioners is the basic requirement for a caste to be declared as an SC. It is stated that in exercising the powers conferred by Article 341 (1) of the Constitution of India, the 1950 order included 'Dewar' in the said list although the said community does not exist in the State of Orissa.

3. It is further stated that on 18th November 1978, the Government of Orissa recommended to the Government of India that the Dewar community be deleted from the list of SCs and reminders were sent repeatedly. The two such reminders dated 4th January, 2002 and 7th February, 2008 are enclosed at Annexure-1 series to the petition.

4. Mr. Prakash Chandra Sethi, learned counsel appearing for the Petitioners states that as a result of a judgment of this Court in ***Narayan Behera v. State of Orissa 1979 SCC OnLine (Orissa)138*** (judgment dated 5th November, 1979 in O.J.C. No. 247 of 1978) which was affirmed by the Supreme Court of India by dismissing the Special Leave Petition filed against the said judgment, instructions were issued by the Government of Orissa to treat Keuta, Kaibarta and Dhibara as synonymous with Dewar and treat them as SC.

This was done despite clear instructions of the Government of India in the Ministry of Home Affairs that they would be treated as SC only after formal inclusion of the names in the list of SCs by appropriate legislation enacted by the Parliament.

5. It is stated that the Registrar General of India by a letter dated 1st August, 2001 reiterated the views expressed in 1979 and supported the exclusion of Dewar from the SC list. It is in the above background, that the 2002 Act including Dhibar, Kaibarta and Keuta along with Dewar at Serial No.24 of the 1950 Order was enacted. It is submitted that the said amendment was made without following the due procedure and modalities; and ignoring the recommendations made earlier by the Government of Orissa for deletion of Dewar from the list of SCs.

6. Notice was first issued in the present writ petition on 20th December, 2013. Pursuant thereto replies have been filed by the Opposite Parties, which will be referred to shortly hereafter.

7. Mr. Sethi refers to a series of judgments including ***Nityanand Sharma v. State of Bihar AIR 1996 SC 2306, Pankaj Kumar Saha v. The Sub-Divisional Officer Islampur AIR 1996 SC 1728, S. Swvigaradoss v. Zonal Manager FCI AIR 1996 SC 1182, Director of Tribal Welfare, Government of A.P. v. Laveti Giri AIR 1995 SC 1506, Srish Kumar Choudhury v. State of Tripura AIR 1990 SC 991, State of Maharashtra v. Milind AIR 2001 SC 393, A Chinnappa v. V.Venkatamuni 1996 (3) SCC 585, Prabhudev Mallikarjunaiah v. Ramachandra Veerappa AIR 1996 SC 1962*** and the decision in ***Puducherry Scheduled Caste People Welfare Association v. Chief Secretary to Government, Union Territory of Pondicherry (2014) 9 SCC 236*** to urge that in terms of Article 341 (2), it is Parliament alone which can by law include or exclude from the list of SCs specified in a Notification issued under Article 341 (1) by the President of India and that even the Courts do not have the power to exclude or include castes in the said list. Mr. Sethi submits that the judgment in Narayan Behera (supra), which purportedly added the Dhibara community as an SC could not have formed the basis for making the 2002 amendment.

8. Mr. Sethi has referred to the reply filed by Opposite Party No.2 i.e. the Deputy Director of Census Operations where it was acknowledged that the ORGI by letter dated 15th January, 1979 had opined as under:

> "7…… With the word 'Dewar', Dhewar were taking advantage of the name Dewar and were returning themselves as Scheduled Castes and may, in fact, were issued Scheduled Caste certificates. Since Kaibarta and Keuta considered themselves as synonymous to Dhewar, they were also claimants to Scheduled Caste status. In fact, the situation

provided scope for 'Back-door' entry of communities in the list of Scheduled Castes and a number of persons from the above fishermen and boatmen communities were returning themselves as Scheduled Caste."

9. In the said affidavit, it was further stated in para 8 as under:

"8…… But this office would like to reiterate here that in view of the ethnic identity of Dewar being different from Dhewar and others, the names Dhewar or Dhiwar, Keuta and Kaibarta, etc. should not be accepted as synonymous of Dewar, as requested in the representation."

10. It acknowledged further as under:

"10. That in 2012, the nodal Ministry (i.e. the 'Ministry of Social Justice & Empowerment) requested the ORGI to examine the State Govt. proposal that whether the main entry 'Dewar' can be deleted from the list of Scheduled Castes, leaving its synonymous in the list of Scheduled Castes or the whole entry ought to be deleted. And the ORGI once again examined the proposal. And that the ORGI vide its D.O. letter No.8/1/2011-SS (Odisha) dated 29th June, 2012 once again reiterated its earlier stand for exclusion of the community from the Scheduled Castes list of the State. The ORGI mentioned that "… this office supports not only exclusion of Dewar but also the deletion of Dhibara, Keuta, Kaibarta, as synonyms of Dewar from the Scheduled Castes list of Odisha."

11. Two affidavits have been filed on behalf of the Opposite Parties 4 and 5. In the affidavit dated 18th December 2018, it was stated that in order to implement the judgment of this Court in ***Narayan Behera*** (supra), the State Government had sought the views of the Government of India and on the advice of the Government of India, the State Government has been providing SC benefits to the above three communities i.e. Dhibara, Keuta and Kaibarta since 1981 and the said communities have been enlisted as SCs in the SC List of Odisha. It is further stated in paras 16 and 17 of the said affidavit as under:

"16. That in reply to the averments made in Paragraph-6 of the writ application, it is humbly submitted that the Petitioners Association have made representations dt. 30.08.2012 for deletion of Dhibara, Keuta, Kaibarta from the SC list of Odisha along with main entry Dewar. On working on the said representation, State Govt. forwarded the same to the Director, SCSTRTI, Bhubaneswar vide letter No.35744 dt.15.11.2012 with instruction to conduct fresh broad based study on Keuta, Kaibarta, Dhibara communities as synonymous to Dewar and furnish the report along with views of SCSTRTI. The SCSTRTI have conducted the fresh broad based study on the above communities in Balesore, Bhadrak, Jajpur, Mayurbhanj and Keonjhar Districts and furnished its report to Govt. in ST & SC Dev. Deptt. vide letter No.1723 dt.27.08.2013. From the latest ethnic status report of SCSTRTI, it reveals that the Keuta, Kaibarta and Dhibara communities are not suffering from the social stigma of untouchability and thus are not entitled for SC status. Therefore it was recommended that (a) The State Govt. has already submitted the proposal to Govt. of India for deletion of Dewar from the SC list of Odisha since 1978 with subsequent reminders from time to time, because Dewar community does not exist in Odisha. It is contradiction that this non-existent

> community has synonyms like Dhibara, Keuta, Kaibarta in the State who are enjoying the SC status as such. (b) Therefore, the proposal may be submitted to delete the whole entry i.e. Dewar, Dhibara, Keuta, Kaibarta at Sl.24 of the SC list of Odisha as they do not at all satisfy the criteria for inclusion in the Scheduled Castes list and close the chapter once for all.
>
> 17. That, the above said broad based status study report of SCSTRTI is now under active consideration of Government. After due examination, the matter will be placed before the Scheduled Castes Welfare Advisory Board for its consideration and recommendation. If the Board recommends, the said proposal will be sent to Government of India for further action."

12. An additional affidavit was filed on 4th February 2019 on behalf of Opposite Parties 4 and 5 in which it is stated in para-5 as under:

> "5. That in addition to the averments made in para-17 of the counter affidavit filed on 18.12.2018, it is humbly submitted that the Scheduled Caste Welfare Advisory Board of the State Government meeting was held on 05.06.2015. The SC Welfare Advisory Board decided to send the matter to Government of India, Ministry of Social Justice & Empowerment for continuance of "KEUTA, KAIBARTA & DHIBAR" as synonym of DEWAR in SC list of Odisha at Sl No-24 and recommend the caste like RADHI, NIARY/NIARI/GIRGIRIA/GIRIGIRA/GINGIRA and GHANI to Govt. of India (Ministry of Social Justice & Empowerment (MOSJ & E) for inclusion in Scheduled Caste (SC) list of Odisha as synonym of KEUTA, KAIBARTA and DHIBAR, Accordingly Govt. of India, MoSJ & E has been requested to include (RADHI, NIARY/NIARI/GIRGIRIA/GIRIGIRA/GINGIRA and GHANI) vide this Deptt. Letter No-20716 dt.16.10.2015. Copy of the letter dtd.16.10.2015 is annexed herewith and marked as **Annexure-A/4** for kind perusal of the Hon'ble Court. Again Govt. of India has been requested vide Deptt. Letter No-9945/SSD dt.01.06.2016 for continuance of DEWAR, along with KEUTA, KAIBARTA & DHIBAR and inclusion of RADHI, NIARY/NIARI/GIRGIRIA/GIRIGIRA/GINGIRA and GHANI in SC list of Odisha. Copy of the letter No-9945/SSD dt.01.06.2016 is annexed herewith and marked as **Annexure-B/4** for kind perusal of the Hon'ble Court."

13. Clearly, between the first affidavit filed on 18th December 2018 and additional affidavit filed on 4th February 2019, there is a change in the stand of the State Government.

14. There have also been interveners on behalf of the three communities sought to be excluded from the list of the SCs. Among the pleas taken by them is that in service matters, a PIL may not be maintainable. It is submitted that there cannot be a judicial review of entries made in the 1950 Order. In support of such proposition, reliance is placed on the decisions in ***Shree Surat Valsad Jilla K.M.G Parishad v. Union of India (2007) 5 SCC 360, Parsram v. Shivchand 1969 1 SCC 20, Pankaj Kumar Saha v. The Sub-Divisional Officer, Islampur*** (supra) ***and State of Maharashtra v. Milind*** (supra), ***Bir Singh v Delhi Jal Board 2018 10 SCC 312, Palghat Jilla Thandan***

Samudhaya Samrakshna Samithi v. State of Kerala (1994) 1 SCC 359. It is further submitted by Mr. Budhadev Routray, learned Senior Advocate, Mr. Gautam Misra, learned Senior Advocate and Mr. U.K. Samal, learned counsel appearing for the Interveners that there cannot be an indirect review of the order passed by this Court in Narayan Behera (supra) against which the SLP was dismissed by the Supreme Court by an order dated 24th September 1980.

15. The above submissions have been considered. The essential prayer in the petition is for striking down Entry 24 in the 1950 order which includes Keuta, Kaibarta and Dhibar in the list of SCs for Odisha and which has been brought about as a result of the 2002 Act. In effect, therefore, what the Petitioners are seeking is for the Court by judicial order to exclude certain communities from the list of SCs. Even if it is sought to be contended that their inclusion in the list was wrongly made in the first place as a result of judicial intervention by the decision in ***Narayan Behera (supra)***, which was impermissible in law and therefore that the wrong should be undone, the Petitioners are in fact inviting the Court to do precisely what it has not been permitted to do in the whole series of judgments cited by the Petitioners themselves.

16. In ***State of Maharashtra v. Milind*** (supra) reference was made to the Constitution Bench judgments in ***B. Basavalingappa v. D. Munichinnappa (1965) 1 SCR 316 and Bhaiyalal v. Hari Kishan Singh AIR 1965 SC 1557*** as well as ***Nityanand Sharma v. State of Bihar*** (supra) holding that "it is for the Parliament to amend the law and the Schedule to include or exclude from the Schedule a tribe or tribal community or part of or group within a tribe or tribal community in the State, District or Region and its declaration is conclusive. The court has no power to declare synonymous as equal to the tribes specified in the Order or include in or substitute any caste/tribe etc."

17. In ***State of Maharashtra v. Milind*** (supra), reference was also made to the judgment in ***Palghat Jilla Thandan Samudhaya Samrakshna Samithi*** (supra) which held that "neither the State Government nor the court can enquire into or let in evidence relating to any claim as belonging to Scheduled Castes in any Entry of the Scheduled Castes Order. Scheduled Castes Order has to be applied as it stands until the same is amended by appropriate legislation."

18. In ***Puducherry Scheduled Caste People Welfare Association*** (supra), it was reiterated that in terms of Article 341 (2), it is Parliament alone which can by law include or exclude a community from the list of SCs from the notification in terms of Article 341(1) of the Constitution issued by the President of India.

19. In ***Bir Singh v. Delhi Jal Board*** (supra), the entire case law was elaborately discussed and it was observed as under:

> "32. The upshot of the aforesaid discussion would lead us to the conclusion that the Presidential Orders issued under Article 341 in regard to Scheduled Castes and under Article 342 in regard to Scheduled Tribes cannot be varied or altered by any authority including the Court. It is the Parliament alone which has been vested with the power to so act, that too, by laws made. Scheduled Castes and Scheduled Tribes thus specified in relation to a State or a Union Territory does not carry the same status in another State or Union Territory. Any expansion/deletion of the list of Scheduled Castes/Scheduled Tribes by any authority except Parliament would be against the constitutional mandate under Articles 341 and 342 of the Constitution of India."

20. The consistent legal position reiterated in all of the above decisions is that the Courts should not entertain any plea for either inclusion or exclusion of a community from the list of SCs. In the present case, the plea is for exclusion of three communities from the list of SCs in Odisha and that is an exercise which in view of the above settled legal position, this Court cannot possibly undertake.

21. Consequently, in view of the settled legal position explained above, the Court declines to grant any of the prayers made in the writ petition and it is dismissed as such. There shall, however, be no order as to costs.

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2022 (III) ILR-CUT-327

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

G.A. NO. 28 OF 1994

STATE OF ODISHA ……..Appellant

.V.

MUNA @MADHUSUDAN KAR & ORS. …….Respondents

(A) CODE OF CRIMINAL PROCEDURE, 1973 – Section 378 – Appeal against acquittal – Power of an Appellate Court, while dealing with an order of acquittal – Discussed with reference to case law.

(Paras16,17,26)

(B) CRIMINAL TRIAL – Offences under Section 302/34 of IPC – Two related eye witnesses to the occurrence – The cause of death was haemorrhage and shock resulting from the penetrating injury to the vital organ like lungs – An important element of appreciation of the evidence of a related eye-witness that it should be corroborated by the medical evidence, which is not fulfilled – There are also other

contradictions in the versions of the two eye witnesses – The failure of (PW4) to states before the police at any time prior to deposing in Court was also not properly explained – The circumstances surrounding the registration of the FIR are also suspicious – Trial Court acquitted the accused – Whether the findings of the trial Court can be said to be perverse? – Held, No. (Paras 20-25)

Case Laws Relied on and Referred to :-

1. AIR 1979 SC 135 : Ganesh Bhavan Patel v. State of Maharashtra.
2. AIR 1998 SC 2107: Sambasivan v. State of Kerala.
3. AIR 1995 SC 280 : Ram Kumar v. State of Haryana.
4. AIR 2003 SC 182 : C. Antony v. K.G.Raghavan Nair.
5. 2013 (II) OLR 228 : Mohan @Srinivas @Seena @Tailor Seena v. State of Karnataka = State of Orissa v. Udayanath Pradhan.
6. AIR 1994 SCW 2210 : Dinesh v. State of Madhya Pradesh.
7. (2021) 3 SCC 687 : N.Vijayakumar v. State of Tamil Nadu.

For Appellant : Mrs. Saswata Pattnaik, AGA
For Respondents: Mr. Kishore Ku.Mishra (R/1) & Mr. Lalit Ku.Maharana (R/2)

JUDGMENT Date of Judgment: 10.10.2022

Dr. S. MURALIDHAR, C.J.

1. The present appeal by the State of Odisha is directed against the judgment dated 16th October 1993 of the II Additional Sessions Judge, Puri in Sessions Trial Case No.56/286 of 1991 acquitting the Respondents of the offence under Section 302/34 IPC for committing the murders of Kasinath Panda and Narayan Panda on 11th August 1990, at around 1.40 pm.

2. It must be noted at the outset that initially this Court had by its judgment dated 20th May 2009 allowed the present appeal reversing the judgment of the trial Court and convicting each of the Respondents for the offence under Section 302/34 IPC and sentencing each of them to undergo imprisonment for life.

Remand order of the Supreme Court

3. Against the said judgment, the Respondents preferred Criminal Appeal No. 2175 of 2009 in the Supreme Court of India. By the order dated 21st May 2012, the Supreme Court set aside the judgment of this Court and inter alia observed as follows:

> "The High Court similarly narrated the facts and evidence of the witnesses upto paragraph No.12 of the judgment. In paragraph 13, in a very cryptic manner and without giving any reason the High Court reversed the findings recorded by the trial Court.

> The High Court did not come to the conclusion that any of the findings recorded by the trial court had been perverse being based on noevidence or was contrary to the evidence on record. On the motive part a finding has been recorded without giving any reason whatsoever.
>
> The law of interfering with the judgment of acquittal is well settled. It is to the effect that only in exceptional cases where there are compelling circumstances and the judgment in appeal is found to be perverse, the appellate court can interfere with the order of the acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial court's acquittal bolsters the presumption of innocence. Interference in a routine manner where the other view is possible should beavoided, unless there are good reasons for interference. (Vide: State of Rajasthan v. Talevar & Anr., AIR 2011 SC 2271; State of U.P. v. Mohd. Iqram & Anr., AIR 2011 SC 2296; Govindaraju @Govinda v. State by Srirampuram Police Station & Anr., (2012) 4 SCC 722; and State of Haryana v. Shakuntala & Ors., (2012) 4 SCALE 526.)
>
> "…the High Court has not dealt with the appeal in accordance with law, as the law mandatorily requires the appellate Court to record reasoned findings that the findings recorded by the Court below were perverse. In the instant case the High Court did not record as where and how the Trial Court's findings were not correct."

4. Accordingly, while setting aside the judgment of this Court, the Supreme Court requested this Court to rehear the appeal afresh and dispose it of preferably within six months thereafter.

5. It so transpired that originally there were four Respondents in the present appeal. Although the appeal filed by Respondent No.1 i.e., Criminal Appeal No.2175 of 2009 stood disposed of by the aforementioned order of the Supreme Court of India, the separate appeal filed there by Respondent No.3 i.e., Accused No.3 (A3) Kalia@ Jameswar Pujapanda i.e. Criminal Appeal No.418 of 2010 was still pending in the Supreme Court of India. The Supreme Court then wrote to this Court asking it to retransmit the entire record, as it was required for hearing of the aforementioned Criminal Appeal No.418 of 2010 filed by A3. This Court therefore adjourned the present appeal awaiting the outcome of Criminal Appeal No.418 of 2010 filed by A3.

6. Ultimately, on 17th September 2019, the said Criminal Appeal No.418 of 2010 was disposed of by the Supreme Court in the same terms as the order disposing of Criminal Appeal No.2175 of 2009. In other words, the matter stood remanded to this Court for a fresh hearing. Thereafter, the present appeal had to be adjourned by this Court awaiting the report from the Inspector-in-Charge (IIC) of Puri Town Police Station (PS) regarding the present whereabouts of Respondent Nos.1 and 3. Both of them were stated to be in their respective villages.

7. It must be mentioned here that during the pendency of the appeal, Respondent Nos.2 and 4 expired. This was noted by the Court in its order dated

25th January, 2021. Therefore, the appeal as far as the said two Respondents were concerned,stood abated. As a result, only A1 Muna @Madhusudan Kar and A3 Kalia @Jameswar Pujapanda remain as Appellants.

Case of the prosecution

8. The case of the prosecution is that Biswanath Panda (PW 1) was working as a Hawker in a Kerosene Depot of one Rampal Saha (not examined) in Puri town since three years prior to the date of occurrence i.e. 11th August, 1990. It is stated that on 8th August 1990, the hawkership of PW 1 was terminatedby the depot owner and he was not supplied kerosene oil. However, on 10th August 1990, PW 1 met the supply officials to ensure supply of kerosene oil from the depot. On that date, PW 1 learnt that his younger brother, the deceased Kasinath Panda had been assaulted by Muna (A1) causing bleeding injuries to his left cheek. On hearing about the assault, PW 1 and the deceased Narayan Panda (his father) went to the depot of Rampal Saha (not examined). However, the Supply Inspector Kar Babu was present there. While PW 1 was narrating about the incident, A1 assaulted him. The persons present there intervened and separated them.

9. On the next day, i.e., 11th August 1990, at about 11am, Simachal Patra (PW 5) told PW 1 that Kalu Saha, the grandson of Rampal Saha had sent for PW 1 to solve the dispute by way of compromise with regard to termination of hawkership. Thereafter, at around 1.30 pm, both the deceased, PW 1, PW 5 and Raghunath Pujapanda went to the depot with money and the issue register. The two deceased persons i.e., the brother and father of PW 1 waited in front of the depot and PW 1 entered inside the office of Kalu Saha. While he was in the office where some other persons were also present, he heard his brother shouting from outside that he was being killed. PW 1 then peeped out from the house standing at the door and saw A1 thrusting a gupti into the abdomen of Kasinath Panda. After receiving the blow, Kasinath ran into the office room and fell down unconscious. Narayan then came running to the door of the office crying for help. A1, who had chased deceased Kasinath to the room, thrust his gupti into the chest of Narayan. The other three accused persons were guarding the gate with their respective weapons in their hands.

10. It is stated that A3 was brandishing a big gupti, whereas accused Kalia was holding a knife and accused Rabi Behera (against whom the appeal has abated) had an iron rod. PW 1's father fell down unconscious and PW 1 bolted the office door from inside to prevent the entry of the accused persons. Kalu Saha was also present in the room. PW 1 took the deceased persons to the District Headquarters Hospital (DHH) Puri where they were declared brought

dead. The Town Inspector, Puri went to the Hospital and received the information. The case was registered against the four Respondents along with Kalu Saha under Section 302 read with 34 IPC. At the time of filing of the charge sheet, the name of Kalu Saha was deleted therefrom.

11. In order to prove its case, the prosecution examined 14 witnesses. No one was examined for the defence. Nevertheless, three documents were exhibited by the defence.

Judgment of the trial Court

12. The trial Court by the judgment dated 16th October 1993, acquitted all the accused because of the infirmities in the evidenceof the two eye witnesses, Biswanath Panda (PW 1) and his maternal uncle Shyam Sundar Panda (PW 4). The reasons for the trial Court acquitting the accused by the impugned judgment dated 16th October 1993, were as follows:

> (i) There were inconsistencies and contradictions in the testimony of PW 1 which remained uncorroborated. PW 1 had attempted to improve the case. The medical evidence was not in consonance with the earlier statement of PW 1. Importantly, in the version of PW 1 an injury was caused on the face of the deceasedKashinath on 10th August 1990, but no such injury was found by the doctor conducting the postmortem.
>
> (ii) The evidence regarding recovery of the weapons was not believable. The evidence regarding the motive for the crime also remained unclear. In other words, the prosecution had not adduced any evidence to show that there was any dispute between the deceased on the one hand and the accused on the other.
>
> (iii) The kerosene depot owners at whose behest, the alleged assault was supposed to have taken place, were not arraigned as accused.
>
> (iv) As regards the serological report, although it was stated by the Investigating Officer (IO) (PW14), that MO-I and MO-II were stained with blood, the report (Ext-30) did not disclose that the bloodstains were of human blood.
>
> (v) The name of the accused Rabi Behera did not find place in the FIR. Further in the FIR, PW1 did not claim to have seen the assault by any of the accused on deceased Kasinath. However, in his testimony in Court, he states that he saw A1 thrust a *gupti* into the abdomen of Kasinath.
>
> (vi) In the FIR, PW1 mentioned that A1 was holding a sharp *bhujali*, but in the Court, he stated it was a *gupti*. This was not a mere omission. Though, the name of Raghunath Pujapanda was mentioned in the FIR a few times as coming in contact with PW 1, he was failed to be recognized by PW 1 later. PW 1 even failed to explain how his name came to be mentioned in the FIR. Although, PW 1 mentioned about the presence of Raghunath at the time of occurrence, in the Court, he denied such presence as well as the presence of a journalist who was supposed to be present at the time of the occurrence.
>
> (vii) PW 4 was not examined by the IO prior to his examination in the Court. PW 4 failed to disclose the reason why he never went before the police.

(viii) According to PW 4, A1 had assaulted the deceased by *bhujali*. He has not mentioned about the assault by A4 with a *casaurina* stick and by A3 with an iron rod. According to PW 4, Budha Panda had thrusted the MO-II into the right side chest of the deceased. However, this was not corroborated by the medical report.

(ix) The evidence of PW 4 that A1 had not assaulted the deceased, contradicted PW-1, who stated that it was A1, who alone inflicted the penetrating wounds. Thus, PW 4 did not corroborate PW1.

13. In the first round, this Court, on an analysis of evidence, held in its judgment dated 20th May 2009 that the trial Court was in error in discarding the evidence of PWs 1 and 4 inasmuch as their evidence was corroborated by the doctor who conducted the post-mortem. This Court reversed the acquittal judgment of the trial Court. As already noted, the Supreme Court set aside the said judgment of this Court and remanded the appeal to this Court to be heard afresh.

Submissions on behalf of the prosecution

14. Mrs. Saswata Patnaik, learned Additional Government Advocate for the Appellant-State of Odisha submitted that the evidence of the two eye witnesses PWs 1 and 4 was clear and cogent and free from any major contradictions or inconsistencies. The so-called inconsistencies were not on the material aspects and did not affect the truth and believability of their versions. The trial Court's judgment in discarding their evidence, which was corroborated by the medical evidence, was perverse and could not be sustained in law. It was necessary for this Court, in exercise of its appellate jurisdiction, to interfere with the impugned judgment of the trial court and convict each of the Respondents accused i.e. A1 and A3.

Submissions on behalf of the accused

15. Mr. Kishore Kumar Mishra, learned counsel appearing for Respondent No.1 (A1) and Mr. Lalit Kumar Maharana, learned counsel appearing for Respondent No.3 (A3) submitted as under:

(i) There were contradictions/mis-descriptions in the testimonies of PWs 1 and 4 with regard to the weapon of assault. There was confusion whether A1 was holding a *bhujali* or a *gupti*. The postmortem report specifically stated that the penetrating injuries on the deceased were caused by '*gupti*' and not by a *bhujali*.PW 7 maintained that MO-II was never called a *gupti* and that the wounds were never possible by a *bhujali*. PW4, who happened to be the uncle of PW 1, and the second eye-witness to the occurrence, did not state before the police that A1 had assaulted both the deceased by means of a *gupti*. He stated that A1 had assaulted the deceased with a *bhujali*.

(ii) On behalf of A3, it is pointed out that in the FIR, it is stated that he was holding a knife. Further PW1 stated that he had seen blood on the weapon of A3 and the other accused.

(iii) Although PW 1 maintained that Budha Panda, Kalia and Rabi Behera were brandishing their respective weapons, PW4, in his evidence, stated that A3 was holding an iron rod and dealt a blow on the face of Kasinath Panda with an iron rod. However, the medical evidence did not corroborate the eye witness testimony in the above regard. Reliance is placed on the decisions in **Ganesh Bhavan Patel v. State of Maharashtra AIR 1979 SC 135, Sambasivan v. State of Kerala AIR 1998 SC 2107, Ram Kumar v. State of Haryana AIR 1995 SC 280 and C. Antony v. K.G.Raghavan Nair AIR 2003 SC 182**.

(iv) On behalf of Respondent No.3, reliance is placed on the decision dated 22nd April 2022 of the Supreme Court of India in Criminal Appeal Nos.430-431 of 2015 (Jafarudheen v. State of Kerala); decision dated 13th December 2021 of the Supreme Court of India in Criminal Appeal No.1420 of 2014 (***Mohan @ Srinivas @ Seena @ Tailor Seena v. State of Karnataka) and State of Orissa v. Udayanath Pradhan 2013 (II) OLR 228.***

(v) The FIR appeared to be ante-timed in order to introduce eye- witnesses to support the prosecution case. In the cross- examination of PW14, it emerged that the FIR was written in the hospital as per the dictation of PW 1 and scribed by PW 14. However, in another portion of his deposition, PW 14 maintains that he did not reduce into writing any FIR. According to him, it was reduced to writing by the SI Akhila Kumar Parida at 2.20 pm and completed at 3.30 pm on 11th August, 1990. The FIR was supposed to have been registered at 2.20 pm and sent to the Court of the S.D.J.M., Puri only the next day at 5.20 pm. This discrepancy in the timing of the registration of the FIR has not been explained by the prosecution. Reliance is placed on the decision in ***Dinesh v. State of Madhya PradeshAIR 1994 SCW 2210***.

(vi) In the inquest held on the dead body of Kashinath on 11th August 1990 in the presence of PW 1, the names of the accused persons and the weapon of offence were not mentioned. This despite PW 14 maintaining that immediately after the registration of the case, he had examined PW 1.

(vii) As regards the recovery of the weapon, PW 14 states that he arrested A3 Kalia on 14th August 1990 at 10 am from Bajragrah AminaJaga at Dolamanda Sahi, Puri. A3 was supposed to have led PW 14 to the Bajragarh Jaga along with two witnesses and supposed to have got recovered one bloodstained *bhujali* (MO-II) and one small *gupti* (MO-I). The seizure list showed that four persons had witnessed such recovery. Of these four, only two were examined i.e., PWs.8 and 10. However, both were declared hostile. Therefore, except the evidence of PW 14, i.e., the IO, there was no other evidence to show that A3 while in custody, led to the recovery of weapons and that the exact information provided by him was reduced to writing.

(viii) Kalu Saha whose name appeared in the FIR and who was supposed to be present during the occurrence according to PW 1, was not named as a witness. His name appeared in the FIR as an accused.In the FIR (Ext-1), PW 1 stated that when he was going to the office of Kalu Saha, he saw one Patanjali coming out of the place. Kalu Saha, Raghu Pujapanda and another journalist were discussing, when the deceased Kasinath Panda soaked in blood entered the office. The said Kalu Saha, Raghu Pujapanda and the journalist were not examined and no reasons have been given by the prosecution.

(ix) PW 1 stated that he saw one Sharangi belonging to the Matimandap Sahi holding an iron rod. PW 1 stated that he could identify Sharangi. While in the FIR, PW 1 claimed

not to have seen the assault by any of the accused persons on Kasinath Panda, in evidence, he said that A1 thrusted a *gupti* into the abdomen of Kasinath Panda.

Analysis and reasons

16. At the outset, this Court would like to recapitulate the legal position on the power of an Appellate Court, while dealing with an order of acquittal. In ***N. Vijayakumar v. State of Tamil Nadu (2021) 3 SCC 687***, it was held as under:

> "20.…..Under Section 378 CrPC, no differentiation is made between an appeal against acquittal and the appeal against conviction. By considering the long line of earlier cases this Court in the judgment in *Chandrappa v. State of Karnataka, (2007) 4 SCC 415* has laid down the general principles regarding the powers of the appellate Court while dealing with an appeal against an order of acquittal. Para 42 of the judgment which is relevant reads as under: (SCC p. 432)
>
> "42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:
>
> (1) An appellate court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.
>
> (2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.
>
> (3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.
>
> (4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. *Firstly*, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. *Secondly*, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.
>
> (5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."
>
> 21. Further in the judgment in *Murugesan v. State, (2012) 10 SCC 383* relied on by the learned Senior Counsel for the appellant, this Court has considered the powers of the High Court in an appeal against acquittal recorded by the trial court. In the said judgment, it is categorically held by this Court that only in cases where conclusion recorded by the trial court is not a possible view, then only High Court can interfere and reverse the acquittal to that of conviction. In the said judgment,distinction from that of "possible view" to "erroneous view" or "wrong view" is explained. In clear terms,

this Court has held that if the view taken by the trial court is a "possible view", the High Court not to reverse the acquittal to that of the conviction.

xxx xxx xxx

23. Further, in *Hakeem Khan v. State of M.P., (2017) 5 SCC 719* this Court has considered powers of appellate court for interference in cases where acquittal is recorded by trial court. In the said judgment it is held that if the "possible view" of the trial court is not agreeable for the High Court, even then such "possible view" recorded by the trial court cannot be interdicted. It is further held that so long as the view of trial court can be reasonably formed, regardless of whether the High Court agrees with the same or not, verdict of trial court cannot be interdicted and the High court cannot supplant over the view of the trial court."

17. Again, in ***Mohan @ Srinivas @ Seena @ Tailor Seena v. State of Karnataka*** (supra), the above principles were reiterated and it was observed by the Supreme Court as under:

"20. Section 378 CrPC enables the State to prefer an appeal against an order of acquittal. Section 384 CrPC speaks of the powers that can be exercised by the Appellate Court. When the trial court renders its decision by acquitting the accused, presumption of innocence gathers strength before the Appellate Court. As a consequence, the onus on the prosecution becomes more burdensome as there is a double presumption of innocence. Certainly, the court of first instance has its own advantages in delivering its verdict, which is to see the witnesses in person while they depose. The Appellate Court is expected to involve itself in a deeper, studied scrutiny of not only the evidence before it, but is duty bound to satisfy itself whether the decision of the trial court is both possible and plausible view. When two views are possible, the one taken by the trial court in a case of acquittal is to be followed on the touchstone of liberty along with the advantage of having seen the witnesses. Article 21 of the Constitution of India also aids the accused after acquittal in a certain way, though not absolute. Suffice it is to state that the Appellate Court shall remind itself of the role required to play, while dealing with a case of an acquittal.

21. Every case has its own journey towards the truth and it is the Court's role undertake. Truth has to be found on the basis of evidence available before it. There is no room for subjectivity nor the nature of offence affects its performance. We have a hierarchy of courts in dealing with cases. An Appellate Court shall not expect the trial court to act in a particular way depending upon the sensitivity of the case. Rather it should be appreciated if a trial court decides a case on its own merit despite its sensitivity.

22. At times, courts do have their constraints. We find, different decisions being made by different courts, namely, trial court on the one hand and the Appellate Courts on the other. If such decisions are made due to institutional constraints, they do not augur well. The district judiciary is expected to be the foundational court, and therefore, should have the freedom of mind to decide a case on its own merit or else it might become a stereotyped one rendering conviction on a moral platform. Indictment and condemnation over a decision rendered, on considering all the materials placed before it, should be avoided. The Appellate Court is expected to maintain a degree of caution before making any remark."

18. This Court has carefully perused the evidence of PW 1, who is stated to be the eye-witness. The most glaring contradiction and inconsistency is about PW 1 stating that on the previous day, i.e., 10th August 1990, A1 assaulted the deceased Kasinath Panda, his younger brother on the face, thus giving him a bleeding injury and that later he had also attacked PW 1. However, the evidence of PW 7, the doctor did not reveal any such injury to the face of the deceased Kasinath Panda. PW 7 found the following injuries on the deceased Kasinath Panda:

> "(i) One lacerated wound of size length ¼" x ¼" breadth over the left maxillary prominence with swelling around it.
>
> (ii) One lacerated wound of size ½" x ¼" breadth on the left side of the fore-head ½" above the left eye- brow. There was little swelling and blackening of the left lower eye-lit.
>
> (iii) One elliptical incised wound having sharp angles at the extremities present over the left and medial aspect of the chest ½" laterial to the mid- sternal line over the second inter costal space.
>
> (iv) Another elliptical incised wound of size 3/4" x1/3" breadth over the abdomen just at the junction line of epigastricun and left hypochondriac plane 1½" above and 1" lateral to the umbilicus."

19. Incidentally, the post-mortem report of Narayan Panda revealed the following injuries:

> "An elliptical wound of size length ¾" x ¼" breadth at the centre having clean cut margins sharp angles at two extremities placed slight obliquely at the 8th intercostal surface on the anterior axillary line of the left chest wall."

20. The cause of death was given as haemorrhage and shock resulting from the penetrating injury to the vital organ like lungs.Thus, an important element of appreciation of the evidence of a related eye-witness, that it should be corroborated by the medical evidence is not fulfilled in the present case.

21. There are also other contradictions in the versions of the two eye witnesses. Although, PW4 stated that A1 had assaulted the deceased persons by means of a *bhujali*, PW-1 stated that the assault took place with a *gupti*. These two are not similar weapons. Further, PW4 stated that Budha Panda had thrusted with MO-II into the right-side chest of the deceased Narayan, but there was no such injury detected by PW 7. The two eye-witnesses, therefore, do not corroborate each other.

22. It also appears that there are improvements made by the two eye witnesses while deposing in the Court. As regards A3, PW 4 states that he dealt a blow on the face of Kasinath with an iron rod, whereas, the only injuries found by PW 7 on Kasinath were one on the abdomen below the ribs on the left side

and the second in the second intercostal space between the second and third ribs on the left side of the chest.

23. The trial Court was right in not considering it safe to rely on the inconsistent versions of PWs 1 and 4, whose evidence was in any event not corroborating with each other and further not corroborated by the medical evidence. The failure of PW4to speak to the police at any time prior to deposing in Court was also not properly explained.

24. The circumstances surrounding the registration of the FIR are also suspicious. PW 14 initially stated that the FIR was scribed by him. However, later he stated that it was reduced to writing by SI Akhil Kumar Parida. The FIR which was supposed to have been registered at 2.20 pm on 11th August 1990 was sent only on the next day at 5.20 pm to the Court of the S.D.J.M. This delay had not been properly explained. The omission to examine Kalu Saha, Raghunath Pujapanda and one 'Sharangi' and a journalist, all of whom found mention in the FIR, has not been explained by the prosecution.

25. The view taken by the trial Court on the above evidence appears to be a plausible one. It need not be upset only because another view is possible to be taken on the evidence on record. Upsetting the judgment of a trial Court acquitting the accused should be only for valid reasons and where the findings are perverse. Learned counsel for the State has been unable to point out in what manner the findings of the trial Court can be said to be perverse.

26. In this context, the following observations in ***Ganesh Bhavan Patel v. State of Maharashtra*** (*supra*) are relevant:

> "13.The dictum of the Privy Council in *Sheo Swarup v. King Emperor (AIR 1934 PC 227)* and a bead-roll of decisions of this Court have firmly established the position that although in an appeal from an order of acquittal the powers of the High Court to reassess the evidence and reach its own conclusions are as extensive as in an appeal against an order of conviction, yet, as a rule of prudence, it should to use the words of Lord Russel of Killowen—"always give proper weight and consideration to such matters as (1) the views of the Trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at the trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses." Where two reasonable conclusions can be drawn on the evidence on record, the High Court should, as a matter of judicial caution, refrain from interfering with the order of acquittal recorded by the Court below. In other words, if the main grounds on which the Court below has based its order acquitting the accused, are reasonable and plausible, and cannot be entirely and effectively dislodged or demolished, the High Court should not disturb the acquittal."

27. For all of the aforementioned reasons, the Court finds no ground made out to interfere with the impugned judgment of the trial Court. The appeal is accordingly dismissed but, in the circumstances, with no order as to costs.

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2022 (III) ILR - CUT-338

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

W.A. NO. 496 OF 2016

HARFUL AGRAWAL …. Appellant

.V.

TAMAL BEHERA & ORS. …..Respondents

ODISHA LAND REFORMS ACT, 1960 – Sections 22, 23 – Whether prior permission in terms of Section 22 of the 1960 Act is required for homestead land within an urban area? – Held, Yes – There is no escape from the applicability of Sections 22 and 23. (Para 21)

Case Laws Relied on and Referred to :

1. 43 (1977) CLT 681(DB) : Mahurilal Agarwal v. Dusasan Sahu.
2. 53 (1982) CLT 1 : Shri Bhanuganga Tribhuban Deb v. Tahasildar-cum-Revenue Officer, Sambalpur.
3. AIR 1993 SC 2585 : Smt. Sarifabibi Ibrahim v. Commissioner of Income Tax,Gujarat.
4. (1999) 3 SCC 231 : Om Prakash Agarwal v. Batara Behera.

For Appellant : Mr. Trilochan Nanda

For Respondents: Mr. Debakanta Mohanty, AGA
Mr. Upendra Kumar Samal

ORDER Date of Order: 12.10.2022

Dr. S. MURALIDHAR, C.J.

1. The present appeal is directed against an order dated 14th September, 2016 passed by the learned Single Judge dismissing the Appellant's writ petition i.e. OJC No.3657 of 1995 in which the Appellant had challenged an order dated 28th January, 1994 passed by the Collector, Bolangir in OLR Revision Case No.35 of 1986.

2. The background facts are that on 15th January, 1974 the Appellant purchased a piece of land admeasuring Ac 0.17 decimals corresponding to Plot No. 901/1188 of Khata No. 53 by way of a registered sale deed from one Sri

Rameswar Behera, who admittedly, belonged to the Scheduled Caste (SC). The land in question is situated within the limits of the Notified Area Council (NAC), Titilagarh in Bolangir district. Admittedly, the kissam in the registered sale deed, as has been noted by the Revenue Inspector, was recorded as 'Atmamuli' i.e. an agricultural land.

3. The son of the vendor one Shri Tribikram Behera, who is the husband of Respondent No.1 and father of Respondent No.2 filed RMC No.8/35 of 1984 before the Revenue Officer (RO), Titilagarh under Section 23 of the Odisha Land Reforms Act, 1960 (OLR Act) contending that since no prior permission was taken from the RO before effecting the sale, the sale deed dated 15th January, 1974 was null and void. Thereby, Section 23 of the OLR Act was invoked.

4. By an order dated 20th March, 1986 the RO allowed the aforementioned RMC No.8/35 of 1984 holding that the sale deed in favour of the present Appellant was null and void as it was executed without prior permission of the RO under Section 22 of the OLR Act.

5. Aggrieved, the Appellant then filed OLR Appeal No.20 of 1986 which came to be allowed by the Additional District Magistrate (ADM), Bolangir by an order dated 15th October 1986. The ADM observed that the land in question was situated inside an urban area and it was homestead land. Accordingly, it was held that the provisions of the OLR Act were not applicable to the purchase of such land by the Appellant.

6. The Collector, Bolangir exercising the power of revision in OLR Revision No. 35 of 1986 set aside the above order of the ADM by an order dated 28th January, 1994. The Collector held that the provisions under Sections 22 and 23 of the OLR Act would apply to the land in question notwithstanding that it may be recorded as homestead land located within an urban area.

7. Challenging the above order dated 28th January, 1994 the Appellant filed the aforementioned OJC No.3657 of 1995 which has come to be dismissed by the learned Single Judge by the impugned order dated 14th September, 2016. Learned counsel for the Appellant informs the Court that the during the pendency of the writ petition, a status quo order was passed and has continued during the pendency of the present writ appeal.

8. This Court has heard the submissions of Mr. Trilochan Nanda, learned counsel appearing for the Appellant; Mr. U.K. Samal, learned counsel appearing for Respondent Nos.1 and 2 and Mr. Debakanta Mohanty, learned Additional Government Advocate (AGA) for the State.

9. Mr. Nanda, learned counsel for the Appellant, submitted that the observation of the learned Single Judge that the entire Titilagarh was within the scheduled area was erroneous and since that formed the basis of the impugned judgment of the learned Single Judge, it was unsustainable in law. Secondly, relying on the decisions in ***Mahurilal Agarwal v. Dusasan Sahu 43 (1977) CLT 681(DB), Shri Bhanuganga Tribhuban Deb v. Tahasildar-cum-Revenue Officer, Sambalpur, 53 (1982) CLT 1*** and the judgment of the Supreme Court ***in Smt. Sarifabibi Ibrahim v. Commissioner of Income-tax, Gujarat AIR 1993 SC 2585***, he submitted that since admittedly, the land in question was homestead land within an urban area, the provisions of the OLR Act did not apply and no prior permission was required to be obtained in terms of Section 22 of the OLR Act. He submitted that the judgment of the Supreme Court in ***Om Prakash Agarwal v. Batara Behera (1999) 3 SCC 231*** which held that the OLR Act would apply to all lands whether located in a rural area or an urban area as long as it was being used for agricultural purpose or was capable for being used as agricultural purpose, would have to be understood in the factual context of the present case, where according to learned counsel for the Appellant, the land has been recorded, subsequent to the sale, as homestead land and in fact there was a factory of the Appellant functioning on the said land. In other words, he submits that since there was no finding that the land was capable of being used for agricultural purposes and that it is in the heart of the NAC, the OLR Act would not apply.

10. Mr. Samal, learned counsel appearing for the Respondent Nos.1 and 2 on the other hand referred to the inquiry report dated 28th November, 2016 of the Tahasildar which was submitted pursuant to the order passed by the learned Single Judge in OJC No. 3657 of 1995. In terms of the said report, it was plain that even at the time of the said inspection there was no textile mill over the land in question and the tenant was also not in possession of the land for over twenty years. Mr. Samal submitted that the possession in fact has now been handed over to Respondent Nos.1 and 2 and they continue to remain in possession of the land in question.

11. Mr. Debakanta Mohanty, learned AGA referred to the counter affidavit filed and, in particular, to the averments in para 3 (E) which refers to the order of the revisional authority and the finding therein that the kissam of the land was ‘agricultural’ at the time of the sale deed. It is submitted that unless there is a notification of the State Government under Section 73 (c) of the OLR Act exempting the land in question from the applicability thereof, the provisions of the OLR Act will continue to apply.

12. It must be noted here that both learned counsel appearing for Respondent Nos.1 and 2 as well as the learned A.G.A. did not dispute the fact that the learned Single Judge perhaps erred in observing that the entire Titilagarh was a scheduled area. It is submitted that it was in fact not a scheduled area, but that would make no difference to the applicability of Sections 22 and 23 of the OLR Act to the land in question inasmuch as the vendor of the present Appellant belonged to the SC.

13. The above submissions have been considered. A plain reading of Sections 22 and 23 of the OLR Act does not indicate that a homestead land located within an urban area is on that score exempt from the applicability of the OLR Act. This position becomes clear when the above provisions are read with Section 73 of the OLR Act, which reads as under:

> "***73. Act not to apply to certain lands*** –
> Nothing contained in this Act, shall apply –
> (a) to the Government in respect of lands held by them and which is used or set apart for any public purpose;
> (b) to lands held by-
>
> (i) the Government of India; (ii) any local authority;
> (iii) any University established by law in the State;
> (iv) the Bhoodan Yagna Samiti established under the Orissa Bhoodan and Gramdan Act, 1970.
> (v) any Government company as defined in the Companies Act, 1956;
> (vi) any Corporation established under any law in force;
>
> (c) to any area which the Government may, from time to time by notification in the official Gazette specify as being reserved for urban, non- agricultural or industrial development or for any other specific purpose; and
>
> (d) to any land which was under the management of any Civil, Revenue or Criminal Court immediately prior to the 26th day of September 1970, for so long as such management continues."

As pointed out by the learned AGA, in the present case there is no notification issued exempting the land in question from the applicability of the OLR Act only because it is located in an urban agglomeration.

14. Turning now to the decision in ***Omprakash Agarwal*** (*supra*), the Court finds that para 3 of the said judgment is relevant for the purpose of the present case. It reads thus:

> "3. In view of the rival submissions at the Bar the first question that arises for consideration is whether the land as defined in Section 2(14) of the Act and which is either being used or capable of being used for agricultural purposes within the municipal area do come under the purview of Orissa Land Reforms Act. The Act, no doubt is a measure relating to agrarian reforms and land tenures and abolition of intermediary interest but there is no provision in the Act which excludes such agricultural lands

> merely because they are situated in an Urban Agglomerations. The Act applies to all land which is either used or capable of being used for agricultural purposes irrespective of whether it is situated within a municipal area or in villages. The very object of the legislation being an agrarian reform, the object will be frustrated if agricultural lands within the municipal area are excluded from the purview of the Act. In this view of the matter we have no hesitation to come to the conclusion that the Act applies to all lands which is used or capable of being used for agricultural purposes irrespective of the fact wherever the said land is situated and the conclusion of the High Court on this score is unassailable. The first submission of Mr. Sanghi is, therefore, devoid of any force. So far as the question that the vendors do not belong to the Scheduled Castes it appears that the Sub-Divisional Officer on the basis of materials produced before him came to a positive conclusion that the vendors of the sale deeds belong to Scheduled Castes which is confirmed by the record of right. This conclusion of the Sub-Divisional Officer had not been assailed before the Appellate Authority, as is apparent from paragraph 2 of the Appellate judgment. Since the finding of the Sub- Divisional Officer on the question whether the vendors of the sale deeds belong to Schedule Castes or not had not been assailed before the Appellate Authority, the said finding has become final and cannot be permitted to be re-agitated again. Rightly, therefore, the High Court did not consider the said question and in our considered opinion, that question cannot be reopened now."

15. It is plain, therefore, in terms of the above decision, the OLR Act would apply "to all land which is either used or capable of being used for agricultural purposes irrespective of whether it is situated within a Municipal area, villages." In other words, merely because the land is within the NAC of Titilagarh would not exclude from the applicability of the OLR Act as long as it is shown that it is either being used or capable of being used for agricultural purposes.

16. Learned counsel for the Appellant vehemently contended that since a textile factory was operating on the land in question by the Appellant for long, there is no finding that the land is "capable of being used for agricultural purpose". It is seen that while delivering the impugned judgment, the learned Single Judge in the operative portion issued the following directions:

> "10. Keeping in view the decision of the Hon'ble Apex Court in the aforesaid case and as this Court in the present case finds that the petitioner has already made a lot of developments over the disputed land that too with the consent of the actual land owner and further with the approval of the public authority, instead of asking for restoration of possession, this Court directs the original authority (Revenue Officer, Titilagarh) to conduct an enquiry through its agency to ascertain the actual occupation of the land by a person belonging to general caste by virtue of sale over which the construction of the Textile Mill has been made and taking into consideration the present market price of the land prevailing in the locality, to pass an order to grant appropriate compensation to the Opp.Party No.1. The entire exercise is directed to be completed within a period of three months from the date of communication of this judgment."

17. Pursuant to the above directions in the impugned judgment, the Tahasildar undertook the exercise of determining what the current status of the

Land was. The Tahasildar in a report dated 28thNovember, 2016 *inter alia* observed as under:

> "With reference to the letter on the subject cited above I am to say that the actual occupation of Sabik Plot No.901/1188 corresponding to Hal Plot No.1824/3810 of Mouza Titilagarh 'Ka' has been enquired by the Revenue Supervisor in the field with reference to R.O.R. The enquiry report of the Revenue Supervisor reveals that the Sabik Plot No.901/1188 Ac. 0.17 decimals corresponds to current Hal Plot No.1824/3810 Ac 0.184 stands recorded under Holding No.423 in the name of Harful Agrwal S/o. Ramajilal Agrawal of Village:- Titilagarh 'Ka'. On enquiry it is ascertained that now there is no textile mill over the case land and the recorded tenant is also not in possession over the case land since around last twenty years. The villagers present at the time of field enquiry stated that there was a textile mill over the suit land prior to twenty years and after civil dispute the textile mill has been closed. In the field it is seen that in one side of the plot there is a fried rice mill over the approximate area of 10 ft X 30ft and in another side there is a damaged house of around 20ft X 40 ft where the textile mill was running. Further the said damage has been given on rented basis to a fertilizer retailer who is using this as store house and the fried rice mill is being run by an outsider who is also paying rent to L.Rs of Late Tribikram Behera."

18. The factual situation, therefore, is that there is now no textile mill over the land in question and the Appellant is also not in possession. It is, therefore, not possible to accept the plea of the Appellant that factually it has been shown that the land in question is not capable of being used for agricultural purposes.

19. This Court has perused the decisions in ***Mahurilal Agarwal*** (*supra*), Shri ***Bhanuganga Tribhuban Deb*** (*supra*), and the judgment of the Supreme Court of India in ***Smt. Sarifabibi Ibrahim*** (*supra*). As far as the last-mentioned decision is concerned, it was not in the context of the OLR Act. It was in the context of the Bombay Tenancy and Agricultural Lands Act. Further, the question that was being addressed by the Court arose under the Income Tax Act, 1961. Consequently, the Court finds that the said decision is distinguishable on facts since questions regarding the nature of the land and the restrictions on transferability have to be addressed in terms of the local law which in this case is the OLR Act.

20. As far as the decision in ***Mahurilal Agarwal*** (*supra*) is concerned, it is seen that it is a decision of the Division Bench of this Court dated 10th May, 1977 and whereas the decision of the Supreme Court in ***Omprakash Agarwal*** (*supra*) is dated 10th March, 1999 and would obviously prevail over the decision of this Court. Likewise, the decision of this Court in ***Shri Bhanuganga Tribhuban Deb*** (*supra*) has to be read now in the context of the subsequent decision of the Supreme Court in ***Omprakash Agarwal*** (*supra*) the relevant portion of which has been extracted hereinbefore.

21. Since the law in the question is governed by the decision in ***Omprakash Agarwal*** (*supra*), the Court has no hesitation in holding that in the present case there is no escape from the applicability of Sections 22 and 23 of the OLR Act to the land in question. This is irrespective of the fact that the learned Single Judge may not have been correct in observing that the entire Titilagarh area would be a scheduled area. The fact remains that Sections 22 and 23 of the OLR Act do apply to the land in question and inasmuch as prior permission was not obtained at the time of execution of the sale deed in favour of the Appellant, it was unsustainable in law. For the aforementioned reasons, the Court finds no ground to interfere with the impugned judgment of the learned Single Judge. The appeal is dismissed. The interim order passed earlier stands vacated.

22. The operative directions of the learned Single Judge as regards compensation payable to the present Appellant would have to be worked out in accordance with law in accordance with the report of the Tahasildar.

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2022 (III) ILR - CUT-344

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

W.A. NOS. 938 AND 968 OF 2021

ODISHA PUBLIC SERVICE COMMISSION …. Appellant

.V.

VARSACHALA CHETAN & ANR. …. Respondents

AND

IN W.A. NO.968 OF 2021

ODISHA PUBLIC SERVICE COMMISSION …. Appellant

.V.

MAMALI MADHUSMITA PATRA & ORS. …. Respondents

SERVICE LAW – Appointment – Requisite qualification – The candidate did not possess the requisite qualification by the date of submission of application form – The petitioners were called to appear in the written examination – Whether OPSC was estopped from rejecting their candidature once they had been allowed to sit in the examination? – Held, No – There is no estoppel against law – The candidature of a candidate shall be rejected at any stage of the recruitment process when discrepancies noticed/detected. (Para 16)

Case Laws Relied on and Referred to :

1. (2011) 12 SCC 85 : Bedanga Talukdar v. Saifudullah Khan.
2. 2021 SCC OnLine SC 1262 : State of Bihar v. Madhu Kant Ranjan.

For Appellant : Mr. S.B. Jena

For Respondents: Mr. D.N. Pattnaik

ORDER Date of Order : 12.10.2022

Dr. S. MURALIDHAR, C.J.

1. Both these appeals are directed against the common judgment dated 18th November 2021 passed by the learned Single Judge allowing W.P.(C) Nos. 18119 and 18127 of 2019. By the impugned judgment, a direction was issued to the Odisha Public Service Commission (OPSC) (the Appellant herein) to call upon writ petitioners i.e., the Respondent No.1 in each of the appeals, to appear in the interview for the post of Dental Surgeon in Group-A (Jr.) of the Odisha Medical Service (Dental) cadre for SC and ST candidates under the Health and Family Welfare Department pursuant to the Advertisement No.6 of 2018-19 before a Special Selection Committee and to complete the exercise within a period of three months.

2. Notice. Mr. D.N. Pattnaik, learned counsel accepts notice on behalf of Respondent No.1 in both the appeals. Since the entire pleadings before the learned Single Judge is already before this Court and arguments have been heard at length, the Court proceeds to dispose of the present appeals at this stage itself.

3. The background facts are that Respondent No.1 in both the writ appeals applied pursuant to the aforementioned advertisement for the post of Dental Surgeon (Group-A) (Junior). In the advertisement as far as the requirement of "Educational Qualification' was concerned, the stipulation was as under:

> ***"EDUCATIONAL QUALIFICATION***:
>
> (i) A candidate must have possessed a Bachelors Degree in Dental Surgery (BDS) or equivalent Degree from a Medical College or Medical Institution recognized by the Dental Council of India (DCI).
>
> (ii) Have possessed a registration certificate under the Dentists Act-1948.
>
> (iii) Have possessed required Conversion Certificates recognized by Dental Council of India (DCI) in case of candidates having Degree from Universities of Foreign Countries."

4. The closing date was 11th October 2018 for submission of the completed application forms. Under the heading "Other Eligibility Conditions" *inter alia* it was stated in Sub Clause-(vii) as under:

> "(vii) Only those candidates, who possess the requisite qualification and within the prescribed age limit etc by the closing date of receipt of online application, will be considered eligible;"

5. The application had to be accompanied by certain documents. Clause-10 of the advertisement set out 17 documents to be enclosed with the application. It must also be noted here that under Clause 10 (v) of the advertisement, one of the documents to be submitted was the "Compulsory Housemanship Completion Certificate" and in Sub Clause (vi) the Medical Registration Certificate under the Dentist Act, 1948. Note-2 below Clause 10 read as under:

> "Note-2 : Degree certificate, caste certificate, odia test pass certificate, discharge certificate of ex-Servicemen and disability certificate of PWD candidates (indicating % of permanent disability) must have been issued by the competent authority within the last date fixed for receipt of online applications." (emphasis in original)

6. As far as both the candidates are concerned, the admitted position is that they did not 'possess' the registration certificate under the Dentists Act, 1948 (Act) by the last date of submission of the completed application form i.e. 11th October, 2018.

7. As far as Respondent No.1 in W.A. No.938 of 2021 is concerned, the provisional certificate as regards completion of the final examination in the BDS course was issued by the Utkal University on 11th July 2019 and the Odisha Dental Council issued its certificate under the Act on 12th July, 2019.

8. As regards Respondent No.1 in W.A. No. 968 of 2021 is concerned, the provisional certificate by the Utkal University was issued on 30th January 2019, and the certificate of the Odisha Dental Council was issued only subsequently.

9. Unless, a candidate completes the housemanship, the provisional degree certificate for the BDS course cannot be issued. Without the provisional certificate being issued by the University, the Odisha Dental Council cannot issue the registration certificate under Section 34 of the Act. In terms of the Note-2 under Clause-10 of the advertisement, these certificates had to be issued "within the last date fixed for receipt of online applications".

10. Even otherwise in terms of the wording in Clause-3 pertaining to "Educational Qualification", the words used are that the candidate "must have possessed" the BDA certificate and in Sub Clause-(ii) "have possessed" a registration certificate under the Act". The words "have possessed" means that by the time of last date of submission of application form, a candidate should already have in hand both these certificates i.e, the BDS certificate (even if it is provisional) and the registration certificate under the Act. This is definitely a mandatory requirement of the advertisement.

11. The learned Single Judge has accepted the plea of Respondent No.1 in both the appeals that since they were called to appear in the written examination, it must be taken that they had satisfied the requirements of the advertisement. Invoking Section 115 of the Evidence Act 1872, the learned Single Judge has opined that the Appellant OPSC was estopped from rejecting their candidature once they had been allowed to sit for the examination. In para 21 of the impugned judgment, it has been observed as under:

> "21. It is of relevance to note that, the petitioner has not violated any of the conditions and instructions issued by the Orissa Public Service Commission, which is mandatory. Though it was stated that the candidates were allowed provisionally, mere mentioning of the word 'provisional' cannot debar the petitioner from satisfying the requirement of conditions stipulated in the advertisement itself. If the petitioner has satisfied the requirement issued in the advertisement and by the time of verification of the documents, the petitioner had possessed the required documents, in that case, rejection of his candidature on the ground that he does not possess the minimum qualification as on the last date of submission of application, cannot sustain in the eye of law."

12. Having heard learned counsel for the parties, the Court is of the view that the learned Single Judge was in error in coming to the above conclusion since factually by the time of the last date for submission of the completed applications neither candidates possessed a provisional BDS degree or the registration certificate under the Act, both of which are compulsorily required to be possessed by them. The crucial date for determining eligibility is the last date for submission of applications i.e., 11th October, 2018. Factually, by that date, neither candidate possessed the requisite qualification.

13. It is a well settled proposition that there is no estoppel against law. If the candidate does not possess the requisite educational qualification by the date of submission of the application, such candidate cannot be considered for the post in question notwithstanding that such candidate may have been allowed to sit for the written examination.

14. In ***Bedanga Talukdar v. Saifudullah Khan (2011) 12 SCC 85***, it was held that:

> "29. We have considered the entire matter in detail. In our opinion, it is too well settled to need any further reiteration that all appointments to public office have to be made in conformity with Article 14 of the Constitution of India. In other words, there must be no arbitrariness resulting from any undue favour being shown to any candidate. Therefore, the selection process has to be conducted strictly in accordance with the stipulated selection procedure. Consequently, when a particular schedule is mentioned in an advertisement, the same has to be scrupulously maintained. There cannot be any relaxation in the terms and conditions of the advertisement unless such a power is specifically reserved. Such a power could be reserved in the relevant statutory rules. Even if power of relaxation is provided in the rules, it must still be mentioned in the

> advertisement. In the absence of such power in the rules, it could still be provided in the advertisement. However, the power of relaxation, if exercised, has to be given due publicity. This would be necessary to ensure that those candidates who become eligible due to the relaxation, are afforded an equal opportunity to apply and compete. Relaxation of any condition in advertisement without due publication would be contrary to the mandate of equality contained in Articles 14 and 16 of the Constitution of India."

15. In ***State of Bihar v. Madhu Kant Ranjan 2021 SCC OnLine SC 1262***, the Supreme Court reiterated that:

> "16. As per the settled proposition of law, a candidate/applicant has to comply with all the conditions/eligibility criteria as per the advertisement before the cut-off date mentioned therein unless extended by the recruiting authority. Also, only those documents, which are submitted along with the application form, which are required to be submitted as per the advertisement have to be considered. Therefore, when the respondent No. 1-original writ petitioner did not produce the photocopy of the NCC 'B' certificate along with the original application as per the advertisement and the same was submitted after a period of three years from the cut-off date and that too after the physical test, he was not entitled to the additional five marks of the NCC 'B' certificate. In these circumstances, the Division Bench of the High Court has erred in directing the appellants to appoint the respondent No. 1 - original writ petitioner on the post of Constable considering the select list dated 08.09.2007 and allotting five additional marks of NCC 'B'certificate."

16. In the instant case, the advertisement makes it abundantly clear that "application/candidature of a candidate shall be rejected at any stage of the recruitment process when discrepancies noticed/detected". Therefore, merely because the candidate was allowed to sit for the examination would not preclude the OPSC from rejecting the candidature if it is found, even at the stage subsequent to the result of the written examination, a candidate was in fact not qualified by the last date for submission of the application form.

17. Consequently, this Court is unable to sustain the impugned judgment of the learned Single Judge and it is hereby set aside. The writ appeals are allowed, but in the circumstances, with no order as to costs.

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2022 (III) ILR - CUT-348

Dr. S. MURALIDHAR, C.J.

CRLREV NO. 907 OF 2006

BABULI DAS …. Petitioner

.V.

STATE OF ODISHA ….Opp.Party

INDIAN PENAL CODE, 1860 – Section 395 – Conviction on the basis identification through TI Parade – The TI Parade conducted on 9th April, 2002, whereas the occurrence happened in the intervening night of 20th/21st December, 2001 – Delay in holding the TI parade without any satisfactory explanation – Effect of – Held, the conviction of the Petitioner being based largely on the TI Parade evidence and such evidence not being found satisfactory, it would be unsafe to convict the Petitioner on that basis. (Para 16)

Case Laws Relied on and Referred to :

1. 1999 SCC (Cri) 1452 : Rajesh Govind Jagesha v. State of Maharashtra.
2. (1991) 4 OCR 269 : State v. Pravakar Behera.
3. 1992 Supp (2) SCC 749 : Puttan alias Kamal Prasad v. State of U.P.
4. (1990) 3 OCR 350 : Govind Pradhan v. State.
5. (2003) 25 OCR (SC) 106 : Anil Kumar v. State of U.P.
6. 1993 Supp (SC) 2003 : Brij Mohan v. State of Rajasthan J.T.
7. AIR 2001 SC 1188 : Daya Singh v. State of Haryana.

For Petitioner : Mr. Debasnan Das
For Opp.Party : Mr. Janmejaya Katikia, AGA.

JUDGMENT Date of Judgment : 14.10.2022

Dr. S. MURALIDHAR, C.J.

1. The Petitioner was convicted by the C.J.M.-cum-Asst. Sessions Judge, Dhenkanal by the judgment dated 24th August, 2005 in C.T. Sessions No.168 of 2004 for the offence under Section 395 IPC and sentenced to seven years rigorous imprisonment (RI) and pay a fine of Rs. 2,000/- and in default to undergo RI for a period of one year. The said judgment was confirmed by the Sessions Judge, Dhenkanal in dismissing the Petitioner's Criminal Appeal No. 67 of 2005 by the judgment dated 17th July, 2006. Both decisions have been questioned in the present revision petition.

2. On 10thJuly, 2007 this Court enlarged the present Petitioner on bail during pendency of the present petition.

3. This Court has heard the submissions of Mr. Debasnan Das, learned counsel appearing for the Petitioner and Mr. J. Katikia, learned Additional Government Advocate for the State-Opposite Party.

4. It must be noted at the outset that the Petitioner was charged both under Section 395 IPC for which he was convicted as well as Section 9-B of the India Explosive Act (IE Act) of which offence he was acquitted.

5. The case of the prosecution is that on the intervening night of 20th and 21st December, 2001 one Jitu Das along with others committed dacoity in the house of Choudhury Dilip Dash (PW 4). According to PW 4, about five of the miscreants entered into the house by breaking upon the front door and they were armed with knives. By exploding bombs they terrorized the inmates of the house. And at the point of knife Rashmita Dash (PW 5), the wife of PW 4 was compelled to handover all that gold jewellery that she was wearing to the miscreants. PW 4 is stated to have telephoned his brother Debasis Pattanaik (PW 7) who managed to chase and nab one of the culprits Jitu Das. The said Jitu Das is further stated to have disclosed the names of four of the accused which included the present Petitioner.

6. In the course of investigation on 26th December, 2001 it came to be ascertained that one of the absconding accused viz., the present Petitioner, had been detained in the Athagarh Sub-Jail in connection with Athagarh P.S. Case No. 135/2001 and 136/2001. CRLREV No. 907 of 2006. Since the S.D.J.M, Athagarh did not permit the present Petitioner to be spared for investigation, the test identification (TI) parade was conducted in the Athagarh Sub-Jail premises on 9th April, 2002. The inmates of the house where the dacoity took place, were supposed to have identified the present Petitioner as one of the miscreants. The remaining three miscreants could not be traced out although the charge sheet was laid against all five accused persons.

7. The trial against the present Petitioner was split up. In the proceedings before the CJM-cum-ASJ, Dhenkanal, the Petitioner was convicted for the offence under Section 395 IPC and he was acquitted of the offence under Section 9-B of the IE Act. The trial Court then proceeded to sentence the Petitioner in the manner indicated above.

8. As far as the evidence against the present Petitioner is concerned, one of the crucial circumstances was the identification of the present Petitioner by PWs 4, 5 and 7. The TI parade in which the Petitioner was identified took place on 9th April, 2002 whereas the occurrence happened in the intervening night of 20th/21st December, 2001. The consequence of the delay in holding the TI parade has been discussed in the decision of the Supreme Court in ***Rajesh Govind Jagesha v. State of Maharashtra 1999 SCC (Cri) 1452***, where it was held that the delay in holding the TI Parade without any satisfactory explanation would enure to the benefit of the accused. This was reiterated in ***State v. Pravakar Behera (1991) 4 OCR 269; Puttan alias Kamal Prasad v. State of U.P. 1992 Supp (2) SCC 749*** and ***Govind Pradhan v. State (1990) 3 OCR 350***.

9. On the other hand, both the Courts below relied on another set of judgments in ***Anil Kumar v. State of U.P. (2003) 25 OCR (SC) 106; Brij Mohan v. State of Rajasthan J.T. 1993 Supp (SC) 2003*** and ***Daya Singh v. State of Haryana AIR 2001 SC 1188***.

10. The evidence of PW 12, who is the investigating officer, is instructive on what happened during the TI Parade. Apart from the fact that he does not offer any explanation for the delay in conducting the TI Parade, he states as under :

> "14. In fact, notices were served on the identifying witnesses through me, but I cannot say on which particular date those were served on them. The notices are not available in the case record."

11. As regards the manner of conducting the TI Parade itself, the evidence of JMFC, Dhenkanal who was examined as PW 13 is significant. The following statements in his examination-in-chief are relevant:

> "2. The witness Choudhury Das could not identify the suspect. The witness Rasmita Das correctly identify the suspect. She could identify as she told that the suspect had given a lathi blow to her causing injury on her person.
>
> 3. Witness Dipti Mayee Patnaik wrongly identified another U.T.P. as suspect.
>
> 4. The witness Debasis correctly identified the suspect stating that he had been the suspect assaulting his sister by a lathi.
>
> 5. The suspect complained that the witness Rasmita and Debasis Patnaik had seen him at the police station. Ext.6/2 is my signature in the T.I. Parade report which were prepared by me on 8.3.2002."

12. Even in the cross-examination, there was no explanation offered for the delay in holding the T.I. Parade. PW 13 simply states that the record was sent by him on 4th March, 2002 for holding the T.I. Parade.

13. A careful perusal of the evidence of PWs 12 and 13 reveals that there is no reason afforded by the prosecution for the delay of nearly four months in holding the T.I. Parade. Since there is no other substantive piece of evidence qua the present Petitioner connecting him to the crime particularly since there was no recovery made of any of the stolen articles from him, the manner of holding the TI Parade and the delay in holding it become significant.

14. As already seen, the delay of four months in holding the TI parade has not been satisfactorily explained. Such a long gap could easily be utilized by the prosecution to make it easier for the PWs to identify the culprits. Further, the manner of holding the TI Parade also is not very satisfactory. It appears that adequate steps were not taken to sufficiently anonymous the accused qua his identification amongst others.

15. It must be noted that all the inmates did not correctly identify the accused. In the circumstances, to hold that the TI Parade was a clinching piece of evidence vis-a-vis the Petitioner is not correct. Since there is no other evidence to link the Petitioner to the crime basing his conviction solely on the evidence of the T.I. Parade would be unsafe. While in ***Anil Kumar v. State of U.P.*** *(supra),* ***Brij Mohan v. State of Rajasthan*** (supra) and ***Daya Singh v. State of Haryana*** *(supra)*, the delay in holding the TI Parade was not considered fatal to the prosecution, the delay in the present case is almost four months and has not been satisfactorily explained by the prosecution.

16. The Court is of the considered view that the conviction of the Petitioner being based largely on the TI Parade evidence and such evidence not being found satisfactory, it would be unsafe to convict the Petitioner on that basis. Consequently, on the ground of benefit of doubt, the Court sets aside the judgment of the CJM- cum-Asst. Sessions Judge, Dhenkanal and the judgment of Sessions Judge, Dhenkanal and acquits the present Petitioner for the offence under Section 395 IPC. Unless his detention is required in some other case, the Petitioner be set at liberty forthwith.

17. The petition is disposed of in the above terms.

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2022 (III) ILR-CUT-352

JASWANT SINGH, J. & MURAHARI SRI RAMAN, J.

I.A. NO. 6274 OF 2022
(IN W.P.(C) NO. 4662 OF 2022)

SHRI K.SATISH KU. SUBUDHI …. Petitioner

.V.

UNION OF INDIA & ORS. …. Opp.Parties

CONSTITUTION OF INDIA, 1950 – Articles 226 & 227 – Scope and ambit of power under Articles 226 & 227 – The Appellate Authority passed an order in a gross violation of the principles of natural justice and without giving appropriate and adequate opportunity of hearing – Whether a writ of certiorari can be issued? – Held, Yes – The Appellate Authority being quasi-judicial authority is supposed to maintain transparency in day-to-day proceeding in the course of hearing of an appeal – The order of the appellate authority deserves to be quashed accordingly. (Para 9.12)

Case Laws Relied on and Referred to :-

1. (2001) 8 SCC 97 : Estralla Rubber Vrs. Dass Estate (P) Ltd.
2. (2021) 9 SCC 251 : Reepak Kansal Vrs. Union of India.
3. 1997 (I) OLR 571 = (2003) 133 STC 22 (Ori) : Utkal Asbestos Limited Vrs. Sales Tax Officer & Anr.
4. 1958 SCR 1080 = AIR1958 SC 300 : Khem Chand Vrs. Union of India.
5. (2013) 4 SCC 465 : Ayaayubkhan Noorkhan Pathan Vrs. State of Maharashtra.
6. (1987) 4 SCC 431 : K.I. Shephard Vrs. Union of India.
7. W.P.(C) No. 21508 of 2017 (dt. 5th April, 2022 of this Court) :Rawani Construction Private Limited Vrs. State of Odisha.
8. 2017 SCC OnLine Bom 8811 = (2018) 1 Bom CR 545 = (2018) 362 ELT 465 : Ciabro Alemao Vrs. Commissioner of Customs.
9. (1982) 2 SCC 463 : State of Maharashtra Vrs. Ramdas Shrinivas Nayak.
10. CR No.496 of 2012 (O&M), dated 27 January, 2012 of the Punjab & Haryana High Court : Sandeep Ghai Vrs. Neeraj Malhotra.
11. (2001) 124 STC 423 (Kar) : Krishna & Co. Vrs. State of Karnataka.
12. W.P.(C) No. 20613 of 2015, vide Order dated February 22, 2016 : Narbheram Power and Steel Pvt. Ltd. Vrs. Joint Commissioner of Sales Tax.

For Petitioner : Mr.Jagamohan Pattanaik

For Opp.Parties : Mr.Radheyshyam Chimanka, Senior Standing Counsel (CGST, Central Excise & Customs),
Sri Biswanath Jena, Superintendent (Appeal),
Central Excise, Customs & Service Tax, Bhhubaneswar

JUDGMENT Date of Hearing/Judgment : 24.08.2022

M.S.RAMAN, J.

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

> *"Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly."* — Martin Luther King Jr.

These words from *Martin Luther King, Jr.* are reminder to the effect that we all have responsibility to take a stand when we witness injustice.

2. This Court wishes to proceed with the context which is brought to the notice of this Court by way of an Interlocutory Application seeking to exercise power under Article 227 of the Constitution ofIndia, 1950 to enforce writ of *mandamus* issued while disposing of the writ petition being W.P.(C) No.4662 of 2022 vide Order dated17.02.2022.

2.1. In *Estralla Rubber Vrs. Dass Estate (P) Ltd., (2001) 8 SCC 97* the scope and ambit of Article 227 of the Constitution of India has been succinctly propounded as follows:

"6. The scope and ambit of exercise of power and jurisdiction by a High Court under Article 227 of the Constitution of India is examined and explained in number of decisions of this Court. The exercise of power under this Article involves a duty on the High Court to keep inferior courts and tribunals within the bounds of their authority and to see thatthey do duty expected or required by them in a legal manner. The High Court is not vested with any unlimited prerogative to correct all kinds of hardship or wrong decisions made within the limits of the jurisdiction of the courts subordinate or tribunals. Exercise of this power and interfering with the orders of the courts or tribunal is restricted to cases of serious dereliction of duty and flagrant violation of fundamental principles of law orjustice, where if High Court does not interfere, a grave injustice remains uncorrected. It is also well settled that the High Court while acting under this Article cannot exerciseits power as an appellate court or substitute its own judgment in place of that of the subordinate court to correctan error, which is not apparent on the face of the record. The High Court can set aside or ignore the findings of facts of inferior court or tribunal, if there is no evidence at all to justify or the finding is so perverse, that no reasonable person can possibly come to such a conclusion, which the court or Tribunal has come to.

7. This Court in Ahmedabad Mfg. & Calico Ptg. Co. Ltd Vrs.Ram Tahel Ramnand and Ors., AIR 1972 SC 1598 in para12 has stated that the power under Article 227 of theConstitution is intended to be used sparingly and only inappropriate cases, for the purpose of keeping thesubordinate courts and tribunals within the bounds of theirauthority and, not for correcting mere errors. Referencealso has been made in this regard to the case WaryamSingh &Anr. Vrs. Amarnath&Anr., 1954 SCR 565. ThisCourt in BabhutmalRaichandOswalVrs. Laxmibai R.Tarte and Anr., AIR 1975 SC 1297 has observed that thepower of superintendence under Article 227 cannot beinvoked to correct an error of fact which only a superiorcourt can do in exercise of its statutory power as a court ofappeal and that the High Court in exercising its jurisdictionunder Article 227 cannot convert itself into a court ofappeal when the legislature has not conferred a right ofappeal."

2.2. In *Reepak Kansal Vrs. Union of India, (2021) 9 SCC 251* it hasbeen enunciated as follows:

"26. However, at the same time, if the statutory authority/authority has failed to perform its statutory duty cast under the statute or constitutional duty, a mandamuscan be issued directing the authority to perform its duty castunder the statute. In such a situation, the Court would beabsolutely justified in issuing a writ of mandamus directingthe authority to perform its statutory duty/constitutionalduty."

2.3. It is by now well-established that the power under Article 227 ofthe Constitution of India is exercised to keep the subordinate courts within the bounds of their authority, thus, this power is tobe used sparingly. The chief grounds available for the High Court to interfere with the orders of Courts/Authorities under Article 227 of the Constitution of India are :

i. When the subordinate Courts/Authorities act arbitrarily;

ii. When the subordinate Courts/Authorities act in excess ofthe Jurisdiction vested in them;

iii. When the subordinate Courts/Authorities fail to exercisejurisdiction vested in them.

The High Court should not interfere for correcting mere error offacts or, with a finding of the subordinate court which is within the jurisdiction of such court. However, if, such finding is perverse insuch a sense that no prudent person having the knowledge of law could have arrived at such finding, or the finding is not based onany material evidence or, such finding results in manifest injustice or if there is a misdirection in law then the High Court can interfere under Article 227 of the Constitution of India.

2.4. Taking into account the fact that on 17th February, 2022, i.e., the date of issue of writ of mandamus in W.P.(C) No. 4662 of 2022 to consider the petition for cross-examination before passing the final order in appeal, the Appellate Authority having shown undue haste in passing the final Order-in-Appeal on the very date when the matter was being taken up in this Court, it is deemed proper to exercise power under Article 227 of the Constitution of India. Mr. Radheyshyam Chimanka, learned Senior Standing Counsel for the CGST, Central Excise and Customs fairly conceded and agreed for setting aside the Order-in-Appeal dated 17.02.2022 and remand the matter for hearing of the application dated 09.02.2022 for issue of summons for cross-examination of witnesses and the appeal afresh on merits.

3. The Petitioner had filed the afore-noted writ petition craving for following reliefs:

> *"Under the aforesaid facts and circumstances, the petitioner most humbly and respectfully prays that the Hon'ble Court may graciously be pleased to remove the injustice caused to the petitioner in the decision making process of the matter by declaring the Order No. CC(P)/BBSR/CUS/No.17 dated18.10.2019 (Annexure-8) is void ab initio and non est in the eyes of law and accordingly be pleased to quash the same;*
>
> *Alternative, be pleased to direct the opposite party No.4 to dispose of/conclude the matter pending with him by taking into consideration the prayer of the petitioner in application dated 09.02.2022 (Annexure-9) within a stipulated period to be fixed by this Hon'ble Court;*
>
> *And to pass any other order/orders as would be deemed fit and proper in the circumstances of the case; ***"*

4. This Court having declined to interfere with the Order-in-Original bearing CC(P)/ BBSR/ CUS/ No.17/ JOINT COMMISSIONNER/2019, dated 04/18.10.2019 (Annexure-8), while disposing of the writ petition with the consent of both the counsel for the partiespassed the following Order on 17th February, 2022:

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

2. The Petitioner has come up before this Court with a prayer for consideration of the application dated 9.02.2022 vide Annexure-9 by the Opposite Party No.4 (Appellate Authority).

3. The short fact adumbrated in the present writ application isthat the Petitioner vide order dated 4.10.2019 passed by the Joint Commissioner, Customs (Preventive) Commissionrate, Bhubaneswar was imposed with penalty U/s 112 of the Customs Act, 1962, in respect of confiscationof twenty pieces of gold biscuits weighing 2332.800 gms valued at Rupees 11,03,414.40. Against the said order, the Petitioner filed an appeal before the Commissioner (Appeals) CGST, Central Excise and Customs,Bhubaneswar. The Petitioner also filed an application dated 09.02.2022 for examination and cross-examination of the witnesses and sought for confrontation.

4. It is alleged by the Counsel for the petitioner that beforepassing order dated 4.10.2019, the Joint Commissioner,Customs (Preventive) Commissionerate, Bhubaneswar, though relied on statements of certain persons, has notgiven opportunity to the petitioners to cross-examine. In thewrit petition, the Petitioner seeks for a direction to theAppellate Authority for consideration of said applicationbefore finalizing the said appeal.

5. Heard Sri. J.M. Pattnaik, learned counsel appearing for the Petitioner and Sri. R.S. Chimanka, learned Standing Counsel for Customs.

6. Both the counsels during the course of hearing agreed for ***disposal of the writ petition with a direction to the Appellate Authority for consideration of application dated 9.02.2022 (Annexure-9) filed in appeal pending adjudication.***

7. Accordingly, on the basis of a consent of both the parties, we dispose of the writ petition with a direction to the Opposite Party No. 4 (Appellate Authority) to consider the application dated 9.02.2022 vide Annexure-9 and take a decision in accordance with law. We make it clear that we have not expressed any opinion on the merits of the matter and it is left open to the Appellate Authority to take adecision on the application dated 9.02.2022 (Annexure-9) based on material relied upon by Adjudicating Authority either prior or while passing of final order in the appeal inaccordance with law.

8. With the aforesaid direction, the writ petition is disposedof." [Emphasis supplied]

5. Mr. Jagamohan Pattanaik, Advocate for the petitioner-applicant submitted that:

i. The petitioner's father Late K. Prasada Rao Subudhi asproprietor of M/s. Shankar Jewellers, Big Bazar, GoudaStreet, Berhampur in the district of Ganjam while filing Appeal under Section 128 of the Customs Act, 1962 readwith Rule 3(1) of the Customs Appeal Rules, 1982, before the Commissioner (Appeals), Customs, Bhubaneswar enclosed a petition praying therein for affording opportunityof cross-examination which was not granted by theAdjudicating Authority.

ii. On 25.01.2021, i.e., the date of hearing before the Commissioner (Appeals), said Late K. Prasada Rao Subudhi had filed written submission specifically inter aliastating thus:

"On 27.02.2017 at the instance of the department the appellant withdrew O.J.C. No. 2045 of 2000 for early disposal though there was no stay on adjudication and on 25.11.2019 the appellant got the OIO where cross-examination of the relevant persons

of MMTC and others relating to the said destination verification report of Vizag/BBSR Customs was denied.

***

The genuine request of appellant for cross-examination of the concerned persons of MMTC and the dealer toreconfirm his transaction/possession of the subject gold as genuine in this fact finding process was denied by the original authority contrary to provisions of natural justiceprovided under Article 311 of the Constitution, hence the OIO is bad in law."

iii. After the death of K. Prasada Rao Subudhi on 01.05.2021, the petitioner-K.Satish Kumar Subudhi, one of the legal heirs, participated in the appeal proceeding on 12thNovember, 2021 pursuant to Notice bearing C.No. V(2)CAP/01/CCP/2020/2244-45, dated 27thOctober, 2021 issued by the Superintendent (Appeals), CGST, C.Ex. & Customs, Bhubaneswar before the Commissioner (Appeal),Customs, Bhubaneswar.

iv. The appeal hearing remained inconclusive and no furtherdate was given instantly.

v. When no further communication was received even afterlapse of almost three months from the date of hearing, i.e.,12.11.2021, the petitioner on 09.02.2022 filed a petition reiterating his prayer for grant of opportunity of cross examination of witnesses.

vi. On 14.02.2022 the petitioner approached this Court invoking provisions of Article 226 of the Constitution ofIndia for issue of mandamus by way of writ petition being W.P.(C) No.4662 of 2022 which came to be disposed of on17.02.2022 on the consent of the counsel for both the parties. It is, thus, evident that the department was wellaware of the fact that the matter in said writ petition was on board before this Court on 17.02.2022.

vii. Even if the department feigns ignorance about matter beinglisted for hearing before this Court, the Commissioner (Appeals), Customs, Bhubaneswar could not have passed the Order in Appeal on the said date without disposing ofthe petition for cross-examination. Therefore, the Order-in Appeal purported to have been passed by the Commissioner (Appeals), Bhubaneswar on 17.02.2022 at 15:33:09 and served on the petitioner on 08.03.2022 cannot be sustained for want of adherence to the principles of natural justice.

viii. Despite the said violation, the petitioner approached the Commissioner (Appeals) with a prayer to afford a chance to cross-examine the witnesses by filing representation on 28.03.2022, which came to be rejected by theSuperintendent (Appeals), CGST, C.Ex. & Customs,Bhubaneswar, with the following words:

"Reference to your above said representation for crossexamination of the witness in your Appeal matter, based ondirection issued by Hon'ble Orissa High Court Judgment dated 17.02.2022 in the matter of W.P.(C) No.4662 of 2022,where Hon'ble High Court vide its Order dated 17.02.2022 directed to consider your representation of cross examination dated 09.02.2022.

The Personal Hearing in the matter was held on 12.11.2021, which was attended by you, where enough opportunity of hearing and representation was provided. After three months of hearing, you have submitted one more representation dated 09.02.2022 requesting for cross examination of witness.

This office of the Commissioner (Appeal), after going through the written and oral submissions and representations, facts and circumstances and relevant provisions of

law, have already issued and dispatch an order in appeal No.08/CUS/CCP/2022 dated 17.02.2022, which is an appealable order.

The Order in Appeal is issued after observing the principles of natural justice. The Order in Appeal is issued in line with provisions of Section 128 and 128A of the Customs Act.

Under customs Law, the Commissioner Appeals do not havepower to re-call/review or modify the already issued Orderin Appeal.

You have liberty to file an Appeal before jurisdictional CESTAT or any other forum as deemed fit."

ix. Usurping the jurisdiction of the Appellate Authority, the Superintendent (Appeals), CGST, C.Ex. & Customs, Bhubaneswar appears to have rejected the representation dated 28.03.2022 vide Communication dated 31.03.2022.

x. The Appellate Authority has, therefore, attempted tofrustrate the effect of writ of mandamus issued by this Courtvide Order dated 17th February, 2022.

xi. Under such circumstances, by way of the present I.A. bearing No. 6274 of 2022, the petitioner has made the following prayers:

"In the aforesaid peculiar facts and circumstances of the case, the petitioner most humbly and respectfully prays that the Hon'ble Court may graciously be pleased to declare the order under Annexure-B dated 17.02.2017 and Annexure-D dated 31.03.2022 non est in the eyes of law/order of this Hon'ble Court dated 17.02.2022 in W.P.(C) No.4662 of 2022;

And consequently be pleased to direct the opposite party No.4 to pass the order after considering the application of the petitioner dated 09.02.2022 (Annexure-E) in compliance of the order of this Hon'ble Court dated 17.02.2022 in W.P.(C) No. 4662 of 2022;

****"*

6. On 22.08.2022 the matter in I.A. No.6274 of 2022 filed by the petitioner in the disposed of W.P.(C) No. 4662 of 2022 was placed on board. This Court passed the following order on the said date:

"1. This matter is taken up through virtual/physical mode.

2. The writ petition disposed of on 17th February, 2022 by aconsensus. The aforesaid I.A. has been moved seeking declaration of the order dated 17th February, 2022 passed by the Appellate Authority-Opposite Party No.4 as non est and in violation of the spirit of the order passed by this Court.

3. Issue notice for 24th August, 2022.

4. Mr. Radheshyam Chimanka, Senior Standing Counsel appears and waives notice on behalf of Opposite Parties and submitted that he has already sought for instruction on the said I.A.. Five extra copies of the I.A. be served on him in course of the day, who prays for a day's adjournment to seek instruction.

5. The complete records relating to the appellate proceedings be immediately sealed and produced in Court on the next date.

6. Mr. Radheshyam Chimanka is directed to ensure that the needful is done."

7. When the matter is called on 24thAugust, 2022, Mr. Radheyshyam Chimanka, counsel for the opposite party No.4-Commissioner (Appeals) submitted record in sealed cover being handed over to him by the Superintendent (Appeals), Central Excise, Customs & Service Tax, Bhubaneswar Sri Biswanath Jena.

8. The sealed cover is opened in the Court during the course of hearing of I.A. today and, it is found on perusal of the Appeal Record that:

i. No order-sheet depicting day-to-day proceeding ismaintained.

ii. There is no indication as to conduct of hearing on petitiondated 09.02.2022.

iii. There is no further date fixed after 12.11.2021.

iv. Said date, i.e., 12th November, 2021 was the first date of appearance of one of the legal heirs, namely Sri K. Satish Kumar Subudhi through Amiya Kanti Patnaik, Authorised Person after the death of the father of the petitioner.

v. There is no indication as to refusal of issue of summons to the witnessses as prayed for in the petition filed by Late K.Prasada Rao Subudhi.

vi. There is no evidence on record to suggest that the Commissioner (Appeal) has fixed further date between 12th November, 2021 (first appearance of the petitioner) and 9th February, 2022, i.e., the date on which petition praying therein to issue summons to the witnesses was filed.

vii. Minute scrutiny of the Order-in-Appeal dated 17.02.2022 shows that the Commissioner (Appeal) has made certain corrections in the draft order placed at page 620 of the Appeal Record, but the final copy of said Appellate Order placed at page 646 of said record does not indicate the rectification of error being carried out. It, therefore, seems that the Appellate Authority has shown undue haste infinalizing the appeal realizing that writ petition containing the allegation of non-consideration of petition dated 09.02.2022 was before this Court for hearing on 17.02.2022. This Court, hence, finds that the Appellate Order dated 17.02.2022 was issued so hastily that the suggested corrections in the draft Order remained unattended to.

viii. Further startling fact is glaring on the record to the effectthat as if the Superintendent (Appeals), CGST, C.Ex. &Customs, Bhubaneswar was within his power to invoke appellate jurisdiction, on 31.03.2022 rejected the representation of the petitioner filed on 28.03.2022 addressed to the Commissioner (Appeals), CGST, Central Excise & Customs, Bhubaneswar which is available at page 688 of the Appeal Record.

ix. A downloaded copy of four notes depicting communication between the Commissioner (Appeals) and Superintendent (Appeals) is attached to the Appeal Record. At note Nos.3 and 4, dated 24th March, 2022, it is maintained as follows:
"Note#3
The Hon'ble High Court of Orissa vide Order dated 17.02.2022 has directed the Appellate Authority to decide the case in accordance with law based on material relied upon by the Adjudicating Authority. The case has already been decided vide O-i-A No. 08/CUS/CCP/2022, dated 17.02.2022. Therefore, no action lies at our end. The CCP has also requested to supply the copy of the O-i-A.

For information pl.

24/03/2022 01:18 PM
Biswanath Jena
Superintendent-Appeals
Note#4
I presume that the impugned letter dated 9.2.2022 referred in HC order was discussed in our O-i-A. No further actionis required at our level now.

24/03/2022 03:26 PM
Arvinder Singh Ranga
Commissioner-Appeals"

It is noticed by this Court that both the Superintendent Appeals and the Commissioner-Appeals have omitted to read the Order date 17.02.2022 of this Court appropriately. This Court in the said Order clarified as follows:

> "We make it clear that we have not expressed any opinion on the merits of the matter and it is left open to the Appellate Authority to take a decision on the application dated 9.02.2022 (Annexure-9) based on material relied upon by Adjudicating Authority either prior or ***while passing of final order in the appeal in accordance with law***."
>
> *[Emphasis supplied]*

On the date when the Appellate Order was purported to have been passed, i.e., 17.02.2022, the Appellate Authority had on his record the petition dated 09.02.2022. When the material on Appeal Record shows that the Appellate Authority kept the file dormant since 12.11.2021, but suddenly sprung into action on 17.02.2022, i.e., the date on which the writ petition was directed to be taken up by this Court, and stated to have passed the Appellate Order on 17.02.2022. From the tenor of Letter dated 31.03.2022 issued by Superintendent (Appeal) rejecting the representation dated 28.03.2022 shows that the Appellate Authority has abdicated his authority which isimpermissible under law.

9. This Court examined the purport and scope of principles of natural justice and consequences in absence of adherence thereto in the case of *Utkal Asbestos Limited Vrs. Sales Tax Officer and another, 1997 (I) OLR 571 = (2003) 133 STC 22 (Ori)*. This Court observed as follows:

> *"8. Natural justice is another name for common sense justice. Rules of natural justice are not codified canons, but they are principles ingrained into the conscience of men. Natural justice is the administration of justice in a commonsense liberal way. Justice is based substantially on natural ideals and human values. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. It is the substance of justice which has to determine its form.*
>
> *The expression natural justice and legal justice do not present a water-tight classification. It is the substance of justice which is to be secured by both, and whenever legal justice fails to achieve this solemn purpose, natural justiceis called in aid of legal*

justice. Natural justice relieves legal justice from unnecessary technicality, grammatical pedantry or logical prevarication. It supplies the omissions of a formulated law.

The adherence to principle of natural justice as recognized by all civilised States is of supreme importance when a quasi judicial body embarks on determining disputes between the parties. These principles are well-settled. The first and foremost principle is what is commonly known as audi alteram partem rule. It says that no one should be condemned unheard. Notice is the first limb of this principle. It must be precise and unambiguous. It should apprise the party determinatively the case he has to meet.Time given for the purpose should be adequate so as to enable him to make his representation. In the absence of a notice of the kind and such reasonable opportunity, the order passed against the person in absentia becomes wholly vitiated. Thus it is but essential that a party should be put on notice of the case before any adverse order is passed against him. This is one of the most important principles of natural justice. It is after all an approved rule of fair-play.

The principles of natural justice are those rules which have been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial or quasi judicial authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice.

What is meant by the term "principles of natural justice" is not easy to determine. Lord Summer (then Hamilton., L.J.) in Rex Vrs. Local Government Board, Ex parte Arlidge (1914) 1 KB 160 at page 199 : 83 L.J. K.B. 86 described the phrase as sadly lacking in precision. In General Council of Medical Education and Registration of United Kingdom Vrs. Sapckman 1943 AC 627 ; (1943) 2 All ER 337, Lord Wright observed that it was not desirable to attempt "toforce it into any procustean bed" and mentioned that one essential requirement was "that the Tribunal should beimpartial" and have no personal interest in the controversy, and further that it should give "a full and fair opportunity"to every party of being heard.

Lord Wright referred to the leading cases on the subject. The most important of them is the Board of Education Vrs. Rice (1911) AC 179 = 80 L.J. KB. 796, where Lord Loreburn, L.C., observed as follows:

*"Comparatively recent statutes have extended, if they havenot originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds *** It will, I suppose usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and 'fairly listen to both sides', for that is a dutylying upon everyone who decides anything. But I do not think they are bound to treat such a question as though itwere a trial *** The board is in the nature of the arbitral Tribunal, and a court of law has no jurisdiction to hear appeals from the determination either upon law or upon fact. But if the court is satisfied either that the Board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by Mandamus and Certiorari."*

Lord Wright also emphasised from the same decision the observation of the Lord Chancellor that the Board:

"Can obtain information in any way they think best always giving a fair opportunity to those who are parties to the controversy for correcting or contradicting any relevant statement prejudicial to their view."

To the same effect are the observations of the Earl of Selbourne, L.C. in Spackman Vrs. Plumstead District Board of Works (1885) 10 AC 229 ; 54 LJMC 81, where the learned and noble Lord Chancellor observed as follows :

"No doubt, in the absence of special provisions as to how the person who is to decide is to proceed, law will imply nomore than that 'the substantial requirements of justice' shall not be violated. He is not a judge in the proper sense of the word ; but he must give the parties an opportunity of being heard before him and stating their case and their view. He must give notice when he will proceed with the matter and he must act honestly and impartially and not under the dictation of some other person or persons to whom the authority is not given by law. There must be nomal versation of any kind. There would be no decision within the meaning of the statute if there were anything of that sort done contrary to 'the essence of justice'."

Lord Selbourne also added that the essence of justice consisted in requiring that all parties should have an opportunity of submitting to the person by whose decision they are to be bound such considerations as in their judgment ought to be brought before him. All these cases lay down the very important rule of natural justice contained in the oft-quoted phrase "justice should not only be done, but should be seen to be done".

9. The concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not rules embodied always expressly in a statute or in rules framed there under. They may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the fact and circumstances of that case, the framework of the statute under which the enquiry is held. The old distinction between a judicial act and an administrative act has withered away. Even an administrative order which involves civil consequences must be consistent with the rules of natural justice. The expression "civil consequences" encompasses infraction of not merely property or personal rights but of civil liberties, material deprivations, and non-pecuniary damages. In its wide umbrella comes everything that affects a citizen in his civillife.

10. Natural justice has been variously defined by differentjudges. A few instances will suffice. In Drew Vrs. Drew andLebura (1855) 2 Macg. 1.8, Lord Cranworth defined it as"universal justice". In James Dunbar Smith Vrs. HerMajesty The Queen (1877-78) 3 AC 614, 623 JC Sir Robert P. Collier, speaking for the Judicial Committee of the Privy Council, used the phrase "the requirements of substantialjustice," while in Arthur John Spackman Vrs. The Plumstead District Board of Works (1885) 10 AC 229, 240, Earl of Selbourne, L.C. preferred the phrase "the substantial requirements of justice". In Voinet Vrs. Barrett (1985) 55 LJRD 39, 41, Lord Esher, M.R., defined natural justice as "the natural sense of what is right and wrong".

While, however, deciding Hookins Vrs. Smethwick Local Board of Health (1890) 24 QBD 712, 716, Lord Esher, M.R, instead of using the definition given earlier by him in Voinet Vrs. Barrett (1985) 55 LJRD 39 chose to define natural justice as "fundamental justice". In Sidon Vrs. Baldwin (1963) 1 WB 539, 578, Harman L.J., in the Court of Appeal countered natural justice with "fair-play in action", a phrase favoured by

Bhagwati, J. in Maneka Gandhi Vrs. Union of India (1978) 2 SCR 621, 676 (AIR1978 SC 597 at pages 625-626). In re H.K. (An Infant)(1967) 2 QB 617, 630 Lord Parker, C.J. preferred to describe natural justice as "a duty to act fairly". In Fairmount Investments Ltd Vrs. Secretary to State for the Environment (1976) 1 WLR 1255, 1265-66, Lord Russell of Willowan somewhat picture squely described natural justiceas "a fair crack of the whip". While Geoffrey Lane, L.J., in Regina Vrs. Secretary of State for Home Affairs Ex parte Hosenball (1977) 1 WLR 766, 784 preferred the homely phrase "common fairness".

11. How then have the principles of natural justice been interpreted in the courts and within what limits are they tobe confined? Over the years by a process of judicial interpretation two rules have been evolved as representing the principles of natural justice in judicial process, including there in quasi judicial and administrative processes. They constitute the basic elements of a fair hearing, having their roots in the innate sense of man forfair-play and justice which is not the preserve of any particular race or country but is shared in common by allmen. The first rule is "nemojudex in causasua" or "nemodebetessejudex in propriacausasua" as stated in (1605)12 Co. Rep. 114 (Earl of Derby's case), that is, "no manshall be a judge in his own cause". Coke used the form"aliquis non debetesse judex in propria causa quia non potestesse judex et pars" (Co. Litt. 1418), that is, "no man ought to be a judge in his own cause, because he cannot act as judge and at the same time be a party". The form "nemo potest esse simul actor et judex", that is, "no one can be atonce suitor and judge" is also at times used. The secondrule and that is the rule with which we are concerned in thiswrit petition is "audi alteram partem", that is, "hear the other side". At times and particularly in continental countries the form "audietur et altera pars" is used, meaning very much the same thing. A corollary has been deduced from the above two rules and particularly the audi alteram partem rule, namely, "qui aliquid statuerit parte inaudita altera setquam licit dixerit, haud aequura facerit", that is, "he who shall decide anything without the other side having been heard, although he may have said what isright, will not have been what is right", (See Bosewell'scase (1605) 6 Co. Rep. 48-b, 52-a) or in other words as it isnow expressed, "justice should not only be done but should manifestly be seen to be done"."

9.1. The quint essence of cross-examination of witness has been propounded by various Courts and all the Courts are led to hold that it is *sine qua non* and causing enquiry without due confrontation to the party against whom the decision is taken vitiates the proceeding for lack of fair-play. Non-summoning of witnesses for the purpose of cross-examination results inmiscarriage of justice. Extending benefit of cross-examining the witness when a decision of *quasi* judicial authority leads to adversely affect the claim of the participant in the proceeding is founded on the fundamental principle of jurisprudence that justice must not only be done but must also be seen to have been done. [See *Khem Chand Vrs. Union of India, 1958 SCR 1080 = AIR 1958 SC 300*].

9.2. In *Ayaayubkhan Noorkhan Pathan Vrs. State of Maharashtra*, *(2013) 4 SCC 465* it is held that not only should the opportunity of cross-examination be made available, but it should be one of effective cross-examination, so as to meet

the requirement of the principles of natural justice. In the absence of such an opportunity, it cannot be held that the matter has been decided in accordance with law, as cross-examination is an integral part and parcel of the principles of natural justice. For coming to such a conclusion the Hon'ble Supreme Court has referred to the following decisions:

> *"24. A Constitution Bench of this Court in State of M.P. Vrs. Chintaman Sadashiva Vaishampayan, AIR 1961 SC 1623, held that the rules of natural justice, require that a party must be given the opportunity to adduce all relevant evidence upon which he relies, and further that, the evidence of the opposite party should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party. Not providing the said opportunity to cross-examine witnesses, would violate the principles of natural justice. (See also:Union of India Vrs. T.R. Varma, AIR 1957 SC 882; Meenglas Tea Estate Vrs. Workmen, AIR 1963 SC 1719; M/s. Kesoram Cotton Mills Ltd. Vrs. Gangadhar&Ors., AIR 1964 SC 708; New India Assurance Company Ltd. v. Nusli Neville Wadia and Anr., AIR 2008 SC 876; Rachpal Singh & Ors. Vrs. Gurmit Singh & Ors., AIR 2009 SC 2448; Biecco Lawrie & Anr. Vrs. State of West Bengal & Anr., AIR 2010 SC 142; and State of Uttar Pradesh Vrs. Saroj Kumar Sinha, AIR 2010 SC 3131).*
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> *25. In Lakshman Exports Ltd. Vrs. Collector of Central Excise,(2005) 10 SCC 634, this Court, while dealing with a case under the Central Excise Act, 1944, considered a similar issue i.e. permission with respect to the cross-examinationof a witness. In the said case, the assessee had specifically asked to be allowed to cross-examine the representatives of the firms concern, to establish that the goods in question had been accounted for in their books of accounts, and that excise duty had been paid. The Court held that such are quest could not be turned down, as the denial of the right to cross-examine, would amount to a denial of the right tobe heard i.e. audi alteram partem.*
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> *26. In New India Assurance Company Ltd., Vrs. Nusli Neville Wadia & Anr., AIR 2008 SC 876; this Court considered a case under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 and held as follows :*
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> *"If some facts are to be proved by the landlord, indisputably the occupant should get an opportunity tocross-examine. The witness who intends to prove the said fact has the right to cross-examine the witness. This may not be provided by under the statute, but it being a part of the principle of natural justice should be held to be indefeasible right."*
>
> *In view of the above, we are of the considered opinion thatthe right of cross-examination is an integral part of theprinciples of natural justice.*
>
> *27. In K.L. Tripathi Vrs. State Bank of India & Ors., AIR 1984 SC 273, this Court held that, in order to sustain a complaint of the violation of the principles of natural justice on the ground of absence of opportunity of cross-examination, it must be established that some prejudice has been caused to the appellant by the procedure followed. A party, who does not want to controvert the veracity of the evidence on record, or of the testimony gathered behind his back, cannot expect to succeed in any subsequent grievance raised by him, stating that no opportunity of cross examination was provided to him, specially when the same was not requested, and there was no dispute regarding the veracity of the statement. (See also: Union of India Vrs. P.K. Roy, AIR 1968 SC 850; and Channabasappa Basappa Happali Vrs. State of Mysore, AIR 1972 SC 32). In*

Transmission Corpn. of A.P. Ltd. Vrs. Sri Rama Krishna Rice Mill, AIR 2006 SC 1445, this Court held:

"In order to establish that the cross-examination isnecessary, the consumer has to make out a case for the same. Merely stating that the statement of an officer isbeing utilised for the purpose of adjudication would not besufficient in all cases. If an application is made requesting for grant of an opportunity to cross-examine any official, the same has to be considered by the adjudicating authoritywho shall have to either grant the request or pass areasoned order if he chooses to reject the application. Inthat event an adjudication being concluded, it shall be certainly open to the consumer to establish before the Appellate Authority as to how he has been prejudiced by the refusal to grant an opportunity to cross-examine any official".

28. The meaning of providing a reasonable opportunity to showcause against an action proposed to be taken by the government, is that the government servant is afforded a reasonable opportunity to defend himself against the charges, on the basis of which an inquiry is held. The government servant should be given an opportunity to deny his guilt and establish his innocence. He can do so onlywhen he is told what the charges against him are. He can therefore, do so by cross-examining the witnesses produced against him. The object of supplying statements is that, the government servant will be able to refer to the previous statements of the witnesses proposed to be examined against him. Unless the said statements are provided to the government servant, he will not be able to conduct an effective and useful cross-examination.

29. In Rajiv Arora Vrs. Union of India & Ors., AIR 2009 SC1100 = (2008) 15 SCC 306, this Court held:

"Effective cross-examination could have been done as regards the correctness or otherwise of the report, if the contents of them were proved. The principles analogous to the provisions of the Indian Evidence Act as also the principles of natural justice demand that the maker of the report should be examined, save and except in cases where the facts are admitted or the witnesses are not available forcross-examination or similar situation.

The High Court in its impugned judgment proceeded to consider the issue on a technical plea, namely, no prejudice has been caused to the appellant by such non-examination. If the basic principles of law have not been complied with or there has been a gross violation of the principles of natural justice, the High Court should have exercised its jurisdiction of judicial review."

9.3. In *K.I. Shephard Vrs. Union of India, (1987) 4 SCC 431*, the Hon'ble Apex Court held that fair play in actions is a facet of natural justice. The principles of natural justice are also applicable to administrative actions. Even in emergent situations, compliance with at least minimum requirements of natural justice rules, is a condition precedent to taking any action which affects adversely leading to civil consequences.

9.4. It is well settled law that justice is rooted in confidence and justice is the goal of a *quasi* judicial proceeding also. If the functioning of a *quasi* judicial authority has to inspire confidence in the minds of those subjected to its

jurisdiction, such authority must act with utmost fairness. Its fairness is obviously to be manifested by the language in which charges are couched and conveyed to the person proceeded against. The principle that justice must not only be done but it must eminently appear to be done as well is equally applicable to *quasi* judicial proceeding if such a proceeding has to inspire confidence in the mind of those who are subject to it. [See *Judgment dated 5th April, 2022* of this Court in *Rawani Construction Private Limited Vrs. State of Odisha, W.P.(C) No. 21508 of 2017*].

9.5. Under Chapter XIII, Section 108 of the Customs Act, 1962 empowers any Gazetted Officer of Customs to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any enquiry which such Officer is making under the Act. Section 108 is an enabling provision empowering a Gazetted Officer of the Customs empowers to enforce attendance of persons he considers necessary for the purpose of an enquiry under the Customs Act. It declares every such enquiry to be a judicial proceeding within the meaning of Section 193 and Section 228 of the Indian Penal Code, 1860. Chapter XIV in Section 122 of the said Act of 1962 provides for adjudication of confiscations and penalties. It stipulates that, in every case under Chapter XIV of the Act of 1962, in which anything is liable to be confiscated or any person is liable to a penalty such confiscation or penalty may be adjudged by the persons as stipulated therein. Section 122A of the Act of 1962 lays down the adjudication procedure. It requires the adjudicating authority to give an opportunity of hearing to a party in a proceeding if such party so desires. Section 122A of the Act of 1962 recognises that the principles of natural justice are applicable to proceedings under the Customs Act. Principles of natural justice are applicable to any proceeding which affects the interest of any person to such proceeding. Applicability of the principles of natural justice to a proceeding which affects any interest of any person is to be read into a statute.

9.6. The person so summoned can make a statement under Section 108. The statement made under Section 108 of the Customs Act is recognised to be distinct and different from statement recorded by Police Officer during the course of investigation under the Code of Criminal Procedure. Statements made under Section 108 are admissible in evidence. They can be used as evidence in any adjudicating or any proceeding for prosecution. The relevancy of the statements made under Section 108 is dealt with in Section 138B under Chapter XVI of the Act of 1962 which deals with "offences and prosecution". Chapter XVI of the Act of 1962 enables the authorities to initiate criminal proceedings against persons who are guilty of the offences specified under said chapter.

Although the Evidence Act, 1872 is not applicable to a proceeding under the Customs Act in the strict sense, the principles thereof are attracted. The adjudicating authority, the appellate authority and any other authority under the Customs Act,1962 required to adjudicate upon any proceeding, is obliged to adhere to the principles of the Evidence Act, 1872 while deciding on any subject. The Evidence Act, 1872 envisages and stipulatesthat a statement made by a witness is relevant and is admissible inevidence only when such witness is offered for cross-examinationin the proceeding. A party to the proceeding, introducing evidence through a person in the proceeding, is obliged to offer such witness for cross-examination to the opposite party. It is for the opposite party to either cross-examine such witness or to decline the same. However, till such time, the witness is offered for cross examination to the opposite party, the statement given by such witness, in the proceeding does not become admissible as evidence in the proceeding. Such statement cannot be treated as evidence. Cross-examination is the norm for making the statement made by a witness relevant for evaluation in the proceedings. Section 138B carves out few exceptions and limits it to aproceeding under the Customs Act and a proceeding for prosecution launched before any Court of law in respect of offences under the Act of 1962. Section 138B(1) of the Act of 1962 envisages that, a statement made and signed by a person before any Gazetted Officer of the Customs during the course of any enquiry or proceeding under the Customs Act shall be relevant, for the purpose proving, in any prosecution of an offence under the said Act, the truth of the facts which it contains, when the person who made the statement is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable; or when the person whomade the statement is examined as a witness in the case before the Court and the Court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice.

9.7. Section 138B(2) of the said Act lays down that the exceptions carved out under Section 138B(1) of the Act of 1962 from the general law of evidence shall apply to a proceeding of adjudication under the Customs Act, so far as may apply in a proceeding before a Court for the prosecution of any offence under the said Act of 1962. When an adjudicating authority is faced with a proceeding in which, the prosecution introduces evidence of witnesses, then the prosecution is obliged to offer such witness for cross-examination to the noticee. Likewise, if the noticee introduces any witness in its defence, the noticee is obliged to offer its witness for cross-examination to the prosecution. Only upon such offers are

made, then the evidence of such witness becomes relevant and admissible as evidence. However, the evidence of such witnesses would also become relevant and admissible, if any of the grounds stipulated in Section 138B(1) of the Act of 1962 is attracted, in a fact scenario. In agiven case, a person making a statement under Section 108 of the Act of 1962 dies prior to the conclusion of the adjudication proceeding and before he can be cross-examined by a noticee, then, the statement of such witness, will not become irrelevant. The relevancy of such statement, would be saved by virtue of the provisions of Section 138B(1)(a) read with 138B(2) of the Act of 1962.

9.8. In *Ciabro Alemao Vrs. Commissioner of Customs, 2017 SCC OnLine Bom 8811 = (2018) 1 Bom CR 545 = (2018) 362 ELT 465*, Section 138B of the Customs Act has been interpreted as follows:

> *"43. The CESTAT confused the issues of relevance and proof. A statement may be relevant, but it yet needs to be proved. The fact that a statement is made and recorded, and is statutorily said to be relevant, does not mean it is proved. That statement, like all testimony, must be subjected to the rigours of cross-examination, to be drawn into the evidentiary pool to form a basis for reasoning or conclusion. Section 138B does not say, and could not say, that statements can be taken as proved even without cross examination. This, however, is how the CESTAT has misunderstood the section. All that the section says is that for want of production of a witness, his Section 108 statement does not automatically cease to become relevant. Questions of relevancy and proof are yet determined by the Indian Evidence Act, and the CESTAT wholly failed to take these into account.*
>
> *44. In Arya Abhushan Bhandar Vrs. Union of India, 2002 (143)ELT 25 (SC) it was held that material witnesses not produced for cross-examination, though asked for, amounts to a clear breach of natural justice. In Union of India Vrs.TR Varma [1958] 1 SCR 499, in paragraph 10, the Court held:*
>
> *"it may be observed that rules of natural justice requirethat a party should have the opportunity of adducing allrelevant evidence on which he relies, that the evidence ofthe opponent should be taken in his presence, and that heshould be given the opportunity of cross-examining thewitnesses examined by that party, and that no materialsshould be relied on against him without his being given anopportunity of explaining them."*

9.9. Right from proceeding before the Adjudicating Authority the petitioner has been praying for cross-examination of material witnesses. Neither the Original Authority nor the Appellate Authority has afforded opportunity to cross-examine the witnesses. At page 24 of the Appellate Order dated 17.02.2022 the Appellate Authority merely stated that report received from Adjudicating Authority indicated "the witnesses were already examined or not traceable" and rejected the demand for cross examination of the witnesses. It is pertinent to observe that when such vital report is relied upon by the Appellate Authority, the same does not form part of the Appeal Record. There is no iota

evidence available on record to suggest that the said report of the Adjudicating Authority was ever confronted to the petitioner. Therefore, such a document remained untested material. It is trite that untested material cannot be treated to have probative value. Suffice it to observe that there was no attempt made on the part of the Appellate Authority in this regard to verify the veracity of such a report, if any.

9.10. Turning to the facts of the present case, it is seen from the Appellate Record that after date of death of father of the petitioner, K. Prasada Rao Subudhi, only on 12.11.2021 alleged opportunity of hearing was stated to have been afforded which the Superintendent (Appeal) conducting himself as if he were the Appellate Authority affirmed in his communication dated 31.03.2022. The very statement that "The Personal Hearing-in the matter was held on 12.11.2021, which was attended by you where enough opportunity of hearing and representation was provided. After three months of hearing, you have submitted one more representation dated 09.02.2022 requesting for cross-examination of witness." is contrary to material available on record. Further fact which is noticed is that the petitioner was denied of opportunity of cross-examination by the Original Authority even though specific prayer by way of petition was made. Before the Appellate Authority also the petitioner made identical prayer while filing the Appeal. When the Appellate Authority did not accede to such a prayer during the course of hearing on 12.11.2022, before passing final Appellate Order, the petitioner substituted legal heir of original appellant-Late K.Prasada Rao Subudhi, has made fresh prayer for issue of summons by way of petition dated 09.02.2022. When said petition was available on the Appellate Record on the date passing of Order dated 17.02.2022, the Appellate Authority without affording opportunity of hearing on such petition ought not to have passed the final order.

9.11. It is not in dispute that the Superintendent (Appeal) received the petition dated 09.02.2022 for summoning the witnesses and on thesaid date Appellate Order was not passed by the Commissioner (Appeals)-opposite party No.4. It is not denied that on receipt of said petition, further date of hearing was not intimated to the petitioner instantaneously nor subsequent thereto before passing the final order dated 17.02.2022 in appeal. Writ Record reveals that the copy of writ petition was served on Sri Radheyshyam Chimanka, Senior Standing Counsel on 15.02.2022. Main plank of argument of the counsel for the petitioner proceeded with the allegation that it is, therefore, not warranted for the Appellate Authority to dispose of without affording opportunity of hearing on the petition dated 09.02.2022 particularly when the hearing of appeal on 12.11.2021 remained in conclusive. From the document titled "Record of

Personal Hearing" available at page 510 of the Appeal Record signed by the Commissioner (Appeals) as also Sri Amiya Kanti Patnaik, the Authorised Representative on behalf of the petitioner, it is manifest that the petitioner had reiterated its stance to the following effect:

> *"5.1. Grounds of dispute and prejudice:*
>
> ***
>
> *b) The genuine request of appellant for cross-examination of the concerned persons of MMTC and the dealer to reconfirm his transaction/possession of the subject gold asgenuine in this fact finding process was denied by the Original Authority contrary to provisions of natural justice provided under Article 311 of the Constitution, hence the OiO is bad in law leading to prejudice."*

In view of such a stand of the petitioner, and the Appeal Record is silent about further date of hearing, it is obvious that the petitioner was under impression that the Appellate Authority would fix up another date of hearing and intimate the petitioner after issuing summons to the witnesses. Mere dealing with such an aspect in the Order-in-Appeal rejecting the prayer made in the petition dated 09.02.2022 without affording opportunity of hearing on the same would not suffice compliance of the principles of natural justice. Thus, the petitioner feels rightly aggrieved for not being given an opportunity of being heard in that proceeding.

9.12. Therefore, this Court comes to conclusion that there has been gross violation of principles of natural justice and the petitioner had had no appropriate and adequate opportunity of hearing. Accordingly, the Appellate Order dated 17.02.2022 deserves to be quashed and a writ of *certiorari* be issued accordingly.

10. Before parting it is relevant to suggest that the Appellate Authority being *quasi* judicial authority is supposed to maintain transparency in day-to-day proceeding in the course of hearing of appeal. The Appellate Authorities and the Adjudicating Authorities are required to record each day's proceeding and signature of the authorized representative/party concerned be obtained in the margin of order-sheet against the record of proceeding/order passed to avoid confusion with regard to communication/intimation of future date/adjourned date. The *quasi* judicial Authorities are supposed to record the appearance of the parties and pass the zimni order to clearly reflect as to what had transpired in the proceeding on that date because it has been held by the Supreme Court in the case of *State of Maharashtra Vrs. RamdasShrinivasNayak*, *(1982) 2 SCC 463* that record of the Court is accepted to be correct until and unless proved to the contrary before the same Court.

10.1. Thus, the recording of zimni orders by the Authorities is of great significance as it reflects the proceedings which transpire during the course of hearing. The Authorities are required to be highly sensitive about recording of the zimni orders lest it create a new type of litigation in the higher Court to deal with, as has happened in this present case where the petitioner. [Reference is made to *Sandeep Ghai Vrs. Neeraj Malhotra, CR No.496 of 2012 (O&M) vide Judgment dated 27 January, 2012 of the Punjab & Haryana High Court at Chandigarh.*]

10.2. Apt here to reflect here what has been pointed out by the Hon'ble Karnataka High Court in the case of *Krishna & Co. Vrs. State of Karnataka, (2001) 124 STC 423 (Kar)* :

> *"5. We need to record here that there are well-defined principles that apply to all judicial proceedings and it is most elementary that courts and Tribunals should not list a case for hearing behind the back of the opposite party, that alterations in the order sheet should never be made and more importantly that one sided or ex parte hearings are not only impermissible but are deprecated. This will apply more so when the case was reserved for judgment because it does create an apprehension of unfairness and the possibility of bias in the mind of the opposite party and irrespective of what were the reasons or how so ever innocuous the entire situation might have been, any breach of the aforesaid principles would be sufficient to vitiate the order that is ultimately passed."*

10.3. It is necessary to reiterate the anxiety as had been shown by an earlier co-ordinate Bench of this Court which cautioned the *quasi* judicial authorities in the following words in the case of *Narbheram Power and Steel Pvt. Ltd. Vrs. Joint Commissioner of Sales Tax, W.P.(C) No. 20613 of 2015, vide Order dated February 22, 2016*:

> *"The very least that can be said in the present circumstances is that the principles of natural justice have been thrown to the wind. Accordingly without going into the merits of the case we set aside the assessment order dated 31.03.2015 passed by the Joint Commissioner of Sales Tax (O.P.1) under Annexure-1 on the ground of violation of principles of natural justice and inadequate opportunity of hearing offered to the petitioner. ****
>
> *We further issue a warning in this case to all statutory authorities that they must in exercise of quasi-judicial authority comply with the principles of natural justice as well as the rules framed at all times."*

11. Realising improper and haphazard maintenance of appeal record, and failure to adhere to the principles of natural justice in the course of hearing of appeal, Mr. Radheyshyam Chimanka, Senior Standing Counsel for Central GST, Central Excise & Customs, upon instructions, fairly conceded that on remand, the appellate authority shall consider the application dated 09.02.2022 for issue of summons to the witnesses and merit of the appeal afresh. Under such premise,

the Order-in-Appeal dated 17th February, 2022 is set aside for want of adherence to the principles of natural justice. Therefore, the matter is now remanded to the Commissioner (Appeals), Bhubaneswar-opposite party No.4. The petitioner is directed to appear before the opposite party No.4 on 21st September, 2022 for instructions. The Appellate Authority-opposite party No.4 shall fix up date of hearing and thereafter affording adequate opportunity, he may proceed with the matter. Upon hearing the petitioner on the petition dated 09.02.2022 and merit of the appeal, the said Authority is at liberty to take appropriate decision in appeal including the petition dated 09.02.2022 seeking issue of summons to witness(es) and pass orders in accordance with law. It is made clear that this Court has not expressed any view on the merits of the appeal.

11.1. The I.A. bearing No. 6274 of 2022 in the writ petition being W.P.(C) No. 4662 of 2022 stands disposed of in the above terms. There shall be no order as to costs.

12. Appeal Record be returned to Sri Radheysham Chimanka, Senior Standing Counsel (CGST, Central Excise & Customs) immediately on proper acknowledgement.

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2022 (III) ILR-CUT-372

JASWANT SINGH, J. & MURAHARI SRI RAMAN, J.

W.P.(C) NO. 15102 OF 2022

AUROGLOBAL COMTRADE PVT. LTD, BHUBANESWAR … Petitioner

.V.

THE CHAIRMAN, CENTRAL BOARD OF DIRECT TAXES & ORS. … Opp.Parties

(A) INCOME TAX ACT, 1961 – Section 148A – A show cause notice was sent to the assessee under clause (b) of Section 148A of the Income Tax Act – The assesse did not comply to the show cause notice or approached the Assessing Officer for extension of time by way of application as required to do so under clause (b) of Section 148A – The Deputy Commissioner passed the order as a fit case to issue notice under Section 148 of the Act – Whether the order passed under clause (d) of Section 148A can be faulted with? – Held, No. (Para 5.18)

(B) CONSTITUTION OF INDIA, 1950 – Article 226 – Writ of certiorari – In the present writ petition, notice U/s. 148 of the Income Tax Act challenged – Question raised, whether at the stage of notice under Section 148, writ Court should venture into the merits of the controversy when Assessing Officer is yet to frame assessment/ reassemment in discharge of statutory duty casted upon him under Section 147 of the Act ? – Held, no interference is called for.

(C) WORD – 'Proceeding' meaning explained with case laws.

Case Laws Relied on and Referred to :-

1. (2017) 103 VST 1 (SC) (Paras 21, 22 & 27) = (2017) 13 SCC 780 : Larsen & Toubro Limited Vrs. State of Jharkhand.
2. 2022 SCC OnLine SC 881 : Amarendra Ku. Pandey Vrs. Union of India.
3. AIR 1982 SC 818 = (1982) 1 SCC 525 : Babu Lal Vrs. Hazari Lal Kishori Lal.
4. MANU/TN/0029/2001 = (2001)1MLJ 420 = O.S.A.No. 309 & 350 of 2000, decided on 10.01.2001 by Madras High Court = 2001 SCC OnLine Mad 28 = (2001) 1 CTC 247 = (2001) 1 Mad LJ 420 : Commander Coast Guard Region (East) Vrs. O. Konavalov.
5. 1995 Supp (4) SCC 286 = AIR 1995 SC 2001 : Most Rev. P.M.A. Metropolitan & Ors. Vrs. Moran Mar Marthoma & Anr.
6. AIR 1995 SC 807 = (1995) 2 SCC 471 : P.L. Kantha Rao Vrs. State of AP.
7. AIR 1995 SC 807 = (1995) 2 SCC 471 : Ram Chandra Aggarwal & Anr. Vrs. State of Uttar Pradesh & Anr.
8. (2020) 9 SCC 121 [9-Judge Bench] : Kantaru Rajeevaru Vrs. Indian Young Lawyers Association.
9. (1999) 2 SCC 543 : Mathew M. Thomas & Ors. Vrs. Commissioner of Income Tax.
10. AIR 1957 SC 540 : Garikapati Veeraya Vrs. N. Subbiah Choudhry.
11. (1973) 32 STC 141 (Cal) : Oriental Gas Co. Ltd. Vrs. State of WB.
12. (2001) 107 Comp Cas 76 (SC) =(2001) 7 SCC 549 : Pallav Sheth Vrs. Custodian.
13. (2017) 102 VST 343 (Chhatisgarh) = 2017 SCC OnLine Chh 584 : Kishan Lal & Co. Vrs. Additional Commissioner of Commercial Tax.
14. CWP No.10219 of 2022, Judgment dated 02.06.2022 by the High Court of Punjab and Haryana at Chandigarh : Anshul Jain Vrs. Principal Commissioner of Income Tax.
15. SLP(C) No.14823 of 2022 : Anshul Jain Vrs. Principal Commissioner of Income Tax.
16. (2009) 21 VST 280 (Ori) = 2008 SCC OnLine Ori 63 = 107 (2009) CLT 107 : Lakhiram Jain Vrs. Sales Tax Officer.

For Petitioner : Mr. Jagamohan Pattanaik

For Opp.Parties: Mr. Tushar Kanti Satapathy,Sr.Standing Counsel (I.T.)

JUDGMENT Date of Hearing and Judgment : 06.09.2022

M.S. RAMAN, J.

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

2. The Petitioner, alleging non-consideration of its application, dated 18th May, 2022 submitted before the Deputy Commissioner of Income-tax, Circle-1(1), Bhubaneswar, in response to the notice dated 15.03.2022 issued under

Section 148A of the Income-tax Act, 1961 (for brevity herein after referred to as "IT Act") pertaining to Assessment Year 2018-19 [Previous Year 2017-18], has filed this writ petition craving for following relief:

> *"*** quash the notice under Section 148 of the IT Act, 1961 dated 26.03.2022 under Annexure-4***."*

3. Shorn off detailed narration of facts, suffice it to describe that based on information which suggests that income chargeable to tax for the Assessment Year 2018-19 has escaped assessment within the meaning of Section 147 of the IT Act, notice dated 15.03.2022 under Section 148A was issued calling upon the petitioner-assessee, bearing PAN AAJCA0870E, to furnish response on or before 22.03.2022. Enclosed to said notice was the following material particulars facilitating filing of show-cause by the petitioner:

> *"As per information gathered, you have inflated your expenses by showing bogus purchase from M/s. Mideast Integrated Steel Pvt. Ltd. and suppressed income amounting to Rs. 31,64,58,088/-, which needed to be added back to your income during the Financial Year 2017-18."*

3.1. There was no response from the assesse nor was any step taken for extension of time on or before 22.03.2022 as stipulated in the aforesaid notice dated 15.03.2022. Vide Order dated 26.03.2022 passed under Section 148A(d) of the Income Tax Act a detailed discussion has been made based on available material which is to the following effect:

> *"The case was flagged for the Assessment Year 2018-19 by DIT (Systems) in Insight Portal in accordance with the risk management strategy formulated by the Board with certain underlying information.*
>
> *'From the information it is noted that, you have inflated your expenses by showing bogus purchase from M/s. Mideast Integrated Steel Pvt. Ltd. and suppressed income amounting to Rs.31,64,58,088/- during the Financial Year 2017-18, which needed to be added back to your total income for the Assessment Year 2018-19.'*
>
> *Accordingly, a show cause notice was sent to the assessee under clause (b) of Section 148A of the Income-tax Act, 1961 for assessee's response with supporting documents (if any) on the above mentioned issues electronically in 'e-proceeding' facility through his account in e-filing portal on or before 22.03.2022. Prior approval of the PCIT-1, Bhubaneswar was obtained before issuance of show cause notice on date 12.03.2022.*
>
> *The assessee has not complied with the show cause notice on or before due date which means assessee has nothing to say in this regard.*
>
> *In view of the above, I have reasons to believe that income chargeable to tax has escaped assessment to the extent of Rs.31,64,58,088/- within the meaning of Section 147 of the Income-tax Act, 1961 and this is a fit case to issue a notice under Section 148 of the Income-tax Act, 1961."*

3.2. The Assessing Officer-Deputy Commissioner of Income-tax, Circle-1(1), Bhubaneswar, after passing such an Order on 26.03.2022, initiated proceeding under Section 148 of the IT Act by issue of notice dated 26.03.2022 (Annexure-4) specifying the reason therefor, which is impugned in the writ petition.

3.3. Annexure-5 enclosed to the writ petition by the petitioner would go to show that Original Return in Form ITR-6 filed [by: Self] on 26.09.2018 under Section 139(1) was processed and intimation of refund was issued on 14.04.2019. However, in response to the notice dated 26.03.2022, the petitioner-assessee has filed its revised return in Form ITR-6 [filed by: Representative] for the Assessment Year 2018-19 on 23.04.2022 under Section 148 which was successfully e-verified on 25.04.2022.

3.4. After having participated in the proceeding, the petitioner- company has filed an application/reply on 18.05.2022 pursuant to notice dated 15.03.2022 issued under Section 148A(b) of IT Act requesting the Deputy Commissioner of Income-tax to refrain from proceeding with reassessment.

3.5. Mr. Jagamohan Pattanaik, learned Advocate for the petitioner-company submitted that the assessee could not furnish its reply to notice dated 15.03.2022 issued under Section 148A as inadequate time of seven days only was given. Furthermore, there was absence of reason with material particulars for proposed reassessment under Section 148 of the IT Act.

4. Mr. Tushar Kanti Satapathy, learned Senior Standing Counsel for Income-tax Department submitted that had the petitioner being sanguine about its rights and prejudice, it could have sought for further time on or before 22.03.2022 in response to notice dated 15.03.2022 under Section 148A enclosed as Annexure-2 to the writ petition. It is too late in the day to raise contention that the time granted to furnish response to notice dated 15.03.2022 under Section 148A was inadequate, more so when Order dated 26.03.2022 had already been passed under Section 148A(d) based on material available on record and in absence of any step being taken by the assessee on or before 22.03.2022. Still there is scope for the petitioner-assessee to place its own material to rebut the evidence collected by the Assessing Officer during the course of assessment under Section 148.

4.1. If the grounds are relevant and have a nexus with the formation of opinion regarding escaped assessment, the Assessing Authority would be clothed with jurisdiction to take action under Section 148 of the IT Act. Whether the grounds are adequate or not is not a matter which would be gone into by the High Court, for the sufficiency of the grounds which induced the Assessing

Authority to act is not a justiciable issue. What can be challenged is the existence of the belief but not the sufficiency or reasons for the belief. It is submitted that non-response of the assessee to the notice dated 15.03.2022 under Section 148A speaks volumes about the conduct of the petitioner-company. Amplifying such submission, it is said that the details of material based on which the action under Section 148 has been initiated was made known to the petitioner, which it itself has enclosed to the writ petition at Annexure-4. Said Annexure contains "Case Related Information Detail" which *inter alia* shows as follows:

S No	Source Pan	Source PAN Name	Information Fy	Information Type	Information Value	Inform -ation Date	Remarks
1	AAACM0846	M/s. Mideast Integrated Steels Ltd.	2017-18	Others	316458088		ITC (Input Tax Credit) fraud above 50 crores

4.2. The petitioner, thus, being well within its knowledge the content and context of assessment under Section 148, no prejudice would ensue if it participates in the assessment proceeding. During the course of assessment there shall be ample opportunity to contest the matter and the petitioner would have sufficient time to produce its books of account as also adduce evidence. Therefore, interference at this juncture by this Court is not warranted.

5. This Court finds force in the submission of Mr. Tushar Kanti Satapathy, Senior Standing Counsel for Income-tax Department inasmuch as the record reveals there has been laches on the part of the petitioner-assessee in responding to the notice dated 15.03.2022. It is unwholesome for the petitioner to urge that there was inadequate time allowed by the Assessing Officer to respond to notice dated 15.03.2022 under Section 148A.

5.1. Section 148A which deals with conducting inquiry, providing opportunity before issue of notice under Section 148 reads thus:

> *"The Assessing Officer shall, before issuing any notice under Section 148,—*
>
> *(a) conduct any enquiry, if required, with the prior approval of specified authority, with respect to the information which suggests that the income chargeable to tax has escaped assessment;*
>
> *(b) provide an opportunity of being heard to the assessee, with the prior approval of specified authority, by serving upon him a notice to show cause within such time, as may be specified in the notice, being* ***not less than seven days and but not exceeding thirty days from the date on which such notice is issued, or such time, as may be extended by him on the basis of an application in this behalf****, as to why a notice under Section 148 should not be issued on the basis of information which suggests that income chargeable*

to tax has escaped assessment in his case for the relevant assessment year and results of enquiry conducted, if any, as per clause (a);

(c) consider the reply of assessee furnished, if any, in response to the show-cause notice referred to in clause (b);

(d) ***decide, on the basis of material available on record*** *including reply of the assessee, whether or not it is a fit case to issue a notice under section 148, by passing an order, with the prior approval of specified authority, within one month from the end of the month in which the reply referred to in clause (c) is received by him, or* ***where no such reply is furnished, within one month from the end of the month in which time or extended time allowed to furnish a reply as per clause (b) expires****:*

Provided that the provisions of this section shall not apply in a case where,—

(a) a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A in the case of the assessee on or after the 1st day of April, 2021; or

(b) the Assessing Officer is satisfied, with the prior approval of the Principal Commissioner or Commissioner that any money, bullion, jewellery or other valuable article or thing, seized in a search under section 132 or requisitioned under section 132A, in the case of any other person on or after the 1st day of April, 2021, belongs to the assessee; or

(c) the Assessing Officer is satisfied, with the prior approval of the Principal Commissioner or Commissioner that any books of account or documents, seized in a search under section 132 or requisitioned under section 132A, in case of any other person on or after the 1st day of April, 2021, pertains or pertain to, or any information contained therein, relate to, the assessee.

Explanation.—

For the purposes of this section, specified authority means the specified authority referred to in Section 151." [Emphasis supplied]

5.2. Bare reading of aforesaid provisions suggests that the Assessing Officer has to provide an opportunity to the assessee with the prior approval of specified authority; and such opportunity is required to be for a period not less than 7 days, but not exceeding 30 days from the date on which such notice was issued. Opportunity is afforded to the petitioner by serving notice requiring it to explain as to why a notice under Section 148 should not be issued on the basis of information, which suggest that income chargeable to tax has escaped assessment in the case for the relevant assessment year and as a result of inquiry conducted, if any, as per clause (a) of Section 148A.

5.3. The connotation of "information" in the context of reopening of assessment has succinctly been laid down in the case of *Larsen & Toubro Limited Vrs. State of Jharkhand, (2017) 103 VST 1 (SC) (Paragraphs 21, 22 & 27) = (2017) 13 SCC 780* which is as follows:

"21. It is also pertinent to understand the meaning of the word 'information' in its true sense. According to the Oxford Dictionary, 'information' means facts told, heard or discovered about somebody/something. The Law Lexicon describes the term 'information' as the act or process of informing, communication or reception of knowledge. The expression 'information' means instruction or knowledge derived from an external source concerning facts or parties or as to law relating to and/or having a bearing on the assessment. We agree that a mere change of opinion or having second thought about it by the competent authority on the same set of facts and materials on the record does not constitute 'information' for the purposes of the State Act. But the word "information" used in the aforesaid Section is of the widest amplitude and should not be construed narrowly. It comprehends not only variety of factors including information from external sources of any kind but also the discovery of new facts or information available in the record of assessment not previously noticed or investigated. Suppose a mistake in the original order of assessment is not discovered by the Assessing Officer, on further scrutiny, if it came to the notice of another assessor or even by a subordinate or a superior officer, it would be considered as information disclosed to the incumbent officer. If the mistake itself is not extraneous to the record and the informant gathered the information from the record, the immediate source of information to the Officer in such circumstances is in one sense extraneous to the record. It will be information in his possession within the meaning of Section 19 of the State Act. In such cases of obvious mistakes apparent on the face of the record of assessment, that record itself can be a source of information, if that information leads to a discovery or belief that there has been an escape of assessment or under- assessment or wrong assessment.

22. There are a catena of judgments of this Court holding that assessment proceedings can be reopened if the audit objection points out the factual information already available in the records and that it was overlooked or not taken into consideration. Similarly, if audit points out some information or facts available outside the record or any arithmetical mistake, assessment can be re-opened.

***

*27. The expression 'information' means instruction or knowledge derived from an external source concerning facts or parties or as to law relating to and/or after bearing on the assessment. We are of the clear view that on the basis of information received and if the assessing officer is satisfied that reasonable ground exists to believe, then in that case the power of the assessing authority extends to re- opening of assessment, if for any reason, the whole or any part of the turnover of the business of the dealer has escaped assessment or has been under assessed and the assessment in such a case would be valid even if the materials, on the basis of which the earlier assessing authority passed the order and the successor assessing authority proceeded, were same. ***"*

5.4. In the present case, it is admitted fact that the petitioner never approached the Assessing Officer for extension of time by way of application as required to do so under clause (b) of Section 148A.Therefore, this Court finds justification in passing order under clause (d) *ibid*. by the Assessing Officer on 26.03.2022. The Assessing Authority having waited for the response proceeded on 26.03.2022 by recording reason to initiate proceeding under Section 148 of the IT Act. Therefore, once *quasi* judicial function is commenced by issue of

notice under Section 148, the same is subject to limitation contained in Section 149 of the IT Act and there is no scope for set the clock ante-clock-wise.

5.5. The action based on the subjective opinion or satisfaction can judicially be reviewed first to find out the existence of the facts or circumstances on the basis of which the authority is alleged to have formed the opinion. It is true that ordinarily the court should not inquire into the correctness or otherwise of the facts found except in a case where it is alleged that the facts which have been found existing were not supported by any evidence at all or that the finding in regard to circumstances or material is so perverse that no reasonable man would say that the facts and circumstances exist. The courts will not readily defer to the conclusiveness of the authority's opinion as to the existence of matter of law or fact upon which the validity of the exercise of the power is predicated. The doctrine of reasonableness thus may be invoked. Where there are no reasonable grounds for the formation of the authority's opinion, judicial review in such a case is permissible. When we say that where the circumstances or material or state of affairs does not at all exist to form an opinion and the action based on such opinion can be quashed by the courts, we mean that in effect there is no evidence whatsoever to form or support the opinion.The distinction between insufficiency or inadequacy of evidence and no evidence must, of course, be borne in mind. A finding based on no evidence as opposed to a finding which is merely against the weight of the evidence is an abuse of the power which courts naturally are loath to tolerate. Whether or not there is evidence to support a particular decision has always been considered as a question of law. It is in such a case that it is said that the authority would be deemed to have not applied its mind or it did not honestly form its opinion. The same conclusion is drawn when opinion is based on irrelevant matter. The existence of circumstances is a condition precedent to form an opinion. The court can inquire whether the facts and circumstances so found to exist have a reasonable nexus with the purpose for which the power is to be exercised. In other words, if an inference from facts does not logically accord with and flow from them, the Courts can interfere treating them as an error of law. Thus, the Court can see whether on the basis of the facts and circumstances found, any reasonable man can say that an opinion as is formed can be formed by a reasonable man. That would be a question of law to be determined by the Court. Where all the material facts are fully found, and the only question is whether the facts are such as to bring the case within the provisions properly construed of some statutory enactment, the question is one of law only. The Court can interfere if the constitutional or statutory term essential for the exercise of the power has either been misapplied or misinterpreted. The Courts have always equated the jurisdictional

review with the review for error of law and have shown their readiness to quash an order if the meaning of the constitutional or statutory term has been misconstrued or misapplied. It is permissible to interfere in a case where the power is exercised for improper purpose. If a power granted for one purpose is exercised for a different purpose, then it will be deemed that the power has not been validly exercised. If the power in this case is found to have not been exercised genuinely for the purpose of taking immediate action but has been used only to avoid embarrassment or wreck personal vengeance, then the power will be deemed to have been exercised improperly. The grounds which are relevant for the purpose for which the power can be exercised have not been considered or grounds which are not relevant and yet are considered and an order is based on such grounds, then the order can be attacked as invalid and illegal. On the same principle, the administrative action will be invalidated if it can be established that the authority was satisfied on the wrong question. The aforesaid principles of exercise of power vis-à-vis validity of exercising power has been discussed elaborately by the Hon'ble Supreme Court of India in *Amarendra Kumar Pandey Vrs. Union of India, 2022 SCC OnLine SC 881*.

5.6. "Proceeding" is frequently used to denote a step in an action and obviously it has that meaning in such phrases as proceeding in any cause or matter. When used alone, however, it is in certain statutes to be construed as synonymous with or including action. Reference may be had to *Halsbury's Laws of England, Vol. 1, 3rd Edition, page 6*.

5.7. The term "proceeding" is a very comprehensive term and generally speaking means a prescribed course of action for enforcing a legal right. It is not a technical expression with a definite meaning attached to it, but one the ambit of whose meaning will be governed by the statute. It indicates a prescribed mode in which judicial business is conducted. Refer: *Babu Lal Vrs. Hazari Lal Kishori Lal, AIR 1982 SC 818 = (1982) 1 SCC 525.*

5.8. In *Commander Coast Guard Region (East) Vrs. O. Konavalov, MANU/TN/0029/2001 = (2001)1MLJ420 = O.S.A. No. 309 & 350 of 2000, decided on 10.01.2001 by Madras High Court = 2001 SCC OnLine Mad 28 = (2001) 1 CTC 247 = (2001) 1 Mad LJ 420* it is laid down that the word "Proceeding" has not been defined in the General Clauses Act, 1897.

Oxford Dictionary explains the term "Proceeding" as "an action taken in a Court to settle a dispute."

The Black's Law Dictionary, Seventh Edition, Edited by Bryan A. Garner, Editor-in-Chief, gives the meaning of the word "Proceeding" as:

> *"the regular and orderly progression of a law suit. Including all acts and events between the time of commencement and the entry of judgment; any procedural means for seeking redress from a tribunal or agency"*.

Words and Phrases (*Legally Defined*) [*2nd Edition] Butterworths Publication* explains the term "Proceedings" as:

> "The term 'proceeding' is frequently used to note a step in an action, and obviously it has that meaning in such phrases as "proceeding in any cause or matter". When used alone, however, it is in certain statutes to be construed as synonymous with, or including "action" [*Halsbury's Laws (3rd Edition) 5, 6*].

The term "Legal Proceedings" is explained as :

> 'Legal Proceedings' mean *prima facie* that which the words would naturally import—i.e., legal process taken to enforce the rights of the *Shipowner, Runchiman & Co. v. Smyth & Co., 1994 (20) T.L.R. 625, per Lord Alverstone,C.J., at P.626*."

The said Dictionary also refers to a Book "*The law of Pleading under the Code of Civil Procedure"* by *Edwin E. Bryant*, and quoted as under:

> "Proceeding" is a word much used to express the business done in courts. A proceeding in Court is an act done by the authority or direction of the court, express or implied. It is more comprehensive than the word 'action', but it may include in its general sense all the steps taken or measures adopted in the prosecution or defense of an action, including the pleadings and Judgment."

The term 'proceeding' would only mean a legal process taken to enforce the rights.

5.9. The dictionary meaning of the word "proceeding" is "the institution of a legal action, any step taken in a legal action". In a general sense, the form and manner of conducting juridical business before a Court or judicial officer. Regular and orderly progress in form of law, including all possible steps in an action from its commencement to the execution of judgment. Term also refers to administrative proceedings before agencies, tribunals, bureaus or the like. See: *Most Rev. P.M.A. Metropolitan & Others Vrs. Moran Mar Marthoma & Another, 1995 Supp (4) SCC 286 = AIR 1995 SC 2001.*

5.10. In *P.L. Kantha Rao Vrs. State of AP, AIR 1995 SC 807 = (1995) 2 SCC 471*, it is stated that the word 'proceeding' would depend upon the scope of the enactment wherein the expression is used with reference to a particular context where it occurs. It may mean a course of action for enforcing legal right. In the journey of litigation, there are several stages, one of which is the realisation of the judicial adjudication which attained finality.

5.11. The expression "proceeding" is not a term of art, which has acquired a definite meaning. What its meaning is when it occurs in a particular

statute or a provision of a statute will have to be ascertained by looking at the relevant statute. Bearing in milnd that the term "proceeding" indicates something in which, business is conducted according to a prescribed mode it would be only right to give it a comprehensive meaning so as to include within it all matters coming up for judicial adjudication and not to confine it to a civil proceeding alone. Vide : *Ram Chandra Aggarwal & Another Vrs. State of Uttar Pradesh & Another, 1966 Supp. SCR 393 = AIR 1966 SC 1888.*

5.12. The term 'proceeding' is a very comprehensive term and generally speaking, means a prescribed course of action for enforcing a legal right. It is a term giving the widest freedom to a Court of law so that it may do justice to the parties in the case. See: *Kantaru Rajeevaru Vrs. Indian Young Lawyers Association, Review Petition (Civil) No. 3358 of 2018 in Writ Petition (Civil) No. 373 of 2006 vide Judgment dated 10.02.2020 of the Supreme Court of India, reported at (2020) 9 SCC 121 [9-Judge Bench]*.

5.13. Reference is made to *Mathew M. Thomas & Others Vrs. Commissioner of Income Tax, (1999) 2 SCC 543*, wherein it has been said that it is sufficient to refer to the Judgment of the Court in *Garikapati Veeraya Vrs. N. Subbiah Choudhry, AIR 1957 SC 540* wherein the court said at p.553:

> *"(i) That the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding."*

5.14. In *Oriental Gas Co. Ltd. Vrs. State of WB, (1973) 32 STC 141 (Cal)* it is observed that a proceeding under the sales tax statute comprehends the whole procedure for the levy, assessment, and collection of the tax liability of a dealer. When some step or action is taken for the ascertainment of imposition of that liability, the proceeding can be said to have commenced under the Act. Filing of return is a step in the procedure for the assessment of the liability of a dealer under the Act. By filing of such a return the machinery for assessment and imposition of liability is set in motion and with the filing of such a return a proceeding commences under the Act.

5.15. The word 'initiate' has been employed in Section 20 of the Contempt of Courts Act, 1971, which provides that no Court shall initiate any proceedings for contempt, either on its own motion or otherwise, after the expiry of a period of one year from the date on which the contempt is alleged to have been committed. In the *Pallav Sheth Vrs. Custodian, (2001) 107 Comp Cas 76 (SC) =(2001) 7 SCC 549* it has been held that in the case of suo motu proceedings contempt proceeding must be initiated by the Court by issuing a notice and in other cases initiation can only be by a party filing an application. Under Section 20 of the

Contempt of Courts Act, 1971 action can be initiated, either by filing an application or by the Court issuing notice *suo motu*, within a period of one year from the date on which the contempt is alleged to have been committed.

5.16. In *Kishan Lal & Co. Vrs. Additional Commissioner of Commercial Tax, (2017) 102 VST 343 (Chhatisgarh) = 2017 SCC OnLine Chh 584* the initiation of proceeding has been described. The word 'initiate' or 'initiation' has not been defined in the Act. Since it has not been defined in the Act, it would be appropriate to refer to the dictionary meaning of the word 'initiate'. In *Webster's Third New International Dictionary*, the word 'initiate' has been defined as to begin or set going; make a beginning of; perform or facilitate the first actions, steps or stages of. Likewise, in *Shorter Oxford English Dictionary*, the word 'initiate' has been defined as to begin, commence, enter upon; to introduce, set going, originate. *Black's Law Dictionary, 6th Edition*, defines the words 'initiate' and 'initiative' as: "Initiate: commence; start; originate; introduce; inchoate. Thus, the word 'initiation' of *suo motu* revision as stated in proviso (a) to Section 9(3) of the Chhatisgarh Value Added Tax Act, 2005, has a definite connotation. Initiation of revisional proceeding is the time when the revisional authority applies its mind to the facts/materials on record and decides to direct issuance of notice in accordance with Rule 61 of the Rules proposing the proposed order and intimating the assessee his intention to take the proceeding in suo motu proceeding. Proviso (a) to Section 49(3) of the Act is the condition precedent to exercise the power of revisional authority under that procedure. It merely contemplates initiation of proceeding by the revisional authority on its own or otherwise. The proceeding can be said to be initiated only when the revisional authority on its own motion or on the motion made otherwise decides to issue notice to the other side. Therefore, what is required and condition precedent for initiation of proceeding by invoking Section 9(3) of the Chhatisgarh Value Added Tax Act, 2005, would be initiation of proceeding under Section 9(3) of the Act and initiation can be done only when the revisional authority applies its mind to the facts of the case on his own motion or on the information received. Once there is application of mind by the revisional authority for *suo motu* proceeding or on the basis of the information received and he decides to issue notice as contemplated under Rule 61 of the Chhatisgarh Value Added Tax Rules, then the exercise of initiation is complete and initiation cannot be said to be made only when the notice is received under Rule 61 by the assessee.

5.17. Having filed revised returns for the Assessment Year 2018-19 after receiving the notice dated 26.03.2022 under Section 148 issued consequent upon Order dated 26.03.2022 passed under Section 148A, the petitioner is said to have

participated in the proceeding and surrendered to the jurisdiction of the Assessing Authority who was competent to initiate proceeding under Section 148. Therefore, it is unbecoming on the part of the petitioner to turn around to contend to the contrary. Acceding to the contention of the petitioner would be rendering violence to provisions of Section 148 and will provide a handle to persons trying to avoid proceedings initiated with justification. It can be said to be taking advantage of one's own wrong inasmuch as there is no explanation whatsoever to explain the circumstance which prevented the petitioner from filing reply or making application for extension of time as required under Section 148A at the relevant point of time.

5.18. Looking the present case in the above perspective, it can be candidly said that in absence of rebuttal to the contents and material particulars supplied to the assessee by specifically mentioning that expenses have been inflated by making bogus purchases from M/s. Mideast Integrated Steel Pvt. Ltd., thereby suppressing income to the tune of Rs.31,64,58,088/- pertaining to Financial Year 2017-18 in the notice dated 15.03.2022, neither the Order dated 26th March, 2022 passed under clause (d) of Section 148A can be faulted with nor does the issue of notice under Section 148 suffer from any infirmity in law. The fact that the petitioner after receipt of the Order dated 26.03.2022 passed under Section 148A and the notice dated 26.03.2022 issued by initiating proceeding for assessment under Section 148, furnished revised return for the Assessment Year 2018-19 on 23.04.2022 in response thereto, leads to construe that the petitioner was conscious about material based on which the reassessment proceeding is stated to have been initiated under Section 148. Therefore, the contention of the petitioner that it was unaware of the evidence based on which the proceeding for assessment under Section 148 is initiated is misconceived and misleading.

5.19. It is pertinent to refer to *Anshul Jain Vrs. Principal Commissioner of Income Tax, CWP No.10219 of 2022, vide Judgment dated 02.06.2022 delivered by the High Court of Punjab and Haryana at Chandigarh*. In the said case by way of writ petition the petitioner had challenged the order dated 31.03.2022 issued under Section 148A(d) of the IT Act and notice dated 31.03.2022 under Section 148 whereby the objections raised by the petitioner to the notice issued under Section 148A(b) were rejected.

The said Court framed the following issue:

> *"Whether at this stage of notice under Section 148, writ Court should venture into the merits of the controversy when AO is yet to frame assessment/reassemment in discharge of statutory duty casted upon him under Section 147 of the Act ?"*

After making elaborate discussion on the subject, the said Court held as follows:

> *"Thus, the consistent view is that where the proceedings have not even been concluded by the statutory authority, the writ Court should not interfere at such a pre-mature stage. Moreover it is not a case where from bare reading of notice it can be axiomatically held that the authority has clutched upon the jurisdiction not vested in it. The correctness of order under Section 148A(d) is being challenged on the factual premise contending that jurisdiction though vested has been wrongly exercised. By now it is well settled that there is vexed distinction between jurisdictional error and error of law/fact within jurisdiction. For rectification of errors statutory remedy has been provided.*
>
> *In the light of aforesaid settled proposition of law, we find that there is no reason to warrant interference by this Court in exercise of the jurisdiction under Article 226/227 of the Constitution of India at this intermediate stage when the proceedings initiated are yet to be concluded by a statutory authority. Hence the writ petition stands dismissed."*

5.20. The said Judgment of the Hon'ble Punjab & Haryana High Court was carried to the Hon'ble Supreme Court of India in *SLP(C) No.14823 of 2022 [Anshul Jain Vrs. Principal Commissioner of Income Tax]*, which came to be disposed of on 02.09.2022 with the following order:

> *"What is challenged before the High Court was the re-opening notice under Section 148A(d) of the Income Tax Act, 1961. The notices have been issued, after considering the objections raised by the petitioner. If the petitioner has any grievance on merits thereafter, the same has to be agitated before the Assessing Officer in the re-assessment proceedings.*
>
> *Under the circumstances, the High Court has rightly dismissed the writ petition.*
>
> *No interference of this Court is called for.*
>
> *The present Special Leave Petition stands dismissed. Pending applications stand disposed of."*

5.21. It is seen that in the case of *Anshul (supra)* the grievance of the petitioner was that his objection raised against notice under Section 148A was not taken care of. Yet, the Hon'ble Supreme Court did not interfere with the order of dismissal of writ petition by the High Court of Punjab & Haryana. Nonetheless, in the instant case, the petitioner has not furnished objection to the notice dated 15.03.2022 issued under Section 148A of the IT Act. Therefore, this Court finds that no case is made out by the petitioner for interfering with the issue of notice under Section 148 by the Adjudicating Authority after taking decision to initiate proceeding on passing order under Section 148A(d) of said Act.

6. Further argument is advanced by Mr. Jagamohan Pattanaik, Advocate for the petitioner on the basis of pleading that "in the event it is found not sufficient to drop the proceedings, then he may be provided the documents/ materials based on which the learned Assessing Officer reached the conclusion 'reason to believe' and approval was accorded by the learned Principal

Commissioner of Income-tax for reopening of assessment thereby giving the assesse an opportunity to rebut and meet the points that the documents/materials based on which such a conclusion is reached is not in fact correct".

6.1. In this respect it would be apt to say that the petitioner is required to participate in the assessment proceeding and produce materials and documents like books of account, vouchers, invoices, etc. maintained in terms of statutory requirement before the Assessing Authority so as to rule out manipulation.

6.2. In this regard the principle propounded by this Court in the case of *Lakhiram Jain Vrs. Sales Tax Officer, (2009) 21 VST 280 (Ori) = 2008 SCC OnLine Ori 63 = 107 (2009) CLT 107* is relevant. It has been stated in the said case as follows:

> *"6. So far as the first question is concerned, Law is well-settled that if any person is likely to be affected by the use of any material against him those are to be brought to his notice for rebuttal. This is the requirement of the natural justice. The principles of natural justice are based on two basic pillars, i.e., (i) nobody shall be condemned unheard (audi alteram partem), and (ii) nobody shall be judge of his own cause (nemo debet esse judex in propria sua causa).*
>
> ***
>
> *14. This Court in Mitra Trading Company (supra) [Mitra Trading Company Vrs. Commissioner of Sales Tax, Orissa, OJC No. 252 of 1968 dated 9th November, 1971] held as follows:—*
>
> *"4. The main question for consideration is whether the Petitioner should be given opportunity to take copy of the seized account book. The answer to such a question would depend upon whether principle of natural justice would be violates unless such opportunity is given. It is well settled that principles of natural justice cannot be confined within close jackets. What would be the principle in a particular case would depend on the facts and circumstances of that case. One thing, however, is certain that in an assessment proceeding if any particular material is used against an assessee then the assessee must be given full opportunity to rebut any adverse inference that could be drawn from user of that particular material. This was fully discussed by us in 26 (1970) S.T.C. 22 (Muralimohan Prabhudaval v. State of Orissa) wherein a question arose as to whether the assessee could be given opportunity for cross-examination with reference to account books of third parties used against the assessee. In paragraph 5 of our Judgment we referred to the fourth proposition as follows:*
>
> *'In case he proposes to use against the assessee the result of any private enquiries made by him, he must communicate to the assessee the substance of the information so proposed to be utilized to such extent as to put the assessee in possession of full particulars of the case he is expected to meet and should further give him ample opportunity to meet it, if possible.'*
>
> *15. Needless to say that an assessing authority is entitled to collect the materials behind the back of the assessee. It is not necessary that all the materials so collected by the assessing authority need be confronted to the assessee. Only those materials which the assessing authority wants to utilize against assessee in assessment he is bound*

to disclose the same to the assessee. In appropriate cases, the assessee can also demand for cross-examination of any person who stated something adverse to him which the Assessing authority wants to utilize against the assessee.

16. Therefore, we are of the considered opinion that a dealer is entitled to be supplied with the materials intended to be used against him in assessment proceeding for rebuttal and the dealer's explanation with regard to those materials is bound to be considered by the assessing officer in the assessment order either accepting or rejecting the same.

17. The second question relates to the stage at which the copy of the seized documents should be supplied to the Petitioner-dealer. Whether it should be supplied before or after production of books of account for verification by the assessing officer? We should keep in mind that in order to plug the leakage of the Revenue the fiscal statutes provide various measures to be taken by the departmental officers including surprise visit to the place of business, audit visit, establishment of check post, inspection of goods in transit etc. Pursuant to such provisions, very often departmental officers use to pay surprise visit to the business premises of the dealer to find out whether all the transactions effected by a dealer in his day today business are recorded in his regular books of account maintained for the purpose of paying tax. It is not uncommon that unscrupulous businessmen who effect purchase and sale outside the regular books of account keep note of the same in some slips/chits or secret account for the purpose of their own reference. The inspecting officers while conducting inspection at the place of business of the dealer, invariably try to trace out such duplicate accounts. If any such account comes to their possession, they cross-verify the same with regular books of account maintained by the dealer and submit their verification report to the assessing officer alleging suppression of purchase and/or sale, if any, found on such verification. In such event, the assessing officer is not bound to accept the view of the inspecting officer in respect of the allegations raised against the dealer in the report in entirety. He may not accept the report at all. He may accept the report in part. Therefore, the part of the report containing allegation against the dealer and the materials on the basis of which such allegation has been made must have to be disclosed to the dealer for his rebuttal, if the assessing officer wants to utilize the same against the dealer.

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21. The Hon'ble Apex Court in GKN Driveshafts (India) Ltd.Vrs. Income-tax Officer, (2003) 259 ITR 19 held that when a notice under Section 148 of the Income Tax Act is issued, the proper course of action for the notice is to file a return and, if he so desires, to seek reasons for issuing notices. The assessing officer is bound to furnish the reasons within a reasonable time.

22. Therefore, it cannot be said that the assessing officer has committed any error in insisting upon production of books of account before issuing the certified copy of the seized materials. Production of books of account prior to issuance of certified copy of the seized materials is necessary to rule out the possibility of preparation of accounts in line with the seized documents. This has become further necessary in this case as at no stage books of account were produced earlier at the time of inspection or before the assessing officer. However, we make it clear that where in course of inspection the inspecting officer seizes incriminating materials as well as regular books of account from the business premises of a dealer, the assessing officer or the inspecting officer shall supply copies of the seized regular books of account and incriminating material(s) to the dealer if he asks for the same before asking the dealer for furnishing his explanation in connection with any proceeding under the OVAT Act."

6.3. Therefore, since the petitioner has already filed revised return for the Assessment Year 2018-19 in compliance of the terms of notice under Section 148, the Assessing Officer is required to verify the books of account of the relevant year and examine any other evidence adduced by the petitioner with reference to the materials available in record. While doing so, he will confront the adverse material, if any, he wishes to utilize against the assessee-petitioner and record a preliminary statement with regard to such verification. He may also record statement whether the alleged transactions are incorporated in the regular books of account/statements on the basis of which returns have already been filed. After such verification, if he comes to the conclusion that the petitioner is liable to be levied with tax, he shall allow the petitioner to take copy of such materials which he wants to utilize against the petitioner. Needless to say that the petitioner shall be allowed reasonable opportunity for stating its case, which shall be considered by the Assessing Officer in the order of assessment. The petitioner for the purpose of assessment may participate in the proceeding initiated under Section 148 of the IT Act and no unnecessary adjournment shall be granted.

7. On the reasoning afore-stated and with the above observations and directions, the writ petition is disposed of. No order as to costs.

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2022 (III) ILR-CUT-388

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

JCRLA NO. 16 OF 2014

PRATAP MALIK ……. Appellant

.V.

STATE OF ODISHA …….Respondent

CRIMINAL TRIAL – Appreciation of evidence – Offence punishable under Sections 302/506/201 of the IPC – Conviction based on circumstantial evidence – Chain of circumstances not completed – Effect of – Held, at the time of giving opinion, it appears that the doctor who conducted post-mortem was a bit confused, whether the injuries sustained was due to fall upon hard substance or not ? – As such, the circumstantial evidence as sought to be proved by the prosecution got blurred and scattered – It did not form any chain to destroy the hypothesis of innocence of the appellant completely – The appeal stands allowed. (Para 33)

Case Law Relied on and Referred to :-

1. 2022 (I) ILR-CUT-241 : Bai @ Nilu @ Niranjan Behera vs. State of Odisha.

For Appellant : Mr. Dibyashree Ray
For Respondent : Mr. S.S. Kanungo, AGA

JUDGMENT Date of Judgment : 23.09.2022

S. TALAPATRA, J.

This appeal, by the convict (hereinafter referred to as the 'appellant') is directed against the judgment and order of conviction and sentence dated 23.12.2013 delivered in C.T.(Sessions) No.346 of 2011, arising from G.R. Case No.340 of 2011.

2. By the said judgment dated 23.12.2013, the appellant has been convicted for committing the offence punishable under Sections-302/506/201 of the IPC and consequent thereupon, he has been sentenced to suffer imprisonment for life and to pay fine of Rs.15,000/- (Rupees fifteen thousand) for committing the offence punishable under Section 302 of the IPC with default imprisonment. The appellant has been further sentenced to suffer rigorous imprisonment for two years and to pay fine of Rs.5,000/- (Rupees five thousand) with default imprisonment for committing the offence punishable under Section-506 of the IPC and further, he has been sentenced to suffer rigorous imprisonment for three years and to pay fine of Rs.10,000/- (Rupees ten thousand) with default imprisonment for committing the offence punishable under Section 201 of the IPC. It has also been stated that the substantive sentences shall run concurrently and the period of detention already undergone by the appellant shall be set off against the sentences of imprisonment in terms of Section-428 of the Cr.P.C. In addition, it has been directed that a sum of Rs.20,000/- (Rupees twenty thousand) out of the fine, if realized, be paid to the informant, namely Chitrasen Malik (P.W.1) as compensation under Section-327 of the Cr.P.C. for death of his father.

3. Briefly stated, the prosecution case is that the father of P.W.1 (the informant) went to the house of the appellant to pacify him as a quarrel broke out between his son (P.W.1) and the appellant, when the appellant threatened to kill the informant. The father of P.W.1 went to tender apology. During that time, at about 7 P.M. in the evening, the appellant killed the father of P.W.1 by pressing his neck with the help of ODHANI and the father of P.W.1 succumbed to death. Thereafter, the appellant left the body of the father (P.W.1) to a distance of 50 ft. and threw away the dead body by the side of a cabin and absconded from his

house with his family. The informant, having seen the dead body of his father near the cabin, could understand that the appellant, out of anger had killed his father. He had informed the Police Station. Based on the said information, a specific Police case was registered and the investigation was taken up. On completion of the investigation, final report under Section-173(2) of the Cr.P.C. was filed against the appellant for committing the offence punishable under Sections-506/302/201 of the IPC. He was put to trial after framing the charge, which the appellant denied.

4. In order to prove the charge of criminal intimidation, murder and for causing the disappearance of the evidence with intention to screen himself, the prosecution adduced 14 witnesses including the informant (P.W.1). Apart from that,12 documentary evidence (Ext.1 to Ext.12) were introduced by the prosecution. At the instance of the defence, the signature of P.W.10 on Ext.3 (the seizure list) was admitted in the evidence as Ext.A. 12 Material Objects (M.O. I to XII) are also brought on record.

5. The defence did not adduce any further evidence. After recording the evidence of the prosecution, the appellant was examined under Section- 313 of the Cr.P.C. when he stated that he has been falsely framed in this case. He denied the evidence as laid by the prosecution.

6. Having appreciated the evidence, the trial court returned the finding of conviction by observing that the chain of circumstances brought to record by the prosecution completely proves the guilt of the appellant. The trial court has observed as follows:

> *"At the outset, there is unshaken evidence of P.Ws that there was enmity between the deceased and accused, the accused had bore grudge against the deceased and his son, he prepared himself to take revenge by leaving his family members in the house of his father-in-law, he came back to achieve his motive and intention, he got the chance to fulfill his anger finding an opportunity of arrival of the deceased to his house, he took the revenge by pressing the neck of the deceased and inflicting injuries on his person, the witnesses saw not only the dragging mark but also blood stain drops from his house to the place where the dead body was thrown, the nature of the injuries were found to be ante- mortem and homicidal in nature and the investigation by an independent I.O established that the accused is the author of the crime but none else and the entire facts, evidence and circumstances on record speaks that the chain is complete and no third man is there to kill the deceased."*

7. Mr. Dibyashree Ray, learned counsel having appeared for the appellant, has submitted that, there is no witness, who had seen that the appellant had done any criminal act, to say the least of killing the deceased by stifling. According to Mr. Ray, learned counsel, there is no evidence that the appellant had dragged the dead body from his house to a point at a distance and left the dead body there.

Even there is no evidence that the deceased and the appellant had any animosity. The story of breaking out of a quarrel with the deceased son and the appellant cannot be relied, in as much as, there is no reliable independent witness to corroborate P.W.1 in this regard. Even no witness has come forward to prove the dragging marks.

8. The medical evidence, as introduced by the prosecution, does not corroborate the prosecution case of dragging. According to Mr. Ray, learned counsel, when the charge of serious offence is sought to be proved by the circumstantial evidence, every episode forming the circumstances be proved so well, so that no doubt is left at all. According to Mr. Ray, learned counsel, the circumstances as proved by the prosecution did not form any chain showing that it is the appellant, but none other has committed the murder of the deceased, the father of P.W.1.

9. In response thereto, Mr. S.S. Kanungo, learned Addl. Government Advocate has submitted that the finding of the trial Judge is well reasoned and based on those findings, the conviction returned, cannot be questioned. Mr. Kanungo, learned Addl. Government Advocate has further submitted that the motive has been clearly established in as much as the appellant gave threat to kill P.W.1. But when his father went to appease the appellant, he killed the father of P.W.1 by strangulation. The motive, the discovery of the dead body in a place not far away from the house of the appellant and the dragging marks, injuries, moreover, the Post Mortem examination report stand to support the prosecution case. Mr. Kanungo, therefore, has emphatically stated that, the facts have been established in a manner which is consistent only to the hypothesis of guilt of the appellant. There is no explainable or any other hypothesis except that the appellant is guilty. Moreover, the circumstances as proved are of the conclusive nature. The prosecution has been able to establish a chain of the episodes so complete that no gap has been left, and as such, inference has to be inconsistent with innocence of the appellant. It rather shows that in all human probabilities, the culpable act has been committed by the appellant.

10. For the purpose of appreciating the rival contentions, it will be apposite for us to make a brief survey of the evidences laid by the prosecution.

11. P.W.1-Sri Chitrasen Malik, the son of the deceased has testified in the trial that he lodged the information on 25.04.2011 in respect of the occurrence. He has further testified that the appellant constructed a house on their land and as such, a quarrel broke out between them and the appellant. The appellant threatened to kill him and his father. His father had come to the house of the appellant to tender apology, out of fear. In the next morning, the informant saw

the dead body of his father, stained with blood, lying near the cabin. He has categorically testified that "*he saw a row of stained of blood from the house of the accused to the spot where the dead body was lying and the distance between the appellant's house and the spot is about 25 ft."* He identified the First Information Report (F.I.R.), Ext.1, that he had filed. He disclosed during their cross-examination that one Bipin Babu wrote the F.I.R. He denied the suggestion that he did not state to the Police that the appellant constructed the house on their land and there was a quarrel between him and themselves or that the appellant had threatened to murder him. He has further stated that, there are four houses in between his house and the house of the appellant. Those four houses belong to Jhari Malik, Mata Malik, Gopi Malik and Alekha Malik. Mata Malik and Gopi Malik are his adjacent neighbours. Houses of Souri Malik and Dari Malik are adjacent to the house of the appellant. He had no other land except the area measuring 0.04 decimal of that homestead. He has described the place where the dead body was found. According to P.W.1, the dead body of his father was lying at a distance of 100 meters from his house by the side of a concrete road near a cabin of Souri Malik. He saw bleeding from the ears of his father. He had also noticed four wounds on both of the thighs of his father. He has categorically stated that *"this much of injuries I noticed in his body in front of the Police at the time of inquest."* He has categorically stated during the said cross-examination, that he had not seen the murder of his father and did not see any mark of violence at the spot. He denied the suggestion that he had illicit relation with the wife of the appellant and he was warned by the appellant not to visit his house.

P.W.1 has further stated that, he did not go to the house of the appellant. He denied the fact that, the appellant had requested his father (the deceased) to convince him to not visit his house or that his father refrained him from going to the house of the appellant. He has also denied the suggestion that, out of the old enmity, P.W.1 had framed the appellant in this case by attributing the criminal liability of murder on him. He has also denied the specific suggestion made to him that he had caught the hands of the appellant's wife. He denied the suggestion that the appellant did not have any role in killing his father.

12. P.W.2-Priya Nath Malik is the nephew of the deceased. He had witnessed the dead body and, as he was present during the inquest. He had put his signature on the inquest report. He has also testified that the dead body was lying at a distance of 20 ft. away from the house of the appellant. During the cross-examination, the endorsement that was appearing on the inquest report, had been shown to P.W.1. The said endorsement, which is written in Odia, if translated verbatim would read as *Pratap Malik killed Kartik Malik (the deceased) pressing his throat is true*. He has also admitted that he had put his

signature on the said endorsement. But at that time, at the instance of the prosecution, he was declared hostile, as he resiled from his statement as recorded by the Investigating Officer during the investigation. The prosecution cross examined him and had shown the previous statement as recorded under Section 161 of the Cr.P.C., but P.W.2 denied to have made the said statement, except that part that he was examined by the Police and he found the dead body lying in front of the house of the appellant with blood patches and injuries on the person of the dead body. But, during the cross-examination, he stated that the quarrel had taken place 7-8 days before the day of occurrence. He has admitted that the appellant did threaten of killing P.W.1. He has also admitted that the accused was not found in his house, when he saw the dead body, lying at the place as referred. He has admitted during his cross-examination that he did not see anything and hence, it cannot be said, who killed Kartik Malik why and how. He has also stated that the occurrence took place during the summer. During that season, evening falls at about 7 P.M. In the cross- examination as carried out by the appellant, P.W.2 has made the following statement:

> *"Police told me that on throttling, the death of the deceased was caused and so when such thing with Police had made endorsement in Column-9 of the inquest report. There was bleeding from his right ear and scratch injury on both of his legs. Except the above injuries, there was no other injury on the deceased."*
>
> He denied that he has been influenced by the appellant.

13. P.W.3-Arjuna Malik testified that he saw the dead body of Kartik Malik by the side of the road at a distance of about 30-40 hands away from the house of the appellant. In his presence, the Police seized blood stained earth, sample earth, one plastic blood-stained jarkin, one mat (plastic) stained with blood from the house of the accused. The Police prepared the seizure list and he signed over the seizure list (Ext.3). At the instance of the prosecution, P.W.3 was also declared hostile.

During the cross-examination as carried by the prosecution, P.W.3 had stated that accused was not present in his house. Throughout the day, he was not present in his house. P.W.3 was there till the Post Mortem Examination was over. He denied his statement made to the Police that Kartik Malik and Chitrasen Malik were in the habit of visiting the house of Pratap Malik and prior to 7-8 days of the occurrence, there was exchange of hot words between Pratap Malik and Chitrasen Malik, for which Pratap Malik had threatened to kill Chitrasen, as Chitrasen had illicit relation with Kanchan, the wife of the appellant. He further denied that on 25.04.2011, the deceased went to the house of the appellant to settle the dispute and in the next morning, he saw the dead body of Kartik Malik. He had also denied to have stated that in order to

cause disappearance of the evidence, the appellant dragged the dead body from his house and left it near the cabin. He denied of being influence by the appellant. During the cross-examination, he has testified that the house of Kartik Malik is in the beginning line of the village, while the house of Pratap Malik is towards the end of the village and between those houses, there are 25 houses. He has also stated that *the seized properties have not been produced in the trial*.

14. P.W.4-Bapi Ojha testified that he saw the dead body of Kartik Malik in the morning and he has stated that, the dead body was lying 30 to 40 hands away from the house of the appellant. He saw bleeding from the ears of the deceased and also 5/6 bleeding injuries on the back side of the dead body. He has testified in the trial that there was bad-blood between the deceased and the appellant over a piece of land. He has categorically stated in the trial that he noticed patches of blood in row from the dead body to the house of the accused. He was present during the inquest procedure and he had signed over the inquest report. He has acceded in the cross-examination that he did not state to the Police that he saw blood in row connecting the spot and the house of the accused, as that was not asked by the Police. He denied that he had stated anything about the illicit relation between the wife of the appellant and P.W.1. But he has confirmed that he had stated to the Police that there was exchange of hot words between Chitrasen (P.W.1) and Pratap, the appellant for which Kanchan, the wife of the appellant had left the house of Pratap few days prior to the occurrence. He denied to have given the evidence falsely.

15. P.W.5-Bata Malik stated that in one morning he saw the dead body of Kartik Malik lying along the cabin of one Alekha. It appeared that, the said body was being dragged from another place, the house of Pratap Malik, but he had immediately stated that he did not see Pratap Malik his relation at the spot. He did see the dragging marks from the house of Pratap to the point of the cabin. He has categorically stated as follows:

> *"As Pratap was absent in his house and as I saw the dragging marks from the house up to the spot, I guessed that Pratap might have killed Kartik Malik. I was examined by the Police. After the incident today for the first time in the Court, I am seeing the accused in the dock, as he was absconding."*

In the cross-examination, he has categorically stated that, he made the statement to the Police on the day, when the dead body was discovered. But he has stated in the cross-examination that the house of Kartika would be about 25 ft. from the place where the dead body was lying. The dead body was removed from that place by the Police at about 12 noon [of the following day]. He has admitted that the deceased is the uncle, husband of father's sister (PIUSA). He

denied to have any knowledge about the illicit relation of P.W.1 but he saw P.W.1 with the wife of the appellant, as suggested. He denied that, he saw P.W.1 was holding the hand of the wife of the appellant, Kanchan. According to him, the Police took the photographs of the dragging marks. The dragging marks were on the road and according to him that was a concrete road.

16. P.W.6-Kirtan Malik testified in the trial that in one morning, he saw the dead body of Kartik Malik lying at a distance of 10 ft. from the house of Pratap and the dead body was lying near the cabin of one Satyananda. There was rain on the previous night. His house is about 50 ft. away from the spot. He denied to have any knowledge how Kartika died. He has confirmed to corroborate that the appellant was not found in the locality after the occurrence took place. He has also stated that the dead body was lying 50 ft. away from his house. He denied to have stated to the Police that Chitrasen (P.W.1) had illicit relationship with Kanchan Malik (wife of the appellant).

17. P.W.7-Dr. Niranjan Swain was working as the Medicine Specialist in D.H.H., Jajpur. On the requisition of the Police, he conducted Post Mortem examination of the dead body of Kartik Malik about 4.50 P.M. and according to him, the cause of death is due to asphyxia resulted from manual strangulation, along with haemorrhage and neurogenic shock caused by the head injury, inflicted by hard and blunt object. It seemed to be homicidal in nature. According to him, the death had taken place within 18 to 24 hours estimating between 4.50 P.M. to 10.30 P.M. of the proceeding day. He identified his report (Ext.4). He had also stated in his cross-examination that the head injuries that was found on the person of the deceased is possible if one would fall on the concrete road depending on the thrust of fall. Again, he has stated that, the types of head injuries that were found on the person of the deceased are not possible on fall. These types of injuries are possible, if hit by bamboo stick, iron rod and stone-blow. According to him, there were bruises on the front side, but there were no abrasion on the back-side. The injuries found around the neck might have caused by any rope or any napkin for being tightly tied around the neck.

18. P.W.8-Damodar Malik has testified that the appellant fled away from the village. He has further testified that he saw the dragging marks from the house of the accused to the point, where the dead body of Kartik Malik was lying. At that point, he was declared hostile at the instance of the prosecution and he was allowed to be examined by the prosecution.

During the cross-examination by the prosecution P.W.8 is denied to have made any statement before the Police that there had been illicit relation between Kanchan, the wife of the appellant and Chitrasen (P.W.1) for which the appellant

had grudge against Chitrasen or that threatened by saying he would kill P.W.1. He also denied that he had stated to the Police that the appellant murdered Kartik Malik and left his dead body to the road near the back side of the cabin.

19. In the cross-examination carried by the defence, he stated that the distance of the house of the deceased from the concrete road is 5 ft., but he has confirmed that, the dragging marks were found from the house of the accused to the point, where the dead body was found lying. The dragging mark was noticed *on the earth* along with both side of the road. The cabin situates close to the concrete road.

20. P.W.9-Deba Malik stated that the dead body was covered by a towel. The accused was not found in the house. He also stated that he saw the dragging marks from the house up to the dead body, but on the concrete road. The distance between the house of the appellant and the spot where the dead body was found lying would be about 39 ft. 8 inch. The breadth of the concrete road would be 10 ft. He was also declared hostile, as he had resiled from the statement made to the Investigating Officer. He was allowed to be cross examined by the prosecution. He denied that the appellant confessed to him that he had killed Kartik Malik by using a black ODHANI. He had also denied that he had given any signature on the disclosure statement made by the appellant. He denied of suppressing any truth. Even though in the cross- examination carried out by the defence, he admitted that he had signed one paper without knowing the content recorded by the Police. He gave description that there are five houses. He stated that there were *no injuries on the back and the leg of the deceased*. There was no enmity between the appellant and the deceased over a land dispute.

21. P.W.10-Sridhar Malik has stated that Kartik Malik did not return home on the night of the occurrence. There was heavy rain on that night. On the next morning, he saw the dead body of Kartik Malik behind the cabin. The house of the appellant is situated at a distance of 30 to 40 ft. away from the point, where the dead body of Kartik was found. He has stated that the house of the appellant and the dead body was intervened by a road but he has corroborated testifying that he saw the dragging marks from the spot, where the dead body was found lying up to the house of the accused and the deceased, who was absent in his house. In his presence, the Police seized blood stained earth, sample earth, one blood stained plastic jerrycan and blood stained grey-colour plastic mat and those were recovered from the house of the appellant. He has admitted his signature on the seizure list (Ext.3). In the cross- examination, he did not deviate from his statement made in the examination-in-chief. But he had testified that he

saw the injuries on the dead body. He has also identified his signature on the inquest report as stated. There were cut injuries on the back of the deceased. He saw cut injuries on his left leg from ankle joint to thigh with bleeding. He saw injuries on his back. The Police also saw the injuries.

22. P.W.11-Rahasa Malik has testified in the trial and stated that on the day of occurrence about 5 P.M., the appellant went to his father-in-law's house with his daughter. He left his daughter in his father-in-law's house and came back to his house. On the next day, the Police enquired from him about Pratap and he told the Police that Pratap had gone with his daughter to his father-in-law's house and he returned after leaving his daughter at his father-in-law's house. He was also declared hostile and allowed to be cross examined by the prosecution. He denied the purported statement claimed to have been made to the Investigating Officer.

23. In the cross-examination, carried by the defence, P.W.11 testified that, he was not even examined by the Police. He made the following statement in his further cross-examination as carried out by the defence:

> *"Kartika consumes heavy liquor. Sometimes after consuming heavy liquor Kartika does not return home and sometimes on fall he receives injuries."*

24. P.W.12-Manoranjan Malik was declared hostile, immediately after he had identified the signature on the seizure list (Ext.6). He was allowed to be cross examined but he denied to have made any statement to the Police during the investigation. He stated Arjuna Malik (P.W.3) is the son-in-law of the deceased, Kartik Malik.

25. P.W.13-Alekha Mallik was also declared hostile, as he did not support his previous statement made to the Police and he was allowed to be cross-examined by the prosecution. But in the cross-examination, carried out by the defence, he had testified that Kartika did not consume liquor, but his son used to take liquor and he had categorically stated that he had never been examined by the Police.

26. P.W.14-Upendranath Sethi is one S.Is. of Police who was working in Dharmasala Police Station on 26.04.2011. Having received the information, the I.I.C. registered the case and on his endorsement and direction, he took up the investigation. He testified in the trial that he had visited the spot and took the photographs of the deceased, which are marked as M.Os. I, II, III, IV, V, VI & VII but the defence raised objection as the photographs were straight away admitted in the evidence without due verification. He testified that, he conducted the inquest over the dead body and prepared the inquest report. Thereafter, he

sent the dead body for Post Mortem examination. In the course of the investigation, he seized the blood stained earth and sample earth from the spot and prepared the seizure list in presence of the witnesses. He seized the wearing dresses and the Command Certificate. He testified in the trial that he had arrested the appellant and on his arrest, he confessed his guilt and voluntarily made disclosure of the fact leading to the recovery of weapon of offence, i.e black ODHANI which he had stated to have kept concealed inside the heap of old clothes. The accused led him to the concealed spot to give recovery of the ODHANI. He had seized the ODHANI by preparing the seizure list (Ext.10). He made the requisition to the C.D.M.O. to know whether the strangulation was possible by the ODHANI. On completion of the investigation, he submitted the charge sheet. He has confirmed that P.W.2 told him that there had been exchange of hot words between Chitrasen Malik and Pratrap Malik *7/8 days prior to the occurrence*. He confirmed that Arjuna Malik (P.W.3) stated to him that Kartika and Chitrasen were in the habit of visiting the house of Pratap Malik and prior to 7/8 days of the occurrence, there was exchange of hot words between Pratap Malik and Chitrasen Malik, for which Pratap Malik had threatened to kill Chitrasen, as Chitrasen was suspected of having illicit relation with Kanchan, the wife of Pratap for which Chitrasen had sent his father Kartik Malik on 25.04.2011 to settle the dispute. On the next morning, he saw the dead body of Kartika Malik. He had confirmed that, P.W.3 had stated that he saw the dragging marks from the house of the appellant to the cabin. P.W.8 stated him that there was illicit relation between Kanchan and Chitrasen for which Pratap had grudge against Chitrasen and he threatened to kill him and that on 25.03.2011, Pratap murdered Kartik Malik and left the dead body of Kartik on the road side, precisely at the back side of the cabin. He also confirmed that P.W.9 stated to him that while in custody, the appellant confessed his guilt of having killed Kartik by using black ODHANI. He had stated further that the appellant concealed the ODHANI in some place. P.W.14 confirmed that P.W.11, Rahasa Malik stated to him that on 27.04.2011, Pratap took his daughter to his father-in-law's house, Pratap threw his trolley in the river and thereafter, brought out the trolley from the river. He admitted in the trial that he had not seen the seized properties in the Court, as those were sent for the chemical examination.

27. P.W.14 was re-examined in the trial, when he testified that a small plastic mat (M.O.VIII), small plastic container (M.O.IX), check lungi (M.O.X), check lungi of blue colour (M.O.XI) were seized. He had seized a black ODHANI (M.O.XII). He had sent the seized articles for chemical examination. But he had testified unambigously that he did not notice any foot print in between the house of the accused and the place where the dead body was lying.

The type of ODHANI marked as M.O.XII is ordinarily used by the girls. He has admitted in the cross-examined that he did not enquire whom the ODHANI belonged to. From the records, we find the forwarding report of the J.M.F.C., Chandikhole for sending those material objects for chemical examination, but that was not admitted in the evidence. Similarly, we have come across the chemical examination reports. No report from the chemical examination was admitted in the evidence.

28. Mr. Ray, learned counsel, in order to buttress his submission has relied on a decision of this Court in ***Bai @ Nilu @ Niranjan Behera vs. State of Odisha*** reported in ***2022 (I) ILR-CUT-241***, where it has been held that to complete the chain of circumstances and to come to a conclusion that the accused, in fact, had committed the crime, the motive receives significance and the same is required to be proved by the prosecution to complete the chain of circumstances.

29. Having appreciated the evidence and the submission, it appears that there is no proof that the deceased went to the house of the appellant in order to settle the dispute between the appellant and his son (P.W.1). Though P.W.1 in his testimony before the Court has stated that his father had gone to the house to tender apology out of fear, but he has not made any explanation, when his father did not return from the house of the appellant as told by the appellant why he had not enquired the whereabouts in that night. Such statement has been made in the aftermath. That apart, a few witnesses have stated that the referred quarrel took place 7-8 days prior to the day of occurrence. The said statement strikes at creditworthiness of the statement of P.W.1.

30. The prosecution relied on **(i)** the evidence of motive, **(ii)** the evidence of dragging marks from the house of the appellant to the spot where the dead body was found on the next morning and **(iii)** the discovery of ODHANI by which, as it has been suggested by P.W.14, the appellant might have strangulated the deceased. P.Ws.2 & 3 turned hostile. P.W.3 is the son-in-law of the deceased. So far as the motive is concerned, there are two sets of evidence have been introduced by the prosecution, one the dispute relating to a piece of land and the other. P.W.1's illicit relation with the wife of the appellant. The former has been subscribed by P.W.1, whereas the first one has not been corroborated by any other witness. Even no documentary evidence in this regard is available. On the contrary, some of the witnesses have testified that both the deceased and his son, P.W.1 used to visit the house of the appellant quite frequently. P.W.1 occupies a position to know the matters from a close quarters. He has not stated when the said quarrel as regards the land had taken place. He has generally stated that the

appellant threatened to kill him, but he did not state when the said threat was extended to him. Moreover, some of the witnesses have vouched in the trial that during the night of occurrence, there had been heavy shower. It is really inconceivable how the dragging marks on earth was retained to be seen in the next morning even though some of the witnesses have stated that the marks were found with bleeding injuries. In the natural course of action, this nature of evidence cannot be trusted without the test of doubt. Moreover, the prosecution has failed to prove the statement relating to the discovery of the so called ODHANI by which, as it has been projected the appellant has strangulated the deceased. On the contrary, both the witnesses of discovery turned hostile. As such, the discovery remained not proved.

31. It is well settled proposition of law that any statement of self-incrimination before the Police is inadmissible in the evidence. Therefore, the confession made to P.W.14 does not have any evidentiary value. On the contrary, P.W.14, when he had been confirming the statement of the hostile witnesses has categorically stated that he was told of dragging marks, has sufficiently damaged the prosecution case. Even the photographs as claimed to have been taken have not been proved by the photographer following the due procedure as already established by way of development of the law. The Investigating Officer cannot come to the dock to show the photographs for the purpose of their admission in the evidence. Therefore, even if photographs were taken of the dragging marks, those were not admitted by observing the procedure. The prosecution has lost the direction even in respect of the motive as stated. They were not sure what was the motive. Is it the relation of the appellant's wife with P.W.1 or the land dispute. There is no clinching evidence in this regard. There is no concrete material even to infer that there was some dispute relating to the so called relation of P.W.1 with the wife of the appellant. So far as the evidence on the dispute regarding the land has been allowed to be scattered away by the prosecution. Therefore, we are persuaded to hold that the motive has not been proved beyond reasonable doubt. Motive is one of the important component in a case of the circumstantial evidence. The prosecution has failed to prove it.

32. We have verified the Post Mortem examination report. The Post Mortem report, even though has been admitted by P.W.7, in his testimony, he did not talk about any ligature mark, but the trial judge has opined that *from the photograph*, he could see the ligature mark. For the purpose of reference, the relevant part of deposition of P.W.7 may be referred to:

"There was bruise on the front side, but there were no injuries on the back side. The injuries found on the neck by me is not possible, if one would tighty tie the neck by means of napkin or rope."

P.W.7 has clearly opined that the cause of death is attributable to the head injuries and asphyxia due to manual strangulation. It is really surprising that the contents of the Post Mortem report has not been proved by the post-mortem doctor but he has admitted the report (Ext.4). From the report, external injuries as recorded are …*bruise haematoma side an echyoneus over the neck. There is no mention of the ligature mark. There were bruises. Even in the detailed description of injury in the Post Mortem report, only the bruises over the front and back side of the neck has been highlighted. Also the other injuries over the head have been detailed*.

33. Even at the time of giving opinion, it appears to us, the post-mortem doctor was a bit confused as regards whether by fall on a hard substance, such injuries can be received or not. As such, the circumstantial evidence as sought to be proved by the prosecution got blurred and scattered. It did not form any chain to destroy the hypothesis of innocence of the appellant completely. Even if, there exists strong doubt against the appellant, but to convict someone, we require legal evidence and the prosecution has failed to lead such legal evidence to prove the episodes of the circumstances in order to form a chain to establish that it is the appellant but none has committed the murder.

34. Having observed thus, the impugned judgment and order dated 23.12.2013 is set-aside.

35. The appellant is acquitted from the charges as aforestated. As such, the appellant be released and set at liberty forthwith, if not wanted in any other case.

36. In the result, the appeal stands allowed.

37. Send down the LCRs. forthwith.

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2022 (III) ILR-CUT-401

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

MATA NO. 33 OF 2021

SMT. CHINMAYEE MOHAPATRA .....Appellant

.V.

SRI CHINMAYA CHETAN MISHRA .....Respondent

(A) HINDU MARRIAGE ACT, 1955 – Section 25(1) – Claim of permanent alimony – Prayer not acceded – Held, the appellant/wife is earning almost twice the income of the respondent – Therefore, even for maintaining the standard of life, the respondent cannot be directed to give any amount as alimony. (Para 42)

(B) HINDU MARRIAGE ACT, 1955 – Section 27 – Whether the appellant is entitled to get back any property given to her at the time of marriage? – Held, Yes.

Case Laws Relied on and Referred to :-

1. AIR 1985 Supreme Court 628 : Pratibha Rani vs. Suraj Kumar and another.
2. AIR 2001 Delhi 267 : Smt. Sangeeta vs. Sanjay Bansal.

For Appellant : Mr. Samir Kumar Mishra
For Respondent : Ms. Deepali Mohapatra

JUDGMENT Date of Judgment: 26.09.2022

S. TALAPATRA, J.

This is an appeal under Section 19(1) of the Family Court's Act, 1984 directed against the part of the Judgment dated 01.03.2021 delivered in Civil Proceeding No.24 of 2019 by the Judge, Family Court, Phulbani.

2. The appellant instituted a suit being Civil Proceeding No. 24 of 2019 for dissolution of marriage on the ground of cruelty within the meaning of Section- 13(1)(1-a) of Hindu Marriage Act,1955 and also for return of the gold ornaments and household materials given to the appellant at the time of marriage including the cash of Rs.1,30,000/- along with permanent alimony to the extent of Rs. 10,00,000/-.

3. It may be mentioned that by the Judgment dated 01.03.2021 delivered in Civil Proceeding No.24 of 2019, the marriage between the appellant and the respondent has been dissolved by a decree of divorce, but the prayer for return of the articles and the cash belonging to the appellant as well as the prayer for permanent alimony have been rejected by the Judge, Family Court, Phulbani.

4. From the records, it appears that for purpose of adjudication of the said matrimonial suit, the following issues amongst the other issues were framed by the Judge, Family Court, Phulbani on the basis of the rival pleadings:

> *".....(**5**) Whether the petitioner is entitled to get back cash of Rs.1,30,000/- (Rupees one lakh thirty thousand) only along with the house hold materials given to her at the time of marriage from the respondent ?*

> ***(6)*** *Whether the petitioner is entitled to get monthly or permanent alimony from the respondent and if so, what would be the quantum ?"*

5. While deciding those two issues relating to return of the articles and cash belonging to the appellant, as claimed and making provision of permanent alimony, the Judge, Family Court, Phulbani has observed that there is no document filed on behalf of the petitioner (the appellant herein) to the effect that in whose name two cheques were issued.

6. P.W.1 (the appellant) in her cross-examination at para-24 expressed her inability to say in whose name the entire amount of Rs.1,30,000/- had been debited. Likewise, P.W.2, the brother of the appellant, in his cross-examination (at para-7) expressed his inability to say to whose account the aforesaid amount had been credited. But, on the other hand, OPW-1 (the respondent) in his examination-in-chief deposed that the parents of the petitioner had given a cheque bearing No. 935854 dated 17.06.2018 amounting to Rs. 65,000/- (Rupees sixty five thousand) to purchase sarees and cloths for himself and his other relatives. Similarly, OPW-2 (the father of OPW-1) in his examination-in-chief deposed that the petitioner (the appellant) had given a cheque of Rs. 65,000/- (Rupees sixty five thousand) only to purchase sarees and cloths for her relatives.

7. After having taken note of the above evidence, the Judge, Family Court has observed in the impugned judgment as follows:

> *"The provision laid down U/S. 27 of the Hindu Marriage Act says about disposal of property presented at or about the time of marriage which may belong jointly to both the husband and wife. So the cheque given by the petitioner amounting to Rs.65,000/- (Rupees sixty five thousand) to purchase the dress materials and clothes for relatives as per the custom of usage in Hindu Society is not coming under Section 27 of the Hindu Marriage Act, 1955".*

8. The appellant had also claimed to get back her gold ornaments and other house hold materials given to her at the time of marriage.

9. On perusal of the petition, which has been filed by the appellant, it appeared to the Judge, Family Court that the appellant had described about the properties to be disposed of U/S.27 of the Hindu Marriage Act viz. gold ornaments of 50 grams, i.e., Bracelet 15 grams, gold chain 16 grams, gold rings (4 nos.) 10 grams and ear rings (9 grams), wooden furniture like dressing table, sofa set, double bed cot, mattress, pillow, wardrobe, trolley suit case, brass utensils, silver utensils and steel utensils. It has been noted by the Judge, Family Court that the respondent denied the aforesaid pleadings. As there was a total denial of those properties, the Judge, Family Court appreciated the evidence in that direction and thereafter he had observed as follows:

"Had it been true that the receipts are handed over to the respondent, the petitioner could have collected copy of the money receipt from her shop keepers from whom the costly materials are being purchased or can be examined. Any person transported such materials after solemnization of the marriage."

10. So, the evidence of P.W.1 regarding purchase of the above said materials is not believable even in the standard of preponderance of the probability. The Judge, Family Court also disbelieved the evidence as regards the gold ornaments as he found some serious discrepancy in the testimonies of P.Ws. 1 & 2. P.W.2 in particular, had introduced receipt of the gold ornaments, being Exhibits-B/1, B/2 & B/4 showing purchase of the gold ornaments weighing about 18.82 grams. So the evidence of both the witnesses regarding the gold ornaments to the extent of quantity was not believed. Thus, the Judge, Family Court rejected the prayer for return of those articles.

11. So far as the claim of permanent alimony is concerned, the Judge, Family Court, having noted the comparative income of the parties, has observed that the appellant has been earning a monthly remuneration of Rs. 55,000/- as the Court Manager in the District Court, Boudh and she was recruited there prior to her marriage. But the appellant, according to the Judge, Family Court did not place any definite evidence as regards the income of the respondent.

12. During her cross-examination, she has stated that she does not know about the monthly income of the respondent (para-28). But she has testified that the respondent has been serving under a private company, namely *SIMPLEX*. However, the respondent (OPW-1) has admitted that she had been earning a sum of Rs. 29,981/- and after deduction, he is to get a sum of Rs. 28,712/- per month.

13. It may be noted at this juncture that the appellant filed a specific application U/S.25 (1) of the Hindu Marriage Act, 1955 seeking the alimony. Thereafter, it has been observed by the Judge, Family Court as follows :

"In the instant case, as the monthly income of the petitioner is near about double the monthly income of the respondent and she is living in better position than that of the respondent. Under the aforesaid scenario, it would not be just and proper to direct the respondent to provide any permanent alimony to the petitioner as claimed."

These findings are under challenge in this appeal by the appellant.

14. Mr. Mishra, learned counsel appearing for the appellant, has submitted that following the standard of preponderance of probability, the appellant has quite successfully proved that the properties as noted above are lying with the respondent and the respondent is under obligation to return the properties in as

much as Section-27 of the Hindu Marriage Act deals with disposal of the property presented, at or about the time of marriage, which may belong to jointly to both husband and wife.

15. For the purpose of reference, Section-27 of the Hindu Marriage Act, 1955 is reproduced hereunder:

> ***27. Disposal of the property***. –
> *In any proceeding under this Act, the Court may make such provision in the decrees as it deems just and proper with respect to any property presented, at or about the time of marriage, which may belong jointly to both the husband and the wife.*

16. Mr. Mishra, learned counsel appearing for the appellant has further submitted that denial of permanent alimony is contrary to the very object of Section-25(1) of the Hindu Marriage Act. The said provision has been enacted so that either of the spouses may carry on a decent life. Section-25(1) of the Hindu Marriage Act postulates that any Court exercising jurisdiction under the Hindu Marriage Act may, at the time of passing any decree or at any time subsequent thereto on application made to it for the purpose, either by the wife or the husband, as the case may be, order that respondent shall pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant, as having regard to the respondent's own income and the other property, if any, the income and other property of the applicant, the conduct of the parties and other circumstances of the case, it may seem to the Court to be just, and any such payment may be secured, if necessary by a charge on the immovable property of the respondent.

17. Sub-section-(2) of Section-25 provides for variance, rescission and modification of the order in respect of maintenance. Even in the event of re-marriage by either of the spouse or if the party is husband, he had sexual intercourse with any woman outside, the order of maintenance may be varied, modified or rescinded in such a manner as the Court may deem just. The appellant herein did ask for the lump- sum as permanent alimony to the extent of Rs.10,00,000/- and return of the articles, which were given about or during the time of marriage.

18. Mr. Mishra, learned counsel appearing for the appellant, has submitted that despite adequate evidence laid by the appellant, her prayer for permanent alimony and return of the properties have been rejected. Mr. Mishra, learned counsel has further contended that Section-27 of the Hindu Marriage Act authorises the Court while deciding matrimonial dispute to pass a decree in respect of the property which may jointly belong to both the husband and the

wife. This Section at best provides a civil remedy to an aggrieved wife and does not in any way take away her right to file a criminal complaint against property belonging to her, if criminally misappropriated by her husband. Mr. Mishra, learned counsel has placed his reliance on an apex Court decision in ***Pratibha Rani vs. Suraj Kumar and another***, reported in ***AIR 1985 Supreme Court 628***, where the apex Court has summed up the position of law in the following words:

> *"**27**. To sum up, the position seems to be that a pure and simple entrustment of stridhan without creating any rights in the husband excepting putting the articles in his possession does not entitle him to use the same to the detriment of his wife without her consent. The husband has no justification for not returning the same articles as and when demanded by the wife nor can be burden her with losses of business by using the said property which was never intended by her while entrusting possession of stridhan. On the allegations in the complaint, the husband is no more and no less than a pure and simple custodian acting on behalf of his wife and if he diverts the entrusted property elsewhere or for different purposes he takes a clear risk of prosecution under S.406 of the IPC. On a parity of reasoning, it is manifest that the husband, being only custodian of the stridhan of his wife, cannot be said to be in joint possession thereof and thus acquire a joint interest in the property."*

19. It is a well-known principle as, however, referred by Mr. Mishra, learned counsel for the appellant that a Hindu wife can own property in her own right. That apart, it is purely a question of fact whether the dowry or the traditional presents given to her, were to be individually owned by her or had been gifted to the husband alone or jointly to the couple. For instance, the jewellary meant for a person for wearing of the bride, wearing apparel made to her, the cash amounts put into the Fixed Deposit in the bank exclusively in her name (the wife) are examples of dowry, raising the strongest, if not conclusive presumption. Once it is found that it is a fact that these articles of dowry were so given to her individually and to her own right, then we are unable to see how the mere factum of marriage would alter any such property and divest her ownership either totally or partially. Therefore, what surfaces from those proposition is that properties, gifted or transferred **(a)** for exclusive use of the bride e.g. her personal jewellary, wearing apparel etc., **(b)** articles of dowry which may be for common use and enjoyment in the matrimonial home and **(c)** articles given as presents to the husband or the parents-in-law and other members of the family are to be brought for consideration for determining a claim under Section-27 of the Hindu Marriage Act. The properties at (a) which are put to the exclusive use of the bride falls within her pristine ownership irrespective of their custody in the matrimonial home.

20. There cannot be any amount of doubt that the bride is entitled to return of her ownership irrespective of her entry and presence in the matrimonial home. The perception that the moment, a married woman enters her matrimonial

home, all her properties, including her exclusive properties become a joint property by affection of being placed in the custody of her husband or his relation. These two views are definitely in contrast to each other. Thus, on the basis of the detailed analysis as made in **Pratibha Rani** (*supra*), it may safely be held that the perception upon entering the matrimonial home, the ownership of stridhan property becomes joint with her husband or his relation, cannot be accepted. Stridhan property of a married woman, even if it is placed in the custody of her husband or in-laws, they will be deemed to be trustees and bound to return the same, if and when demanded by her.

21. Mr. Mishra, learned counsel for the appellant has placed his reliance on a decision of the Delhi High Court in ***Smt. Sangeeta vs. Sanjay Bansal*** as reported in ***AIR 2001 Delhi 267***. In that decision, the claim of the spouse for return of her properties were rejected holding that those properties since were presented at the time of marriage fell outside Section-27 of the Hindu Marriage Act, 1955. The Delhi High Court has rejected the proposition by holding that the property, as contemplated by Section-27 is not the property which is given to the wife at the time of marriage only. It includes the property given to the parties before or after marriage also, so long as it is relatable to the marriage. The expression "at or about the time of marriage" has to be properly construed to include such property which is given at the time of marriage and also the property given before or after marriage to the parties to become their joint property. Implying thereby, the property can be treated to have connection with the marriage. All such properties fall within the ambit of Section-27 of the said Act.

22. To repel the submissions made by Mr. Mishra, learned counsel for the appellant, Ms. Deepali Mohapatra, learned counsel has submitted that, there is no difference of opinion so far as the exposition of law relating to Sections- 25 & 27 of the Act are concerned. So far as return of the property under Section-27 of the Hindu Marriage Act is concerned, Ms. Deepali Mohapatra, learned counsel has quite robustly submitted that the right over the properties, meaning as stridhan, has to be established by evidence. The appellant has miserably failed to prove her ownership to prove the existence of the property or the right of the appellant to hold such property and her right to get the property returned. The Judge, Family Court has appreciated the evidence and every part of it and thereafter by advancing his analogy has observed that the appellant is not entitled to get the properties. Even the reason those are provided for denying the permanent alimony do not ex facie suffer from any infirmity. Ms. Mohapatra, learned counsel furthercontended that no interference in respect of the impugned judgment is called for.

23. So far as the alimony is concerned, Mr. Mishra, learned counsel has reiterated that the alimony as claimed is very little in as much as the said alimony has been claimed to retain the standard of life. The appellant is supposed to have and she cannot be pushed for dissolution of marriage, to disadvantageous financial condition. He has urged for interference in the impugned judgment.

24. For purpose of appreciation of findings as returned by the Judge, Family Court, Phulbani, it would be appropriate to make a meaningful survey of the evidence as recorded so far as related to the property covered by Section 27 and to the claim of alimony under Section 25(1) of the Hindu Marriage Act are concerned.

25. Before we appreciate the evidence, let us refer to the pleadings made in paragraph-8 of the petition as the appellant has pleaded as follows:

> *"8. That my parents have given costly bed, bed materials, pillows, wardrobe, dress materials as per their choice and also given other house hold articles and a sum of Rs.1,30,000/- in shape of Cheque bearing No.935854, dated 07.06.2018 & 935855, dated 16.06.2019 on SBI even though they have not demanded anything."*

26. Beyond this, there is no pleading so far as return of the properties is concerned. Without giving any particulars regarding the income of the respondent, the appellant herein prayed for a decree of permanent alimony to the extent of Rs. 10,00,000/- for sustenance of the appellant in future.

27. In support of the pleadings, as it appears from the records, the appellant adduced two witnesses including herself (P.W.2). The other witness is his brother Deepak Mohapatra (P.W.2). The documents as considered relevant for the purpose of determining the claim for returning the properties under Section 27 of the Hindu Marriage Act, have been admitted as Ext.B series (Ext.B/1 to Ext.B/4), as regards the purchase of the gold ornaments in the years 2013 & 2014.

28. In the written statement filed by the respondent, it has been stated that the pleading at para-8 of the petition (the matrimonial suit) is not fully correct. But the respondent has admitted that the parents of the petitioner (the appellant) had given a Cheque No. 935854, dated 17.06.2018 amounting to Rs. 65,000/- towards purchase of sarees and cloths for the relatives of the bride but no other cheque had been given by the parents of the petitioner as alleged.

29. Therefore, it is a total denial, as the said money according to the respondent was spent for purchasing sarees and cloths for the relatives of the bride. But there is no definite denial in respect of the furnitures, golden ornaments,

utensils etc. Since it is a case of denial, burden was on the appellant. For that purpose, let us now survey what P.W.1 (the appellant) has stated in her testimony. She has testified as follows:

> *"**9**. That my parents have given costly Bed, Bed materials, pillows, wardrobe, dress materials as per their choice, and also given other house hold articles and a sum of Rs.1,30,000/-in shape of Cheque bearing No.935854, dated 07.06.2018 & 935855, dated 16.06.2018 of SBI along with gold ornaments about 80 grams of different items."*

But she has denied any gift to have been received from the parents of the respondent. However, in the cross-examination, she failed to take any definite stand regarding the cheques. She testified as follows:

> *"24. A sum of Rupees one lakhs thirty thousand was given to the respondent in shape of two cheques each amounting to Rs.65,000/-. There was no demand from the side of the respondent so far my marriage with the respondent is concerned. The two cheques were blank, save and except the amount is concerned. The amount has been debited from my account but without verification of the Pass Book, I cannot say in whose name the entire amount of rupees one lakh thirty thousand has been credited."*

30. However, she had confirmed that from her father's house, bed materials, pillows, wardrobe, dress materials were given to the respondent. But the money receipts of those materials were handed over to the respondent. But no such claim was raised in the pleading. The appellant has stated that she has been receiving the monthly sum of Rs.55,000/- serving as the Court Manager in the Civil Courts, Boudh. She has also stated that the respondent has been working in a private company, namely SIMPLEX at Cuttack. Her brother, namely Deepak Mohpatra (P.W.2) in his examination-in-chief has testified as under:

> "**2**. That my sister informed about the torture by the respondent and her parental in-laws. That at the time of marriage we have given house hold articles and furniture along with gold ornaments to the respondent, i.e. brasslet-15 gms, gold chain-16 gms, gold rings four in numbers 10 gms. each. And we have also given Ear rings to the sister of the respondent–9 gms. and money Rs.1,30,000/- (Rupees one lakh thirty thousand) in shape of two Cheques."

31. P.W.2 has stated of no other materials. But in the cross- examination regarding issuance of the cheque, P.W.2 has stated as follows:

> *"**7**. To my knowledge, the parents of the respondent asked the petitioner to provide two number of cheques of Rs.1,30,000/- and for which the petitioner issued two cheques but I do not know for what purpose the two cheques were issued by the petitioner. One cheque was issued on 06.07.2018 and the subsequent cheque was issued on 16th or 17th July, 2018. To my knowledge both the cheques were issued without mentioning the name of the drawer. I do not know whose account the aforesaid cheques amount has been credited."*

32. But he has stated in the cross-examination that the respondent has not given anything to his sister. He has further corroborated that the appellant (P.W.1) has been serving as a Court Manager in the Civil Courts at Boudh. But

he has denied to have any knowledge about the appellant's monthly remuneration.

33. The respondent has categorically denied to have received a sum of Rs.1,30,000/-, sofa set, brass and silver utensils etc. But he has admitted that he received one cheque amounting to Rs.65,000/- for the purpose of purchasing sarees and cloths for the relatives of the appellant. He has claimed that his parents gave the appellant some gold ornaments, the relevant part of his testimony is extracted hereunder:

> *"**10**. That my parents had given necklace with ear ring totaling 50 grams, ring 2 nos. measuring 8 grams, bangles set of 30 grams, patta set with gold 20 grams, Mangal sutra 10 grams and guest gifts of 4 rings of 10 grams, 4 ear rings of 15 grams and set of palla 10 grams. The petitioner had brought some golden ornaments for her use. All these golden ornaments were with the petitioner, but she concealed such facts for ill-motive."*

34. So far as the income of the appellant and the respondent is concerned, the respondent has stated that the appellant is drawing a sum of Rs.55,000/- per month, as her salary, whereas, he has been receiving a sum of Rs.28,712/-. In support thereof, he has produced the salary statement in the evidence. He has denied that the appellant is entitled to get any alimony.

35. The respondent as OPW-1 has testified that some gold ornaments were given to the appellant by him and the purchase vouchers (Ext.B series) were produced in support thereof.

36. In para-38, the respondent (OPW-1) has stated that the gold ornaments like necklace, ring, bangle set, Mangal sutra etc. weighing about 80 grams, as stated by him at para-10 of the examination-in-chief, were given to the appellant.

37. As stated earlier, the father of the appellant, namely Santosh Kumar Mishra testified in the trial as OPW-2. He had stated that no dowry was ever demanded nor any amount or any articles as dowry was received by their family. He has also stated that a sum of Rs.65,000/- was received for purchase of sarees and cloths for the relatives of their own choice.

38. Further, OPW-2 has categorically stated in the trial as under:

> *"**11**. That I had given golden ornaments to the petitioner such as necklace with ear ring totally 50 grams, ring 2 nos. measuring 8 grams, bangles set 30 grams, patta set with gold 20 grams, Mangal sutra 10 grams and guest gifts of 4 rings about 10 grams, 4 earrings of 15 grams and set of palla 10 grams, but such facts have been concealed by the petitioner. All the golden ornaments are with the petitioner including her own golden ornaments."*

His statement could not be dented by way of cross-examination.

39. Thus, it is apparent from appreciation of the evidence as recorded in the trial of the matrimonial suit that except payment of Rs. 65,000/- to the respondent, no amount was paid to him. So far as the claim of paying Rs. 1,30,000/- is concerned, cannot be believed at the best evidence that could have been placed in the trial, has not been placed. If the cheques were issued either from any account and encashed, from the ledger of the bank it could have been proved who issued the cheque in whose favour and who had drawn the said amount from the bank. But the said evidence has not been advanced. Hence, the adverse inference is bound to follow. There is no pleading that the gold ornaments, as claimed to have been owned by the appellant were ever put to the custody of the respondent or any of his relative. Thus, we are also unable to accept that gold ornaments were/are ever in the custody of the respondent. The respondent has denied the fact of accepting any furniture, utensils or the bed materials. However, it is customary that during the marriage, if socially arranged, such gifts are given to the bride for her comfort and ownership of the materials in the matrimonial home. Even the respondent's denial is evasive in nature, as he has not categorically stated that no such materials were brought by the appellant.

40. A presumption could have been drawn based on the testimony of the appellant, such as bed sheet, some utensils etc. were given at the time of marriage. But strangely enough, the appellant did not plead that she had left those materials in her matrimonial home. As such, it is very difficult to hold that those properties (furniture, bed sheet and utensils) were left in her matrimonial home, as we are bound to determine the fundamental fact as regards the possession or custody.

41. Now, we are to decide whether the appellant is entitled to return of any properties U/S. 27 of the Hindu Marriage Act, 1955 or the appellant is entitled to get alimony as claimed U/S. 25(1) of the Hindu Marriage Act. Let us take up first the issue of granting permanent alimony to the appellant.

42. It is an admitted fact that the appellant is earning almost twice the income of the respondent. Therefore, even for maintaining the standard of life, the respondent cannot be directed to give any amount as alimony. In this regard, the findings of the Judge, Family Court stands affirmed. Nowhere, the Judge, Family Court has observed that the properties as claimed by the appellant cannot be returned under Section 27 of the Hindu Marriage Act. What he has precisely observed is that the ownership of that property as claimed by the appellant could not be proved. On the contrary, the claim of proprietorship on a sum of Rs.1,30,000/- has not been proved, as the best evidence that could have been

produced, has been withheld. Hence, the ground of objection in this regard is unsustainable. However, what we find that a sum of Rs.65,000/- was paid to the respondent. Even though the respondent's claim is that, that amount was given to him for purchase of the cloths for the relatives of the appellant. This explanation is difficult to believe. Hence, in our considered view, the said amount is liable to be returned. On the basis of a general presumption, this Court would further direct that the respondent shall pay another sum of Rs.60,000/- for miscellaneous properties or accrual of interest etc.

43. Hence, this appeal stands partly allowed with direction on the respondent to pay a total sum of Rs.1,25,000/- (Rupees one lakh twenty five thousand) to the appellant. After such payment, the appellant will have no further claim whatsoever. The said amount shall be paid within a period of two months from the date of decree, failure of which, it is needless to say, that the appellant will be at liberty to recover the said amount through the process of Court. For that purpose, the decree shall be treated as the money decree.

44. Draw the decree accordingly.

45. LCRs, if lying with the Registry, be sent down thereafter.

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2022 (III) ILR-CUT-412

BISWAJIT MOHANTY, J & BIRAJA PRASANNA SATAPATHY, J.

W.P.(C) NO. 20007 OF 2013

M/s. ORISSA FOREST DEVELOPMENT CORPORATION LTD. …. Petitioner

.**V**.

MINATI BEHERA ….Opp. Party

INDUSTRIAL DISPUTES ACT, 1947 – Section 36(4) – The workman filed an application before learned Labour Court praying for permitting her to conduct her case through a legal practitioner – The management made an objection to such petition – The Labour Court allowed the prayer of workman – Question raised that, whether an Advocate can appear before the Tribunal without the consent of the other party? – Held, Yes – As the said provision has been declared as unconstitutional by the Allahabad High Court and no other judicial declaration to that effect made by the Apex Court.

Case Laws Relied on and Referred to :-

1. (1977) 2 SCC 339 : Paradip Port Trust, Paradip v. Their Workmen.
2. (1992)(64) FLR 968 : I.C.I.India Ltd. v. Presiding Officer, Labour (IV) & Ors.
3. (2004) 6 SCC 254 : Kusum Ingots & Alloys Ltd. v. Union of India & Anr.

For Petitioner : Mr. Somnath Mishra
For Opp.Party : Mr. S.K. Mishra

JUDGMENT Date of Judgment : 13.05.2022

BY THE BENCH

1. This writ application has been filed by the petitioner praying for quashing of order dated 20.6.2013 passed by the learned Presiding Officer, Labour Court, Bhubaneswar in I.D. Case No.37 of 2012 filed under Section 2A(2) of the Industrial Disputes Act, 1947 permitting engagement of a lawyer by the opposite party to conduct her above noted case.

2. Mr. Somnath Mishra, learned counsel for the petitioner while drawing our attention to sub-section 4 of Section 36 of the Industrial Disputes Act, 1947, for short "the Act" submitted that despite objection from the petitioner side, the above noted order has been passed which clearly violates the above noted provision which makes it clear that a legal practitioner cannot be engaged by a party if the other party does not consent to the same. In such background, he prayed that the impugned order be set aside. In this context, he drew our attention to the memo of objection under Annexure-4 filed by the petitioner to the prayer of the opposite party-workman for engagement of a lawyer. In this context, he also relied upon the decision of the Supreme Court in the case of **Paradip Port Trust, Paradip v. Their Workmen** reported in **(1977) 2 SCC 339**. He submitted that the said decision makes it clear that the word "and" used in sub-section 4 of Section 36 of "the Act" cannot be read as "or" and that the word "consent" of the other parties as used in that subsection is not an idle alternative but a ruling factor in the said sub-section. Since the prayer of the opposite party for engagement of a lawyer has been allowed by the learned Labour Court, Bhubaneswar though no consent was given by the petitioner Management to such prayer, the impugned order under Annexure-5 is legally vulnerable and ought to be set aside.

3. Mr. S.K. Mishra, learned counsel representing the opposite party strongly defended the impugned order and relied upon a host of decisions. But he mainly put emphasis on the decision of Allhabad High Court in the case of **I.C.I. India Ltd. v. Presiding Officer, Labour (IV) and others** reported in **(1992)(64) FLR 968** wherein sub-section 4 of Section 36 of "the Act" has been

held to be unconstitutional. Advancing his arguments further, he submitted that as per the decision of the Supreme Court in the case of **Kusum Ingots & Alloys Ltd. v. Union of India and another** reported in **(2004) 6 SCC 254**, it is settled that an order passéd in a writ petition questioning the constitutionality of a parliamentary Act whether interim or final shall have effect through out the country. Accordingly, he submitted that subsection 4 of Section 36 of "the Act" no more exists in the statute book and arguments advanced by learned counsel for the petitioner based on such provision ought not to be given credence. He also submitted that in Paradp Port Trust case (supra) vires of sub-section 4 of Section 36 of "the Act" was never challenged or decided. Even there the Supreme Court has made it clear that sub-sections 1 & 2 of "the Act" making provisions for representation of the parties are not exhaustive. Accordingly, he submitted that the learned Labour Court has not committed any wrong in permitting the representation of the opposite party, who was a Junior Clerk having little knowledge about the procedure under "the Act", by a lawyer in the interest of justice. Lastly, he submitted that though the writ petition challenging constitutional validity of Section 36(4) of "the Act" is pending before the Supreme Court in Civil Appeal No. 6586 of 2019, W.P.(Civil) No.1169 of 2018 & Civil Appeal No.6587 of 2019 in the case of Thyssen Krupp Industries India Private Limited v. Suresh Murti Chougule and others, however, from order dated 22.8.2019 referring the matter to larger Bench, it appears that the attention of the Supreme Court has not been drawn to the fact that the issue of vires has already been settled by Allhabad High Court in the case of I.C.I. India Ltd. case (supra).

4. Heard learned counsel for the parties.

5. Perused the writ petition and Annexures.

6. The opposite party, a lady employee, who was working with the petitioner Management as a Junior Clerk was retrenched from her services with effect from 29.10.2007. She filed an application before the learned Labour Court, Bhubaneswar under Section 2A(2) of "the Act" under Annexure-1, which was registered as I.D. Case No.37 of 2012 praying for reinstatement with full back wages on the ground that her retrenchment was done in violation of Section 25N of "the Act". The petitioner filed its written statement under Annexure-2. It is not disputed that Shri Ashok Kumar Swain, Law Officer of the petitioner was engaged on behalf of the petitioner to look after the above noted case pending before the learned Labour Court, Bhubaneswar, who filed written statement and other documents and took active part in hearing of that case. Probably, in such background, the opposite party filed a petition on 16.4.2013 under Annexure-3 praying for permitting her to conduct her case through a legal practitioner as she

had no knowledge about the law and procedure of the court whereas the authorized representative of the petitioner happened to be a law knowing person. This was objected to by the petitioner vide Annexure-4 stating therein that since the Management is being represented by their employee, it is not practicable to allow the legal practitioner to represent the workman. Apart from this, the petitioner also took a plea in its objection that sub-section 3 of Section 36 of "the Act" prohibits engagement of legal practitioner in any proceeding before the Court. However, the learned Labour Court on 20.6.2013 passed the impugned order taking into account the fact that Shri Ashok Kumar Swain, who is the Law Officer of the petitioner has filed the written statement on behalf of the management along with other documents and is taking active part in hearing of the case and that the opposite party is a mere Junior Clerk having little knowledge about the proceeding under "the Act". Keeping in view the engagement of Shri Swain on behalf of the Management and for the interest of justice, the petition for engagement of lawyer was allowed by the learned court below.

7. Though before the Labour Court, the petitioner under Annexure-4 took the plea that Sub-Section 3 of Section 36 of "the Act" prohibits engagement of legal practitioner, mercifully the said point was rightly not canvassed by Shri Mishra, learned counsel for the petitioner as the word "Court" used in Section 36(3) of "the Act", obviously means a "Court of Inquiry" as constituted under "the Act" as per the definition of the word "Court" as contained in Section 2(f) of "the Act". Now with regard to submission of Mr. Somnath Mishra that the impugned order is legally vulnerable as the same has been passed in violation of sub-section 4 of Section 36 of "the Act", it may be noted that no doubt the Supreme Court in Paradip Port Trust case (supra) has made it clear that consent of the opposite party is not an idle formality but a ruling factor in Section 36(4) of "the Act" and that the word "and" in Section 36(4) of "the Act" cannot be read as "or", however, in the said case, there was no challenge to constitutionality of sub-section 4 of Section 36. However, as indicated earlier Allhabad High Court in I.C.I. India case (supra) has declared the above sub-section as unconstitutional after making it clear that in Paradip Port Trust case (supra) vires of Section 36(4) of "the Act" was never decided. Learned counsel for the parties also fairly did not dispute that in Paradeep Port Trust case (supra) vires of Section 36(4) of "the Act" was never decided. For declaring the said provisional unconstitutional, Allhabad High Court has given the following reasons:

> "**3**. xxx xxx xxx It is well known that Industrial Law is a complicated branch of law, and only persons who have knowledge of labour laws, and also some practical experience, can properly represent the parties before the Labour Court/Tribunal. The principles of

Labour Laws are quite different from the principles of ordinary civil law, and what to say of a lay man even an ordinary civil lawyer, unless he has studied labour law, cannot properly present the case before the Labour Court/Tribunal. For example it is an established principle in labour create contracts, and to enforcer contracts of personal service Labour law is largely Judge made law, and hence only a person who has studied this branch of law can properly represent a party before the Labour Court. It has become a highly technical branch, and only trained persons can properly assist the Labour Court/Tribunal in the matter. Hence, to debar lawyers merely because the opposite party objects is wholly unreasonable and arbitrary.

4. The argument that lawyers will cause, delay is, in my opinion, wholly frivolous. No doubt the aim of industrial adjudication is to expeditiously decide an industrial dispute because industrial friction affects not only the employer and the workmen, but also the public at large, but it is not understandable how the appearance of a lawyer will obstruct expeditious disposal. On the contrary a lawyer who is trained in labour law can quickly focus the attention of the Labour Court/Tribunal to the main points of the dispute, and place the relevant case law so that the Labour Court can quickly dispose of the dispute. Hence, debarring of lawyers, even with the proviso that a lawyer can appear if the other side gives consent, is in my opinion, wholly arbitrary. As a matter of fact, it is well known that this arbitrary provision in the two Industrial Disputes; Act, viz. Section 36 (4) in the Industrial disputes Act and Section 6-I(2) of the U.P. Industrial Disputes Act, has led to all sorts of subterfuges. Lawyers have had to resort to creation of artificial employer's or employees' organizations of which they claim to be representatives, or appear as Officers of the concern. This invites all sorts of objections and much time of the labour court has to be wasted and devoted to first deciding this matter before proceeding to dispose of the dispute on merits. The provisions to my mind is clearly arbitrary, and hence violative of Articles 14 of the Constitution of India.

5. The procedure in the Labour Courts, though slightly different from those of the civil court, is still similar to it, and hence this requires study of the procedure also, which an untrained person does not know. For example certain provisions of the Civil Procedure Code apply to the Labour Courts, vide Section 11(3) of the Central Act. Similarly many other provisions in the Industrial Disputes Act are similar to the provisions in the Civil Procedure Code. It is, therefore, wholly unreasonable to expect a layman to present, his case properly before the Labour Court without assistance of a specialized lawyer.

6. In my opinion, the aforesaid provisions in both the Central and U.P. Acts are also violative of Articles 19(1)(g) of the Constitution of India since they amount to unreasonable restriction on a lawyer's right to practise his profession. A whole class of labour lawyers has sprung up after enforcement of the Industrial Disputes Act, and the aforesaid provisions amount to unreasonable restriction on their right to practise. To say that lawyers raise all sorts of technical objections to delay the disposal of the case, is to my, mind, a wholly frivolous objection. The Presiding Officer of the Labour Court/ Tribunal can always conduct the proceedings firmly and in such a manner that no delay is caused, and he can always reject any objection which he finds to be frivious or hyper technical and which comes in the way of speedy disposal of the dispute.

Xxx xxx xxx"

Nothing has been brought to our notice that aforesaid judgment of Allhabad High Court has been overruled/annulled in the meantime.

8. The next thing that remains to be decided here is the impact of the judgment of Allhabad High Court on pan India scenario. In this context, observations of the Supreme Court made in Kusum Ingots & Alloys Ltd. case (supra) assume significance. There it has been made clear that an order passed in a writ petition questioning the constitutionality of a parliamentary Act whether interim or final keeping in view the provisions contained in Article 226(2) of the Constitution of India, will have effect though out the territory of India subject of course to the applicability of the Act. Here there exists no dispute that "the Act" applies to whole of Inia as made clear by sub-section 2 of Section 1 of "the Act", which obviously includes the State of Odisha and accordingly, without doubt Allhabad High Court judgment in I.C.I. India case (supra) will have full effect/full application in the State of Odisha. No doubt, in Thyssen Krupp Industries India Private Limited case (supra) the matter of constitutional validity of sub-section 4 of Section 36 of "the Act" has been challenged and the matter has been referred to a larger Bench by the Supreme Court on 21.8.2019. Though a copy of the said order was produced before us in course of hearing, however, a perusal of the same does not indicate that attention of the Supreme Court was drawn to Allhabad High Court judgment in I.C.I. India Ltd. case (supra).

9. In such background, we have no hesitation in coming to a conclusion that the petitioner management cannot take the plea of sub-section 4 of Section 36 of "the Act" to challenge the impugned order because as per the judgment of Allhabad High Court in I.C.I. India Ltd. case (supra), the said provision has already been declared to be unconstitutional. Thus, the plea raised by the petitioner that the impugned order is legally vulnerable on account of violation of sub-section 4 of Section 36 of "the Act" has no legs to stand. Accordingly, the challenge fails and the writ application is dismissed but without any costs and interim order granted in this case stands vacated.

10. Since the case is an old one, we direct the learned Labour Court to take expeditious steps to dispose of the aforesaid case in accordance with law preferably within a period of six months from the date of receipt/production of certified copy of this order. Parties are directed to cooperate in the matter.

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2022 (III) ILR-CUT-417

Dr. B.R.SARANGI, J & G.SATAPATHY, J.

W.P.(C) NO.13237 OF 2017

SRI LAXMIDHAR MISHRA .....Petitioner

.V.

STATE OF ODISHA & ORS. ……Opp.Parties

SCALE OF PAY – Fixation – Whether withdrawal of one increment granted to the Salaried Amins pursuant to the recommendation of Justice Shetty Commission is justified? – Held, No – Once the High Court has made a recommendation to the Government to extend the benefit of one advance increment to the 'Salaried Amins' considering the nature of duties performed, their qualification and the responsibility shouldered by them, the State Government should not consider the same lightly and withdrawn the benefit on flimsy ground – The impugned order passed by the Authority cannot sustain in the eyes of law – Writ petition allowed. (Para 20)

Case Laws Relied on and Referred to :-

1. 70 (1990) CLT 110 : Santosh Kumar Samantray v. State of Orissa.
2. 68 (1989) CLT 771 : Narayan Sahoo v. State of Orissa.
3. 78 (1994) CLT 665 : Bhibuti Bhusan Mohapatra v. State of Orissa.
4. 1998 (I) OLR 157 : Sk. Hyder v. State of Orissa.
5. 1995 Supp (1) SCC 18 : Sahib Ram v. State of Haryana.
6. (2009) 3 SCC 475 : Syed Abdul Quadir v. State of Bihar.
7. 2006 (II) SCC 492 : Purshottam Lal Das v. The State of Bihar.
8. 1994 (2) SCC 521 : Shyam Babu Verma v. Union of India.
9. (1949) 1 All ER 109 : Russel v. Duke of Norfolk.
10. (1943) 2 All ER 337 : General Medical Council v. Spackman.
11. (1963) 2 All ER 66 (HL) : Ridge v. Baldwin.
12. AIR 2015 SC 696 : State of Punjab v. Rafiq Masih (White Washer).

For Petitioner : M/s. Susanta Kumar Dash, A.K. Otta, A. Dhalsamanta, B.P.Dhal, S. Das & N.K. Das

For Opp.Parties : Mr. S.N.Nayak. A.S.C. (O.Ps. No. 1 to 4)
Mr. Saroj Ku. Das, Standing Counsel, AG&A (O.P.No.5)

JUDGMENT Date of Hearing : 23.08.2022 : Date of Judgment : 30.08.2022

Dr. B.R.SARANGI, J.

The Petitioner, who was working as Salaried Amin under the District Judge, Cuttack (re-engaged after superannuation), has filed this writ petition seeking to quash the letter no.4009 dated 12.05.2014, as at Annexure-6, by which the Government of Orissa in Law Department observed that the Salaried Amins and Drivers of Subordinate Judiciary are not entitled to get one increment in pursuance of Law Department Resolution No.10077/L dated 13.09.2012. The petitioner also seeks to quash the order dated 26.05.2017 at Annexure-11 rejecting the representation filed by All Orissa Judicial Employees Association regarding giving benefit of one advance increment to the Salaried Amins working in the Subordinate Judiciary, and to hold that the petitioner is entitled to get one advance increment like other staff in the ministerial cadre of the

Subordinate Judiciary and accordingly his pension/family pension is to be processed and released within a stipulated time. The petitioner also further prayed to direct the opposite parties not to recover the amount paid to him by grant of one advance increment.

2. The genesis of the case revolves around the fact that this High Court considering the necessity to appoint 'Salaried Amins' in place of 'Survey Knowing Pleader Commissioners',vide letter no.9938 dated 07.11.1973, clarified that the posts of 'Salaried Amin' with scale of pay Rs.125-190/-, shall be created under the Government, but those Salaried Amins will remain under the control of the District Judges. The qualification and other eligibility criteria for appointment were also indicated therein. Consequentially, recommendation was made by this Court for creation of the posts of Salaried Amin with the scale of pay Rs.320-450/- which is equal to that of the Grade-II Assistants, keeping in view the recommendation of the 4th State Pay Commission in 1974. Such recommendation was made to the Government, vide letter no. 5443, dated 16.07.1979, by indicating that the posts of Lower Division Assistant in the Subordinate Civil Court, for which the prescribed qualification is Matriculate, carry a scale of pay of Rs.255-360/- and, therefore, it will not be reasonable to prescribe a lower scale of pay for the post of Salaried Amin, for whom the prescribed qualification is higher than the post of Lower Division Assistant. Accordingly, the posts of Salaried Amin were created with scale of pay of Rs.320- 450/-, vide Government Letter No. 2097/L dated 15.11.1980. The prescribed qualification for the post of Salaried Amin is passing of Matriculation and Revenue Inspectorship Examination with knowledge in Survey, while the prescribed qualification for the post of Revenue Inspectors in the Government was passing of Matriculation Examination only. Therefore, the scale of pay for the post of Revenue Inspector has relevancy in the context of scale of pay for the post of Salaried Amin. When the Government, vide Resolution No.10533 dated 02.03.2009, raised the scale of pay of the Revenue Inspectors to Rs.9,300-34,800/- with a grade pay of Rs.4,200/-, but did not increase the pay scale of the Salaried Amins notwithstanding the fact that prior to 02.03.2009, the Salaried Amins, who were enjoying higher scale of pay than that of the Revenue Inspectors, were equated with the un-equals, i.e., the Assistant Revenue Inspectors. The scale of pay of Rs. 125-190/-, as was recommended by the High Court, was equivalent to that of the scale of pay of the Grade-II Revenue Supervisors, which is the next promotional post of the Revenue Inspectors. Thus, the Salaried Amins have been placed in the most disadvantageous position, due to non-consideration of the relevant aspects, as mentioned above.

2.1 The duties and responsibilities attached to the post of Salaried Amin have not been visualized in proper perspective. While there are 52 sanctioned

posts of Salaried Amin in the State in different Judgeships, keeping in view that the cases in which their assistance is sought for even by the Higher Courts, where expertise and greater care is required, up-gradation of 50% of the posts of the 'Salaried Amin' would rather facilitate effective disposal of the complicated matters. Chance of promotion being a part of every job, to provide incentive and prevent stagnation, it would have been necessary to have up-gradation of certain posts and creating promotional avenues for the Salaried Amins. The duties and responsibilities attached to the posts of the Salaried Amin is not at all clear from the designation, rather the designation creates confusion at all levels. One such example is, while considering the revision of the scale of pay of the Salaried Amins in the Courts' establishment, their scale of pay was equated with the Amins working in the Settlement Operation and in the Tahasils. Though in terms of the Orissa District Revenue Service (Method of Recruitment and Conditions of Rules),1983, an Amin is promoted to the post of Revenue Inspector, after completion of five years of service, as per Rule 11-A, whereas the Salaried Amins, who are recruited with higher qualification than the Revenue Inspectors suffer the most. The petitioner, who was in the cadre of Revenue Inspector, came to join as Salaried Amin, considering that the establishment is in higher pedestal. Thus, the designation of the 'Salaried Amin' ought to have been changed to 'Civil Court Commissioner'.

2.2 Keeping in view the report of the Justice Shetty Commission, the Salaried Amins working under different Judgeships, like the petitioner, were granted one advance increment. But the Government, vide Law Department Letter No. 4009, dated 12.05.2014, decided that the Salaried Amins are not entitled to the above said increment. As per the terms and conditions mentioned in Clause-6 of the order of this Court dated 28.01.1981, the Salaried Amins are also discharging other clerical works and duties, when are not occupied with the functions of the Court Commissioner. The grievance of the Salaried Amins was ventilated through the representation dated 04.01.2016 of the All Orissa Judicial Employees' Association. Said representation was forwarded by this Court, after taking into account the fact that the services of the Salaried Amins are being utilized for other ministerial work by the District Judges as per provision of the Rule 186-A of G.R.&C.O. (CIVIL) Vol.1. This Court recommended the Government, to allow one increment on the existing scale of pay to the cadre of Salaried Amins with effect from 01.04.2003, i.e., the day from which one advance increment was allowed in favour of the different common category posts in the ministerial cadres of the Subordinate Judiciary in terms of the Resolution No. 10077 dated 13.09.2012. But the said representation filed by the All Orissa Judicial Employees' Association has been

rejected, vide order dated 26.05.2017, as per the observation of the Finance Department of the Government that the benefit of advance increment to the Salaried Amins working under Subordinate Judiciary hardly merits consideration.

3. Mr. Susanta Kumar Dash, learned Counsel appearing for the petitioner, vehemently contended that the benefit, which has been admissible to the petitioner, pursuant to the recommendation made by Justice Shetty Commission, having been extended with effect from 01.04.2003, the same should not have been withdrawn, without application of mind, by holding that the Salaried Amins are not entitled to the said increment. Such withdrawal of benefit is arbitrary, unreasonable, contrary to the Provisions of Law and violates the principle of natural justice. It is further contended that as per the terms and conditions mentioned in Clause-6 of the order of the High Court dated 28.01.1981, the Salaried Amins are also discharging other clerical works and duties, when are not occupied with the functions of the Court Commissioner. More so, they are discharging the higher responsibility, as a consequence thereof their scale of pay had been fixed at Rs.125-190/-, as recommended by the High Court, which was equivalent to that of the scale of pay of the Grade-II Revenue Supervisors, which is the next promotional post of the Revenue Inspectors. Therefore, the 'Salaried Amins' stood in higher pedestal than that of the Revenue Supervisor and, as such, they were getting the scale of pay of Grade-II Revenue Supervisor, which is the promotional post of Revenue Inspector. It is further contended that once the benefit of one increment has been allowed with effect from 01.04.2003, surreptitiously, the said benefit cannot and could not have been withdrawn on a plea without germen to the issue in question and without considering the nature of work discharged by this category of employees. It is further contended that once the recommendation has been made by the High Court, the same should not have been considered lightly and, as such, the benefit should have been extended to the petitioner without creating any hindrance, and that he is entitled to get one increment as per the recommendation made by Justice Shetty Commission, as the increment recommended by the 1st National Judicial Pay Commission, which has been implemented by the Government vide Resolution dated 13.09.2012, in that case, the Government has no right to recover the amount already sanctioned and disbursed to the Salaried Amins.

To substantiate his contention, Mr. S.K. Dash, learned counsel for the petitioner relied upon the judgments of the apex Court as well of this Court in the cases of ***Santosh Kumar Samantray v. State of Orissa***,70 (1990) CLT 110; ***Narayan Sahoo v. State of Orissa***, 68 (1989) CLT 771; ***Bhibuti Bhusan Mohapatra v. State of Orissa***, 78 (1994) CLT 665; ***Sk.Hyder v. State of Orissa***, 1998 (I) OLR 157; ***Sahib Ram v. State of Haryana***, 1995 Supp (1) SCC 18;

Syed Abdul Quadir v. State of Bihar, (2009) 3 SCC 475; ***Purshottam Lal Das v. The State of Bihar***, 2006 (II) SCC 492 and ***Shyam Babu Verma v. Union of India***, 1994 (2) SCC 521.

4. Mr. S.N. Nayak, learned Additional Standing Counsel appearing for the State-Opposite Parties No.1 to 4 justified the order passed by the authorities under Annexure-6 and 11 and also contended that on the basis of the grievance of the All Orissa Judicial Employees' Association, vide representation dated 04.01.2016, the matter was considered and it was intimated that as per the observation of the Finance Department, the benefit of one advance increment to the Salaried Amins working in the Subordinate Judiciary hardly merits consideration. He also contended that on receipt of such letter of the Law Department, the matter is also now pending before the Court on administrative side for reconsideration. Therefore, he contended that the benefit is not admissible to the petitioner and, as such, no error has been committed by the authorities in denying such benefit to the Salaried Amins and consequentially the writ petition is liable to be dismissed.

5. Mr. Saroj Kumar Das, learned counsel appearing for opposite party no.5 contended that the Pension Sanctioning Authority, i.e., the learned District Judge, Cuttack submitted the pension paper of the petitioner in the office of opposite party no.5, vide letter no.349 dated 22.04.2017, for authorization of pensionary benefits, but on scrutiny, it was noticed that one advance increment was allowed to the petitioner with effect from 01.04.2003 in the existing scale of pay attached to the cadre of Salaried Amins at par with the ministerial posts. But as clarified by the Government of Odisha, Law Department, vide letter dated 12.05.2014, the Salaried Amins of the Subordinate Judiciary do not come under the category of Ministerial Posts and they are not entitled to get one increment in pursuance of the Law Department Resolution No.10077/L dated 13.09.2012. In view of such clarification, opposite party no.5 returned the pension papers of the petitioner, vide letter dated 30.05.2017, for necessary compliance. In the meantime, the Pension Sanctioning Authority resubmitted pension papers of the petitioner, vide letter no.664 dated 04.08.2017, with due compliance to the observations made by the office of the opposite party no.5, i.e., by withdrawing one advance increment allowed to the petitioner w.e.f. 01.04.2003. Accordingly, the office of opposite party no.5 authorized pension vide PPO No.567058, along with Gratuity Payment Order (GPO) and Commutation Payment Order (CPO), as admissible in favour of the petitioner, vide letter dated 13.09.2017, by effecting recoveries towards the following outstanding Government dues from the gratuity of the petitioner, as per suggestion given by the Pension Sanctioning Authority in pension papers.

"i) Rs.4105/- towards interest on Special House Building Advance.
ii) Rs.65314/- towards excess drawn on pay and allowance.
iii) Rs.7890/- excess drawn on un-utilised leave salary."

Since one increment admissible to the petitioner and extended to him with effect from 01.04.2003 had been withdrawn and the pension papers were re-submitted thereafter, opposite party no.5 has not committed any illegality or irregularity, so far as the benefit admissible to the petitioner is concerned. As such, opposite party no.5 has discharged its duties and responsibility for authorization of pensionary benefits in respect of the petitioner, as per the prevailing rules and regulations/instructions issued by the Government of Odisha.

5. This Court heard Mr. Susanta Kumar Dash, learned counsel appearing for the petitioner; Mr.S.N.Nayak, learned Additional Standing Counsel appearing for the State-opposite parties no.1 to 4; and Mr. Saroj Kumar Das, learned Standing Counsel (AG&A) appearing for opposite party no.5 by hybrid mode, and perused the record. Pleadings having been exchanged between the parties, with the consent of learned Counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

6. On the basis of the factual matrix as well as the rival contentions of the parties, as delineated above, the only question to be considered by this Court is, *"whether the withdrawal of one increment granted to the Salaried Amins pursuant to the recommendation of Justice Shetty Commission is justified or not"* and "*if not justified what relief can be granted to the Petitioner*".

7. Undisputedly, the High Court considering the necessity to appoint 'Salaried Amins' in place of 'Survey knowing Pleader Commissioners', vide letter no.9938 dated 07.11.1973, clarified that the posts of 'Salaried Amins' with scale of pay of Rs.125-190/- shall be created under the Government, but those Salaried Amins will remain under the control of the District Judges as per Annexure-1. The qualification and other eligibility criteria for appointment were also indicated therein. The High Court recommended for creation of the posts of 'Salaried Amins' with the scale of pay Rs.320-450/-, vide its letter dated 16.07.1979 under Annexure-2, which is equal to that of the Grade-II Assistants, keeping in view the recommendation of the 4th State Pay Commission in 1974. Therefore, the recommendation made to the Government, vide letter no.5443, dated 16.07.1979, indicating that the posts of Lower Division Assistant in the Sub-ordinate Civil Courts, for which the prescribed qualification is Matriculate, carry a scale of pay of Rs. 255-360/- and, therefore, it will not be reasonable to prescribe a lower scale of pay for the posts of Salaried Amins, for whom the prescribed qualification is higher than the post of Lower Division Assistant. Therefore, the posts of Salaried Amins were created with scale of pay

of Rs.320-450/-, vide Government order dated 15.11.1980. The Government, vide Resolution No. 10533 dated 02.03.2009, raised the scale of pay of the Revenue Inspectors to Rs. 9,300-34,800/- with a grade pay of Rs. 4,200/-, but did not increase the pay scale of the 'Salaried Amins' notwithstanding the fact that prior to 02.03.2009, the 'Salaried Amins', who were enjoying higher scale of pay than that of the Revenue Inspectors were equated with the un-equals, i.e., the Assistant Revenue Inspectors. Needless to say that the scale of pay of Rs. 125-190/-, as recommended by this Court, was equivalent to that of the scale of pay of the Grade-II Revenue Supervisors, which is the next promotional post of the Revenue Inspectors. Keeping in view the report of Justice Shetty Commission, the 'Salaried Amins' working in different Judgeships, like the petitioner, were granted one advance increment. It is apt to place on record that National Judicial Pay Commission did not specifically consider about extending the benefit of one advance increment to the 'Salaried Amins'. But, the National Judicial Pay Commission report or the recommendation made therein clearly stated as under, making room for consideration of the question relating to grant of such benefit to the Salaried Amins. It is relevant to quote the note appended to the recommendation in respect of the common category posts under Chapter-VII of the report of the National Judicial Pay Commission.

> *"NOTE : The aforesaid posts are indicative and not exhaustive. If there are any other common category posts in the Ministerial Cadres, the incumbents thereof are also entitled to the benefit of our recommendation."*

The aforementioned Note clearly indicates that if there are any other common category posts in the Ministerial Cadres, the incumbents thereof are also entitled to the benefit of the recommendation. Therefore, the question comes for consideration is whether the posts of 'Salaried Amins' are coming within the ambit of "other common category posts in the Ministerial Cadres". Therefore, the circumstances leading to the creation of the posts of 'Salaried Amins' will indicate that the Civil Courts used to take the help of the Survey knowing Pleaders and Amin Commissioners, to undertake local investigation and submit reports, mostly in the matter of boundary disputes, encroachments, location of trees, ponds and buildings and for carving out shares in suits for partition amongst the co-sharers. Therefore, the High Court, vide order dated 07.11.1973, considered the necessity to appoint 'Salaried Amins' in place of 'Survey knowing Pleader Commissioners' with scale of pay of Rs. 125-190/- and clarified that the posts of 'Salaried Amins' shall be created under the Government, but those 'Salaried Amins' will remain under the control of the District Judges. Their qualification and other eligibility criteria for appointment were also prescribed. Consequentially, recommendation was also made for the creation of the posts of 'Salaried Amins' with the scale of pay of Rs. 320-450/-, which is equal to that of

the Grade-II Assistants, keeping in view the recommendation of the 4th State Pay Commission in 1974.

8. Therefore, there is no iota of doubt that the 'Salaried Amins' working under the Subordinate Judiciary comes within the ambit of other common category posts in the Ministerial Cadre of the Note to Chapter-VII of the report of the National Judicial Pay Commission. Therefore, on the basis of the Report at Page-253 to 255 of the Justice Shetty Commission under the heading "Common Category Posts" it has been recommended that holder of common category post in the Ministerial cadre other than to whom the Commission have recommended higher pay scale be given one increment at the initial scale of pay admissible to them. Further, Justice Shetty Commission have suggested that the aforesaid posts are indicative and not exhaustive. The same has also been clarified by the apex Court, vide judgment dated 07.10.2009 passed in W.P.(C) No.1022 of 1989, and it was directed that there shall be benefit of one advance increment on the existing scale of pay instead of initial pay scale. Therefore, on the recommendation made by Justice Shetty Commission, one increment had been allowed to 'Salaried Amins' with effect from 01.04.2003 and the said benefit had also been extended to the Petitioner from that date.

9. Considering from other angle, Rule 186-A of G.R. & C.O. (CIVIL) Vol.1, which deals with the duties and responsibility of 'Salaried Amins', reads as follows:-

> *"186-A - Duties and responsibilities of Salaried Amins Salaried Amins as far as possible should be utilised for the purpose of the works for which they have been appointed, i.e. for spot inspections. Survey and measurement works and effecting partition in final decree proceeding, etc. If there is dearth of such work during the period their services may be utilised for other suitable purposes in the office as ordered by the Controlling Officer. Regarding the outturn, the Controlling Officer taking into consideration the nature of the work entrusted while issuing writ should specify the period of its execution. The Salaried Amins should be required to maintain a daily diary of the work done by them during the period of absence from the headquarter Station when they discharge other duties, the yardstick applicable to regular employees discharging such duties will also be ,applicable to Salaried Amins."*

10. In view of the nature of duties and responsibility of the 'Salaried Amins', as mentioned above, the benefit of one increment is admissible to them. As such the same was extended with effect from 01.04.2003. But such benefit extended to the Petitioner was withdrawn relying upon the Resolution No. 4009 dated 12.05.2014 issued by the Law Department. It is to be noted here that such benefit had been extended, pursuant to the recommendation made by the High Court to the Government relying upon Rule-186-A of G.R. & C.O. (CIVIL) Vol. 1 and taking into consideration the nature of duties discharged by the 'Salaried

Amins', with effect from 01.04.2003, the day from which one advance increment was allowed in favour of different common category posts in the Ministerial Cadre of the Subordinate Judiciary. Once this Court had recommended to extend the benefit of one advance increment, the same should not have been lightly considered by the authority and withdrawal of such benefit of one advance increment with effect from 01.04.2003, without complying the principle of natural justice, cannot sustain in the eye of law.

11. On attaining the age of superannuation, when pension papers of the petitioner were submitted, the same were returned to re-submit after deducting the benefit of one increment extended to the petitioner with effect from 01.04.2003. But fact remains, the prescribed qualification for 'Salaried Amin' in the Subordinate Judiciary is Matriculate with passing of Revenue Inspectorship Examination, whereas the qualification for Junior Clerk, which has been re-designated as Lower Division Assistant, is passing of 10+2 Examination with Diploma in Computer Application, as prescribed in Orissa District and Sub-Ordinate Courts Non-Judicial Staff Services (Method of Recruitment and Conditions of Service) Rules, 2008. Similarly, the qualification for Revenue Inspector under the Government of Odisha is Bachelor's Degree with knowledge in Computer Operation and the qualification for Amin and Assistant Revenue Inspector is passing of Higher Secondary Examination (10+2) with knowledge of Computer Operation, as per the Odisha District Revenue Service (Method of Recruitment and Conditions of Service) Amendment Rules, 2011. The qualifications, as prescribed under the Rules of 2008 and 2011, have no application to the case of the petitioner, as because the petitioner had already been appointed much prior to the commencement of these Rules, on the recommendation made by the High Court, and that at the relevant point of time these 'Salaried Amins' were having higher qualification than that of the Revenue Inspectors holding the posts, and their duties and responsibility were much more than that of the Revenue Supervisor, which is a promotional post of the Revenue Inspector. Since 'Salaried Amins' were discharging higher responsibility, on the recommendation made by Justice Shetty Commission, the petitioner was allowed one advance increment with effect from 01.04.2003. Thus, extension of such benefit to the petitioner cannot be found to be faulted with so as to withdraw the same without complying with the principle of natural justice.

12. In ***Russel v. Duke of Norfolk***, (1949) 1 All ER 109, it was observed "whatever standard of natural justice is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case".

13. The expression "reasonable opportunity" is a principle of natural justice. The term denotes the minimum standard of fairness in the adjudicatory process embodying the specific requirements that the party affected must be heard and no man can be condemned unheard, i.e., *audi alteram partem*. Whether an opportunity is reasonable or not would also, to an extent, depend on the nature of the charge, the nature of the power which is sought to be exercised, the ramification of the order that is sought to be made, the rights and interests that are sought to be protected. Finally, the opportunity to show cause must not only be reasonable by all the objective criteria but must also appear to a reasonable person to be so.

14. In ***General Medical Council v. Spackman***, (1943) 2 All ER 337, Lord Writ said that if the principles of natural justice are violated in respect of any decision, it is indeed, immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision.

15. In ***Ridge v. Baldwin***, (1963) 2 All ER 66 (HL), it was held that a decision given without regard to the principles of natural justice is void.

16. Applying the said principle to the present case, if the authorities have withdrawn the benefit without giving reasonable opportunity of hearing to the petitioner, that itself is void being violative of principle of natural justice.

17. In the counter affidavit filed by opposite party no.3, reference has been made to the letter dated 24.11.2016 under Annexure-A/3, whereby the grievance of All Orissa Judicial Employees Association regarding giving of benefits of one advance increment to the 'Salaried Amins' working in Subordinate Judiciary, as per the recommendation of the Justice Shetty Commission, has been recommended to the Government. The letter under Annexure-A/3 is quoted hereunder:-

"ORISSA HIGH COURT : CUTTACK

Letter No. 10494 / IV- 04/2016 *Date 24.11.2016*

From

Shri D.R. Kanungo, O.S.J.S.,
Secretary (J.J.C.) & Deputy Registrar (Admn. & Protocol)

To

The Principal Secretary, Government of Odisha,
Law Department, Bhubaneswar.

Sub : Grievances All Orissa Judicial Employees Association regarding giving benefits of one advance increment to the Salaried Amin working in the Subordinate Judiciary as per recommendation of the Hon'ble Shetty Commission.

Sir,

In enclosing herewith a copy of representation dated 04.01.2016 submitted by the President, All Orissa Judicial Employees' Association on the above subject, I am directed to say that the Hon'ble Justice Shetty Commission vide their report at Page 253 to 255 under heading common category post have recommended that holder of common category post in the Ministerial cadre other than to whom the Commission have recommended higher pay scale be given one increment at the initial scale of pay admission to them. Further, the Hon'ble Justice Shetty Commission have suggested that the aforesaid posts are indicative and not exhaustive. If there are any other common category posts in the Ministerial cadres, the incumbents thereof are also entiled to the benefit of their recommendation.

Subsequently, the Hon'ble Supreme Court of India vide their Judgment dated 07.10.2009 passed in W.P.(C) No. 1022/1989 have directed that there shall be benefit of one advance increment on the existing scale of pay instead of initial pay scale.

Accordingly, the Govt. of Odisha in Law Department vide Resolution No. 10077 dated 13.09.2012 have allowed one increment at the existing scale of pay in respect of different common category posts in the ministerial cadres of all the Judgeships of the State w.e.f. 01.04.2003 where the post of Salaried Amins did not finde place.

Since the work of the Salaried Amins are being utilized for other ministerial work as per the provision of the Rule 186 - A of G.R C.0 (Civil) Vol.- I, the grievance of the All Orissa Judicial Employees' Association for giving one increment on the existing scale of pay to the Salaried Amin was under active consideration of the Court and the Court after careful consideration of the matter have been pleased to recommend for grant of one advance increment to the Salaried Amins working in the Subordinate Judiciary of the State on the existing scale of pay like other ministerial cadre staff as per the recommendation of the Hon'ble Justice Shetty Commission w.e.f. 01.04.2003 and in response to Law Department Resolution No. 10077 dated 13.09.2012.

I am, therefore, to request that the matter may kindly be placed before the State Government and their orders allowing one increment on the existing scale of pay to the posts Salaried Amins in the subordinate

Judiciary w.e.f. 01.04.2003 be obtained and communicated to the Court soon.

Yours faithfully,
Deputy Registrar (A &P) I/c"

18. On perusal of the aforementioned recommendation, it is made clear that the Government of Orissa in Law Department, vide Resolution No. 10077 dated 13.09.2012, have allowed one increment at the existing scale of pay in respect of different common categories of posts in the ministerial cadres of all the Judgships of the State with effect from 01.04.2003, where the post of 'Salaried Amin' did not find place. Therefore, justifying the claim of the 'Salaried Amins', the recommendation has been made by this Court to the Government. In view of the judgment of this Court in ***Narayan Sahoo, Bibhuti Bhusan Mohapatra and Sk. Hyder*** (supra), the recommendation made by this Court should have been given priority and worked out.

19. In ***Santosh Kumar Samantray*** (supra), this Court observed as follows:-

> *" ……In this view of the matter, we cannot but hold that the fixationof their salary in the pay scale of Rs.625-940/- under the Orissa Revised Scales of Pay Rules, 1985 and treating them at par with the general Amins is arbitrary and has been made on incorrect assumption and, therefore, cannot be sustained in law……."*

20. Therefore, taking into consideration the judgments mentioned above, once the High Court has made a recommendation to the Government to extend the benefit of one advance increment to the 'Salaried Amins' taking into consideration the nature of duties performed by them, their qualification and the responsibility shouldered by them, the State Government should not have considered the same lightly and withdrawn the benefit on flimsy ground. Therefore, the order passed for withdrawal of such benefits vide Annexure-6 dated 12.05.2014 and consequential rejection of the representation vide Annexure-11 dated 26.05.2017 cannot sustain in the eye of law.

21. In ***Sahib Ram*** (supra), the apex Court held that when the authority granted upgraded pay scale to an employee due to the wrong construction of the relevant order without any misrepresentation or fraud on the part of the employee concerned, such excess amount should not be recovered from the employee.

22. Admittedly, in the case at hand, the benefit of one advance increment was extended to the petitioner pursuant to the recommendation made by Justice Shetty Commission and also on the basis of the report of the National Judicial Pay Commission and there was no misrepresentation or fraud on the part of the petitioner. In such circumstance, any amount paid to the petitioner should not have been recovered from him.

23. In the case of ***Syed Abdul Qadir*** (supra), the apex Court directed the concerned authority not to recover the excess amount sanctioned in favour of the Teachers, irrespective of the fact whether they have moved before the apex Court or not. It was also directed that the amount that has already been recovered from some of the Teachers, after the impugned judgment was passed by the High Court, be refunded to them within three months from the date of receipt of copy of that judgment, irrespective of the fact whether they have moved the apex Court or not.

24. Applying the ratio decided in ***Syed Abdul Qadir*** (supra) to the present context, it can safely be concluded that whatever amount has been paid to the petitioner on account of granting of one advance increment, being in terms of the Justice Shetty Commission report and also the report of the National Judicial Pay Commission, the same cannot be recovered irrespective of the fact whether

such 'Salaried Amins' have approached this Court by filing writ petition or not. Similar view has also been taken in ***Purhottam Lal*** (supra) as well as in the case of ***State of Punjab v. Rafiq Masih (White Washer)***, AIR 2015 SC 696.

25. In view of the facts and law, as discussed above, this Court is of the considered view that the decision of the Government disentitling 'Salaried Amins' to get one advance increment, in pursuance of subsequent clarification in Resolution No.10077 dated 13.09.2012 that they do not come under the category of ministerial cadre, cannot sustain, and, further, in absence of any reason contained in Annexure-A/3 to the counter affidavit filed by the opposite party no.3 to disagree with the recommendation of this Court, the order under Annexure-11 dated 26.05.2017 to the writ petition rejecting the representation also cannot sustain, in view of the ratio decided in ***Narayan Sahoo, Bibhuti Bhusan Mohapatra and Sk. Hyder*** (supra). Accordingly, the orders dated 12.05.2014 in Annexure-6 and dated 26.05.2017 in Annexure-11 are liable to be quashed and are hereby quashed. Consequentially, the petitioner is entitled to get one advance increment w.e.f. 01.04.2003, like other staff in the ministerial cadre of the Subordinate Judiciary, and, accordingly, his pensionary benefits be calculated and released in his favour within a period of three months from the date of communication of this judgment.

26. In the result, the writ petition is allowed. There shall be no order as to costs.

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2022 (III) ILR-CUT-430

Dr. B.R.SARANGI, J & G.SATAPATHY, J.

W.P.(C) NO. 11779 OF 2018

JNANEDRANATH MOHANTA ……..Petitioner

.V.

COMMISSIONER-CUM-SECRETARY, HOME DEPT., GOVT. OF ODISHA & ORS. .....Opp.Parties

SERVICE LAW – Departmental Proceeding – Punishment of dismissal from service imposed by the Appellate Authority – Scope of judicial review – Held, if the penalty saddled by an authority shocks the conscience of the Court, it would appropriately mould the relief, when the petitioner has already been acquitted from the criminal charge, which is also one of the charges levelled against him in the departmental proceeding – Punishment of dismissal from service, as

imposed on the petitioner, is too harsh and the same should be modified to one of compulsory retirement and this Court directs accordingly. (Para 17)

Case Laws Relied on and Referred to :-

1. 2022 LiveLaw (SC) 155 : Umesh Kumar Pahwa v. The Board of Directors Uttarakhand Gramin Bank.
2. Civil Appeal No.7382 of 2021 (disposed of on 25.01.2022) : Brijesh Chandra Dwivedi (Dead) v. Sanya Sahayak.
3. (2014) 1 SCC 82 : Girish Bhushan Goyal v. BHEL and another.
4. 2017 (II) OLR 60 : Arjun Charan Sahoo v. State of Odisha.
5. AIR 1987 SC 2386 : Ranjit Thakur v. Union of India.
6. AIR 1994 SC 215 : Union of India v. Giriraj Sharma.
7. AIR 1996 SC 484 : B.C. Chaturvedi v. Union of India.

For Petitioner : M/s Manas Pati, S. Kar, P.Das, S.S. Pati, H. Roy & B. Panda
For Opp.Parties: Mr. S. Rath, ASC

JUDGMENT Date of Hearing : 23.08.2022 : Date of Judgment : 30.08.2022

Dr. B.R.SARANGI , J.

The petitioner, who was working as a Constable in the office of the Superintendent of Police, Mayurbhanj, has filed this writ petition seeking to quash the order dated 04.09.2015 passed by the Superintendent of Police, Mayurbhanj in Mayurbhanj Departmental Proceeding No. 5 of 2002 (Annexure-3) imposing punishment of dismissal from service treating the period of suspension from 18.01.2002 to 07.05.2002 as such; as well as the order dated 04.08.2016 passed by the appellate authority, viz., D.I.G. of Police, Eastern Region, Balasore (Annexure-4) confirming the order of punishment; so also the order dated 05.05.2018 passed by the Odisha Administrative Tribunal, Principal Bench, Bhubaneswar, in O.A. No. 2134 of 2016, as at Annexure-5, affirming the order of punishment imposed by the disciplinary authority as well as the order of confirmation passed by the appellate authority.

2. The factual matrix of the case, in brief, is that the petitioner, while working as a Constable under Superintendent of Police, Mayurbhanj, Departmental Proceeding No. 5 of 2002 was initiated against him for gross misconduct, indiscipline, negligence and unauthorized absence from duty. It was alleged that while the petitioner was deputed to Rairangpur for sessions guard duty on 13.01.2002, his reliever reported to SDPO, Rairangpur. But he neither took his departure from CSI, Rairangpur nor from SDPO, Rairangpur, instead fled keeping his rifle in Rairangpur Sub-Treasury Guard. It was further alleged that on 16.01.2002, while he was driving a car rashly and negligently it

dashed against a mini truck near Rairangpur Golei causing damage to the mini truck and after the accident he abused one Sapan Kumar Dey, the driver of that mini truck, assaulted him causing injuries on his person and snatched away cash of Rs.800/- so also a wrist watch. Consequentially, a criminal case was registered as Rairangpur P.S. Case No.3 of 2002.

2.1 The departmental proceeding was enquired into by appointing enquiry officer, who submitted his report to the disciplinary authority and ultimately the order dismissing the petitioner from service w.e.f. 08.01.2006, treating the period of suspension from 18.01.2002 to 07.05.2002 as such, was passed on 04.09.2015. Against the said order of punishment, the petitioner preferred appeal before the DIG of Police, Eastern Region, Balasore, who rejected the same vide order dated 04.08.2016. Challenging the said order, the petitioner approached the tribunal by filing O.A. No. 2540 of 2013 and after due adjudication, the tribunal, quashed the order of punishment as well as the confirming order passed by the appellate authority and directed the authority to proceed with the enquiry afresh by giving due opportunity to the petitioner to cross-examine the witnesses who were examined during the enquiry and after the enquiry is concluded, if he is found guilty, he may be given opportunity to submit his show cause and thereafter proceeded to conclude the enquiry.

2.2 In compliance of the above order, enquiry was conducted afresh by giving due opportunity to the petitioner to cross-examine the witnesses and the enquiry officer, after conducting the enquiry, concluded the same and submitted his report holding that the petitioner was guilty of the charges. On receipt of such inquiry report, the disciplinary authority, namely, S.P., Mayurbhanj, issued notice of show cause on 18.08.2015 to which the petitioner submitted reply. Thereafter, a second show cause notice was issued to the petitioner and on receipt of the same, he submitted his reply. Thereafter, the order of dismissal from service and treating the period of suspension from 18.01.2002 to 07.05.2002 as such was passed. Against the said order of punishment, the petitioner preferred appeal before the appellate authority, which was ultimately rejected and the order of punishment was confirmed. Against the order of the appellate authority, the petitioner approached the tribunal by filing O.A. No. 2134 of 2016, which was disposed of vide order dated 05.05.2018 affirming the order of punishment imposed by the disciplinary authority, which was confirmed by the appellate authority. Hence, this writ petition.

3. Mr. Manas Pati, learned counsel for the petitioner at the outset contended that in compliance of the order dated 08.05.2015 passed in O.A. No. 2540 of 2013, the opposite parties are bound to conduct the enquiry by affording opportunity to the petitioner to cross examine all the witnesses those who

were examined during the enquiry and, as such, the disciplinary authority, having not satisfied with the reply, issued a second show cause notice to the petitioner and passed the final order imposing punishment on 04.09.2015, which is illegal, arbitrary and contrary to the settled position of law. It is further contended that on the basis of the charges framed against the petitioner, the punishment of dismissal from service and treating the period of suspension as such is shockingly disproportionate, for which the Court can interfere with the same. It is further contended that enquiry was conducted in a perfunctory manner without examining the vital witnesses, therefore, the punishment so imposed cannot sustain in the eye of law. As such, there was no proceeding initiated against the petitioner during his 25 years of service and he had never been communicated any adverse CCR, rather, he was awarded for his satisfactory performance from D.G. of Police. It is alternatively contended that since the punishment imposed against the petitioner is shockingly disproportionate, the Court may interfere with the quantum of punishment and modify the same to compulsory retirement so that the petitioner can get some financial benefits.

To substantiate his contention, learned counsel for the petitioner has relied upon the judgment of the apex Court in the cases of ***Umesh Kumar Pahwa v. The Board of Directors Uttarakhand Gramin Bank***, 2022 LiveLaw (SC) 155; ***Brijesh Chandra Dwivedi (Dead) v. Sanya Sahayak***, Civil Appeal No.7382 of 2021 disposed of on 25.01.2022; ***Girish Bhushan Goyal v. BHEL and another***, (2014) 1 SCC 82; and of this Court in the case of ***Arjun Charan Sahoo v. State of Odisha***; 2017 (II) OLR 60.

4. Mr. S. Rath, learned Addl. Standing Counsel appearing for the State-opposite parties vehemently contended that on the basis of the charge framed, the petitioner being a police personnel, after conducting enquiry in due compliance of the principles of natural justice, punishment was imposed by the disciplinary authority and the same was confirmed by the appellate authority, which is well justified. As such, the tribunal has taken note of each stages of the proceeding lucidly and come to a finding that at each stage due opportunity was given in compliance of the order passed by the tribunal in earlier O.A. No. 2540 of 2013. Therefore, the punishment so imposed, which has been confirmed by the tribunal, is well justified and, as such, the same does not require any interference of this Court.

5. This Court heard Mr. Manas Pati, learned counsel appearing for the petitioner and Mr. S.Rath, learned Addl. Standing Counsel appearing for the State-opposite parties by hybrid mode. Pleadings having been exchanged between

the parties, with the consent of learned Counsel for the parties this writ petition is being disposed of finally at the stage of admission.

6. At the outset, it is profitable to note the charges, which were framed against the petitioner:-

> *"C/488 JnanendraNath Mohanta of Mayurbhanj district is charged with gross misconduct, indiscipline, negligence of duty and unauthorized absence from duty in that:-*
>
> *While he was posted to hdqrs. A.P.R he was deputed to Rairangpur on 14.09.2001 for session guard duty. On 13.1.2002 though his reliever reported to SDPO, Rairangpur and performed Session Guard duty in his place, he neither took his departure from C.S.I. Rairangpur Court nor form SDPO, Rairangpur instead he fied away keeping his Rifile in Rairangpur Sub- Treasury guard.*
>
> *On 16.1.2002 night while he was driving a car bearing registration No. OSS-5179 rashly and negligently dashed against a Mini Truck bearing reg. No. OSM-3322 near Rairangpur Golei causing damage to the Mini truck. After the incident/accident he abused Sapan Kumar Dey and assaulted him causing injuries on his person and by the by snatched away cash of Rs. 800/- and wrist watch.*
>
> *He is therefore directed to show cause within 15 days of receipt of this notice as to why suitable disciplinary action will not be taken against him in the event of the charge being proved against him.*
>
> *Any representation that he wish to make either orally in writing; will be duly considered by the authority competent to pas final order before passing such order."*

7. On the basis of the charges framed against the petitioner, though enquiry was conducted and punishment was imposed, the same was challenged by the petitioner before the tribunal in O.A. No. 2540 of 2013, which was disposed of vide order dated 08.05.2015 by quashing the order of punishment imposed by the disciplinary authority and confirmed by the appellate authority, and remitting the matter back to the authority for fresh inquiry by giving due opportunity to the petitioner to cross-examine the witnesses, who were examined during the enquiry.

8. As is evident from the record, by granting opportunity to the petitioner to cross-examine the witnesses, the enquiry officer though conducted the inquiry afresh and submitted his report on 14.08.2015 finding the petitioner guilty of charges, but failed to explain in the enquiry report as to what irreparable loss was caused to the Government by keeping the Rifle in Rairangpur Sub-Treasury Guard. It is the practice to keep the Service Rifle by every staff at Sub-Treasury at Rairangpur for the purpose of its safety. In the criminal case, on the selfsame charge, i.e., abusing the driver of other vehicle, the petitioner was acquitted by the competent criminal court as the prosecution failed to prove the charge, but this aspect was not taken into account while finding the petitioner

guilty in the disciplinary proceeding. As regards going out without obtaining departure certificate, as alleged in the charge memo, as no relieve order was issued to the petitioner question of obtaining departure certificate does not arise. As the authorities were biased against the petitioner, while conducting the enquiry, such fact was not appreciated by the disciplinary authority as well as appellate authority. Needless to say, if the petitioner was acquitted in the criminal case and the prosecution was not able to prove the charge, in that case, the enquiry officer could not have come to a conclusion and found the petitioner guilty of the selfsame charge. As such, the enquiry having been conducted without any application of mind and with a prejudicial manner punishment has been imposed on the petitioner pursuant to second enquiry conducted, as per direction of the tribunal. Therefore, the enquiry officer, disciplinary authority and the appellate authority have acted against the petitioner with a gross prejudicial manner and with a biased mind to confirm their own punishment imposed by them in the first enquiry. More so, the punishment imposed on the allegation pointed out in the charge itself is shockingly disproportionate. Therefore, in exercise of power under judicial review, though the scope in the matter of imposition of penalty is very limited, but the Court can interfere with the punishment only if it is found that the same is shockingly disproportionate to the charges found to be proved. Since there was procedural irregularity in the order imposing penalty, the tribunal interfered with the same in O.A. No. 2540 of 2013 and quashed the order of punishment and remitted the matter back to the enquiry officer for fresh adjudication, vide order dated 08.05.2015. But, instead of reducing the punishment by causing fresh inquiry, the order of punishment was imposed against the petitioner which was confirmed by the appellate authority. Therefore, the manner of conducting the second enquiry, in compliance of the direction given by the tribunal, and imposition of penalty thereof, considering the gravity of misconduct alleged against the petitioner and knowing fully well that against one charge the petitioner has already been acquitted in criminal case, it would be arbitrary, unreasonable and violative of Article 14 of the Constitution of India.

9. It is trite law that the quantum of punishment imposed against the petitioner has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review would ensure that even on an aspect, which is otherwise within the exclusive province of the Court Marshal, if the decision of the Court even as to sentence is an out ranges defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognized grounds of judicial review. Though

the apex Court held time and again that Court cannot normally substitute own conclusion or penalty. But if the penalty imposed by an authority shocks the conscience of the Court, it would appropriately mould the relief either directing the authority to reconsider the penalty imposed and in exceptional and rare cases, in order to shorten the litigation itself, impose appropriate punishment with cogent reasons in support thereof. This view has been taken by the apex Court in the cases of ***Ranjit Thakur v. Union of India***, AIR 1987 SC 2386; ***Union of India v. Giriraj Sharma***, AIR 1994 SC 215; ***B.C. Chaturvedi v. Union of India***, AIR 1996 SC 484.

10. Therefore, two alternatives can be found out that either the Court has to remit the matter back to the authority for reconsideration of the punishment or to shorten the litigation the Court can think of substituting its own views as to the quantum of punishment in the place of punishment awarded by the competent authority. But, in the present case, even after remand, the authorities are bent upon to impose penalty of dismissal from service, as they are biased against the petitioner, even though it was brought to the notice of the Court at the time of second inquiry that the petitioner was acquitted from the criminal charges, as the prosecution failed to prove the allegation against him.

11. So far as keeping the Rifle in the Rairangpur Sub-Treasury is concerned, that is the mode available to keep the armory in the treasury and in that case if the petitioner has kept the same in the treasury for safety of the Rifle, it cannot be said that punishment can be imposed, as has been done in the instant case by the disciplinary authority and the appellate authority. Furthermore, nothing has been placed on record as to what irreparable loss has been caused to the Government by keeping the Rifle in the Rairangpur Sub-Treasury. More so, as regards non-obtaining of departure certificate, as alleged in the charge memo, it was vehemently urged by learned counsel for the petitioner that since no relieve order was issued to the petitioner, question of obtaining departure certificate does not arise. Consequentially, if all these aspects would be taken into consideration together, it cannot be said that the petitioner has committed such a gross error or misconduct so as to face a punishment of dismissal from service. Therefore, causing an inquiry on a vague charge, as the same does not give a clear picture to the petitioner to make an effective defence, because he may not be aware as to what the allegation against him is and what ground of defence he can put in the rebuttal thereof. As such, in a domestic inquiry, charges must be clear and specific so that the delinquent can meet the vague charges. More so, when the petitioner has already been acquitted in the criminal case instituted against him for the alleged rash and negligent driving of vehicle, the opposite party-authorities would have taken a lenient view and, as such, the punishment

imposed by them is shockingly disproportionate to the charges levelled against the petitioner.

12. In ***Umesh Kumar Pahwa*** (supra), the Apex Court came to a definite finding that the order of removal from service can be said to be disproportionate to the charges of misconduct held to be proved. Therefore, the apex Court interfered with the quantum of punishment imposed and substituted the punishment from that of removal of service to that of compulsory retirement.

13. In ***Brijesh Chandra Dwivedi*** (dead), mentioned supra, the apex Court in paragraph-12 of the said judgment had come to a conclusion to the following effect:-

> *"12. However, at the same, considering the statement of the employee at the time of the enquiry and the explanation given by him that on going to duty on taking the vehicle from battalion, he had not consumed the liquor and after the accident with the objective to suppress the fear on coming to battalion and on parking the vehicle, he went directly to bus terminal, Ghazipur and consumed 100 ml of country made wine, though has not been accepted but that might be plausible and considering his 25 years of long service and fortunately it was a minor accident which resulted into some loss to the vehicle and considering the fact that the employee has since died, we find that the punishment of dismissal can be said to be too harsh and may be treated one for compulsory retirement."*

14. In ***Girish Bhusan Goyal*** (supra), the apex Court interfered with the quantum of punishment imposed on the petitioner, as he was terminated from service just six days prior to his retirement, whereby there was no further possibility of any increment, his last one year increment was liable to be deducted from the arrears, which he was statutorily entitled to.

15. In ***Arjun Charan Sahoo*** (supra), this Court held that since the punishment imposed was related to unauthorized absence and not related to his integrity and moral turpitude and, as such, the order of dismissal would be harsh considering the fact that there was also other punishment provided in Rule 836 of the Orissa Police Rules regarding compulsory retirement, since the petitioner had already rendered 17 years of service and if the order of punishment of compulsory retirement would be awarded in place of the order of dismissal, the purpose of the department would be served and awarding of punishment of compulsory retirement would be just and proper and, thereby, quashed the order of dismissal from service.

16. The cumulative effect of all these judgments, as discussed above, gives an irresistible conclusion that for a trivial allegation, imposition of punishment of dismissal from service is shockingly disproportionate. Applying the same analogy to the case at hand, keeping in view the charges levelled against the

petitioner, this Court, in exercise of power of judicial review, can either remit the matter back to the authority for re-enquiry or interfere with the quantum of punishment imposed by the disciplinary authority. But then, since the matter was once remitted back and the authorities acted prejudicially to the interest of the petitioner reaffirming their views and, as such, instead of only permitting the petitioner to cross-examine the witnesses have started de-novo enquiry, which itself is contrary to the order passed by the tribunal, and once again imposed punishment of dismissal from service, by treating the period of suspension as such, when the petitioner has already been acquitted from the criminal charge, which is also one of the charges levelled against him in the departmental proceeding.

17. In view of such position, to subserve the interest of justice, equity and fair play, since the punishment imposed on the petitioner is shockingly disproportionate, this Court, in exercise of power under judicial review, holds that punishment of dismissal from service, as imposed on the petitioner, is too harsh and the same should be modified to one of compulsory retirement and this Court directs accordingly. Consequentially, the order dated 04.09.2015 passed by the Superintendent of Police, Mayurbhanj in Mayurbhanj Departmental Proceeding No. 5 of 2002 (Annexure-3) imposing the punishment of dismissal from service, by treating the period of suspension from 18.01.2002 to 07.05.2002 as such, the order dated 04.08.2016 passed by the appellate authority, viz., D.I.G. of Police, Eastern Region, Balasore vide Annexure-4 confirming the order of punishment; and the order dated 05.05.2018 passed in O.A. No. 2134 of 2016, as at Annexure-5, affirming the order of punishment imposed by the disciplinary authority and the order of confirmation passed by the appellate authority, are modified to the extent indicated above.

18. In the result, the writ petition is allowed leaving the parties to bear their own costs.

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2022 (III) ILR-CUT-438

Dr. B.R.SARANGI, J .

WPC (OAC) NO. 1680 OF 2017

SMT. ANINDITA MISHRA ..... Petitioner

.V.

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

(A) MATERNITY BENEFIT ACT, 1961 – Maternity leave has been denied to the petitioner on the ground that she is not entitled to get such benefit in terms of the agreement executed with the Department for her professional service – Whether such denial is sustainable under law ? – Held, No – In view of the judgments, *Municipal Corporation of Delhi v. Female Workers (Muster Roll), (2000) 3 SCC 224* : benefit of maternity leave cannot be denied. (Para 14)

(B) INTERPRETATION OF STATUTE – Reasoned order – Necessity of – Discussed. (Para 10.3)

Case Laws Relied on and Referred to :-

1. (2000) 3 SCC 224 : 2000 SCC (L&S) 331 : Municipal Corporation of Delhi v. Female Workers (Muster Roll).
2. AIR 1971 SC 862 : Travancore Rayons Ltd. V. The Union of India.
3. (1990) 4 SCC 594 : S.N. Mukherjee v. Union of India.
4. AIR 1978 SC 597 : Menaka Gandhi v. Union of India.
5. AIR 1974 SC 87 : Union of India v. Mohan Lal Capoor.
6. AIR 1981 SC1915 : Uma Charan v. State of Madhya Pradesh.
7. 2017 (I) OLR 5 : Patitapaban Pala v. Orissa Forest Development Corporation Ltd.
8. 2017 (I) OLR 625 : Banambar Parida v. Orissa Forest Development Corporation Ltd.

For Petitioner : M/s P.K. Rath, R.N. Parija, A.K. Rout, S.K. Pattnaik and A. Behera
For Opp.Parties : Mr. S. Rath, A.S.C.

JUDGMENT Date of Hearing and Judgment : 30.08.2022

Dr. B.R.SARANGI, J.

By means of this writ petition, the petitioner seeks to quash the order dated 07.06.2017 passed by the Under Secretary to Government, Health and FamilyWelfare Department, Govt. of Odisha, under Annexure-1, by which sanction of maternity leave has been denied on the ground that she is not entitled to get such benefit in terms of the Agreement executed with the Department for her professional service.

2. The factual matrix of the case, in a nutshell, is that the Government in General Administrative Department issued an Office Memorandum in the nature of advertisement in daily newspaper inviting applications from various eligible candidates for the post of Young Professionals (YPs) to be engaged in the Administrative Department or they may authorize their sub-ordinate offices for engagement. Pursuant to such advertisement, the petitioner, being eligible, applied for the post of Young Professionals. After following due procedure of selection, she was selected and was appointed as Young Professional. The name of the petitioner was sponsored by the G.A. Department to be posted under the

Health and Family Welfare Department. Accordingly, she joined under the Health and Family Welfare Department on 20.05.2014. The Health and Family Welfare Department initially entered into an agreement with the petitioner for engagement as Young Professional for one year and, as such, on completion of one year, being satisfied with the performance of the petitioner, her service was further extended and un-interruptedly the petitioner was continued as Young Professional under the opposite parties. While she was continuing as such, she was blessed with a female child. On 17.08.2016, the petitioner submitted a leave application before opposite party no.2 for the period from 17.08.2016 to 12.02.2017 on maternity ground incorporating the certificate of doctor, as well as Finance Department Instructions. But, the same was rejected by opposite party no.2 without assigning any reason vide Annexure-1 dated 07.06.2017 stating that she is not entitled to get such benefit in terms of the Agreement executed with the Department for her professional service. Hence, this application.

3. Mr. P.K.Rath, learned counsel for the petitioner contended that the petitioner, having been engaged as contractual employee, can also avail the maternity leave of 180 days. Therefore, there is no justification at all for denying the claim of the petitioner to avail maternity leave, which is admissible to the petitioner, particularly when the contract is in existence. It is further contended that the State, being a model employer, cannot deny the benefit of maternity leave to the contractual employees, else there will be breach of Articles 14 and 16 of the Constitution of India. It is further contended that the contractual employees are entitled to get the maternity leave at par with their counterparts in the regular establishment and, as such, the benefit so admissible cannot be denied to such employees. More so, Maternity Benefit Act, 1961 entitles the said benefit to the petitioner and, as such, the same having been rejected, the petitioner has approached this Court by filing the present writ petition.

To substantiate his contention, learned counsel for the petitioner has relied upon the judgment of the apex Court in the case of ***Municipal Corporation of Delhi v. Female Workers (Muster Roll)***, (2000) 3 SCC 224: 2000 SCC (L&S) 331.

4. Mr. S.Rath, learned Addl. Standing Counsel appearing for the State-opposite parties vehemently contended that since the petitioner was engaged by the opposite parties in terms of the General Administration Department Office Memorandum dated 02.05.2013, by which a policy has been formulated for the purpose of Young Professionals, which clearly indicates the objectives, terms of engagement, scope of work, tenure and compensation for such Young Professionals and, as such, nowhere the entitlement of maternity leave has been indicated in the said memorandum, the petitioner is not entitled to get such

benefit. It is further contended that the petitioner is neither regular nor contractual employee to avail such leave, as she is a Sui-generis. Therefore, the claim of the petitioner, that she is entitled to the benefit of maternity leave, cannot be sustained in the eye of law and, as such, the relief sought by the petitioner cannot be granted to her. Consequentially, he seeks for dismissal of the writ petition.

5. This Court heard Mr. P.K. Rath, learned counsel appearing for the petitioner and Mr. S.Rath, learned Addl. Standing Counsel appearing for the State-Opposite Parties by virtual mode, and perused the records. Pleadings having been exchanged between the parties, with the consent of learned counsel for the parties this writ petition is being disposed of finally at the stage of admission.

6. The undisputed fact being that the petitioner was selected and appointed as Young Professional by following due process of selection, pursuant to which, she joined under the Health and Family Welfare Department on contractual basis by executing an agreement. The object of engagement of such Young Professional is to ensure timely availability of skilled manpower of a fixed tenure to government offices in order to assist the offices in planning, organizing, budgeting, implementing, monitoring, auditing, evaluating and adapting of their programmes, schemes, activities and functions so that they are able to discharge their roles and responsibilities more effectively.The programme aims at bringing technological advances in government in management methods by application of innovations and best practices will be an important endeavour under the programme. All these will ultimately aim to improve governance, public service delivery and satisfaction of citizens. The Young Professional are being paid with a consolidated remuneration of Rs.25,000/- per month and, as such, by virtue of the agreement, it creates relationships between the parties. More so, the agreement was effective for a period of one year, unless sooner terminated if their performance was not good or unless extended by agreement of the parties but not beyond a period of five years. As per clause-10 of such agreement, the Young Professionals shall be eligible for 8 (eight) days leave in a calendar year on pro-rata basis. He/She shall not draw any remuneration in case of his/her absence beyond 8 (eight) days per year and un-availed leave in a calendar year shall not be carried forward to next calendar year. As such, their services shall be terminated in case of their absence for more than 15 days beyond the entitled leave in a calendar year or any unauthorized leave on the part of the Young Professionals. This being the condition stipulated in the agreement itself, pursuant to such agreement, the petitioner was discharging her duties and, as such, her performance was satisfactory for the period from 20.05.2015 to 19.05.2016.

7. Thereafter, performance of Young Professionals were reviewed by the Review Committee on 27.05.2016 and on the recommendation of the Committee their services were extended without any performance bonus for another one year with effect from 20.05.2016 to 19.05.2017 with the same terms and conditions mentioned in the agreement made during the year 2014, vide Annexure-7 dated 02.06.2016, where the petitioner's name finds place at sl.no.1. Needless to say, when the period was extended for the period from 20.05.2016 to 19.05.2017, the petitioner remained absent for the period from 17.08.2016 to 12.02.2017, on the ground of maternity leave. But the benefit admissible to the petitioner was denied by the authority. It is pertinent to mention here that the Government in Finance Department issued memorandum dated 31.03.2012, by which the Government has been pleased to decide to extend the benefit of absence from duty on maternity ground by Female Contractual Employees engaged in different Departments of Government, the relevant part of which is extracted hereunder:-

> *"……Government have enhanced the ceiling of 90 (ninety) days of maternity leave provided under sub-rule(b) of Rule -194 of Orissa Service Code to 180 days in Finance Department O.M No. 51856/F., Dt.7.12.2011 in respect of State Government employees.*
>
> *After careful consideration Government have been pleased to decide that in respect of all female employees engaged in Government establishment on contract basis with consolidated remuneration the existing ceiling of 90 days of absence from duty on maternity ground is enhanced to 180 days subject to condition that the tenure of maternity leave will be within the contractual period in maximum."*

8. As it appears, when the petitioner sought the benefit of maternity leave, the same was denied vide letter dated 07.06.2017 in Annexure-1 simply stating that she is not entitled to get such benefit in terms of the agreement executed with the Department for her professional service. As such, there is no other reason mentioned in the order impugned dated 07.06.2017 vide Annexure-1, save and except stating that as per the terms and conditions of the agreement, she is not entitled to get such benefit, which cannot suffice the dispute. Law is well settled that administrative officer has to give reason while accepting or rejecting the claim of the person concerned.

9. Reasons being a necessary concomitant to passing an order, the Appellate Authority can thus discharge his duty in a meaningful manner either by furnishing the same expressly or by necessary reference to those given by the original Authority.

10. In ***Travancore Rayons Ltd. V. The Union of India***, AIR 1971 SC 862, the apex Court observed that the necessity to give sufficient reasons, which disclose proper appreciation of the problem to be solved, and the mental process

by which the conclusion is reached in cases where a non-judicial Authority exercises judicial functions is obvious. When judicial power is exercised by an Authority normally performing executive or administrative functions, the Court would require to be satisfied that the decision has been reached after due consideration of the merits of the dispute, uninfluenced by extraneous considerations of policy or expediency. The Court insists upon disclosure of reasons in support of the order on two grounds: one that the party aggrieved in a proceeding before the Court has the opportunity to demonstrate that the reasons which persuaded the Authority to reject his case were erroneous; the other, that the obligation to record reasons operates as a deterrent against possible arbitrary action by the Executive Authority invested with the judicial power.

11. In ***S.N. Mukherjee v. Union of India*** (1990) 4 SCC 594, the apex Court held that keeping in view the expanding horizon of Principles of Natural Justice, the requirement to record reasons can be regarded as one of the Principles of Natural Justice, which governs exercise of power by administrative Authorities. Except in cases where the requirement has been dispensed with expressly or by necessary implication, an Administrative Authority is required to record reasons for its decision.

12. In ***Menaka Gandhi v. Union of India***, AIR 1978 SC 597, the apex Court observed that the reasons, if disclosed, being open to judicial scrutiny for ascertaining their nexus with the order, the refusal to disclose the reasons would equally be open to the scrutiny of the court; or else, the wholesome power of a dispassionate judicial examination of executive orders could with impunity be set naught by an obdurate determination to suppress the reasons.

13. In ***Union of India v. Mohan Lal Capoor***, AIR 1974 SC 87, it has been held that reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject-matter for a decision whether it is purely administrative or quasi-judicial and reveal a rational nexus between the facts considered and conclusions reached. The reasons assure an inbuilt support to the conclusion and decision 8 reached. Recording of reasons is also an assurance that the authority concerned applied its mind to the facts on record. It is vital for the purpose of showing a person that he is receiving justice.

Similar view has also been taken by the apex Court in ***Uma Charan v. State of Madhya Pradesh***, AIR 1981 SC 1915, and by this Court in ***Patitapaban Pala v. Orissa Forest Development Corporation Ltd.***, 2017 (I) OLR 5 and in ***Banambar Parida v. Orissa Forest Development Corporation Limited***, 2017 (I) OLR 625.

Therefore, in absence of any reason in the order impugned dated 07.06.2017 in Annexure-1, denying the benefit of maternity leave, cannot be sustained in the eye of law.

14. In ***Municipal Corporation of Delhi*** (supra), while considering the case of the workmen, including those employed on muster roll for carrying out such activities, the apex Court taking into consideration the provisions contained in Maternity Benefit Act, 1961 read with Constitutional mandate under Article 42 observed that in exercise of power of judicial review of administrative action, the benefit of maternity leave admissible to the muster roll female workmen cannot be denied. In view of doctrine of social justice and universal declaration of Human Rights,1948 and Convention on the Elimination of all forms of industrial dispute between such workmen and the Corporation, would have to be tackled as an industrial dispute in the light of industrial law, including the Maternity Benefit Act. By observing so, the apex Court in paragraph-37 of the said judgment, held as under:

> *"37. Delhi is the capital of India. No other city or corporation would be more conscious than the city of Delhi that India is a signatory to various international covenants and treaties. The Universal Declaration of Human rights, adopted by the United Nations on 10-12-1948, set in motion the universal thinking that Human Rights, adopted by the United Nations on 10-12-1948, set in motion the universal thinking that human rights are supreme and ought to be preserved at all costs. This was followed y a series of conventions. On 18-12-1979, the United Nations adopted the "Convention on the Elimination of all Forms of Discrimination against Women".Article 11 of this Convention provides as under:*
>
> *Article 11*
>
> *1. States/parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, particular:*
>
> *(a) the right to work as an inalienable right of all human beings;*
>
> *(b) the right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;*
>
> *(c) the right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;*
>
> *(d) the right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;*
>
> *(e) the right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;*
>
> *(f) the right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.*

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, Stats/parties shall take appropriate measures:
(a) to prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;
(b) to introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;
(c) to encourage the provision of the necessary supporting social services to enable parent to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;
(d) to provide special protection to women during pregnancy in types of work proved to be harmful to them.

3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary. (emphasis supplied)"

15. There is no iota of doubt that the petitioner was discharging her duties and responsibilities as Young Professional and, thereby, the benefit of maternity leave cannot be denied to her, in view of the judgments mentioned supra. Therefore, applying the aforesaid law laid down by the apex Court in the present context, this Court is of the considered view that denial of the benefit of maternity leave to the petitioner, vide impugned order dated 07.06.2017 in Annexure-1, is without assigning any reason and thus cannot be sustained in the eye of law and the same is liable to be quashed. Accordingly, the order dated 07.06.2017 under Annexure-1 is hereby quashed. The opposite parties are directed to extend the benefit of maternity leave to the petitioner, as admissible to her in accordance with law, as expeditiously as possible, preferably within a period of three months from the date of communication/production of certified copy of this judgment.

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

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2022 (III) ILR-CUT-445

ARINDAM SINHA, J.

WP(C) NO. 3433 OF 2020

BENADIKTA DIGAL .....Petitioner

.V.

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

COMPENSATION – The Petitioner claim Compensation being grievously injured in communal riot on 26th August, 2008 – There is no dispute that compensation and additional compensation were paid by State, from Chief Minister's Relief Fund pursuant to direction of the Supreme Court, to those killed in communal violence – State filed affidavit and raised defence of delay – Whether such defence is sustainable under law? – Held, No – The claim of petitioner is not hit by the doctrine of delay and laches as the same is not a constitutional limitation – State is directed to pay aggregate compensation to the petitioner as were paid to other victims of the riot. (Para 11)

Case Laws Relied on and Referred to :-

1. AIR 2013 SC 565 : Tukaram Kana Joshi v. M.I.D.C.
2. AIR 2016 SC 3639 : Archbishop Raphael Cheenath S.V.D. v. State of Orissa.

For Petitioner : Mr. P.C. Chhinchani
For Opp.Parties : Mr. T. K. Patnaik, ASC

ORDER Date of Order: 27.09.2022

ARINDAM SINHA, J.

1. Mr. Chhinchani, learned advocate appears on behalf of petitioner and submits, his client's brother was grievously injured on 26th August, 2008 in the communal riot that followed assassination of Swami Laxmanananda Saraswati on 23rdAugust, 2008. There is no dispute that compensation and additional compensation were paid by State from, inter alia, Chief Minister's Relief Fund as well as pursuant to direction of the Supreme Court, to those killed in communal violence. He submits, taking advantage of direction in procedural order dated 5th September, 2022 requiring State to file objection to the additional affidavit filed by his client, State filed affidavit and raised defence of delay, against his client's claim for compensation. He submits, this contention was not there in the counter statement filed and subsequently taking it in response to the additional affidavit disclosing documents of injuries suffered and hospital treatment leading to death of his client's brother, should not be entertained or looked at by Court.

2. He submits, the writ petition was presented on 28th January, 2020. Coordinate Bench had required satisfaction from him, to admit the writ petition. Satisfaction rendered was by reliance on judgment of the Supreme Court in **Tukaram Kana Joshi v. M.I.D.C**., reported in **AIR 2013 SC 565.** He submits further, there be direction for payment of compensation, as has already been paid out to victims of the communal riot.

3. Mr. Patnaik, learned advocate, Additional Standing Counsel appears on behalf of State and submits, the writ petition should be dismissed on ground of delay. Without prejudice he relies on the objection affidavit. Paragraph 7 is reproduced below.

> *"That, regarding the averment made in writ petition relating to FIR registered at Kharavelanagar Police station Case No. 282/2008 U/s.147/148/436/307/302/149 of I.P.C.the same was subsequently investigated by the Crime Branch and after completion of the investigation, charge sheet has been submitted under section 147,148,341, 323,325,149 IPC against the accused persons mentioned in the charge sheet. As during investigation by the Crime Branch no offence under section 302 IPC is established, the Noks of Fr. Bernard Digal are not entitled to receive any compensation awarded for the riot victims by the Government."*

He submits further, though FIR was registered in the police case, inter alia, under section 302 of IPC, upon investigation by the Crime Branch, charge sheet was filed invoking sections 147, 148, 341, 323, 325, 149 IPC against accused persons. During investigation by the Crime Branch, no offence under section 302 IPC was established and as such next of kin of the deceased is not entitled to receive the compensation awarded for the riot victims. This is corroborated on petitioner's brother having died much later, on 28th October, 2008.

4. First point of controversy between petitioner and State is delay in presenting the writ petition. Assuming at this point death was consequent to grievous injury received in the communal riots, death happened on 28th October, 2008 and the petition was presented on 28th January, 2020. More than eleven years is the delay.

5. In **Tukaram** (supra) compensation had been claimed by land losers on the very large chunk of land notified under section 4 of Land Acquisition Act, 1894, on 6th June, 1964. The land losers were appellants in the Supreme Court. They were deprived of their immovable property in year 1964, when article 31 in the Constitution was still intact and right of property was part of fundamental rights under article 19. However, the writ petition, which culminated in the appeal before the Supreme Court, was filed in year 2009. Delay in that case was much more than eleven years.

6. The Supreme Court in **Tukaram** (supra) said, inter alia, question of condonation of delay is one of discretion. It will depend upon what the breach of fundamental right and remedy claimed are and when and why the delay arose. It is not that there is any period of limitation for the Courts to exercise their powers under article 226. Ultimately, it would be a matter within the discretion of the Court and such discretion, must be exercised fairly and justly so as to promote justice and not to defeat it. The Court went on to say, in event claim made by the applicant is legally sustainable, delay should be condoned where circumstances

justifying the conduct exist, the illegality which is manifest, cannot be sustained on the sole ground of laches. The Court should not harm innocent parties if their rights have in fact emerged, by delay on the part of petitioners. A passage from paragraph 10 is extracted and reproduced below.

> *"10. xx xx xx The Court is required to exercise judicial discretion. The said discretion is dependent on facts and circumstances of the cases. Delay and laches is one of the facets to deny exercise of discretion. It is not an absolute impediment. There can be mitigating factors, continuity of cause action, etc. That apart, if whole thing shocks the judicial conscience, then the Court should exercise the discretion more so, when no third party interest is involved. Thus analysed, the petition is not hit by the doctrine of delay and laches as the same is not a constitutional limitation, the cause of action is continuous and further the situation certainly shocks judicial conscience."*

7. Keeping above in mind, Court is required to see whether this is a fit case to exercise discretion to condone the delay of more than eleven years. Facts regarding the assassination and following communal riot are not in dispute. State, however, has disputed petitioner's assertion that his brother died on being grievously injured in the following communal riot. The additional affidavit filed by petitioner says that the deceased was brutally assaulted on 26th August, 2008, at night, by a group of people armed with deadly weapons and thereafter treated at UPHC, Tikabali and then referred to District Headquarters Hospital, Phulbani on 27th August, 2008. From there, upon having been given emergency treatment, there was referral to SCB Medical, Cuttack. The deceased was then brought to Kalinga Hospital, Bhubaneswar, where he was admitted on 28th August, 2008 and discharged on 1st September, 2008 after being treated for head injuries and fracture on vital parts of the body. Upon discharge he was shifted to Holy Spirit Hospital at Mumbai and admitted there on 2nd September, 2008 with history of assault by a mob, at Odisha. The Bombay Hospital discharged the patient on 17th September, 2008. Upon his second discharge, condition of the injured deteriorated and he was taken to and admitted in St. Thomas Hospital, Chennai on 20thOctober, 2008. Death happened on 28th October, 2008 as aforesaid. The additional affidavit discloses documents in support of above statements. The documents have not been disputed.

8. State filed objection affidavit. Paragraph 7 has already been reproduced above. It appears from said paragraph, sections 436, 307 and 302 IPC were omitted in the charge- sheet. Instead, sections 341, 323 and 325 were added. Section 436 relates to mischief by explosive substance with intention to destroy a house etc. Clearly it was misapplied in the FIR. Section 302 is murder, while section 307 is attempt to murder.State has sought to build its contention in resistance to the claim, by relying on omission of these two sections from the charge-sheet.

9. Sections 147 to 149 relate to rioting, rioting with deadly weapon and deeming offence committed by any member of an unlawful assembly, to include every other member of such assembly, as guilty of the offence. State relying on the charge-sheet bearing the sections, which were also there in the FIR, establishes nexus between the riot and the victim. Court needs look no further. A person grievously injured in a riot later succumbing to his injuries may have led the investigating agency to distinguish the death as caused by rioting with deadly weapon and not an attempt to murder or murder with motive. The fine distinction made appears to be that rioting with deadly weapon is an offence and death caused thereby is not the same as a person attempting to murder another or actually does so. In other words, by invoking section 149 the investigating agency made out a case that an unlawful assembly of people caused riot. Hence, the agency did not say that the unlawful assembly was an attempt to murder or for murdering the deceased.

10. Annexure 5 in the writ petition is representation dated 28th June, 2017 made to the Collector requesting grant of ex-gratia. Paragraph 7 therefrom is extracted and reproduced below.

> *"7. xx xx xx*
>
> *Taking all the evidence on records and personal I had met him in the hospital, it is true that my brother Bernard Digal died because of Kandhamal violence and I have been running pillar to post to get justice for him. The cases have been registered and it never came to any verdict. I have made many representation to the concerned authorities (Collector and others) also personally met to Collector and put all the grievances before him to get ex-gratia which was announced by both the Central Govt. and State Govt. but I have not been received any compensation till date. My brother used to help my children for their studies and now they are not able to study properly due to financial difficulties."*

Court is convinced there were mitigating factors and continuity of cause of action of petitioner. Rejection of claim for compensation in the face of ultimately the Supreme Court having directed payment of additional compensation in respect of victims of the communal violence by **Archbishop Raphael Cheenath S.V.D. v. State of Orissa**, reported in **AIR 2016 SC 3639**, is position taken by State that shocks the judicial conscience. In the circumstances, as declared in Tukaram (supra), discretion is to be exercised to hold that the petition is not hit by doctrine of delay and laches, as the same are not a constitutional limitation.

11. State is directed to pay aggregate compensation as were paid to other victims of the riot, to petitioner. The aggregate is to be the compensation paid by State with Central Government assistance, including from the Chief Minister's Relief Fund, along with additional compensation directed to be paid by **Archbishop Raphael Cheenath S.V.D.** (supra). Petitioner will produce this

order before the Collector, giving particulars of his claim on the aggregate compensation. The Collector (opposite party no.3) is directed to sanction and disburse the compensation within four weeks of communication. In so doing, the Collector will factor in the component of Central assistance. In event the Central assistance is not obtained, petitioner has liberty to apply.

12. The writ petition is disposed of.

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2022 (III) ILR-CUT-450

ARINDAM SINHA, J.

W.P.(C) NO.16845 OF 2012

JALADHAR JENA .....Petitioner

.V.

UNION OF INDIA & ORS. ……Opp.Parties

COMPENSATION – Death of a school student – Amount of Compensation – Determination – Held, the Court is convinced that there was contributory negligence on part of the School leading to loss of the young life – Direction issued upon opposite parties, jointly and severally, to pay compensation of Rs.10,00,000/- to petitioner within four weeks. (Para 11)

Case Laws Relied on and Referred to :-

1. Writ Petition (Civil) No.7584 of 2014 (dated 11th August, 2022) : Madhav Soren v. State of Odisha & Ors.
2. W.P.(C) No.20443 of 2012 (dated 10th May, 2022) : Sanjay Ku.Mohanty & Anr. v. State of Odisha & Ors.
3. W.P.(C) No.24882 of 2012 (dated 30th September, 2021) : Jambeswar Naik and another v. State of Odisha & Ors.

For Petitioner : Mr. A. Sahoo
For Opp.Parties : Mr. C. K. Pradhan, Sr. Panel Counsel

JUDGMENT Date of Judgment: 18.10.2022

ARINDAM SINHA, J.

1. Mr. Sahoo, learned advocate appears on behalf of petitioner and submits, his client lost his son, who died when he was in school. By the writ petition his client has sought compensation. On earlier occasion Mr. Pradhan, learned advocate, Senior Panel Counsel appearing on behalf of Union of India had submitted, Rs.50,000/- was sanctioned but petitioner did not turn up to receive the same.

2. Mr. Sahoo, submits, the boy suffered injury and died. He refers to information obtained by writing dated 19th June, 2012, on query made under Right to Information Act, 2005, disclosed under annexure-3 at page-10. Treatment status stated therein is extracted and reproduced below.

> *"The laceration of up lip was stitched by Bhakta Charan Sahoo and treated with required medicines.* ***The prescription has been handed over to the attendant of patient****. The treatment hours in P.H.C(N), Konark is approximately 1 ½ hours.* ***The patient was then referred to Capital Hospital, BBSR due to headache for CT scan."***
>
> *(emphasis supplied)*

He submits, the scan was not made. There was, therefore, negligence on part of the school.

3. He relies on **judgment dated 11thAugust, 2022** by the first Division Bench of this Court in **Writ Petition (Civil) no. 7584 of 2014 (Madhav Soren v. State of Odisha and others)** and **order dated 10th May, 2022** of this Bench in **W.P.(C) no. 20443 of 2012 (Sanjay Kumar Mohanty and another v. State of Odisha and others)**, wherein **order dated 30th September, 2021** also made by the first Division Bench of this Court in **W.P.(C) no. 24882 of 2012, (Jambeswar Naik and another v. State of Odisha and others)** was relied upon.All the cases were regarding death of school children, where compensation awarded was Rs.10 lakhs.

4. Mr. Pradhan submits, there was no negligence on part of the school. In the play ground, cricket bat slipped out of hands of a student, who was batting and hit the child, since deceased. It was an accident.

5. In the cases relied upon on behalf of petitioner, the victim children had died. On finding of negligence, State was directed to pay compensation at Rs. 10,00,000/-. Here, the school is under the Central Government. Earlier, adjournment was granted for the school to consider its position and issue instructions. Mr. Pradhan submits, additional affidavit has been filed on 11th October, 2022. The affidavit is not in file. He hands up a copy. Relied upon paragraph nos. 6 and 7 in the affidavit are extracted and reproduced below.

> *"6.* ***That as seen from the prescription of PHC Hospital (attached therewith as Annexure-R/1****) the treatment was given promptly as prescribed by the doctor when the patient was not recovering, the Doctor referred the patient to Capital Hospital, Bhubaneswar for further treatment, the patient was immediately shifted to Bhubaneswar* ***duly escorted by the staff of the School*** *by road at a distance of about 66-70 Kms.*
>
> *7. That the allegation of the Petitioner has already been denied in para-12 of the Counter Reply with the submissions that during the treatment the doctor on duty PHC Konark prescribed 5 days medicines. As the patient was stable, no swelling and no head injury, but in the night when the condition of the patient was marked deteriorating, the*

doctor was again consulted and on his advice given on prescription, the patient was immediately taken to Hospital at Bhubaneswar for further treatment. ***As evident from the prescription, the Doctor at PHC Konark had neither told us nor advised for CT Scan (copy of prescription attached with Counter Reply as Annexure R/1). Hence, it is expected that the petitioner had managed & procured the modified status of treatment after 7 months under RTI Act from the office of PHC Konark as the original prescriptions of treatment were*** *handed over to the relatives of deceased student at Bhubaneswar on 03.11.2011. The petitioner did not submit the original prescription along with his writ petition." (emphasis supplied)*

In the counter too there is allegation that the doctor at PHC Konark had not told nor advised for CT Scan.

6. Petitioner's contention is that there was contributory negligence on part of the school leading to death of the child. Hence, reliance on **judgment dated 11thAugust, 2022** (supra), and **orders dated 10th May, 2022** (supra) and **30th September, 2021** (supra) regarding award of compensation at Rs. 10,00,000/- on finding of contributory negligence. Prayer of petitioner is for compensation, modestly estimated at Rs. 5,00,000/- along with further prayer for issuance of such order or direction as may deem fit and proper to the Court. The First Division Bench of this Court, on finding of contributory negligence, had quantified the compensation at Rs.10,00,000/- by **judgment dated 11thAugust, 2022** (supra) and **order dated 30th September, 2021** (supra), the latter followed by this Bench on **order dated 10th May, 2022** (supra). Therefore, the controversy to be decided here is whether or not there was contributory negligence on part of the school, where quantification of the compensation already stands decided.

7. Petitioner has relied on 'treatment status' obtained by writing dated 19thJune, 2012, in answer to query made under the Act of 2005. In that context it is necessary to ascertain the facts. For the purpose, a passage from paragraph 5 of the counter is extracted and reproduced below.

"5. That the brief facts of the case is that Jayaram Jena was a student of Class-XII (Science) in JNV, Konark ***and he was boarder of school hostel****. He was playing cricket along with some of his classmates in the play ground on 02.11.2011 at about 5.00 P.M. The accident was occurred like this. One student named Sriram Pidikaka was batting and Jayram was standing in front of the batsman as a fielder. While batting a ball, the bat slipped from the hand of the batsman and hit to the mouth of Jayaram Jena. He fell down on the ground and without any delay Master Jayaram Jena was taken to the nearby available Konark PHC Hospital escorted by Staff Nurse, House Master and other teachers. Medical Officer on duty started treatment immediately. Doctor gave saline drips, medicines and stitched the injury on the lip and kept under observation. The parents was contacted by Dr.D.K.Mishra,the House Master over phone on 02.11.2011 in evening time to time during the treatment at PHC, Konark and appraised the condition of their son.* ***As per the Doctor's advice the patient shifted to Bhubaneswar***

> ***escorted by Staff Nurse, House Master & other teacher in the same night for further treatment. The patient was admitted in the Hospital on 03.11.2011 at 4.45 a.m and immediately started treatment in ICU and immediately Parents were also contacted over Phone during the admission in Hospital on 03.11.2011 at 4.45 a.m. as the parents were staying at Rayagada, the paternal uncle of the boy namely Mr.Gunamani Jena, cousin brother Mr. Subhas Chandra Jena and some other relatives staying at Bhubaneswar came to the hospital on 03.11.2011 at 5.10 a.m and observed the condition of the boy in the ICU and after all efforts made by doctor,the student Jayaram Jena was not survived, lastly the doctor declared as dead in the morning at about 5.55a.m on 03.11.2011*** *in presence of Mr. Gunamani Jena, Mr. Subhas Chandra Jena & other relatives, Dr. D. K. Mishra, the House Master, Mr. J. S.Mahalik, PGT (English) and Mrs. P.Mohanty,Staff Nurse."*

8. On query from Court, Mr. Pradhan submits, deponent of the additional affidavit, said to be filed on 11th October, 2022, was not in the school on 2nd or 3rd November, 2011. On further query from Court Mr. Pradhan submits, the deponent recently joined the school. As such, evidentiary value of allegations made in said additional affidavit is of little or no effect. So much so, statements made in the counter, were affirmed by the then Principal of the school, a person who had succeeded to the office after the principal, officiating at the material time, had vacated it. Furthermore, under paragraph 7 in the counter, copy of prescription of PHC, Konark stands annexed and marked as R/1. The document at R/1 is ticket for outdoor patients. The ticket is said to be prescription given by the hospital, as it appears to contain particulars of medication. What it does prove is, the school, in event it had handed over original prescriptions to family members of the deceased, as alleged in the additional affidavit, retained copies. In the circumstances, further allegation of expectation that petitioner had managed and procured to obtain modified 'status of treatment' after 7 months under the Act of 2005 from office of PHC, Konark, as the original prescriptions of treatment were handed over to the relatives, is reckless to say the least.

9. In analyzing the facts, it appears ' treatment status' reported by PHC, Konark had recommended CT scan be done on the boy. Court has no reason to disbelieve the 'treatment status', obtained by petitioner on query made under the Act of 2005. There is no necessity to require PHC, Konark to file affidavit evidence since, the information furnished under the Act of 2005 is to be taken as duly done. The referral by the hospital is not disputed and also appears from annexure R/1, relied upon as prescription by the school. Parents of the boy were staying at Rayagada. They were not in the scene post accident, treatment at PHC, Konark and, thereafter, on referral, Sparsh Hospital, Bhubaneswar.

10. It also appears that on the deterioration of condition and referral, the parents were again contacted. In turn the parents contacted paternal uncle of the boy,petitioner's cousin brother and some other relatives staying at Bhubaneswar,

who reached Sparsh Hospital on 3rd November, 2011 at 5.10a.m.. The boy was declared dead on that day at 5:55a.m.. In the circumstances, it is clear that neither the relatives nor the parents participated in causing the boy to receive medical attention post accident. There is also no dispute that CT Scan was not done, when the child had complained of headache, mild or otherwise.

11. Court is convinced there was contributory negligence on part of the school leading to loss of the young life. In the circumstances, following **judgment dated 11thAugust, 2022** (supra) and order **dated 30th September, 2021** (supra), there will be direction upon opposite parties, jointly and severally, to pay compensation of Rs. 10,00,000/- to petitioner within four weeks from date. In event payment is not made, the amount will carry interest at 5% per annum simple, calculated on and from 7th September, 2012, being date of presentation of the writ petition, till date of payment.

12. The writ petition is disposed of.

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2022 (III) ILR - CUT-454

D. DASH, J.

S.A. NO. 320 OF 2001

SAKRA MAJHI (SINCE DEAD) THROUGH HER L.Rs. & ORS. ….. Appellants

.V.

HAMBIRA MAJHI (SINCE DEAD) THROUGH HIS L.Rs. & ORS. ……Respondents

INDIAN EVIDENCE ACT, 1872 – Sections 50 and 60 – Adoption – The parties being Santalas by caste are members of Scheduled Tribe and are governed by the Old and Traditional Hindu law – The provisions of Hindu Succession Act & Hindu Adoption and Maintenance Act etc. have no applicability – Question raised that, which rules of evidence would be applicable to the case of ancient adoption ? – Held, in absence of any rule of evidence in such cases, the evidence on record has to be scrutinized like any other evidence as per the requirements of sections 50 and 60 of the 1872 Act, to find out if the adoption had taken place or not. (Para 13)

Case Laws Relied on and Referred to :-

1. AIR 1970 SC 1286 : L.Debi Prasad v. Smt. Tribeni Devi.
2. AIR 1925 PC 201 : Sri Kanchumarthi Venkata Seetharama Chandra Row v. Kanchumarthi Raju.
3. AIR 1969 SC 1359 : Voleti Venkata Ramarao v. Kesaparagada Bhasararao.
4. (1968) 34 CLT 778 : Jadumani Patra Vrs. Padan Patra
5. AIR 1973 Orissa 160 : Jagannath Mohanty Vrs. Chanchala Bewa.

For Appellants : Mr. S.D Mohanty, P.K Dash.
For Respondents: M/s. Soumya Mishra, G.N. Parida, S. Priyadarsin, A. Agarwal & M. Mohanty

JUDGMENT Date of Hearing :11.08.2022 : Date of Judgment: 22.08.2022

D. DASH, J.

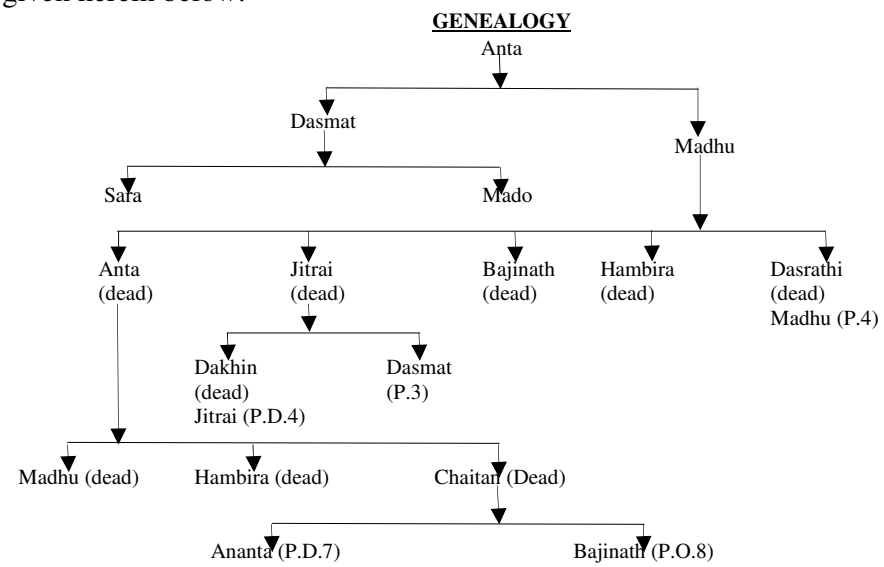
The Appellants, by filing this Appeal, under Section-100 of the Code of Civil Procedure, 1908 (for short, 'the Code') have assailed thejudgment and decree passed by the learned Additional District Judge, Rairangpur in Title Appeal No.09 of 2000. By the same, the Appeal filed by these Appellants being the aggrieved Defendant Nos. 1 and 3 under section 96 of the Code has been dismissed and thereby the judgment and decree passed by the learned Civil Judge (Sr.Division), Rairangpur in Title Suit No. 40 of 1994 have been confirmed. The suit filed by the original Respondent Nos. 1 to 4 for declaration of their right, title and interest over the suit land and recovery of possession as against the Appellants (Defendant Nos.1 and 3) and others having been decreed by the Trial Court, the same has been upheld.

It may be stated at this stage that Appellant No.1 (Defendant No.1) having died during pendency of the Second Appeal, his legal representatives have come on record and so also Respondent Nos.1, 3 and 6 having died, their legal representatives come to be arraigned as parties on being substituted.

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

3. Plaintiffs case is that one Anta Majhi had two sons, namely, Dasmat Majhi and Madhu Majhi. Dasmat Majhi died prior to the year 1927 leaving behind his two daughters, namely, Sara and Mado and his wife had predeceased him. Sara and Mado were given in marriage. It is stated that Sara died without any issue. Mado married to one Karoo. Both Mado and Karoo were living in village Dhana. Karoo died forty years before the suit and Mado died long thereafter on 14.02.1994. It is stated that Madhu died after 1927 settlement leaving behind his five sons, namely, Anta, Jitrai stated as Jitrai-I, Bajinath,

Habmira and Dasarathi. Anta died leaving behind three sons, namely, Madhu, Hambira (Plaintiff No.1) and Chaitan, who died on 30.11.1999. Madhu son of Anta died leaving behind his two sons, namely, Dhaneswar andLal Mohan, who are Defendant Nos. 5 to 6 respectively. Chaitan son of Anta died leaving behind Anta whom we may say Anta-II and Bajinath who are Defendant Nos.7 and 8 respectively. Madhu's son Anta's brothers, namely, Bajinath and Hambira died leaving behind no heir while Jitrai-I died leaving behind two sons, namely, Dakhin and Dasmat. Dakhin died leaving behind his son Jitrai, whom we may say Jitrai-II and Dasmat, who is Plaintiff No.3. Dakhin is dead leaving behind his only son Jitrai-II, who is Defendant No.4. Dasarath also dead leaving behind his only son Madhu, whom we may say Madhu-II, who is Plaintiff No.4. For proper appreciation, the genealogy showing the inter se relationship of the parties is given herein below:-



It is stated that the Defendants are in no way related to the Plaintiffs and they are completely strangers to the family of the common ancestor, Ananta Majhi. The parties are members of the Scheduled Tribe Community being Santal by caste and as such they are governed by Traditional Hindu law when the provisions of Hindu Succession Act and other codifications are not applicable to them. After the death of Anta, his son Dasmat came to village Dhana and permanently settled there with his family. He acquired M.16-02-0-04 Gandas of land and possessed the same. This has been described in schedule 'B' of the plaint. These lands are recorded in his name as per the record of 1906 settlement under Khata No. 16. After the settlement of 1906, his brother Madhu came and wanted to settle in that village. Dasmat allowed him to live with him jointly.

Both of them cultivated landed properties jointly. After some years, they partitioned the properties between themselves and Madhu got about M. 8-10-15-12 Gandas of land towards his share, which has been described in schedule C of the plaint. Dasmat after partitionacquired about 4 manas of lands separately and possessed the same. The lands allotted to Madhu were recorded in his name under Khata No.43 as per the record of 1927 settlement. The lands allotted to Dasmat along with the lands acquired by him after partition stood recorded in his name under Khata No.19 in the records of 1927 settlement. These lands have been shown in schedule 'D' of the plaint. These lands have been jointly recorded in the name of Mado daughter of Dasmat and Defendant Nos.1 and 2 under Hal Khata No.58 of current settlement which has been described in schedule 'D-1' of the plaint. Mado daughter of Dasmat married Karoo Majhi of Purunapani and were staying in the house of Dasmat and as such cultivating the suit lands. Karoo died forty years prior to the suit leaving no issue. So, it is said that Mado faced great difficulties and inconvenience in possessing all the landed properties of her father. For that, she requested her husband's brother, i.e., Makru's son to remain in her house to help her in cultivation. As proposed by karu, she mutated ac.1.26 dec. of land in her name alone and the rest of the land in the name of Karu. Since then, Karu stayed in the house of Mado to help her in cultivation of the lands. Mado gave Karu in marriage and allowed Karu and his wife to remain with her. Defendant Nos.2 and 3 were born in the house. Karu died about twenty years before the suit leaving behind his widow Defendant No.1 and sons, the Defendant No.2 and 3. After death of Karu, his widow and sons helped Mado in cultivation of the landed properties till her death on 14.02.1994.

During the current settlement operation Mado being influenced by Defendant Nos. 1 to 3 got all the land of her father recorded jointly in her name as also in the name of the Defendant Nos.2 and 3 jointly in hal Khata No. 59 and after the death Mado, the Plaintiffs requested theDefendants to leave the house and lands of Mado and deliver possession of schedule 'B' land to them which the Defendants refused. They, on the other hand, claimed title over the lands as those have been recorded in their names in the record of right of the current settlement. In view of such attitude of the Defendant Nos. 1 to 3.the Plaintiffs filed the suit to declare them as the rightful owner of the suit land and for recovery of possession of schedule 'D' land.

4. The Defendant Nos. 1 to 3, 7 and 8 in their written statement have stated that Karoo and Mado had no issue. So, they had adopted Karu son of Makru who happens to be the brother of Karoo. The adoption is said to have taken place when Karu was seven to eight years old. There was giving and taking ceremony and it was performed by the natural parents as well as the adoptive parents, who

discharged their respective roles herein. Hence, Karu remained as the adopted son of Mado and Karoo. It is stated that thus Mado and Karoo performed the marriage of Karu in their house. The Defendant Nos.2 and 3 were born in the house. Such adoption of Karu was known to all the Plaintiffs and their forefathers as also the persons of the locality and they had accepted that status of Karu and there was recognition of Karu as the adopted son of Mado and Karoo. So, it is stated that the Defendants have the right, title, interest and possession over the suit land and the lands have been rightly recorded jointly.

5. On the above rival pleadings, the Trial Court in total framed eight issues. The Trial has answered the crucial issue, i.e., Issue No.6 as to whether Karu had been adopted by Mado and her husband Karoo in the negative. This has decided the fate of the suit in finally saying that the Defendants have no right, title and interest over the suit land and the Plaintiffs have been held to be having the right, title and interest and entitlement to possess the land described in schedule 'D' of the plaint.

6. Upon hearing learned counsel for the Appellants and the learned counsel for the Respondents, the substantial questions of law as framed on 05.07.2002 for being answered in this Appeal stood substituted by the following:-

> "Whether the Courts below are not right in holding that Karu is not the adopted son of Mado and Karoo and when by appreciating the evidence on record in a perverse manner and without being alive to the settled principles of law holding the field of adoption with regard to establishment of such a claim; such a finding has been returned by the Courts below against the adoption; the same if can be sustained?"

After the above exercise, the learned counsel for the parties had been heard at length on that question.

7. Learned counsel for the parties submitted in chorus that the parties being Santalas by caste are members of Scheduled Tribe and as such are governed by the Old and Traditional Hindu law and the provisions of Hindu Succession Act, Hindu Adoption and Maintenance Act etc. have no applicability in the respective field for them.

8. Learned counsel for the Appellants submitted that although the finding of the Courts below is concurrent against the claim of the Defendants in holding that Karu is not the adopted son of Mado and Karoo, yet the evidence on record being gone through, it would appear that the same is the outcome of perverse appreciation. He further submitted that it being a case of ancient adoption, the Courts below ought to have given importance to the evidence on record with regard to the dealings between the parties and their relationship as also how the properties of Mado and Karoo were dealt. He submitted that the overwhelming

evidence being there on record that Karu had been recognized and accepted by the members of the locality and all their relations as the adopted son of Mado and Karoo, the Courts below oughtto have ruled in favour of adoption and not negated the claim of adoption as projected by the Defendants. He further submitted that the oral evidence receiving corroboration from the documentary evidence when wholly probabilise the case of adoption of Karu by Mado and Karoo, the of adoption of Karu by Courts below ought to have answered that Issue No.6 against the Plaintiff.

9. Learned counsel for the Respondents, on the other hand, submittedall in favour of the findings of the Courts below. According to him, the Courts below upon elaborate discussion of evidence on record and their examination from all angles on proper analysis when have arrived at a conclusion that the Defendants have failed to prove the factum of adoption of Karu by Karoo and Mado and when absolutely no perversity surfaces therein, it is not permissible for this Court to tinker with the same. He submitted that the claim of the Defendants as to adoption of Karu by Mado and Karoo when fails, the Plaintiffs suit is bound to be decreed and that has been rightly done by the Courts below, as according to him, the Plaintiffs as the reversionaries are entitled to the property in schedule 'D'.

10. 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. I have perused the depositions of the witnesses and the documents admitted in evidence and marked exhibits from the side of the parties.

11. Before proceeding further in the exercise of searching out the answer to the substantial question of law; it would be appropriate to have a look over the settled principles of law holding the field on the concerned subject.

The law is fairly settled that the evidence in support of an adoption must be sufficient to satisfy the very grave and serious onus that rests upon any person who seeks to displace the natural line of succession by alleging an adoption. The fact of adoption must be proved in the same way as any other fact, but where there is a lapse of long period between the date of adoption and the time when it is being questioned, every allowance for the absence of evidence to prove such fact must be favourably entertained, as after the lapse of a long period, direct evidence to prove adoption may not be available.

The Hon'ble Supreme Court in the case of L. Debi Prasad v. Smt. Tribeni Devi, AIR 1970 SC 1286, have observed :-

> "In the case of all ancient transactions, it is but natural that positive oral evidence will be lacking. Passage of time gradually wipes out such evidence. Human affairs often have

> to be judged on the basis of probabilities. Rendering of justice will become impossible if a particular mode of proof is insisted upon under all circumstances. In judging whether an adoption pleaded has been satisfactorily proved or not, we have to bear in mind the lapse of time between the date of the alleged adoption and the date on which the concerned party is required to adduce proof. In the case of an adoption said to have taken place years before the same is questioned, the most important evidence is likely to be that the alleged adoptive father held out the person claiming to have been adopted as his son; the latter treated the former as his father and their relations and friends treated them as father and son. There is no predetermined way of proving any fact. A fact is said to have been proved where after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. Hence if after taking an overall view of the evidence adduced in the case, we are satisfied that the adoption pleaded is true, we must necessarily proceed on the basis, in the absence of any evidence to the contrary, that it is a valid adoption as well."

The aforesaid view of the Supreme Court has been followed in a number of cases of this Court and other High Courts. The aforesaid Court and other High principle only regulates the mode of proof of the factum of adoption. In the decision in the case of Sri Kanchumarthi Venkata Seetharama Chandra Row v. Kanchumarthi Raju, AIR 1925 PC 201, which has been approved by the Hon'ble Supreme Court in the case of Voletib Venkata Ramarao v. Kesaparagada Bhasararao, AIR 1969 SC 1359, it has been authoritatively said that in the case of an ancient adoption, it stands to reason that after a very long term of years and a variety of transactions of open life and conduct upon the footing that the adoption was a valid act, the burden must rest heavily upon him who challenges its validity. The appellants in that case relying upon the aforesaid principles and had contended that the year of adoption as available from the evidence on record being 1909, was not possible to prove the factum of adoption by direct evidence.

12. The Defendants in the written statement have pleaded that Karu the father of Defendant Nos.2 and 3 and husband of the Defendant No.1 had been adopted by Karoo and Mado when he was seven to eight years old. The Defendant No.1, who happens to be the wife of Karu whose adoption is under challenge in the year 1994 was aged about 40 years and when her husband was about seven to eight years old, the adoption is said to have taken place. So, it can be well inferred that the adoption as projected by the Defendants was about 40 years prior to the suit. It is further stated that there was giving and taking ceremony in the said adoption and that was in presence of the natural parents as well as the adoptive parents.

13. The evidence of the present case, however, being gone through, it is seen that the Defendants upon whom the initial burden of establishing the alleged adoption lies have examined D.W.2 as a witness to the said ceremony of giving and taking as to have witnessed the same. That being so, on the face of the well

settled law, the relaxation permissible in case of an ancient adoption is not is not available to be applied in this case and the Defendants cannot take the advantage of the relaxation. When it is said by the Defendants that all those who were present at the time of adoption of Karu are dead and not available to be examined in the case, D.W.2 has claimed to have witnessed the adoption ceremony. Reliance is placed on the decisions of this Court in case of *Jadumani Patra Vrs. Padan Patra* (1968) 34 CLT 778 and *Jagannath Mohanty Vrs. Chanchala Bewa;* AIR 1973 Orissa 160. In such circumstances, the rule of evidence applicable to the case of ancient adoption would not, in my opinion, be available. In such cases, the evidence on record has to be scrutinized like any other evidence to find out if the adoption, in fact, had taken place.

This D.W.2's evidence is to the effect that Mado was the daughter of Dasmat and Karoo was her husband. He has stated that Karoo was the illatum son-in-law of Dasmat and as such was residing in the house of Dasmat as Dasmat had no male issue. Admittedly, Mado and Karoo had no issue. Karu is stated to be seven to eight years of old at the time of adoption and this D.W.2 states that in that adoption Makru handed over his child to Mado and Karoo when Mado gave a new cloth to the child and the name of her son was given as Karu and since then Karu addressed Karoo as his father and Mado as his mother and they all remained in the house of Mado and Karoo. The veracity of his evidence as to adoption is seen to have been shaken during cross-examination. He states to be having no knowledge about the social custom, living of the parties and performance of different ceremonies in the family of the Plaintiffs. He states that since he hails from upper class, he has never taken any meal in the house of the Plaintiffs as they belong to lower caste. It is stated that Karoo died, when he was young and Mado being unable to cultivate her lands had approached Makru's son to come to her house to help her for cultivation. The witness when claims to have seen the performance of giving and taking Ceremony with Mado and Karoo on one side and Makru and his wife on the other, he is not able to say the name of any other then present at the relevant time. In such state of affair, the First Appellate Court appears to be wholly right in assessing the evidence and finding out that as per his evidence, Mado having brought Karu to help her in cultivation after the death of her husband Karoo appears to be more probable. So, the Courts below are right in holding that his evidence cannot be so accepted to say that the factum of adoption of Karu by Mado and Karoo has been established. The other witness D.W.3 is none other than the Defendant No.3. So his evidence has no much of bearing on the factum of actual giving and taking ceremony in the said adoption. The next witness D.W.4 has gone one step ahead of D.W.2 in saying that the adoptive father first washed the feet of the adopted son, which too is not deriving any support from

the evidence of D.W.2. With such evidence on record when no further satisfactory evidence is forthcoming to prove the relationship of Karoo and Madoo with Karu as adoptive parents and adoptive son in fulfilling the requirements of sections 50 and 60 of the Evidence Act, this Court is not in a position to find any fault with the conclusion of the Courts below in repelling the case/claim of the Defendants that Karu had been adopted by Karoo and Mado and as such is not the adopted son entitled to succeed to the properties of Mado.

In view of the aforesaid, the substantial question of law stands answered against the claim/case of the Defendants, which run to affirm the findings of the Courts below that Karu had not been adopted by Karoo and Mado. When such is the conclusive finding, it has to be held that the Plaintiffs have the right, title and interest over the properties described in schedule 'D' and as such they are entitled to possess and recover the possession of the same.

14. In the result, the Appeal fails. No order as to cost.

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2022 (III) ILR-CUT-462

D. DASH, J.

R.S.A. NO. 82 OF 2018

SHYAM SUNDAR MOHARANA & ORS. … ..Appellants

.V.

SUNIL KUMAR SAHOO & ORS. …..Respondents

TRANSFER OF TITLE – Whether physical delivery of possession of immovable properties is the legal precondition or *sine qua non* for due transfer of the title from the hands of the vendors to the vendees? – Held, No – That only stands as a surrounding circumstance so as to be viewed and for being appreciated in its proper perspective where the execution of the deed is under challenge on the ground that it was obtained by fraud, misrepresentation etc. (Para 11)

Case Laws Relied on and Referred to :-

1. AIR 1966 SC 629 : Atyam Veerraju & Ors. Vrs. Pechetti Venkanna & Ors.
2. AIR 2002 SC 136 : Rajendra Tiwary Vrs. Basudev Prasad & Anr.

For Appellants : M/s. A.R. Dash, Sr. Advocate, S.K. Nanda-1, B. Mohapatra, K.S. Sahu, A. Mahanta.

For Respondents: M/s. B.G. Mishra, A. Routray, A. Routray, R.R. Barik.

JUDGMENT Date of Hearing : 12.08.2022 :: Date of Judgment : 06.09.2022

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, Cuttack, in RFA No. 193 of 2011.

By the same, the Appeal filed by the present Appellants being the unsuccessful Defendants in Title Suit Nos.123 of 1990 under Section-96 of the Code has been dismissed and thereby, the judgment and decree passed by the learned Civil Judge (Junior Division), 1st Court, Cuttack in the above noted suit have been confirmed.

The Respondents pursuing the suit as the Plaintiffs on the death of the sole Plaintiff have been successful in getting the decree of delivery of vacant possession with the direction that the Appellants (Defendants) would vacate the land measuring Ac.0.026 decimals of Plot Nos. 953 and 944 by paying damage @Rs.20/-per decimal from the date of filing of the suit till delivery of possession.

Gopal Chandra Sahoo and his wife as the Plaintiffs had filed the suit arraigning the Appellants and others as the Defendants. The prayer in the suit is for eviction of the Respondents (Defendants) from the suit land and damage. The suit land measures Ac. 0.123 decimals and 3 links under Plot no. 953 appertaining to Khata No. 565 and Ac.0.065 decimals and 8 links under Plot No. 955 appertaining to Khata No. 93 of mouza Bahar Bisinabar.

The Trial Court having decreed the suit when has directed the Appellants (Defendants) to deliver vacant possession of the land measuring Ac.0.026 decimals under Plot No. 953 and 954 to the Respondent (Plaintiffs) paying damage @Rs.20/- per day from the date of filing of the suit till eviction; the same has been confirmed in the First Appeal.

It may be stated here that sole Plaintiff having died during the suit, his legal representatives coming to be substituted as the Plaintiffs have prosecuted the suit and they also contested the First Appeal and thus are the Respondents in this Appeal. The Appellants Nos. 2 to 4 have come on record in place of their predecessor-in-interest namely, Sankar Moharana, who was the Defendant No. 2 and Appellant No.2 before the Trial Court and First Appellate Court respectively when his death took place during pendency of First Appeal.

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. Plaintiff's case is that one Rehman Khan was exclusive owner of the suit properties as well as some other properties. After his death; there was a partition of his properties amongst his sons. The said partition was evidenced by registered deed of partition dated 07.09.1961. The suit property was allotted in part to his son Naim Khan and rest to the other son Atar Khan. These two brothers then leased out the suit properties to one Hadibandhu Moharana, the predecessor-in-interest of Defendant Nos.2 to 8 and Shamsundar Moharana, the Defendant No.1 for a period of 20 years. They had executed the Registered Lease Deed on 13.05.1967. The period of lease commenced on and from 01.10.1966. It is stated that the Plaintiffs fixed the annual rent of schedule premises at Rs.1160/-. However, the lessors were to pay Rs. 21,000/- to the lessees though rent for 20 years came to Rs. 23,200/-. It was stipulated that the lessees would pay Rs.110 for 20 years before the end of March every year to the lessors. The lessees were to handover possession of the suit land to the lessors on expiry of the period of 20 years. It was also stated that in the event, the suit property would be subleased by the lessees, those inducted sub-lessees would be bound by the terms and conditions of the deed of lease.

It is further stated that there after by registered sale-deed dated 10.02.1968, Naim Khan sold his share of the suit property to the Plaintiff No.2 for consideration of Rs.15,000/-. Similarly under registered sale-deed dated 24.05.1968, Atar Khan also sold his share over the suit property to Plaintiff No.1 for consideration of Rs. 15,000/-. Having purchased the properties under those two registered sale-deeds, the original Plaintiffs claim to have become the owners of the suit properties which is succeeded by these Plaintiffs. It is stated that the tenant i.e. the Defendant No.1 had sublet portion of the suit property to Defendant No.9 with a rent of Rs.450/- per month. The Defendant No.1 also sublet the suit properties to Defendant No.10 for Rs.250/- per month. It is asserted that the Defendant No.1 and other Defendants had no right to receive rent from the sub-lessees as because their lease stood expired on 30.09.1986. After expiry of the lease, the possession of the Defendants including those sub-lessees over the suit property became unlawful. In spite of repeated demand, when they did not handover the possession of the suit property to the original Plaintiff who is the owners and as such in constructive possession over the suit properties in the year, 1981, the original Plaintiff had filed one SCC suit against the Defendants for recovery of rent of three years amounting to Rs. 330/-. The suit was dismissed on 17.08.1981. The Defendants are bound to vacate the possession of the suit property in favour of the Plaintiffs and liable to pay the damage. Since they did not do so; the suit has come to be filed.

4. The Defendant Nos. 1 to 5 in their written statement have stated that the suit property belonged to Naim Khan and Atar Khan and it was laying fallow. Hadibandhu Maharana and Shamsundar Maharana, (Defendant No.1) took lease of Ac.0.026 decimals of land out of Plot No.953 and 954 and they constructed five pucca rooms having tin roof with the consent of the lessors. They stated that there was a decision that the lessees would continue their business for twenty years and would adjust the investment of Rs.21,000/- and pay Rs.110/- by the end of the March every year. The lease-deed was registered. Subsequently, in an unfortunate incident Naim Khan received burn injuries for which his brother Atar Khan for the treatment took advance of Rs.2750/- on 28.10.1967 and Rs. 5250/- on 07.11.1967 by granting the receipts and the lease was extended to 25 years. The Plaintiffs without the knowledge of the Defendants have purchased the property from Naim Khan and Atar Khan including the portions of the suit property under the possession of the Defendants. It is stated that possession of the suit property was never delivered to the Plaintiffs nor attornment as to said relationship was made and thus the sales were not acted upon. Plaintiffs were not even aware about the interest of the Defendants involved in respect of the suit property till they filed show-cause in CMC No.419 of 1983. It is stated that no consideration money was paid by the Plaintiffs nor they had taken delivery of possession. The Registered sale-deeds are said to have not been acted upon. The Plaintiffs are said to be having no locus standie to file the suit, i.e. Title Suit No.98 of 1972, which concerns with another properties and that had been decreed. It is further said that it was the promise from Naim and Atar, that if the property under possession of the Defendants would in future be sold for necessity, the sale would be to the Defendants. The possession of the Defendants was already running adverse against Naim and Atar by the time the Plaintiffs purchased the suit land from them. In the alternative, it is thus stated that the Defendants have perfected their title by way of adverse possession being in possession since 13.05.1967. They state that the Plaintiffs have no manner of right, title and interest over the suit property. They assert that at no given point of time notice under section- 106 of the Transfer of Property Act had been served on them.

5. On the above rival pleadings, the Trial Court framed seven (7) issues.

6. On issue no.5 as to the validity of the registered sale-deeds dated 14.02.1968 and 25.05.1968 (Exts. 3 & 4), the Trial Court has answered the same in ruling those registered sale-deeds as legal and valid in the eye of law. Then the issue with regard to the grant of the reliefs as claimed by the Plaintiffs has also been answered in favour of the Plaintiffs by negating the claim of the Defendants that they have acquired title by adverse possession. The suit having

been held to be maintainable and for filing the same it being held that there was the cause of action, the Trial Court has decreed the suit.

7. The Defendants being aggrieved by the same having carried the First Appeal have failed in that move.

8. The Appeal has been admitted and answered the following questions of law:-

> 1) Whether the Courts below in the facts and circumstances of the case and on the basis of evidence on record ought to have held the suit as laid for the reliefs claimed as not maintainable?
>
> 2) Whether the Courts below have erred in law by decreeing the suit at the instance of the plaintiffs who after their purchase of the land in the year, 1968 have sold the same in favour of a stranger to the suit vide Exts. F and G in the year, 1981 only retaining an area Ac.0.007.8 links?

9. Learned Counsel for the Appellants submitted that the Courts below in view of the evidence on record ought to have held that the transactions under the two registered sale-deeds projected by the Plaintiffs as the documents of title which have been admitted in evidence and marked Ext.3 and 4 are sham transactions. He further submitted that when the Plaintiffs admit that they are not in possession of the suit property and the Defendants are possessing the same since the time of lease, there being no delivery of possession pursuant to the sale- deeds taken by the Plaintiffs, those sale-deeds ought not to have been looked into for the purpose of passing of title over the suit property to the hands of the Plaintiffs. He further submitted that as per the case of the Plaintiffs, the Defendants are in possession of the suit property since 13.05.1967 and despite expiry of period of lease, when they are continuing to possess the suit property in open and peaceful manner till the filing of the suit and it was to the knowledge of all and that they have possessed for upward of 12 years, the Courts below ought to have held that the Defendants have acquired the title over the suit property by way of adverse possession and the title of the true owners even though so assumed to have come to the hands of Plaintiffs, in respect of the suit land has stood extinguished.

10. Learned Counsel for the Respondents submitted that non-delivery of possession of the property sold pursuant to the registered sale-deeds does not invalidate the sale and arrest the passing of title from the hands of the vendors to the vendees. He submitted that when admittedly the possession of the Defendants from the very beginning under the deed of lease is permissible it having not been pleaded and proved as to when after the expiry of the period of lease, the same became adverse and from when they possessed the suit property

exhibiting hostile animus claiming the ownership of the same unto themselves and denying the title of the true owners, the claim of the Defendants that they have acquired title over the suit land by adverse possession has rightly been repelled. He submitted that the nature of possession of the lessees and sub-lessees even after expiry of the period of lease does not get automatically converted as hostile and said possession is nothing but precarious and at the mercy of the true owner.

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

The claim of title over the suit property by the Plaintiffs is founded upon or stands on the base of two registered sale-deeds, Exts. 3 & 4, which are dated 10.02.1968 and 24.07.1968 respectively. They assert to have purchased the property from the original owners namely Naim Khan and Atar Khan who are the lessors of the contesting Defendants. Admittedly, pursuant to these sale-deeds there has been no physical delivery of possession of the properties by the vendors to these Plaintiffs who are the vendees and the vendors were then not capable to do so being not in physical possession. It is stated by the Defendants that by the time, the properties were purported to have been sold by those two registered sale-deeds, their possession was running adverse and it was to the knowledge of the true owners.

Factum of physical delivery of possession of immovable properties is not the legal precondition or *sine qua non* for due transfer of the title from the hands of the vendors to the vendees. That only stands as a surrounding circumstance so as to be viewed and for being appreciated in its proper perspective where the execution of the deed is under challenge on the ground that it was obtained by fraud, misrepresentation etc or that it was not a sale but transaction of another nature or where the vendor or person claiming through him/her questions that there was no passing of title for non-payment of consideration as promised to be paid and it was so withheld. Here the Defendants do not deny the title of the vendors of the Plaintiffs over the suit property and in fact, they are estopped from doing so being the lessees under them. The said vendors having thus sold the suit properties which was in possession of the Defendants being the prior lessees, who were then in possession as tenants holding over or tenant at sufferance,the passing of title in the eye of law does not get arrested. Admittedly, the Defendants have entered into possession of the property under their status as lessees which is permissive. They have not pleaded and proved that after expiry of the period of lease as to when they having surrendered the possession of the property to the lessors and re-entered upon the same and began to possess

it on their own right totally shunning their earlier status and character and then asserting ownership to themselves and denying the title of the erstwhile lessors. Thus the possession of the Defendants either as tenants holding over or tenant as sufferance continued and the Plaintiffs being the owners have stepped into the position of the lessors who are their vendors by virtue of their purchase. In view of the aforesaid, the very claim of the Defendants as to acquisition of title by way of adverse possession falls flat.

12. It has been held in case of ***Atyam Veerraju and Others Vrs. Pechetti Venkanna and others***; AIR 1966 SC 629 that as per Section. 108(a) of the Transfer of Property Act, the last duty of lessee is to handover vacant possession of the property to the lessor on the termination of the lease in any manner thereafter. If therefore, the property is in the possession of a sub-lessee the lessee must turn him out, otherwise the landlord may maintain a suit for ejectment and recover damages from the lessee. The tenant cannot deny the title of the landlord nor can he prescribe title unto himself.

13. In addressing the connection of the Defendants-Appellants that the leasehold property in question being only 0.026 dec. of Plot No. 953 & 954 and as per the schedule of the plaint, the suit property being larger than the lease hold property, the Plaintiff is not entitled any relief; the learned Court below considering this question came to the conclusion in para-9 of its judgment which are quoted below for reference.

> xxxx xxxx xxxx xxxx xxxx
> *"However, it is admitted by the Defendant Nos. 1 to 5 that they are possessing an area of Ac.0.026 dec. of leasehold property as per Ext.2 which has been purchased by the Plaintiff from their lessors."*

The Trial Court has relied upon the judgment of the Hon'ble Supreme Court reported in case of ***Rajendra Tiwary Vrs. Basudev Prasad & Another***; AIR 2002 SC 136, wherein it has been held:-

> *"where the relief prayed for in the suit is a larger relief and if no case is made out for granting the same but the facts, as established, justified granting of a smaller relief, Or.7 Rule-7 permit granting of such a relief to the parties."*

The Trial Court relying upon the aforesaid principles further held thus:-

Therefore, in view of the aforesaid ruling of the Hon'ble Apex Court, the Plaintiffs are entitled for the relief with respect to Ac.0.026 dec. of leasehold property out of suit Plot No. 953 & 954 as per Ext.2. The Defendants have filed certified copy of the RSSD No.5898, dated 31.08.1981 (Ext.F) and certified copy of RSD No. 5896, dated 31.08.1981(Ext.G) from Ext. F & G. It reveals that Gopal Chandra Sahoo and Mina Kumari Sahoo have alienated some portion

of the land to one Debendranath Das vide Ext.3 and Ext.4. Mina Kumari Sahoo and Gopan Chandra Sahoo purchased an area of Ac.0.188 dec. and Ac.0.0151.8 dec. Hence, the balance land with them is Ac.0.036.8 dec. On the other hand, the area of the alleged leasehold property is Ac.0.026 dec. It is admitted by D.W.1 that Mina Kumari Sahoo and Gopal Chandra Sahoo have purchased the portion of suit land possessed by himself. Also it is stated by D.W.1 during his cross-examination has expressed the inability to say if the land possessed by him was sold by Gopal Chandra Sahoo and Mina Kumari Sahoo to Debendranath Das. He states to be possessing total area of Ac.0.026 dec. from out of Plot No.953 & 954."

From the above testimony of D.W.1 and from the aforesaid discussion it can be safely concluded that the lease hold property of an area of Ac.0.026 dec. under the possession of the Defendants, has been purchased by the Plaintiffs. Also the said area has not been sold by Mina Kumari Sahoo and Gopal Chandra Sahoo to anyone.

The possession of the Defendants in respect of the suit properties in this case thus continues to be permissive and the Plaintiffs have rightly been found to be the title holders and rightful owners of the same. This Court finds the aforesaid exercise undertaken by the Trial Court is well in order and that view taken by the Courts below must receive acceptance.

For the aforesaid discussions and reasons, this Court finds no such infirmity with the above and therefore the above contention of the Defendants stand is hereby repelled. The substantial questions of law are answered accordingly.

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

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2022 (III) ILR-CUT-469

BISWANATH RATH ,J.

W.P.(C). NO. 19989 OF 2022

ASHOK KUMAR GEDI ..... Petitioner

.V.

JYOTRIMAYEE BEHERA & ORS. .....Opp.Parties

CODE OF CIVIL PROCEDURE, 1908 – Order VI, Rule 17 – Election dispute filed under the provision of Gram Panchayat Act – There is inherent mistake involving an election dispute in-as-much as claiming

relief of replacing particular villages under the Grama Panchayat – Whether an amendment petition is entertainable replacing the villages under the Panchayat in the case of election dispute ? – Held, No.

(Para 6)

Case Laws Relied on and Referred to :-

1. 1998 (II) OLR 43 : Surekha Dash Vs. Civil Judge (Junior Division) Jajpur & Ors.
2. 2005 (II) OLR 628 : Dibakar Patra Vs. Jatadhari Mishra & Ors.
3. AIR 1997 Orissa 204 : Umaballav Rath Vs. Maheswar Mohanty & Ors.
4. 2007(Supp II) OLR 627 : Kalandi Mallik Vs. Sricharan Sethy & Ors.
5. AIR 1957 SC 454 : Harish Chandra Bajpai vs Triloki Singh.

For Petitioner :Mr. M.K.Panda, S.R.Nayak, S.S.Chhualsingh & M.Mohanty

For Opp.Parties:Mr. A.Rath & S. Rath (For O.P.No.1)
Mr. U.K.Sahoo, Addl. Standing Counsel.

JUDGMENT Date of Judgment : 25.08.2022

BISWANATH RATH , J.

This writ petition involves allowing an amendment application under Order 6 Rule 17 of the Code of Civil Procedure involving election dispute filed under the provisions of Orissa Gram Panchayat Act. Bringing the application, Mr.Panda, learned counsel for the petitioner taking this Court to the nature of dispute involving an election petition contended once there is inherent mistake involving an election dispute inasmuch as claiming relief involving particular villages under Panchayat, there cannot be amendment entertainable replacing the villages under Panchayat which involved in the election dispute. Taking this Court to paragraph-4 of pleadings in the election dispute and reading through the same together with the proposed amendment available at page-25 of the brief, Mr. Panda, learned counsel for the petitioner contended that paragraph-4 discloses clear pleading that opposite party no. 1 insisting 6 P.S. Members of particular villages such as Chandanpur Bari, Madhusudanpur, Ratalanga, Arangabad & Amathpur G.P., who were very much hale hearty on that day represented the E.O., that they are not capable to cast their votes but however by thus proposed amendment attempt is made by the election petitioner to change the name of the villages involving the Grama Panchayat. For such a drastic change, it is alleged attempt is made in the election petition to change the nature and character of the dispute. Mr. Panda, learned counsel thus contested the allowing of amendment application.

2. Mr. Rath, learned counsel appearing for the contesting opposite party however taking to the nature of change through the proposed amendment contended that it is not a material defect prejudicing the case of the opposite party therein in the event such defect is cured. Mr. Rath, learned counsel further

also contended that unless the proposed amendment is allowed, the effect of the election petition will go away and there will be automatic dismissal of the election petition depriving the election petitioner from his dispute exercise. Taking this Court to the proposed amendment and the observation of the trial court allowing such application, Mr. Rath, learned counsel contended that amendment being formal in nature has been rightly allowed requiring no interference by this Court.

Further in course of hearing, Mr. Rath, learned counsel contended that the petitioner was in doubt with regard to the name of the villages mentioned and the petitioner was still awaiting for the correct information through his attempt under the R.T.I. Act provisions. Mr. Rath, learned counsel thus contended the amendment was possible only after the information comes through the development under the R.T.I. application. To this submission of Mr.Rath, counsel for petitioner opposed the same saying that in the event petitioner was waiting for correct information on the villages involved, nothing prevented the petitioner to keep his scope of giving names of particular villages later on by bringing such disclosure through specific pleading.

3. Both parties relied on citations rendered in the case of ***Surekha Dash Vs. Civil Judge (Junior Division) Jajpur & Ors****, 1998 (II) OLR 43,* ***Dibakar Patra Vs. Jatadhari Mishra & Ors****, 2005 (II) OLR 628,* ***Umaballav Rath Vs. Maheswar Mohanty & Ors****, AIR 1997 Orissa 204* and in the case of ***Kalandi Mallik Vs. Sricharan Sethy*** *& Ors.2007(Supp II) OLR 627.*

4. Considering the rival contentions of the parties, this Court finds the moot question involved herein even assuming the election proceeding involved herein has the scope of Order 6 Rule 17 of the Code of Civil Procedure, being considered, looking to the nature of amendment since attempted for correcting an inherent mistake, if permissible in the eye of law? This Court here takes into account the pleadings already exist the election petition in paragraph-4,which reads as follows:

> "4) That while the voting process was going on unfortunately all on a sudden O.P.No.1 insisted six P.S. Members of Chandanpur Bari, Madhusudanpur, Ratalanga, Arangabad & Amathpur G.P. who were very much hale hearty on that day presented the E.O. i.e. O.P.No.2 that they are not capable to caste their votes and thus their representatives be permitted to caste their votes on their behalf to which the present petitioner and some other voters objected."

Proposed amendment moved by the petitioner therein remains as follows:

> "That in Para-4 of the election petition 'Ratnagiri, Sahupada & Mandari' be written in place of Chandanpur, Madhusudanpur & Amathpur."

Reading together both the above paragraphs, this Court finds mistake committed through the pleading in paragraph-4 cannot be considered to be a simple typographical error. Keeping in view that the contesting opposite party herein moved an election petition, it is unbelievable even the petitioner is making his ground involving mal functioning in a election petition giving wrong description of the villages. For the opinion of this Court, the mistake appears to be inherent mistake by allowing change in the village names after election dispute period is over which will be amounting to extending filing of election dispute beyond the time stipulation prescribed in the Grama Panchayat Election Rules. Finding the election dispute involved inherent mistake and amendment being brought after 15 days restriction from filing the election dispute of this nature is impermissible in the eye of law. As observed earlier in the event election petitioner was unaware of names of villages so relied and he was waiting to know the names of villages in a development under the RTI exercise, nothing prevented the Election Petitioner from not disclosing the names of villages and leaving a statement that his right to giving the names of villages to be brought out subsequent stage but dependant on his RTI exercise. Reading from the statement made in paragraph-4 it appears with close mind it already indicated the particular villages involved therein. This Court discard the plea of Mr.Rath, learned counsel on the premises of obtaining information through the R.T.I. development.

5. This Court here takes into account the decisions cited by respective parties and finds from the case of ***Surekha Dash*** *(supra)* that amendment involved therein had the reference of pleading by way of amendment was already there and the amendment attempted was relevant. Facts therein does not fit to the case at hand. The decision in the case of ***Dibakar Patra*** *(supra)* rather supports the case of the petitioner. So far as the case of ***Umaballav Rath*** *(supra)* is concerned, this is a decision involving an election dispute under Representation of the People Act.1950 and has no application to the case at hand. In the case of ***Kalandi Mallik*** *(supra)* since stand on different facts, does not apply to the case at hand. This Court from the case of ***Harish Chandra Bajpai vs Triloki Singh,*** *AIR 1957 SC 454* finds in similar situation Hon'ble Apex Court held " its powers to amend a petition under Order VI, Rule 17 of Code of Civil Procedure could not be exercised so as to permit new grounds of charges to be raised or the character of the petition to be so altered so as to make it in substance and a new petition, when a fresh petition on those allegations would be time barred". This decision is squarely applicable to the case of the petitioner at hand.

6. Perusal of the reasoning assigned in the impugned order, for the support of law of land to the case of the petitioner and for clear restriction involving limitation bringing such disputes, this Court records that there is casual attempt by the trial court in considering such amendment application particularly involving election dispute. For there is mechanical disposal of the amendment application and allowing such application in illegal exercise of power, almost involving an attempt to extend the filing period of election dispute even there having no such power, this Court interfering in the order at Annexure-5 sets aside the same.

7. In the result the writ petition succeeds. No cost.

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2022 (III) ILR-CUT-473

BISWANATH RATH, J.

W.P.(C). NO. 23622 OF 2022

JAYARAM NAYAK ….. Petitioner

.V.

BALARAM SWAIN & ORS. .....Opp.Parties

ODISHA GRAMA PANCHAYAT ACT, 1964 – Sections 30 & 31 – The Election Tribunal allowed the application for condonation of delay filed by the defeated candidate without giving an opportunity of hearing to the contesting Opp.Party – Whether the Election Tribunal is justified in taking a decision on the question of condonation of delay ex-parte ? – Held, No – The impugned order set aside, and remitted back to the Election Tribunal for re-adjudication on the question of delay after providing opportunity of hearing to the Petitioner herein. (Para 15)

Case Laws Relied on and Referred to :-

1. (2008) 105 CLT 407 : Maina Tandia vrs. Election Officer-Cum-B.D.O, Kantamal & Ors.
2. (2005) Sup Ori.Law Rev.668 : Sri.Mangal Charan Behera vrs. Sri Banamali Biswal & Ors.

For Petitioner : Mr. K.K Mishra

For Opp.Parties: Mr. S.Palit, Sr. Adv. (O.P.No.1)
Mr. S.Ghose, Addl. Standing Counsel (O.P.Nos. 2&3).

JUDGMENT Date of Hearing and Judgment : 27.09.2022

BISWANATH RATH, J.

This Writ Petition involves a challenge to the order of the Election Tribunal dated 05.04.2022 in unilaterally allowing the application for condonation of delay involving an Election Dispute raised under Section 30&31

of the Odisha Gram Panchayat Act, 1964 as appearing at running page-26 of the brief i.e. a part of Annexure-3 involving Election Petition No.4 of 2022.

2. Mr. Mishra, learned counsel appearing for the return candidate-Petitioner taking this Court to the aspect of limitation disclosed in the Election Dispute, reading together with the provision at Section 31 of the Odisha Grama Panchayats Act, 1964 hereinafter in short be reflected as "the Act, 1964", contended that once there is delay in institution of an Election Dispute under the provision of Section 31 of the Act, 1964, the return candidate should have been involved prior to final decision in the condonation of delay and dependent on the outcome, the matter could have been considered for admission and not otherwise and that too abruptly closing the issue on limitation for all time to come.

3. Reading through the provision at second proviso of Section 31 of the Act, 1964 and further referring to a decision of this Court in the case of ***Maina Tandia vrs. Election Officer-Cum-B.D.O., Kantamal and Others*** as reported in ***(2008) 105 CLT 407***, Mr. Mishra, learned counsel for the Petitioner brings to the notice of this Court that through this decision the Division Bench of this Court has come to hold that once there is delay involving Election Dispute, the same should not have been decided *ex parte*.

4. It is, in this view of the matter, Mr. Mishra, learned counsel appearing for the return candidate-Petitioner seeks intervention of this Court in the order dated 05.04.2022 and setting aside of the same thereby passing appropriate direction.

5. Mr. Palit, learned Senior Counsel appearing for the defeated candidate i.e. the Election Petitioner, however, reading again through the provision at Section 31 of the Act, 1964 contended that for the prescription therein even involving the delay aspect and for the power provided to the Tribunal through the provision in second proviso at Section 31 of the Act, 1964 for taking a decision in such matter, the learned Civil Judge (Junior Division), Aska-the Tribunal exercised its discretion on the condonation of delay aspect. Mr. Palit, learned Senior Counsel thus submits, there is no illegal exercise of power by the trial court requiring to interfere therein.

6. Mr. Palit, learned Senior Advocate appearing on behalf of the defeated candidate further taking this Court to the provision at Section 38 of the Act, 1964 submitted that there is an attempt by the Petitioner in bringing such dispute to the High Court in a way to linger the proceeding in absence of availing of statutory remedy available through the above provision. This Court here considering the applicability of the provision at Section 38 of the Act, 1964, if any, to the case at

hand finds, the provision at Section 38 provides opportunity to a losing party in Election Dispute to have a review mechanism before the same authority and before availing appeal mechanism under the provision of Sub-Section (4) of Section 38 of the Act, 1964. This Court finds, the provision at Section 38 of the Act, 1964 has no application to the case at hand at all and thus finds there is no force in such submission.

7. Mr. Palit, learned Senior Advocate appearing for the defeated candidate/ losing candidate however on the issue involved and raised by the successful candidate relied on a decision of this Court in the case of ***Sri. Mangal Charan Behera vrs. Sri. Banamali Biswal and Others*** as reported in ***(2005) Sup Ori.Law Rev. 668***. Taking this Court to the fact available in para-1, the observation of the Court in para-6 and plethora of direction contained in para-8 therein, Mr. Palit, learned Senior Advocate submitted that for the ruling of the Division Bench of this Court, the question of maintainability of Election Petition on the ground of limitation is very much available even after admission of the Election Dispute, subject to framing of issues therein and dealing with such issues in the final adjudication of the dispute, contended there is no room to challenge such orders at this stage. In the circumstance Mr. Palit, learned Senior Advocate submitted that the Petitioner-the return candidate has a scope of agitating such dispute by making specific pleadings through his written statement, requesting for framing appropriate issue and getting it adjudicated at appropriate time in the ultimate trial of the suit and in no circumstance, the Writ Petition in the present form is entertainable.

8. Considering the rival contentions of the parties, this Court finds, short questions involved herein to be decided is; even assuming that the provision at Section 31(1) of the Act, 1964 involves only a composite Election Dispute even inclusive of delay condonation aspect and for the protection on such issues with the Election Tribunal under the second proviso of Section 31 of the Act, 1964, if the Election Tribunal is justified in taking a decision on the question of condonation of delay *ex parte* ? And when the decision is taken *ex parte* in condonation of delay, whether the prospect of adjudicating such issues in the ultimate trial of the suit is available or not?

9. Taking into account the provision applicable to the case at hand and as relied by both the parties, this Court finds, the provision at Section 31(1) of the Act, 1964 reads as follows:-

> 31. **Presentation of petitions-** (1) The Petition shall be presented on one or more of the grounds specified in Section 39 before the Civil Judge (Junior Division) having jurisdiction over the place at which the office of the Grama Sasan is situated together with a deposit of such amount, if any, as may be prescribed in that behalf as security for

costs within fifteen days after the date on which the name of the person elected is published under Section 15:

Provided that if the office of the Civil Judge (Junior Division) is closed on the last day of the period of limitation as aforesaid the petition may be presented on the next day on which such office is open:

Provided further that if the petitioner satisfies the Civil Judge (Junior Division) that sufficient cause existed for the failure to present the petition within the period aforesaid the Civil Judge (Junior Division) may in his discretion condone such failure."

10. Looking to the safeguard under the provision at second proviso of Section 31 of the Act, 1964 this Court finds, undisputedly there is no need of separate filing of delay condonation application and such an attempt can be made in the Election Dispute itself. Looking to the cardinal principle of law on limitation, this Court finds, the position of law has been settled through number of decisions even through the Hon'ble Apex Court, on involvement of issue on condonation of delay the normal rule is, a party likely to be affected should be provided with an opportunity of hearing before there is condonation of delay.

11. It is, at this stage of the matter, this Court looking to the plea taken in the condonation of delay application, finds, the averments made in para-4 of the Election Dispute specifically dealing with delay in bringing the Election Dispute reads as follows:-

"That in view of publication of the result of election of Sarpanch of Pailipada Gram Panchayat by the Election Officer under Section 15 of the Orissa Grama Panchayat Act, 1964 read with Rule 52 of Orissa Gram Panchayat (Election) Rules, 1965, on 02/03/2022, the election petition ought to have been filed within 15 days thereof i.e. on or before 17/03/2022. But as the petitioner fell sick having suffered from E. fever & P. Neuritis since 10/03/2022 and was under treatment in CHC, Belaguntha as a patient vide OPD Regn. No.8340 dtd.10/03/2022 till 17/03/2022 and his treating Doctor advised him to take bed rest for 2 weeks from 17/03/2022 i.e. till 31/03/2022, he could not file the election petition within prescribed period by attending the Court in person. After recovery from illness to some extent, the Petitioner obtained the RTI information on 31/03/2022 relating to the nomination and election of the Opposite Party No.3 as Sarpanch of Pailipada Grama Panchayat and instructed his Advocate to prepare the election petition and accordingly the same was prepared and since 01/04/2022 to 03/04/2022 the court was closed on account of holiday, the election petition is filed today i.e. on 04/04/2022 after reopening of the Court. Since due to aforementioned sufficient cause, the Petitioner could not file the election petition within stipulated time, he files a separate petition as per proviso to Section 31(1) of Orissa Grama Panchayat Act, 1964, along with this election petition praying to condone the delay/failure in filing the election petition within prescribed period."

12. Since the application for condonation of delay is decided ex parte, there is no possibility of objection by the party likely to be affected. Undisputedly Petitioner has so many pleas requesting condonation of delay more particularly

involving his suffering at the particular point of time in one of the Government Hospital and the Petitioner also files documents in support of his claim of illness. From the observation of the trial court made in deciding the petition under order 7 Rule 11 of CPC, this Court finds, there is availability of document to establish the claim of delay made by the Petitioner. Keeping the cardinal principle of law on condonation of delay aspect in view, this Court finds, there has been attending to such issues also by at least two Division Benches of this Court. From the earlier decision in **Sri Mangal Charan Behera** (supra) this Court finds, the paragraph no.1 therein remains as follows:-

> "The Petitioner in this writ application has sought for quashing the order under Annexure-1 and for directing disposal of Election Misc. Case No.1 of 2003 pending before the Civil Judge (Junior Division), Balasore within a stipulated period. The Petitioner was the returned candidate being elected as a Sarpanch of Markona Gram Panchayat situated under Simulia Block in the district of Balasoe. The opp. Party No.1 filed Election Misc.Case No.1 of 2003 before the Civil Judge (Junior Division), Balasore under the provisions of the Orissa Gram Panchayat Act. The admitted case of the parties is that the election was held on 19.02.2002 and the results were declared on 21.2.2002. The election petition was filed by opp. Party no.1 on 15.04.003 along with an application u/s 5 of the Indian Limitation Act, 1963. It appears that after filing of election petition along with the application for condonation of delay, the learned Civil Judge (Junior Division), Balasore condoned the delay by exercising power under the second proviso to Section 31(1) of the Orissa Gram Panchayat Act and issued notice to the present petitioner and other opposite parties therein. It further transpires that the present Petitioner appeared in the said election case on 1.8.2003 and subsequently filed his objection/written statement to the Election Misc. Case. It also further transpired that the writ Petitioner took a stand in his objection that the Election Misc. Case is barred by time. Thereafter, the Petitioner filed an application under Order 14 Rule 2(2) of the Code of Civil Procedure, to decide the question of maintainability of the Election Misc. Case on the ground of limitation, as a preliminary issue. The said application havingbeen rejected by the Civil Judge (Junior Division), Balasore, by this order dated 15.03.2004 (Annexure-1), the Petitioner has preferred the present writ petition."

The observation of the Division Bench in para-6 reads as follows:-

> "In this view of the matter, we are of the view that the issue regarding non-maintainability of the election petition on the ground of limitation has to be gone into by the Election Tribunal and while deciding the said issue, the Election Tribunal has to reconsider the order dated 9.5.2003 by which the delay in filing the election petition was condoned ex parte before issuance of notice to the opp. Parties in the said election petition."

Keeping in view the above observation in para-8 the Division Bench has given a plethora of directions. The direction in paragraph No.8 therein reads as follows:-

> (i) "The Learned Civil Judge (Junior Division), Balasore shall frame a specific issue with regard to the maintainability of the election petition on the ground of limitation along with other issues that may be framed.

(ii) The Learned Civil Judge (Jr. Divn.) while pronouncing his judgment on the election petition after trial of the same, shall first address itself, in the judgement, to the issue regarding maintainability of the application on the question of limitation.

(iii) During trial of the Election Misc. case, the writ Petitioner who is the Opp. Party No.1 in the Election Misc. case, shall be given opportunity to rebut the grounds set-forth by the election petitioner explaining the delay in filing the Election Misc. case, as stated in his application for condoning the delay.

(iv) If the learned Civil Judge (Jr. Divn.) while deciding the issue on the question of maintainability of the election petition on the ground of limitation, comes to a finding that the delay in filing the Election Misc. Case has been sufficiently explained, he may, by exercising the power conferred on him under the second proviso to Section 31(1) of the Orissa Gram Panchayat Act, hold that the delay has been sufficiently explained and then proceed to decide the other issues in the Election Misc. case, in the judgement.

(v) In the event the learned Civil Judge (Jr. Divn.) comes to a finding that the election Petitioner has failed to show that there is sufficient cause for condoling the delay in filing the Election Misc. case, he on finding that the Election Misc. case is barred by time, will not be required to give findings on other issues."

13. Reading the above, this Court finds, the Division Bench of this Court has taken note of *ex parte* disposal of the delay condonation application and while deprecating such consideration held, this will not affect the issue on limitation being considered in the ultimate trial of the dispute, thus kept the issue open to be adjudicated in the ultimate decision of the suit after framing of particular issues.

This Court first of all observes, there is no question of judgment being passed by the Division Bench and then binding on Single Bench in the peculiar circumstance stated hereunder. In the nature of allotment/assignment at the relevant point of time involving the Gram Panchayat Act used to be allotted two Judges Bench. In a subsequent development, same assignment got into the Single Judge Bench. Therefore, the decision taken note here can be maximum construed to be a Bench decision. Further looking to the discussion by the Bench decision above on having a scope for framing issue on the question of limitation in the ultimate trial and decision thereon, this Court finds, the analysis of the Court may not be justified as for the opinion of this Court, the Bench deciding such matter appears to have failed in making a distinction between a plaint under the Code of Civil Procedure and a Petition in an Election Dispute under the Orissa Grama Panchayat Act when the provision in filing suit under the Code of Civil Procedure not only has any scope to file suit belatedly at the same time does not also give power to the Civil Court to condone delay in filing suit whereas for the provision at Section 31 of the Orissa Grama Panchayat Act, there is clear prescription in case Election Dispute is filed belatedly and the Election Tribunal has the discretion for condonation of delay. Therefore, this

Court finds, in the above circumstance the decision above can be distinguished not being a proper law.

14. This Court finds, this aspect has again been gone into by another two Judges Bench through the decision vide (2008) 105 CLT 407 as per roster available therein. The Division Bench here while deprecating the *ex parte* disposal of delay condonation application, in paragrapg-9 therein has come to observe as follows:-

> "Therefore, it is a fact that the application for condonation of delay was decided ex parte without providing an opportunity of hearing to the other side and that too without a speaking order. In an election petition delay of more than six months of the time limit prescribed by the Statute was not liable to be condoned in this manner. The parties should have been given an opportunity of hearing and the application should have been decided by a reasoned order. It is noticed that while deciding issue No.3, the learned trial Judge has made an observation that the Petitioner was ill but no such observation was made while accepting the application for condonation of delay, more particularly when the order condoning the delay was passed ex parte without any notice to the other side."

In addition to above observation in para-10 therein the two Judges Bench even though finds, the case is to be remitted back to the trial court for first deciding the delay condonation application after providing opportunity of hearing to the parties, but restrained itself in doing so for there is already involvement of next Election making the attempt through the Election Dispute finally infructuous.

15. Looking to the cardinal principle of law, this Court finds, the crux in the Election Dispute has nothing to do with the condonation of delay aspect and there is no doubt unless the Election Petitioner gets out of limitation aspect, there may not be any point in going into other aspects. Trial of all such issues together with other issues on merit of case may not be beneficial to either of the parties and keeping in view that there is hardly seventeen days delay in filing the Election Dispute and looking to the disclosures in paragraph-12 therein, this Court finds, the defeated candidate has sufficient explanation on the delay approach to the Election Tribunal. To avoid any conflict at a later stage this Court likes to adopt the observation made in the decision vide *(2008) 105 CLT 407* and accordingly, while interfering in the impugned order dated 05.04.2022, sets aside the same and remits the matter back to the Election Tribunal i.e. the learned Civil Judge (Junior Division) Aska for re-adjudication on the question of delay after providing opportunity of hearing to the Petitioner herein. Upon taking a fresh decision on the condonation of delay aspect, the trial Court if finds appropriate shall proceed for admission of the matter and then to trial.

16. For the remand of the proceeding, this Court directs the Petitioner herein and the contesting Opposite Party to appear before the trial court along with a certified copy of this order on 11th October, 2022.

17. If the Petitioner is so advised, he may file objection to the delay condonation aspect before the trial court on the date of appearance itself, with service of copy thereof on the other side.

18. For there is requirement of fresh adjudication of the condonation of delay aspect, neither the observation of this Court made hereinabove nor any observation and findings of the trial court made in the impugned order or in the rejection of application under Order 7 Rule 11 CPC shall have anything to do with the fresh disposal of the condonation of delay aspect. Appropriate steps for fresh disposal of the application for condonation of delay shall be undertaken within a period of fifteen days from the date of appearance of the parties.

19. The Writ Petition succeeds. However, there is no order as to the costs.

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2022 (III) ILR-CUT-480

S.K. SAHOO, J.

JCRLA NO. 14 OF 2019

PUSKAR BISOI .....Appellant

.V.

STATE OF ORISSA .....Respondent

CRIMINAL TRIAL – Offences punishable U/s. 302 of the I.P.C. and Section 3(2)(v) of the SC and ST (PoA) Act, 1989 – Trial Court acquitted the appellant from the charge U/s. 302 of the I.P.C, so also U/s. 3(2)(v) of SC and ST (PoA) Act, but found him guilty U/s. 304 Part-II of the I.P.C. – There is no material on record that the injury inflicted was sufficient in the ordinary course of nature to cause death and it cannot be said that the appellant knew that his act was so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death – Whether the conviction of the appellant U/s. 304 Part-II of the I.P.C. can be sustained in the eye of law? – Held, not sustainable, accordingly the act of the appellant would squarely come within the purview of Section 325 of the I.P.C. (Para 9)

For Appellant : Mr. Anirudha Das (Amicus Curiae)

For Respondent : Mr. Manoranjan Mishra, A.S.C.

JUDGMENT Date of Hearing and Judgment: 11.08.2022

S.K. SAHOO, J.

The appellant Puskar Bisoi faced trial in the Court of learned Sessions Judge-cum-Special Judge, Nabarangpur in Criminal Trial No.131 of 2017 for commission of offences punishable under section 302 of the Indian Penal Code and section 3(2)(v) of the SC and ST (PoA) Act, 1989 on the accusation that on 26.06.2017 at about 8.00 p.m. at village Phatakote under Papadahandi police station, he being not a member of Scheduled Caste or Secheduled Tribe committed murder of Pitambar Jani (hereafter'the deceased') who was a member of Scheduled Tribe.

The learned trial Court acquitted the appellant of the charge under section 302 of the Indian Penal Code so also under section 3(2)(v) of SC and ST (PoA) Act, 1989, but found him guilty under section 304 Part-II of the Indian Penal Code and sentenced him to undergo R.I. for a period of eight years and to pay a fine of Rs. 3,000/- (rupees three thousand), in default, to undergo further R.I. for a period of six months.

2. The prosecution case, as per the first information report lodged by one Subhadra Jani (P.W.3), the widow of the deceased is that on 26.06.2017 about 8.00 p.m. hearing cries of her husband, she along with her daughter Kumari Jani (P.W.4) came out of their house and found that the appellant was quarrelling with the deceased and during such quarrel, all on a sudden, the appellant gave a push to the deceased, for which the latter fell down on the road, sustained head injury and became senseless. The informant (P.W.3) and her daughter (P.W.4) carried the deceased inside their house and tried to give some water to him but the deceased was found dead.

The first information report was scribed by one Gangadhar Jani and P.W.3 presented the same before the Inspector-in-charge of Papadahandi police station on 27.06.2017, on the basis of which Papadahandi P.S. Case No. 111 of 2017 was registered on the same day under section 302 of the Indian Penal Code and section 3(2)(v) of SC and ST (PoA) Act.

P.W.12 who was in-charge of D.S.P., Papadahandi, took charge of investigation of the case as per the direction of the Superintendent of Police, Nabarangpur and during course of investigation, the witnesses were examined, spot map (Ext.7) was prepared, inquest over the dead body was conducted as per inquest report (Ext.1) and the dead body was sent for post mortem examination. P.W.13 Mr.Arupananda Kar, the Medical Officer of District Headquarters Hospital, Nabarangpur conducted post mortem examination over the dead body and he submitted his report (Ext.12). P.W.12 seized the sample earth and blood

stained earth from the place of occurrence as per the seizure list (Ext.9), wearing apparels of the deceased from the escorting constable after post mortem examination under seizure list (Ex.3). The appellant surrendered in the police station on 28.06.2017 whereafter he was arrested and forwarded to Court after medical examination. The wearing apparels of the appellant were seized as per the seizure list (Ext.5), the nail clippings of the appellant collected by the Medical Officer which was produced by the constable was also seized as per the seizure list (Ext.4). P.W.12, the Investigating Officer issued requisition to the Tahasildar, Nabarangpur to obtain caste particulars of the appellant as well as the deceased. He received the post mortem examination report so also the caste verification report from the Tahasildar and the seized articles were sent to R.F.S.L., Berhampur through the Court for chemical examination and on completion of investigation, P.W.12 submitted charge sheet on 22.10.2017 against the appellant under section 302 of the Indian Penal Code and section 3(2)(v) of SC and ST (PoA) Act.

3. After submission of charge sheet, the case was committed to the Court of Session after following the due formalities. The learned trial Court framed the charges against the appellant as aforesaid and since the appellant refuted the charges, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prove the guilt of the appellant.

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

P.W.1 Pabitra Khora stated that he was present at the time of inquest and he had seen bleeding on the head of the deceased and he is a witness to the inquest report vide Ext.1.

P.W.2 Narasingh Kunthar did not support the prosecution case, for which he was declared hostile by the prosecution.

P.W.3 Subhadha Jani is the informant who is a post-occurrence witness and stated that on the date of occurrence, she and her daughter shifted the deceased from the spot to their house thinking that he was alive but he died.

P.W.4 Kumari Jani is the daughter of the informant who is an eye witness to the occurrence and she stated that while she and her mother (P.W.3) shifted the deceased from the spot to their house, he was found dead.

P.W.5 Balaram Harijan stated that about six months back in one night, widow of the deceased was going to the house of the ward member crying and disclosed the incident and as per the request of the ward member, he went near the shop of the accused wherefrom, he noticed that the deceased was lying in his house.

P.W.6 Madhusudan Bisoi stated that he heard quarrel in between the appellant and the husband of the informant and the deceased succumbed to the injuries.

P.W.7 Laxman Gond was the constable attached to Papadahandi Police station who carried the dead body for post mortem examination. He is also a witness to the seizure of the wearing apparels of the deceased and a command certificate under seizure list Ext.3.

P.W.8 Ratan Naik was another constable attached to Papadahandi police station who had escorted the dead body to Nabarangpur hospital for post mortem examination. He is also a witness to the seizure of wearing apparels of the deceased under seizure list Ext.3.

P.W.9 Baidyanath Bhatra was the constable who had taken the appellant to Papadahandi Hospital for his medical examination as per command certificate issued in his favour. He produced the nail clippings collected by the Medical Officer in a sealed vial before the I.O. which was seized as per seizure list Ext.4.

P.W.10 Krishnadas Mandal was the constable who produced one sealed vial containing nail clippings of the appellant before the Investigating Officer which was seized under seizure list Ext.4. He further stated about the seizure of wearing apparels of the deceased on his production as per seizure list Ext.5.

P.W.11 Akhaya Kumar Khemndi was the Tahasildar, Nabarangpur who on receipt of the letter from S.D.P.O., Papadahandi regarding furnishing caste particulars of the deceased as well as the appellant, entrusted the matter to the R.I. of Baghsuini circle, who after conducting enquiry submitted his reports and basing on the same, P.W.11 submitted his report (Ext. 6).

P.W.12 Bimal Kant Brahma was the in-charge of D.S.P. of Papadahandi who took charge of investigation as per the direction of the S.P., Nabarangpur and on completion of investigation, he submitted charge sheet.

P.W.13 Dr.Arupananda Kar was the Medical Officer of District Headquarters Hospital, Nabarangpur who conducted post mortem examination over the dead body of the deceased and found no external injury on the body except small contusion over occipital area of the skull. He proved his report vide Ext.12.

The prosecution exhibited thirteen documents. Ext.1 is the inquest report, Ext.2 is the F.I.R., Exts.3, 4, 5 and 9 are the seizure lists, Ext.6 is the report of Tahasildar, Ext.7 is the spot map, Ext.8 is the dead body challan, Ext.10 is the requisition for caste identification report, Ext.11 is the forwarding report, Ext.12 is the post mortem examination report and Ext.13 is the Chemical Examination report.

No witness was examined on behalf of the defence.

5. The learned trial Court after assessing the oral and documentary evidence on record, came to hold that the evidence of the Medical Officer as well as the contents of the post mortem examination report and the inquest report are not challenged by the defence and it can be safely concluded that the deceased suffered a homicidal death. It was further held that though the witnesses have been cross-examined by the defence, but no substantial materials elicited to discredit their testimony more particularly the evidence of P.Ws.3, 4 and the Medical Officer P.W.13. The learned trial Court further came to hold that the facts established that the deceased died having sustained an injury on his head when the appellant gave a push to him at the spur of moment without any premeditation or any prior deliberation and therefore, the learned trial Court came to the conclusion that Exception 4 to section 300 of the Indian Penal Code would be attracted and accordingly, convicted the appellant under section 304 Part-II of the Indian Penal Code. However, the learned trial Court held that though the deceased belonged to 'Paraja' caste which comes within the Scheduled Tribe community and the appellant belonged to 'Bisoi' caste which comes within the general community, but there was no intention on the part of the appellant that he being general caste committed the crime against the Scheduled Tribe community person by giving a push to the deceased resulting his death and accordingly, the learned trial Court held that the prosecution has failed to prove the charge under section 3(2)(v) of the SC and ST (PoA) Act.

6. Mr. Anirudha Das, learned amicus curiae engaged for the appellant contended that though in the first information report, it is specifically stated that on account of push of the appellant given to the deceased, the latter fell down on the ground and sustained head injury which resulted in his death but most peculiarly, during course of trial, the prosecution has come forward with a case that the deceased was assaulted by means of weight (Batakara) on the head and thereafter the appellant gave a push to the deceased which resulted in his death. It is further contended that the evidence of the two material witnesses on behalf of the prosecution i.e., P.W.3 and P.W.4 indicate that both of them came to the spot on hearing hullah, but their evidence is completely discrepant and therefore, it appears that both of them are post occurrence witnesses and the evidence of P.W.4 as an eye witness to the occurrence is not believable. He further submitted that since both P.W.3 and P.W.4 were related to the deceased, they are interested witnesses and therefore, the learned trial Court in view of factual scenario should not have placed implicit reliance on their testimony to convict the appellant. It is argued that the scribe of the first information report has not been examined and even if for the sake of argument, it is accepted that during course of quarrel, the

appellant gave a push to the deceased, for which he fell down on the ground and sustained head injury, under no stretch of imagination, it can be said that the same would come within the purview of section 304 Part-II of the Indian Penal Code and therefore, it is a fit case where the benefit of doubt should be extended in favour of the appellant.

Mr. Manoranjan Mishra, learned Addl. Standing Counsel appearing for the State of Odisha, on the other hand submitted that the discrepancies which are there in the evidence of two eye witnesses i.e., P.W.3 and P.W.4 are minor in nature and the discrepancies do not go to the root of the matter or affect the credibility of these two witnesses. It is further submitted that the doctor (P.W.13) who conducted post mortem examination, noticed haemorrhage over the occipital lobe of the brain, the spleen was ruptured and the cause of death has been opined to be haemorrhagic shock on account of the internal injury and the injuries have been opined to be ante mortem in nature and the mode of death was homicidal. Learned counsel further argued that as per the evidence of the Investigating Officer, it was a metallic murram road and when the accused pushed the appellant, he must have been aware that by such overt act, the deceased is likely to sustain any injury which may be fatal and therefore, the learned trial Court has rightly found the appellant guilty under section 304 Part-II of the Indian Penal Code and the appeal should be dismissed.

7. The doctor's evidence is to be analyzed first to come to a finding that whether it is a case of homicidal death or not.

P.W.13 conducted the post mortem examination over the dead body of the deceased on 27.06.2017 at District Headquarters Hospital, Nabarangpur and he found no external injury on the dead body except small contusion over the occipital area of the skull. So far as internal injuries are concerned, he found haemorrhage over the occipital lobe of the brain, haemorrhage into the peritoneal cavity, spleen was ruptured. According to the doctor, the cause of death was haemorrhagic shock on account of the internal injury and the injuries were ante mortem in nature and the mode of death was homicidal. He has proved the post mortem examination report vide Ext.12. In the cross-examination, he has stated that haemorrhage over occipital lobe of the brain may be possible by fall on hard and blunt surface.

Considering the evidence of the doctor so also the inquest report which has been marked as Ext.1, I am of the humble view that the learned trial Court has rightly come to the conclusion that the prosecution has been able to prove that the deceased died a homicidal death.

8. Now, coming to the evidence of two star witnesses on behalf of the prosecution i.e., P.W.3 and P.W.4, it appears that P.W.3 is the informant in the case and the case of the prosecution as per the first information report is that during course of quarrel, the appellant gave a push to the deceased, for which he fell down on the murram road and sustained head injury. P.W.3 has stated that the mother of the appellant called her disclosing the incident and her house and the house of the appellant was intervening with the village road and both she as well as her daughter (P.W.4) came to the spot and found that her husband (deceased) was lying dead having sustained bleeding injuries on his head and then she and P.W.4 shifted the deceased from the spot thinking him to be alive. However, in the cross-examination, she has stated that when she came to the spot, she found that her husband was lying on the road having sustained injuries on his head and no one was present at that time. P.W.4 on the other hand has stated that the appellant assaulted to the deceased by means of a weight (Batkara) used for weighment in his shop and then threw the deceased on the road. At this juncture, the evidence of P.W.4, the daughter of the deceased is required to be analysed and she has stated that the mother of the appellant called them saying that the appellant was assaulting to the deceased and at that time, she was reading in her house and hearing the same, she immediately proceeded to the house of the appellant where she found that the appellant was assaulting the deceased by means of weight and then P.W.3 followed her and after assaulting her father, the appellant threw him on the ground and then both she and her mother (P.W.3) shifted the deceased to their house and the deceased was dead at that time. Therefore, the statement made by P.W.3 completely rules out P.W.4 as an eye witness to the occurrence. The evidence of P.W.4 that she had seen the appellant assaulting the deceased by means of weight is not acceptable.

The evidence of P.W.3 and P.W.4 appear to be discrepant in nature in as much as P.W.3 has stated that she came to the spot along with P.W.4 and saw the deceased lying on the ground whereas P.W.4 has stated that she came ahead of her mother (P.W.4) and saw the assault on her father. The assault by means of weight on the deceased by the appellant seems to be a subsequent development in the prosecution case and rightly the learned trial court has also not placed any reliance on the said aspect and came to hold that the deceased died having sustained an injury on his head and the appellant gave push to him at the spur of moment without any premeditation or any prior deliberation. The so-called weight with which the appellant stated to have assaulted to the deceased has not been seized, therefore, I am of the humble view that there is no clinching material available on record that the appellant assaulted the deceased on his head by means of the weight. However, the evidence given by the prosecution witnesses relating to the push given by the appellant to the deceased is acceptable

and it appears that on account of such push, the deceased fell down on the road which was a metallic morrum road and sustained head injury as noticed by the doctor (P.W.13).

The contentions raised by the learned counsel for the appellant that P.W.3 and P.W.4 were related to the deceased and therefore, they are interested witnesses cannot be a ground to discard their evidence. Law is well settled that related witnesses are not necessarily false witnesses. Unless their evidence suffers from serious infirmity or raises considerable doubt in the mind of the Court, it would not be proper to discard their evidence straightaway. 'Related' is not equivalent to 'interested'.

Similarly, non-examination of the scribe of the F.I.R. does not affect the prosecution case and it cannot be a ground to doubt the prosecution case and it can at best be treated as mere irregularity, but if it is otherwise proved, then it can be said that irregularity has been cured.

9. The main crux of the matter for consideration is whether the act of the appellant comes within the purview of section 304 Part-II of the Indian Penal Code as held by the learned trial Court.

Section 299 of the Indian Penal Code defines 'culpable homicide'. In order to constitute an offence of culpable homicide, the prosecution is required to prove the following aspects i.e. the death was caused by doing an act (a) with the intention of causing death; or (b) with the intention of causing such bodily injury as is likely to cause death; or (c) with the knowledge that the act is likely to cause death. Culpable homicide is murder only when it falls within any of the four clauses that has been mentioned under section 300 of the Indian Penal Code. Culpable homicide is not murder, if it falls within any of the five exceptions mentioned under section 300 of the Indian Penal Code. Section 304 of the Indian Penal Code has two parts i.e., section 304 Part-I, section 304 Part-II. If the culpable homicide is not murder as it falls within any of the five exceptions mentioned under section 300 of the Indian Penal Code, but it is proved that the accused has the intention of causing death, or of causing such bodily injury as is likely to cause death then the offence will come within the purview of section 304 Part-I of the Indian Penal Code. If the accused has no such intention but he has the requisite knowledge that the act is likely to cause death or the act is to cause such bodily injury as is likely to cause death, then the offence under section 304 Part-II of the Indian Penal Code would be attracted. The intention is the state of mind which has to be inferred in the facts and circumstances of each case and it would depend upon various factors like nature of weapon used, nature of injury inflicted, conduct of the accused prior to the assault and after the assault

etc. and act is said to be intentional when it is done with the desire that certain consequences shall follow for a person's act or omission. The intention is thus a subjective consideration. Keeping in mind the four clauses as are mentioned under section 300 of the Indian Penal Code, if the factual scenario is considered, in my humble view, none of the four clauses are attracted. By giving a push to the deceased during course of quarrel, it cannot be said that the appellant intended to cause his death or intended to cause such bodily injury as he knew to be likely to cause death of the deceased. There is no material on record that the injury inflicted was sufficient in the ordinary course of nature to cause death and by giving a push to the deceased, it cannot be said that the appellant knew that his act was so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death. When in the factual scenario, none of the four clauses as mentioned under section 300 of the Indian Penal Code are attracted and the act does not come within the purview of culpable homicide as defined under section 299 of the Indian Penal Code, the conviction of the appellant under section 304 Part-II of the Indian Penal Code cannot be sustained in the eye of law. However since due to the push given to the deceased, he fell down on the morrum road and in that process, a small contusion was caused over the occipital area of the skull and there was internal haemorrhage over the occipital lobe of the brain so also haemorrhage to the peritoneal cavity and his spleen was ruptured, it can be said that such hurt endangered the life of the deceased and therefore, it falls under clause 'eighthly' of section 320 of the Indian Penal Code which defines 'grievous hurt'. Therefore, I am of the humble view that the act of the appellant would squarely come within the purview of section 325 of the Indian Penal Code.

Accordingly, the conviction of the appellant under section 304 Part-II of the Indian Penal Code is altered to one under section 325 of the Indian Penal Code. It appears that the appellant is in judicial custody since 29.06.2017 and thus he has already undergone substantive sentence of five years and one month. Since the maximum substantive sentence of imprisonment for the offence under section 325 of the Indian Penal Code is seven years and the appellant has already undergone the substantive sentence of five years and one month by now, in view of the passage of time and the young age of the appellant at the time of occurrence and the surrounding circumstances under which the crime has been committed, the substantive sentence is reduced to period already undergone. In view of the financial condition of the appellant, there is no need to impose any fine on the appellant. The appellant be set at liberty forthwith, if his detention is not required in any other case.

Accordingly, the JCRLA is allowed in part**.**

Before parting with the case, I would like to put on record my appreciation to Anirudha Das, Advocate, the learned Amicus Curiae for rendering his valuable help and assistance towards arriving at the decision above mentioned. The learned Amicus Curiae shall be entitled to his professional fees which is fixed at Rs. 7,500/- (rupees seven thousand five hundred only).

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2022 (III) ILR-CUT-489

S.K. SAHOO, J.

BLAPL NO. 11612 OF 2021

BISHNU PRASAD SAHU …….. Petitioner

.V.

STATE OF ODISHA (OPID) …….. Opp.Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 439 – Application for Bail – Offences punishable under sections 406, 420, 467, 468, 471 r/w section 120-B of the IPC and section 6 of the Odisha Protection of Interests of Depositors (in Financial Establishments) Act, 2011 – Consideration of – Held, since it is an economic offence and reasonable apprehension of tampering with the evidence cannot be ruled out at this stage and above all in the larger interest of society, the Court does not inclined to release the petitioner on bail. (Para 7)

Case Laws Relied on and Referred to :-

1. (2021) 2 SCC 779 : Dillip Singh -Vrs.- State of Madhya Pradesh & Anr.
2. (2005) 10 SCC 228 : Anil Mahajan -Vrs.- Bhor Industries Ltd. & Anr.
3. 2019 SCC Online SC 996 : Commissioner of Police & Ors. -Vrs.- Devendra Anand & Ors.
4. (2012) 1 SCC 40 : Sanjay Chandra -Vrs.- Central Bureau of Investigation.
5. (2018) 3 SCC 22 : Dataram Singh -Vrs.- State of Uttarpradesh & Anr.
6. (1987) 2 SCC 364 : State of Gujarat -Vrs.-Mohanlal Jitamalji Porwal & Ors.
7. (2013) 7 SCC 439 : Y.S.Jagan Mohan Reddy -Vrs.- C.B.I.
8. (2021) 84 OCR 1 : Aswini Kumar Patra -Vrs.- Republic of India.

For Petitioner : Mr. Yasobant Das, Senior Advocate
For Opp.Party : Mr. Bibekananda Bhuyan, Mr. J.P. Patra

ORDER Date of Hearing :16.08.2022 : Date of Order : 02.09.2022

S.K. SAHOO, J.

The petitioner Bishnu Prasad Sahu has filed this application under Section 439 of Code of Criminal Procedure (hereinafter 'Cr.P.C.') seeking for bail in connection with E.O.W., Bhubaneswar P.S. Case No. 04 of 2021 corresponding to C.T. Case No. 02 of 2021 pending on the file of Presiding Officer,

Designated Court, O.P.I.D. Act, Cuttack in which charge sheet has been submitted for offences punishable under sections 406, 420, 467, 468, 471 read with section 120-B of the Indian Penal Code and section 6 of the Odisha Protection of Interests of Depositors (in Financial Establishments) Act, 2011 (hereafter 'O.P.I.D. Act') keeping the investigation open under Section173(8) of Cr.P.C.

The petitioner moved for bail before the learned Presiding Officer, Designated Court, O.P.I.D. Act, Cuttack which was rejected as per order dated 23.06.2021.

2. On 18.02.2021 one Shubhranshu Shekhara Rauta, resident of Khallingi, P.S.- Pattapur in the district of Ganjam lodged the first information report before the Superintendent of Police, Economic Offences Wing, Odisha, Bhubaneswar (hereafter 'E.O.W.') stating therein that during the year 2017, he came in contact with the petitioner, who was the proprietor of M/s. Sahil Enterprises, the lease holder of the Odisha Govt. owned MARKFED Cold Storage at Patia in front of KIMS Medical College, Plot No.17, Bhubaneswar. In course of acquaintance, the petitioner along with some of his associates encouraged the informant to invest in the ongoing potato business and Sea Food Trading/Prawn business made by M/s. Sahil Enterprises, with assurance to return him the principal plus dividend on the next 15th November and that the said scheme could be renewed in case of willingness of the informant to continue with the business. Being allured with the scheme and believing the words of the petitioner and others, the informant paid Rs.66,89,868/- (rupees sixty six lakhs eighty nine thousand eight hundred sixty eight) to the petitioner in installments during the period from March 2017 to March 2018. It is further stated in the F.I.R. that the aforesaid amount has been paid by the informant in installments through NEFT from his bank accounts maintained with S.B.I., Konkorada Branch and City Bank, MG Road Branch, Bangalore and also from the account of one of his relatives maintained with ICICI Bank, Bhubaneswar Branch. The amounts were paid in the accounts of M/s. Sahil Enterprises maintained with Union Bank of India, Patia Branch and HDFC Bank, Sriya Talkies Square Branch, Bhubaneswar. It is stated that the aforesaid amount was paid by the informant by availing loans from different banks and till the date of lodging of F.I.R., he was repaying the loan through EMI. It is further stated that initially an agreement was executed by the petitioner in favour of the informant during December 2017 and the petitioner had assured to return at least minimum 30% annually on investment with potato business and flat 35% annually on investment with Sea Food Trading/Prawn business. It is further stated that initially during the period from June2017 to December 2018, the petitioner paid back an amount of Rs.7,82,950/-

(rupees seven lakhs eighty two thousand nine hundred fifty), which was transferred to the S.B.I. account of the petitioner from the accounts of M/s. Sahil Enterprises, but thereafter in spite of repeated request made by the informant, the petitioner did not repay the balance amount to him. It is further stated that the petitioner had taken money from him in a deceitful manner and he had the dishonest intention right from the very beginning of the transaction to deceive the informant and M/s. Sahil Enterprises also stopped running its business. It is further stated that with dishonest intention, the petitioner had executed false agreements with the informant and in that process, cheated an amount of Rs.59,06,918/- (fifty nine lakhs six thousand nine hundred eighteen). The informant also came to know that the petitioner in similar manner cheated twenty one investors by using fake/false documents and duped them to the tune of about Rs.2.5Crores and misappropriated the same.

On receipt of such F.I.R., the Superintendent of Police, E.O.W., Bhubaneswar registered E.O.W., Bhubaneswar P.S. Case No.04 dated 18.02.2021 under Sections 406, 420,467, 468, 471 and 120-B of the Indian Penal Code read with Section 6 of the O.P.I.D. Act against the petitioner and directed the Inspector, E.O.W. namely PradiptaPanigrahi to take up investigation of the case.

3. During course of investigation, it was ascertained that the proprietorship firm, namely, M/s. Sahil Enterprises in which the petitioner was the proprietor, was registered under sub section (5) of section 25 or sub-section (2) of section 26 of the Odisha Value Added Tax Act, 2004 and was assigned with Identification Number vide TIN No. 21485505503 w.e.f. 16.05.2016 by Deputy Commissioner of Sales Tax, Bhubaneswar III Circle. The registered office address of the firm was Plot No. D/65, Essen Residency, Raghunathpur, P.O.-Patia, Bhubaneswar and the petitioner had taken lease from Odisha Govt. owned MARKFED Cold Storage at Patia, situated in front of KIMS Medical College, Plot No.17, Bhubaneswar having 5000 MT capacity multi commodity cold storage on monthly lease rent basis for eleven months w.e.f. 01.03.2019 by executing an agreement in between Managing Director, MARKFED, Odisha, Bhubaneswar and M/s. Sahil Enterprises through Prop. Bishnu Prasad Sahu (petitioner). The above deed of agreement was made with M/s. Sahil Enterprises basing on a tender process floated by MARKFED to let out its cold storage on monthly rent basis for storing of potato, fruits, vegetables etc. The investigation further revealed that before expiry of eleven months lease period, the petitioner had breached the terms of the agreement and did not pay the rent etc. as per the agreement and left the premises of cold storage with his bags and baggage without any intimation to the first party MARKFED. When it came to the notice

of the MARKFED on 23.09.2019, the authorities of MARKFED terminated the agreement made with the petitioner and took possession of the cold storage on 18.12.2019.

During course of investigation, the investigating officer found that twenty five investors have been duped/cheated by the petitioner to the tune of Rs.2.86 Crores (rupees two crores eighty six lakhs) approximately. The investors were examined and relevant documents towards their investments in the firm of the petitioner were seized. The investigation further revealed that many other investors were duped/cheated by the petitioner and they were yet to be examined and the relevant documents were yet to be seized apart from relevant documents to be seized from different officers. The investigating officer sent requisitions to Union Bank of India, HDFC Bank, Kotak Mahindra Bank, Axis Bank with a request to freeze the accounts in the name of M/s. Sahil Enterprises and its proprietor i.e. the petitioner herein. The investigating officer also collected the information from FIU, India, New Delhi regarding information of accounts in the name of M/s. Sahil Enterprises and its proprietor and the same is under verification. The investigation further revealed that pursuant to the requisition made by the I.O, an amount of Rs. 2,13,244/- (rupees two lakhs thirteen thousand and two hundred forty four) has been freezed by Axis Bank, Oswara Branch, Mumbai, Maharastra bearing A/c No. 920020070585327, which stands in the name of M/s. Jagannath Enterprises being represented by its proprietor i.e. the petitioner herein. The I.O further noted in the charge sheet that he is yet to gather information regarding investment of money by the petitioner from banks and other sources as well as information from the IGR, Cuttack regarding immovable properties of the petitioner and M/s. Sahil Enterprises for submission of proposal for attachment.

The investigation further revealed that the I.O received information from Managing Director, Orissa State Co-operative Marketing Federation Ltd., Bhubaneswar through Sri Santanu Kumar Mallick, Manager (Legal), MARKFED, Odisha vide letter no. 2787/L-28/2020-21dtd. 19.07.2021 regarding lease of Cold Storage at Patia which proved that the petitioner had taken lease of cold storage w.e.f. 01.03.2019 for storing of potato, fruits and vegetable etc. by execution of an agreement, but in the year 2017 and onwards, the petitioner being the proprietor M/s Sahil Enterprises had issued cold storage receipts in the name of M/s. Sahil Enterprises being represented by him as its proprietor, as the lease holder of MARKFED Cold Storage to the informant and other investors though at that time he had no authorisation to use the cold storage situated at Patia. Since then, the petitioner was inducing the public with the assurance that, he had taken lease of cold storage from MARKFED, Govt.of Odisha on monthly

rent basis for storing of potato, fruits, vegetables etc. and that whosoever would invest money in his ongoing potato business, they would get an interest of 30% annually. The petitioner also assured to return 35% flat annually on the investment with Sea Food Trading/Prawn Business. The petitioner had paid back only Rs.7,82,950/- (rupees seven lakhs eighty two thousand nine hundred fifty) to the informant as against his deposit of Rs. 66,89,868/- (rupees sixty six lakhs eighty nine thousand eight hundred sixty eight). The petitioner failed to return the residuary amount despite repeated demand and thus defalcated a sum of Rs. 59,06,618/- (rupees fifty nine lakhs six thousand six hundred eighteen) of the petitioner and he also gave assurance to the investors to return the principal plus dividend during the next six months and the said scheme would be renewed in case of willingness of the investors to continue with the business. The I.O further found that in this way, the investors have invested money believing the ongoing potato business made by M/s Sahil Enterprises as true. The investigation further revealed that the petitioner had prepared forged and fabricated cold storage receipt book in the name of M/s. Sahil Enterprises, MARKFED Cold Storage with dishonest intention to cheat the investors deliberately and issued such receipts to the investors with his seal and signature, which was used as genuine. On being so induced by the petitioner, during March 2017 to 2018, the informant paid a sum of Rs.66,89,868/- (rupees sixty six lakhs eighty nine thousand eight hundred sixty eight) in toto in instalments towards investment being transferred through NEFT from his accounts and the accounts of his relatives maintained in S.B.I. and ICICI Bank to the account of M/s. Sahil Enterprises maintained in UBI, Patia Branch and HDFC Bank, Sriya Talkies Square, Bhubaneswar.

The I.O during investigation found that the investors had executed agreements with the petitioner being the proprietor of M/s. Sahil Enterprises regarding investment of money in his ongoing Sea Food Trading/Prawn business. In the said agreement, it is clearly mentioned that, if any, dispute arose between the parties, then the affected party would take shelter before the Court of law.

The investigation further revealed that in the same manner, the petitioner had cheated so many investors by using fake/false documents and collected huge amount to the tune of about Rs.2.86 Crores in between 2017 onwards. The I.O. further found that the petitioner being the proprietor of M/s.Sahil Enterprises was returning the interest/dividend to the investors for only one to two years towards the investment in potato and sea food business of M/s. Sahil Enterprises and thereafter, he did not return any interest/dividend to the investors towards their investment by taking some plea or other. After several requests,the petitioner issued cheques of HDFC Bank etc. in the name of some investors towards their

investing money, but those cheques were bounced due to insufficient funds in his account, for which the investors tried to contact the petitioner over telephone so many times, but he did not respond to their telephone calls and fled away from the locality by switching off his mobile phones by misappropriating crores of rupees of the innocent investors.

The investigation further revealed that in this fashion with dishonest intention, right from the very beginning since 2017 during which period he had not obtained any lease of cold storage of MARKFED, Odisha, the petitioner had executed forged and fabricated agreements and granted cold storage receipts of cold storage at Patia and used the same as genuine and cheated several innocent investors with assurance of return towards their investment in potato business/sea food trading business and collected crores of rupees and misappropriated the same.

The investigation further revealed that the petitioner being the proprietor of M/s. Sahil Enterprises has defaulted in returning the investment made to him and also failed to render service for which the deposits were made by the investors and as such, the petitioner is responsible for the management of the day to day affairs of the Firm and is liable for the offence under section 6 of the OPID Act, 2011.

During course of investigation, it came to light that the petitioner had registered one company styled as M/s. Sahil Ventures Pvt. Ltd. before ROC, Cuttack and the address of the registered office of the company has been mentioned as C/O. Jyotirsmita Das, Plot No. D/65, Essen Residency, Raghunathpur, Bhubaneswar, Orissa and he is the Managing Director of the said company.

The investigation further revealed that pursuant to the requisition of the I.O., the Reserve Bank of India, Odisha, Bhubaneswar (hereinafter 'R.B.I.') had informed that M/s.Sahil Enterprises and M/s. Sahil Ventures Pvt. Ltd. are not registered as a non-banking financial institution with Reserve Bank of India under section 45-IA of the R.B.I. Act, 1934 to commence or carry on the business of a Non-Banking Financial Institution as defined under section 45-1A(1) of the said Act and R.B.I. had not authorised these entities to collect/accept deposits from the public.

The I.O. on due analysis of the documentary and oral evidence collected during investigation came to the conclusion that the petitioner being the proprietor of M/s. Sahil Enterprises prepared the forged and fabricated documents i.e., cold storage receipts as he was the lease holder of cold storage of MARKFED, Odisha, Bhubaneswar since 2017 and executed false agreements

with dishonest intention to cheat the informant and twenty four investors and by utilising such forged documents as genuine, the petitioner collected huge amount to the tune of Rs.2.86 crores (rupees two crores eighty six lakhs) from the informant and other investors for the purpose of investing in the ongoing potato business and sea food business and thereafter, he did not return any interest/dividend to the investors towards their investment by taking some plea or other and even after several requests, the petitioner had issued cheques in the names of some of the investors towards their deposits, but those cheques were bounced due to insufficient of funds in the account of the petitioner, for which the investors tried to contact him over telephone many times, but he did not respond to their telephone calls and fled away from the locality by switching off his mobile phone by misappropriating crores of rupees of the innocent investors.

The investigating officer found prima facie evidence against the petitioner and his company under sections 406, 420, 467, 468, 471 and 120-B of the Indian Penal Code read with section 6 of the O.P.I.D. Act and accordingly, he submitted first charge sheet on 19.08.2021 against the petitioner keeping further investigation open under section 173(8) of Cr.P.C. to ascertain about the complicity of other persons, tracing the money trail, examining other investors and witnesses and seizure of incriminating documents.

4. Mr.Yasobanta Das, learned Senior Advocate appearing for the petitioner contended that as per the F.I.R. version, an agreement was executed between the petitioner and the informant in December 2017, but no such agreement has been annexed to the F.I.R. and though it is stated that the petitioner has returned Rs.7.82 lakhs between June 2017 and December 2018 and there was no payment thereafter, but all the same, the F.I.R. was lodged only on 18.02.2021. Learned counsel further argued that the dispute between the parties is basically civil in nature and recovery of money as on today is barred by law of limitation under Articles 24 and 25 of the Schedule of Limitation Act, 1963 and till date, no civil proceeding has been initiated by the informant and thus, the informant is attempting to use the criminal procedure for recovery of his time barred money, which is an abuse of the process of law. It is further submitted that law is no more res integra that in case of grant of bail, the Court has to come to a prima facie finding whether an offence is made out or not. Learned counsel further contended that the petitioner is a permanent resident of Keonjhar district and there is no chance of absconding and he is in judicial custody for a period of sixteen months and therefore, the bail application of the petitioner may be favourably considered. In support of such contention, he has placed reliance on the decisions of the Hon'ble Supreme Court in the cases of **Dillip Singh -Vrs.- State of Madhya Pradesh and another reported in (2021) 2 Supreme Court**

Cases 779, Anil Mahajan -Vrs.- Bhor Industries Ltd. and another reported in (2005) 10 Supreme Court Cases 228, Commissioner of Police and others -Vrs.- Devendra Anand and others reported in 2019 SCC Online Supreme Court 996, Sanjay Chandra -Vrs.- Central Bureau of Investigation reported in (2012) 1 Supreme Court Cases 40, Dataram Singh -Vrs.- State of uttarpradesh and another reported in (2018) 3 Supreme Court Cases 22.

Mr. Bibekananda Bhuyan, learned Special Counsel appearing for the State of Odisha in O.P.I.D. Act matters being ably assisted by Mr. J.P. Patra, Advocate vehemently opposed the prayer for bail and submitted that it is a case of economic offence and investigation is under progress and huge amount of public money was collected under false assurance which are yet to be recovered and in case the petitioner is enlarged on bail, there is every chance of tampering with the evidence and therefore, the petitioner should not be released on bail at this stage.

5. This is a case of economic offence. Economic offences are always considered as grave offences as it involves deep rooted conspiracy and huge loss of public fund. Such offences are committed with cool calculation and deliberate design solely with an eye on personal profit regardless of the consequence to the community. It brings about total imbalance in the economy of the country, which has the effect of making lives of people economically weaker and miserable. Such offences are treated worse than murders. In such type of offences, while granting bail, the Court has to keep in mind, inter alia, the larger interest of public and State. The nature and seriousness of an economic offence and its impact on the society are always important considerations in such a case and those aspects must squarely be dealt with by the Court while passing an order on bail applications. (Ref: **State of Gujarat -Vrs.- Mohanlal Jitamalji Porwal and others reported in (1987) 2 Supreme Court Cases 364, Y.S. Jagan Mohan Reddy-Vrs.- C.B.I. reported in (2013) 7 Supreme Court Cases 439 and Aswini Kumar Patra -Vrs.- Republic of India** reported in **(2021) 84 Odisha Criminal Reports 1**.

Before dealing with the rival contentions raised, let me take a bird's eye view to the citations placed by the learned counsel for the petitioner. In the case of **Dillip Singh** (supra), it is held as follows:-

> "4. It is well settled by a plethora of decisions of this Court that criminal proceedings are not for realization of disputed dues. It is open to a Courtto grant or refuse the prayer for anticipatory bail, depending on the facts and circumstances of the particular case. The factors to be taken into consideration, while considering an application for bail are the nature of accusation and the severity of the punishment in the case of conviction and the nature of the materials relied upon by the prosecution; reasonable apprehension of tampering with the witnesses or apprehension of threat to the complainant or the witnesses;

> reasonable possibility of securing the presence of the accused at the time of trial or the likelihood of his abscondance; character, behavior and standing of the accused, and the circumstances which are peculiar of the accused and larger interest of the public or the State and similar other considerations. A criminal court, exercising jurisdiction to grant bail/anticipatory bail, is not expected to act as a recovery agent to realise the dues of the complainant, and that too, without any trial."

In the case of **Anil Mahajan** (supra), it is held as that mere failure of a person to keep up promise subsequently, a culpable intention right at the beginning that is, when he made the promises cannot be presumed. A distinction has to be kept in mind between mere breach of contract and the offence of cheating. It depends upon the intention of the accused at the time of inducement. The subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent, dishonest intention is shown at the beginning of the transaction. The substance of the complaint is to be seen. Mere use of the expression "cheating" in the complaint is of no consequence.

In the case of **DevendraAnand** (supra), it is held that the case involves a civil dispute and for settling a civil dispute, which is nothing but an abuse of process of law.

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

> "21. In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will 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 duly found guilty.
>
> 22. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, 'necessity' is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances.
>
> 23. Apart from the question of prevention being the object of a refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any Court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an un-convicted person for the purpose of giving him a taste of imprisonment as a lesson."

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

> "5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an Accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an Accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in **In Re-Inhuman Conditions in 1382 Prisons, In re (2017) 10 SCC 658**."

It is the settled law that detailed examination ofevidence and elaborate discussion on merits of the case should not be undertaken while adjudicating a bail application. The nature of accusation, the severity of punishment in case of conviction, the nature of supporting evidence, the criminal antecedents of the petitioner, if any, reasonable apprehension of tampering with the evidence of the witnesses, apprehension of threat to the witnesses, reasonable possibility of securing the presence of the petitioner at the time of trial and above all the larger interests of the public and State are required to be taken note of by the Court while granting bail. Law is well settled that in a given case, civil proceedings and criminal proceedings can proceed simultaneously if prima facie essential ingredients of an offence or offences are disclosed from the complaint petition or first information report or charge sheet. In many criminal proceeding, there would be some element of civil nature. Therefore, it cannot be universally said that where there is civil litigation between the same parties, criminal proceeding cannot be initiated with regard to same subject. An unscrupulous litigant, apprehending criminal action against him, would be encouraged to frustrate the course of justice and law by filing civil suits with respect to the documents intended to be used against him after the initiation of criminal proceeding or in anticipation of such proceeding. This case is not one of such criminal case which is overwhelmingly and predominantly civil in character. There are enough criminal elements in the accusation and it cannot be said that the proceeding has been instituted at a belated stage just to cause great hardships, humiliation, inconvenience and harassment to the petitioner particularly when no civil case is pending between the parties as stated at the Bar.

6. Adverting to the contentions raised by the learned counsel for the respective parties, it appears from the case records that the petitioner being the proprietor of M/s. Sahil Enterprises collected more than Rs.2.86 crores of rupees from 25 investors including the informant and misappropriated the same as per first charge sheet.

The fact remains that the investors who have invested huge amount of their hard earned money or after availing loan from different sources and were dreaming to get high rate of interest/dividend, have been duped by the petitioner on the basis of false promises. Though the petitioner had taken lease of cold

storage w.e.f. 01.03.2019 for storing of potato, fruits and vegetable etc. by execution of an agreement, but in the year 2017 and onwards, the petitioner being the proprietor M/s Sahil Enterprises had issued cold storage receipts in the name of M/s. Sahil Enterprises being represented by him as its proprietor, as the lease holder of MARKFED Cold Storage to the informant and other investors though at that time he had no authorisation to use the cold storage situated at Patia. False agreements and cold storage receipts were issued in favour of the investors.

During course of hearing of the bail application, the learned Special Counsel for the State furnished a list of investors with investment amount under the signature of D.S.P., E.O.W. Bhubaneswar from which it revealed that thirty three investors invested Rs.5,18,93,868/- (Rupees five crores eighteen lakhs ninety three thousand eight hundred sixty eight), they have received back Rs.98,28,265/- (rupees ninety eighty twenty eight thousand two hundred sixty five) and the outstanding amount is Rs.4,20,67,203/- (rupees four crores twenty lakhs sixty thousand two hundred three). When a query was made to the learned counsel for the petitioner as to whether the petitioner is ready and willing to deposit such money in the trial Court, on instruction, the learned counsel for the petitioner submitted that the petitioner is not having good financial condition to deposit the amount as reflected in the list furnished by the learned special counsel appearing for the State of Odisha. On a query being made, the I.O. submitted the status report of investigation indicating therein that letters have been sent to Bank of India, HDFC Bank to furnish the bank statement for verification and that of verified documents have been sent to HWB, Rasulgarh, Bhubaneswar for examination and opinion, which has been received and it is in affirmative. With the available oral and documentary evidence, I am prima facie satisfied that the ingredients of the offences under which charge sheet has been submitted are made out against the petitioner.

7. Without detailed examination of evidence on record and elaborate discussions on merits of the case, but considering the nature and gravity of the accusation, the nature of supporting evidence, availability of prima facie case against the petitioner, severity of punishment likely to be imposed in case of conviction and since huge amount of public money has been misappropriated and the investors have been cheated of their hard earned money which is as of now is more than four crores on the false assurance of giving them high interest/dividend for which agreements were executed by the petitioner with them and when further investigation of the case is under progress and many more vital links of the case are yet to be unearthed, since it is an economic offence

and reasonable apprehension of tampering with the evidence cannot be ruled out at this stage and above all in the larger interest of society, I am not inclined to release the petitioner on bail.

Accordingly, the bail application sans merit and hence stands rejected.

Before parting, I would like to place it on record by way of abundant caution that whatever has been stated hereinabove in this order has been so said only for the purpose of disposing of the prayer for bail made by the petitioner. Nothing contained in this order shall be construed as expression of a final opinion on any of the issues of fact or law arising for decision in the case which shall naturally have to be done by the trial Court at the appropriate stage of the trial.

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2022 (III) ILR-CUT-500

S.K. SAHOO, J.

CRLREV NO. 307 OF 2022

ANIL KUMAR JENA …….. Petitioner

.V.

STATE OF ODISHA …….. Opp.Party

(A) INDIAN PENAL CODE, 1860 – Charges under sections 376(2)(n)/417 of IPC – Prayer for discharge of the accused from the case – Plea taken by the accused that there was no sign of any forcible sexual intercourse – The prosecution case is, on the assurance of marriage, the petitioner used to visit the house of the victim regularly and forcibly kept physical relationship with her on many a times against her will – There are absence of materials to constitute the offences – Effect of – Discussed with case laws. (Para-7)

(B) INDIAN PENAL CODE, 1860 – Section 375 – Consent – When vitiated – Held, where the promise to marry is false and the intention of the maker at the time of making the promise itself was not to abide by it but to deceive the woman to convince her to engage in sexual relation, there is a "misconception of fact", that vitiates the woman's "consent".

Case Laws Relied on and Referred to :-

1. (2019) 9 SCC 608 : Pramod Suryabhan Pawar-Vrs.- State of Maharashtra & Anr.
2. (2020) 10 SCC 108 : Maheshwar Tigga -Vrs.- State of Jharkhand.
3. (2006) 11 SCC 615 : Yedla Srinivasa Rao -Vrs.- State of A.P.

4. (2001) 4 SCC 333 : Om Wati -Vrs.- State.
5. (2012) 9 SCC 460 : Amit Kapoor -Vrs.- Ramesh Chander.
6. AIR 2000 SC 2583 : State of Madhya Pradesh -Vrs.- Mohanlal Soni.
7. (2004) 1 SCC 691 : State of M.P. -Vrs.- Awadh Kishore Gupta.
8. (2005) 30 OCR (SC)177 : State of Orissa -Vrs.- Debendra Nath Padhi.
9. (2003) 4 SCC 46 : Uday -Vrs.- State of Karnataka.
10. (2013) 7 SCC 675 : Deepak Gulati -Vrs.- State of Haryana.

For Petitioner : Mr. Devashish Panda
For Opp.Party : Mr. Rajesh Tripathy, A.S.C.

ORDER Date of Hearing :13.09.2022 : Date of order : 19.09.2022

S.K. SAHOO, J.

> "Broken vows are like broken mirrors. They leave those who held to them bleeding and staring at fractured images of themselves"
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> - Richard Paul Evans

The petitioner Anil Kumar Jena has filed this criminal revision petition under section 401 read with section 397 of the Code of Criminal Procedure, 1973 (hereafter 'Cr.P.C.') to set aside the impugned order dated 04.06.2022 passed by the learned Additional Sessions Judge, Anandapur in S.T. Case No.29 of 2022 in framing charges under sections 376(2)(n)/417 of Indian Penal Code against him with a further prayer for discharge him from the case. The said case arises out of Nandipada P.S. Case No.73 of 2022.

2. The prosecution case, as per the first information report lodged by the victim 'RJ' on 10.04.2022 before the Inspector in-charge of Nandipada police station is that prior toeight years of lodging of the first information report, while shewas prosecuting her studies in the college, the petitioner used tocome near her college and after they met several times, love affair was developed between them and the petitioner assured the victim to marry her. The father of the petitioner brought marriage proposal to the house of the victim, which was alsoduly accepted by her father. On the assurance of marriage, the petitioner used to visit the house of the victim regularly and forcibly keeping physical relationship with her on many a times against her will. The petitioner took a sum of Rs.30,000/- (rupees thirty thousand) from the father of the victim and being asked to return the same, the petitioner told openly that neither he would return the money nor would he marry the victim as his marriage was fixed with another girl by his family members. The petitioner was working as Assistant Officer in the L.I.C.office at Nimapada. Near about one year, the petitioner kept no relation with the victim and he even blocked her mobile number and rejected her marriage proposal. The petitioner's three sisters and two brother-in-laws threatened

the victim with dire consequences and stated that they would settle the marriage of the petitioner at another place.

On the basis of such first information report, Nandipada P.S. Case No.73 of 2022 was registered under sections 376(1)/493/417/506/34 of the Indian Penal Code.

On completion of investigation, charge sheet was submitted on 27.05.2022 under sections 376(2)(n)/417 of the Indian Penal Code only against the petitioner.

3. Mr. Devashis Panda, learned counsel for the petitioner contended that the medical examination report of the victim-informant indicated that there was no sign of any forcible sexual intercourse. He further contended that the petitioner had filed a complaint case i.e. 1.C.C. Case No.11 of 2022 before the learned S.D.J.M., Anandapur against the victim and her father alleging therein that the victim having become acquainted with the petitioner maintained friendship through phone calls and messages, however after sometime when she began to call him during his working hours, he had to block her mobile number and being annoyed, she and her father used to threaten the petitioner and also demanded a sum of Rs.5,00,000/- (rupees five lakh) from him saying that non-payment would put him into problems with threat to diminish his social standing and accordingly, the victim filed a false case against the petitioner. It is further contended that the victim was major when she kept physical relationship with the petitioner and she was aconsenting party. It is argued that even though there are no materials to constitute the ingredients of offences under sections 376(2)(n)/ 417 of the Indian Penal Code, charge has been framed in a mechanical manner without application of mind and therefore, the impugned order so far as framing of charge under sections 376(2)(n)/417 of the Indian Penal Code should be set aside. Learned counsel has relied upon the decisions of the Hon'ble Supreme Court in cases of **Pramod Suryabhan Pawar -Vrs.- State of Maharashtra and another** reported in **(2019) 9 Supreme Court Cases 608** and **Maheshwar Tigga -Vrs.- State of Jharkhand** reported in **(2020) 10 Supreme Court Cases 108.**

Mr. Rajesh Tripathy, learned Addl. Standing Counselon the other hand supported the impugned order and contendedthat at the stage of framing charge, the trial Court is notrequired to enter into meticulous consideration of evidence and material placed before it at that stage. The defence plea is not required to be considered. He argued that much prior to the medical examination of the victim, the petitioner had stopped keeping physical relationship with her and therefore, the finding in the medical examination report of the victim that there was no sign

of any forcible sexual intercourse on her cannot be a ground to discharge the petitioner. He placed reliance on the decision of the Hon'ble Supreme Court in the case of **Yedla Srinivasa Rao -Vrs.- State of A.P.** reported in **(2006) 11 Supreme Court Cases 615** and submitted that the revision petition should be dismissed.

4. Adverting to the contentions raised by the leaned counsel for the respective parties, let me first discuss the scope of sections 227 and 228 of Cr.P.C. as held by the Hon'ble Supreme Court in the following decisions.

In the case of **Om Wati -Vrs.- State** reported in **(2001) 4 Supreme Court Cases 333**, the Hon'ble Supreme Court held as follows:-

> "7. Section 227 of the Code provides that if upon consideration of record of the case and the documents submitted there with, the Judge considers that there is no sufficient ground for proceeding against the accused, he shall discharge the accused for which he is required to record his reasons for so doing. No reasons are required to be recorded when the charges are framed against the accused persons.
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> 8. At the stage of passing the order in terms of Section 227 of the Code, the Court has merely to peruse the evidence in order to find out whether or not there is a sufficient ground for proceeding against the accused. If upon consideration, the court is satisfied that a prima facie case is made out against the accused, the Judge must proceed to frame charge in terms of Section 228 of the Code. Only in a case where it is shown that the evidence which the prosecution proposes to adduce to prove the guilt of the accused, even if fully accepted before it is challenged in cross-examination or rebutted by defence evidence cannot show that the accused committed the crime, then and then alone the court can discharge the accused. The court is not required to enter into meticulous consideration of evidence and material placed before it at this stage."

In case of **Amit Kapoor -Vrs.- Ramesh Chander** reported in **(2012) 9 Supreme Court Cases 460**, it is held as follows:-

> "17. Framing of a charge is an exercise of jurisdiction by the trial Court in terms of Section 228 of the Code, unless the accused is discharged under Section 227 of the Code. Under both these provisions, the Court is required to consider the 'record of the case' and documents submitted there with and, after hearing the parties, may either discharge the accused or where it appears to the Court and inits opinion there is ground for presuming that the accused has committed an offence, it shall frame the charge. Once the facts and ingredients of the Section exists, then the Court would be right in presuming that there is ground to proceed against the accused and frame the charge accordingly. This presumption is not a presumption of law as such. The satisfaction of the Court in relation to the existence of constituents of an offence and the facts leading to that offence is a sine qua non for exercise of such jurisdiction. It may even be weaker than a prima facie case. There is a fine distinction between the language of Sections 227 and 228 of the Code. Section 227 is expression of a definite opinion and judgment of the Court while Section 228 is tentative. Thus, to say that at the stage of framing of

> charge, the Court should form an opinion that the accused is certainly guilty of committing an offence, is an approach which is impermissible in terms of Section 228 of the Code.
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> 19. At the initial stage of framing of a charge, the Court is concerned not with proof but with a strong suspicion that the accused has committed an offence, which, if put to trial, could prove him guilty. All that the Court has to see is that the material on record and the facts would be compatible with the innocence of the accused ornot. The final test of guilt is not to be applied at that stage....."

In case of **State of Madhya Pradesh -Vrs.-Mohanlal Soni reported in A.I.R. 2000 S.C. 2583**, it is held that at the stage of framing charge, the Court has to prima facie consider whether there is sufficient ground for proceeding against the accused. The Court is not required to appreciate the evidence to conclude whether the materials produced are sufficient or not for convicting the accused. If the evidence which the prosecution proposes to produce to prove the guilt of the accused, even if fully accepted before it is challenged by the cross-examination or rebutted by the defence evidence, if any, cannot show that accused committed the particular offence then the charge can be quashed.

In case of **State of M.P. -Vrs.- Awadh Kishore Gupta** reported in **(2004) 1 Supreme Court Cases 691**, it is held that when charge is framed, at that stage, the Court has to only prima facie be satisfied about existence of sufficient ground for proceeding against the accused. For that limited purpose, the Court can evaluate materials and documents on records but it cannot appreciate evidence.

In case of **State of Orissa -Vrs.- Debendra Nath Padhi** reported in **(2005) 30 Orissa Criminal Reports (SC) 177**, it is held as follows:-

> "18..The scheme of the Code and object with which Section 227 was incorporated and Sections 207 and 207(A) omitted have already been noticed. Further, at the stage of framing of charge, roving and fishing inquiry is impermissible. If the contention of the accused is accepted, there would be a mini trial at the stage of framing of charge. That would defeat the object of the Code. It is well-settled that at the stage of framing of charge, the defence of the accused cannot be put forth. The acceptance of the contention of the learned counsel for the accused would mean permitting the accused to adduce his defence at the stage of framing of charge and for examination thereof at that stage which is against the criminal jurisprudence. By way of illustration, it may be noted that the plea of alibi taken by the accused may have to be examined at the stage of framing of charge if the contention of the accused is accepted despite the well settled proposition that it is for the accused to lead evidence at the trial to sustain such a plea. The accused would been titled to produce materials and documents in proof of such a plea at the stage of framing of the charge, in case we accept the contention put forth on behalf of the accused. That has never been the intention of the law well settled for over one hundred years now. It is in this light that the provision about hearing the submissions of the

> accused as postulated by section 227 is to be understood. It only means hearing the submissions of the accused on the record of the case as filed by the prosecution and documents submitted there with and nothing more. The expression 'hearing the submissions of the accused' cannot mean opportunity to file material to be granted to the accused and thereby changing the settled law. At the state of framing of charge hearing the submissions of the accused has to be confined to the material produced by the police."

5. The contention of the learned counsel for the petitioner that the medical examination report of the victim indicated that there was no sign of any forcible sexual intercourse, cannot be a ground to disbelieve the prosecution case at this stage. As rightly pointed out by the learned counsel for the State that much prior to the medical examination of the victim, the petitioner had stopped keeping physical relationship with her. It is the settled law that the victim of rape is not to be treated as accomplice and as such, her evidence does not require corroboration from any other evidence including the evidence of a doctor. In a given case, even if the doctor who examined the victim does not find sign of rape, it is no ground to disbelieve the sole testimony of the prosecutrix if it inspires confidence and it is clear, cogent, reliable and trustworthy. Thus, the contention of the learned counsel for the petitioner on this score is not acceptable.

6. The contention of the learned counsel for the petitioner that the petitioner had filed a complaint case i.e. 1.C.C. Case No.11 of 2022 before the learned S.D.J.M., Anandapur against the victim and her father for which the rape case has been foisted, is very difficult to be accepted. Neither any discharge petition was filed by the petitioner nor was any such contention regarding his false implication on account of filing of complaint petition raised in the trial Court at the time of hearing on the point of charge. Such contentions were raised for the first time in this Court. Moreover, the defence plea regarding the false implication is not to be considered at this stage. If oral as well as documentary evidence is adduced by the petitioner in the trial Court in support of his defence plea, it will be considered in accordance with law.

When the learned counsel for the petitioner contended that the learned S.D.J.M. after taking cognizance of offences has issued process against the victim and her father in the complaint case, this Court asked the learned counsel for the petitioner to produce the certified copy of the order taking cognizance of offences in the complaint petition. The learned counsel for the petitioner produced the certified copy of the order sheet of the complaint case from which it appears that even initial statement of the complainant has not been recorded. Therefore, there was no scope for the victim to know that a complaint petition has been filed against her by the petitioner. Thus the submission made by the learned counsel for the petitioner on this score is palpably wrong.

7. Coming to the submission made the learned counsel for the petitioner that there are absence of materials to constitute the ingredients of offences, reliance was placed by the learned counsel for the petitioner in the case of **Pramod Suryabhan Pawar** (supra), wherein the Hon'ble Supreme Court held as follows:-

> "16. Where the promise to marry is false and the intention of the maker at the time of making the promise itself was not to abide by it but to deceive the woman to convince her to engage in sexual relations, there is a "misconception of fact" that vitiates the woman's "consent". Onthe other hand, a breach of a promise cannot be said to be a false promise. To establish a false promise, the maker of the promise should have had no intention of upholding his word at the time of giving it. The "consent" of a woman under Section 375 is vitiated on the ground of a "misconception of fact" where such misconception was the basis for her choosing to engage in the said act.
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> 18. To summarise the legal position that emerges from the above cases, the "consent" of a woman with respect to Section 375 must in volve an active and reasoned deliberation towards the proposed act. To establish whether the "consent" was vitiated by a "misconception of fact" arising out of a promise to marry, two propositions must be established. The promise of marriage must have been a false promise, given in bad faith and with no intention of being adhered to at the time it was given. The false promise itself must be of immediate relevance, or bear a direct nexus to the woman's decision to engage in the sexual act."

Reliance was further placed by the learned counsel for the petitioner in case of **Maheswar Tigga** (supra), wherein the Hon'ble Supreme Court held as follows:-

> "13. The question for our consideration is whether the prosecutrix consented to the physical relationship under any misconception of fact with regard to the promise of marriage by the appellant or was her consent based on a fraudulent misrepresentation of marriage which the appellant never intended to keep since the very inception of the relationship. If we reach the conclusion that he intentionally made a fraudulent misrepresentation from the very inception and the prosecutrix gave her consenton a misconception of fact, the offence of rape under Section 375 I.P.C. is clearly made out. It is not possible to hold in the nature of evidence on record that the appellant obtained her consent at the inception by putting her under any fear. Under Section 90 I.P.C. a consent given under fear of injury is not a consent in the eyes of law. In the facts of the present case, we are not persuaded to accept the solitary statement of the prosecutrix that at the time ofthe first alleged offence, her consent was obtained under fear of injury.
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> 14. Under Section 90 I.P.C., a consent give nunder a misconception of fact is no consent in the eyes of law. But the misconception of fact has to be in proximity of time to the occurrence and cannot be spread over a period of four years. It hardly needs any elaboration that the consent by the appellant was a conscious and informed choice made by her after due deliberation, it being spread over a long period of time coupled with a conscious positive action not to protest. The prosecutrix in her letters to the appellant also mentions that there would often be quarrels at her home with her family members with regard to the relationship, and beatings given to her.

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20. We have no hesitation in concluding that the consent of the prosecutrix was but a conscious and deliberated choice, as distinct from an involuntary action or denial and which opportunity was available to her, because of her deep-seated love for the appellant leading her to willingly permit him liberties with her body, which according to normal human behaviour are permitted only to a person with whom one is deeply in love. The observations in this regard in **Uday -Vrs.- State of Karnataka : (2003) 4 Supreme Court Cases 46** are considered relevant:

"25…It usually happens in such cases,when two young persons are madly in love, that they promise to each other several times that come what may, they will get married. As stated by the prosecutrix the appellant also made such a promise on more than one occasion. In such circumstances, the promise loses all significance, particularly when they are overcome with emotions and passion and find themselves in situations and circumstances where they, in a weak moment, succumb to the temptation of having sexual relationship. This is what appears to have happened in this case as well, and the prosecutrix willingly consented to having sexual intercourse with the appellant with whom she was deeply in love, not because he promised to marry her, but because she also desired it. In these circumstances, it would be very difficult to impute to the appellant knowledge that the prosecutrix had consented in consequence of a misconception of fact arising from his promise. In any event, it was not possible for the appellant to know what was in the mind of the prosecutrix when she consented, because there were more reasons than one for her to consent."

Reliance was placed by the learned counsel for the State in case of In **Yedla Srinivasa Rao** (supra), where the accused forcibly established sexual relations with the prosecutrix. When she asked the accused why he had spoiled her life, he promised to marry her. On this premise, the accused repeatedly had sexual intercourse with the prosecutrix. When theprosecutrix became pregnant, the accused refused to marry her. When the matter was brought to the Panchayat, the accused admitted to having had sexual intercourse with the prosecutrix but subsequently absconded. Given this factual background, the Court observed:

"10. It appears that the intention of the accusedas per the testimony of P.W.1 was, right from the beginning, not honest and he kept on promising that he will marry her, till she became pregnant. This kind of consent obtained by the accused cannot be said to be any consent because she was under a misconception of fact that the accused intends to marry her, therefore, she had submitted to sexual intercourse with him. This fact is also admittedby the accused that he had committed sexual intercourse which is apparent from the testimony of P.Ws.1, 2 and 3 and before the panchayat of elders of the village. It is more than clear that the accused made a false promise that he would marry her. Therefore, the intention of the accused right from the beginning was not bona fide and the poor girl submitted to the lust of the accused, completely being misled by the accused who held out the promise for marriage. This kind of consent taken by the accused with clear intention not to fulfil the promise and persuading the girl to believe that he is going to marry her and obtained her consent for the sexual intercourse under total misconception, cannot be treated to be a consent....It is always matter of evidence whether the consent was obtained willingly or consent has been obtained by holding a false promise which the accused never intended to fulfil. If the court of facts come to

> the conclusion that the consent has been obtained under misconception and the accused persuaded a girl of tender age that the he would marry her then in that case it can always be said that such consent was not obtained voluntarily but under a misconception of fact and the accused right from the beginning never intended to fulfil the promise. Such consent cannot condone the offence."

8. On perusal of the first information report and the statement of the victim, it clearly indicates that the victim was major and aged about twenty seven years when she lodged the F.I.R. and love affair between the petitioner and the victim blossomed since eight years prior to the lodging of F.I.R. and assurance of marriage was given by the petitioner and even the father of the petitioner brought marriage proposal to which the victim's father agreed. The victim specifically stated that the petitioner kept physical relationship on many a time against her will. He not only took money from the father of the victim and did not return it, but when he was asked for the money, he refused to pay back and did not show any interest to marry the victim rather his family members settled his marriage at another place. Whether the intention of the petitioner right from the beginning when he gave assurance of marriage to the victim was bonafide and honest or it was a false promise of marriage given by the petitioner to keep physical relationship with the victim with no intention of being adhered to at the time it was given, is to be adjudicated at the stage of trial after assessing the evidence on record. The Court may find basing on evidence that at initial stage itself, the petitioner had no intention whatsoever,of keeping his promise to marry the victim. In the case of **Deepak Gulati -Vrs.- State of Haryana** reported in **(2013) 7 Supreme Court Cases 675**, the Hon'ble Supreme Court held that there may, of course, be circumstances, when a person having the best of intentions is unable to marry the victim owing to various unavoidable circumstances. The failure to keep a promise made with respect to a future uncertain date, due to reasons that are not very clear from the evidence available, does not always amount to 'misconception of fact'. In order to come within the meaning of the term 'misconception of fact', the fact must have an immediate relevance. Section 90 Indian Penal Code cannot be called into aid in such a situation, to pardon the act of a girl in entirety, and fasten criminal liability on the other, unless the Court is assured of the fact that from the very beginning, the accused had never really intended to marry her.

In the case in hand, the victim has specifically stated that the petitioner kept physical relationship with her against her will on many a time giving assurance of marriage. Merely because a boy and a girl were having love affairs for a long term, it does not mean that the girl would be willing or be a consenting party to have sexual intercourse with the boy and that to before their marriage. It would depend on the f actual scenario. A famous quote states, "Touch her heart, not her body. Steal her attention, not her virginity. Make her smile, don't waste

her tears." Whether the victim willingly consented to have sexual intercourse with the petitioner or the petitioner had sexual intercourse with the victim against her will as per the first clause of section 375 of the Indian Penal Code is no doubt to be adjudicated by the learned trial Court at the appropriate stage. The expression 'against the will' seems to con note that the offending act was done despite resistance and opposition of the woman. It would not be proper to give any finding in that respect at this stage.

9. In the case of **Amit Kapoor** (supra), while discussing the scope of revisional jurisdiction, the Hon'ble Supreme Court held as follows:-

> "12. Section 397 of the Code vests the Court with the power to call for and examine the records of an inferior Court for the purposes of satisfying itself as to the legality and regularity of any proceedings or order made in a case. The object of this provision is to set right a patent defect or an error of jurisdiction or law. There has to be a well-founded error and it may not be appropriate for the Court to scrutinize the orders, which upon the face of it bears a token of careful consideration and appear to be in accordance with law. If one looks into the various judgments of this Court, it emerges that the revisional jurisdiction can be invoked where the decisions under challenge are grossly erroneous, there is no compliance with the provisions of law, the finding recorded is based on no evidence, material evidence is ignored or judicial discretion is exercised arbitrarily or perversely. These are not exhaustive classes, but are merely indicative. Each case would have to be determined on its own merits.
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> 13. Another well-accepted norm is that the revisional jurisdiction of the higher Court is a very limited one and cannot be exercised in a routine manner. One of the inbuilt restrictions is that it should not be against an interim or interlocutory order. The Court has to keep in mind that the exercise of revisional jurisdiction itself should not lead to injustice ex-facie. Where the Court is dealing with the question as to whether the charge has been framed properly and in accordance with law in a given case, it may be reluctant to interfere in exercise of its revisional jurisdiction unless the case substantially falls within the categories aforestated. Even framing of charge is a much advanced stage in the proceedings under the Cr.P.C.
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> 20. The jurisdiction of the Court under Section 397 can be exercised so as to examine the correctness, legality or proprietary of an order passed by the trial Court or the inferior Court, as the case may be. Though the section does not specifically use the expression 'prevent abuse of process of any Court or otherwise to secure the ends of justice', the jurisdiction under Section 397 is a very limited one. The legality, proprietary or correctness of an order passed by a Court is the very foundation of exercise of jurisdiction under Section 397 but ultimately it also requires justice to be done. The jurisdiction could be exercised where there is palpable error, non-compliance with the provisions of law, the decision is completely erroneous or where the judicial discretion is exercised arbitrarily."

10. Without entering into a detailed analysis of the materials in the case records, it cannot be said at this stage that there are no prima facie case against

the petitioner to frame thecharges. In view of the foregoing discussions, on a careful scrutiny of the case records produced by the learned counsel for the State, I do not find any illegality or perversity in the impugned order. Accordingly, the CRLREV petition being devoid of merits, stands dismissed.

Before parting, I would like to place it on record by way of abundant caution that whatever has been stated hereinabove in this order has been so said only for the purpose of disposing of the prayer made by the petitioner to set aside the order of framing of charge. Nothing contained in this order shall be construed as expression of a final opinion on any of the issues of fact or law arising for decision in the case which shall naturally have to be done by the trial Court at the appropriate stage of the trial on the basis of evidence to be adduced by the parties.

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2022 (III) ILR-CUT-510

K.R. MOHAPATRA, J.

CMP NO. 680 OF 2022

GOKULA NAIK …….. Petitioner

.V.

PITAMBAR NAIK & ORS. ……..Opp.Parties

CODE OF CIVIL PROCEDURE, 1908 – Section 151, Order XXXIX Rules 1, 2 & 2A – The petitioner filed an application under Order 39 Rules 1 & 2 alongwith the plaint – Learned Trial Court directed the parties to maintain *status quo* over the schedule land – But the Opp.Parties initiated construction inspite of the *status quo* order – The petitioner filed an application under Section 151 with a prayer for direction to implement the order of *status quo* – The learned trial Court rejected the same as not maintainable – Whether such order is sustainable under law ? – Held, No – The Court has ample power to exercise its discretionary power under Section 151 C.P.C – When the remedy under Order 39 Rule 2-A C.P.C. will not be sufficient, the Court has a duty to evaluate the grievance of the Petitioner vis-à-vis the loss likely to be suffered, if timely intervention is not made to see that the order of *status quo* is implemented. (Para 8.4)

Case Laws Relied on and Referred to :-

1. CMP No.128 of 2021 : Smt. Manoj Manjari Mohapatra & Anr. -v- Sri Kapila @ Kapilendra Mohapatra & Anr.

2. 1989 (I) OLR 398 : Subal Kumar Dey -v- Purna Chandra Giri
3. (2007) 12 SCC 201 : Meera Chauhan -v- Harsh Bishnoi & Anr.

For Petitioner : Mr. Anam Charan Panda
For Opp.Parties : Mr. Suvashish Pattnaik, AGA

ORDER Date of Order : 09.09.2022

K.R. MOHAPATRA, J.

1. This matter is taken up through hybrid mode.

2. The Petitioner in this CMP seeks to assail the order dated 19th May, 2022 (Annexure-4) passed in C.M.A. No. 112 of 2021 (arising out of I.A. No. 071 of 2020), whereby learned 1st Additional Senior Civil Judge, Cuttack rejected an application under Section 151 C.P.C. filed by him to implement the order dated 20th January, 2021 passed in I.A. No.1 of 2020 (arising out of C.S. No.477 of 2020) through the Inspector-in-Charge, Dargha Bazar P.S., Cuttack.

3. Office note indicates that notice on Opposite Party No.1 has returned un-served with a postal endorsement 'Addressee left'. Notices on Opposite Party Nos. 6 and 7 returned un-served as they refused to accept the same. Further, tracking report of Postal Department discloses that notices on Opposite Party Nos.2 to 5 and 8 to 11 have been delivered to them on 30th August, 2022. Thus, notices on Opposite Party Nos. 2 to 11 are treated to be sufficient.

4. Mr. Panda, learned counsel for the Petitioner submits that in spite of service of notice on Opposite Party No.1, he did not contest either the interim application or the C.M.A. No.112 of 2021. Hence, the CMP can be disposed of in his absence. Considering such fact, this Court proceeds with final disposal of CMP.

5. Mr. Panda, learned counsel for the Petitioner submits that along with the plaint, the Petitioner filed an application under Order XXXIX Rules 1 and 2 C.P.C. in I.A. No.1 of 2020. Said application was allowed in part on contest vide order dated 20th January, 2021 with the following direction:

> *"The interim application is **allowed** in part on contest but without any cost. The petitioners as well as the O.Ps are directed to maintain **status quo** over the I.A. schedule land i.e. Khata No.254, plot no.622 of mouza-Cuttack Sahar, Unit No.11, Odia Bazar till disposal of the suit."*

In spite of the aforesaid order, the Opposite Parties are proceeding with construction over the suit land, i.e. Plot No. 622 under Khata No.254 situated in mouza Cuttack Sahar, Unit No. 11, Odia Bazar. As such, the Petitioner filed two applications, one under Order XXXIX Rule 2-A C.P.C. in I.A. No.113 of 2021

and another under Section 151 C.P.C. in C.M.A. No.112 of 2021. The petition under Order XXXIX Rule 2-A is pending for adjudication before learned trial Court. Since the Opposite Parties proceeded to make construction over the suit land, the Petitioner moved the petition under Section 151 C.P.C. and prayed to direct the Inspector-in-Charge, Dargha Bazar Police Station, Cuttack to implement the order of status quo. Learned trial Court rejected the application holding that since the Petitioner has alternative remedy under the Code of Civil Procedure to file an application under Order XXXIX Rule 2-A C.P.C.,an application under Section 151 C.P.C. forimplementation of the order of status quo is not maintainable. Hence, he rejected the said application.

6. Mr. Panda, learned counsel for the Petitioner further submits that learned trial Court has duty to see that the order of status quo is respected. It cannot be mute spectator to the order of status quo being violated on the plea that the Petitioner has a remedy under Order XXXIX Rule 2-A C.P.C.. He relied upon the decision of this Court in the case of ***Smt. Manoj Manjari Mohapatra and another –v- Sri Kapila @ Kapilendra Mohapatra and another*** in CMP No. 128 of 2021, wherein it is held as under:

> *"8. Thus, the Court has also the power to restore possession in exercise of power under Section 151 C.P.C. in the event a party is dispossessed in utter violation of order of injunction/status quo. But, while exercising discretion under Section 151 C.P.C., theCourt must be extremely careful and circumspect andonly when the Court is satisfied that the remedy under Order XXXIX Rule 2-A C.P.C. will not be sufficient to maintain the order passed or remedy the prejudice caused to the applicant, it may exercise such discretion. If necessary, the Court may also direct the police authority to render aid and assistance for implementation of the restraint order. It is the duty of the Court to see that the order of injunction/status quo is respected and maintained during pendency of the suit and suit property is protected. The Court has also the power to put back the parties in the same position as they stood prior to issuance of the restraint order of give appropriate direction to the police authority to render aid to the aggrieved parties for the due andproper implementation of the orders passed in the suit."*

7. It is his submission that the application under Section 151 C.P.C. is not considered in the light of the ratio decided in the case of ***Smt. Manoj Manjari Mohapatra and another*** (supra). He, therefore, prays for setting aside the impugned order under Annexure-4 and to direct the Inspector-in-Charge, Dargha Bazar P.S., Cuttack to implement the order of status quo passed in I.A. No.1 of 2020.

8. Considering the submission made by learned counsel for the Petitioner and on perusal of the materials on record, it appears that alleging violation of the order of status quo, the Petitioner has filed two applications, one under Order XXXIX Rule 2-A C.P.C. and another under Section 151 C.P.C.. The petition

under Order XXXIX Rule 2-A C.P.C. is pending for adjudication. Law is well settled that the Court cannot be a mute spectator to its order being violated.

8.1. This Court in the case of ***Subal Kumar Dey –v- Purna Chandra Giri***, reported in 1989 (I) OLR 398 held at paragraph-9 as follows:

> *"9. Next question of consideration relates to the validity of direction of the trial court to the officerincharge. Baliapal P.S. to render assistance for implementation of the order of injunction. As has been held in the decisions reported in AIR 1971 Andh Pra 33 (Rayapati Audemma v. Pothineni Narasimham) and AIR 1983 Cal 266 (Sunil Kumar Halder v. NishikantaBhandari), direction to the police for implementation 5 of order of temporary injunction is given by a Court in exercise of the inherent powers under Section 151, C.P.C. Inherent power is wide in its nature to protect the interest of the parties in a given case. It is not a power to be exercised for implementation of an order of the Court. Where violation of the order would be so prejudicial to a party that remedies or penalty forviolation of the order available under the statute would not be sufficient, inherent power may be exercised.Therefore, a Court is to be careful before taking external help of police for implementation of the order……."*

8.2. Thus, the Court has ample power to exercise its discretion under Section 151 C.P.C., when the remedy under Order XXXIX Rule 2-A C.P.C. will not be sufficient to remedy the prejudice caused to the applicant. The Hon'ble Supreme Court in the case of **Meera Chauhan – v- Harsh Bishnoi and another**, reported in **(2007) 12 SCC 201** in paragraphs- 16, 17 and 18 held as follows:

> *"16. The power of Section 151 to pass order of injunction in the form of restoration of possession of the code is not res integra now,*
>
> *17. In Manohar vs. HiraLal [AIR 1962 SC 527] while dealing with the power of the Court to pass orders for the ends of justice or to prevent the abuse of the process of the Court, this Court held that the courts have inherent jurisdiction to issue temporary order of injunction in the circumstances which are not covered under the provisions of Order 39 of the Code of Civil Procedure. However, it was held by this Court in the aforesaid decision that the inherent power under Section 151 of the Code of Civil Procedure must be exercised only in exceptional circumstances for which the Code lays down no procedure.*
>
> *18. At the same time, it is also well settled that when parties violate order of injunction or stay order or act in violation of the said order the Court can, by exercising its inherent power, put back the parties in the same position as they stood prior to issuance of the injunction order or give appropriate direction to the police authority to render aid to the aggrieved parties for the due and proper implementation of the orders passed in the suit and also order police protection for implementation of such order."*

8.3 Relying upon the aforesaid case laws, this Court has laid down the principle in ***Smt. Manoj Manjari Mohapatra and another*** (supra) as stated above.

8.4. Further, the Court has to see that parties to the proceeding should respect the order of the Court. In the instant case, parties are directed to maintain status

quo over the suit property. Hence, the Court has to see that the order of status quo passed by it is respected by the parties. A relief under Order XXXIX Rule 2-A C.P.C. may not be sufficient in all cases to mitigate the loss suffered by a party due to violation of order of injunction. Thus, the Court has a duty to evaluate the grievance of the Petitioner vis-à-vis the loss likely to be suffered, if timely intervention is not made to see that the order of status quo is implemented. On perusal of the impugned order under Annexure-4, it appears that this material aspect was not taken into consideration by learned trial Court while adjudicating the petition under Section 151 C.P.C. in C.M.A. No.112 of 2021.

9. In that view of the matter, the impugned order under Annexure-4 is set aside and the matter is remitted back to learned 1st Additional Senior Civil Judge, Cuttack to adjudicate C.M.A. No.112 of 2021 filed under Section 151 C.P.C. afresh, giving opportunity of hearing to the parties concerned.

10. Since the Petitioner alleges that parties are proceeding with construction over the suit land, learned trial Court shall make an endeavour to dispose of the application under Section 151 C.P.C. by the Petitioner in accordance with law at an early date. While adjudicating the said petition, learned trial Court shall also verify as to whether a fresh notice is required to be issued to the Opposite Parties in the instant case.

11. Since this order is passed in absence of the Opposite Parties, they may move this Court for variation of the same, if they feel aggrieved.

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2022 (III) ILR-CUT-514

K.R. MOHAPATRA, J.

CMP NO. 852 OF 2022

VICE-CHANCELLOR, MAHARAJA SRIRAM CHANDRA BHANJA DEO UNIVERSITY & ANR. …….. Petitioners

.V.

SAIBANI GIRI & ORS. ……..Opp.Parties

CODE OF CIVIL PROCEDURE, 1908 – Section 47 and Order XXI Rule 97 – The Workmen/DHrs. filed an Execution Case – The management filed a Writ application challenging the order of Labour Court where an interim order was passed – After expiry of six months from the date of

the interim order – The DHrs. filed an application to vacate the interim order and to proceed with the execution case – The executing Court relying upon paragraphs 35 and 36 of *Asian Resurfacing of Road Agency Ltd. (supra)* proceeded with the execution case – Petitioner /management challenge the same with a plea that the ratio is applicable to trials only and not to the execution proceeding – Held, the ratio of Hon'ble Supreme Court is squarely applicable to execution proceeding.
(Para 5.1)

Case Laws Relied on and Referred to :-

1. (2018) 16 SCC 299 : 2022 SCC Online SC 1014 : Asian Resurfacing of Road Agency Private Limited and another Vs. Central Bureau of Investigation.
2. (2021) 6 SCC 418 : Rahul S. Shah Vs. Jinendra Kumar Gandhi and others.

For Petitioners : Mr. Sanjeev Udgata
For Opp.Parties : --

ORDER Date of Order : 27.09.2022

K.R. MOHAPATRA, J

1. This matter is taken up through hybrid mode.

2. Petitioners in this CMP seek to assail the order dated 3rdAugust, 2022 passed by learned Senior Civil Judge, Baripada in Execution Case No.13 of 2018, whereby it proceeded with the execution proceeding relying upon the ratio decided in the case of ***Asian Resurfacing of Road Agency Private Limited and another Vs. Central Bureau of Investigation***, reported in (2018) 16 SCC 299 in spite of the interim order passed by this Court on 2ndNovember, 2021 in IA No.10826 of 2021 (arising out of W.P.(C) No.23443 of 2021).

3. Mr. Udgagata, learned counsel for the Petitioners submits that assailing the award passed by learned Labour Court, Bhubaneswar in ID Case No.1 of 2017, the Petitioner has preferred W.P.(C) No.23443 of 2021, wherein, this Court, vide order dated 2nd November, 2021, passed the following order:-

> *"W.P.(C) No. 23443 of 2021*
> *And*
> *IA No. 10826 of 2021*
>
> 1. *This matter is taken up through hybrid mode.*
> 2. *Heard.*
> 3. *Issue notice to Opposite Party Nos.1(a) to 1(d) and 2 by Registered Post with A.D. Requisites shall be filed by Friday (05.11.2021), as undertaken.*
> 4. *List this matter after service of return from the Opposite Parties.*
> 5. *As an interim measure, it is directed that, there shall be interim stay of operation of the impugned award vide Annexure-1, till the next date."*

In time meantime, the Workmen-DHrs. filed Execution Case No.13 of 2018. After expiry of six months from the date of the interim order, as aforesaid, the DHrs. filed an application to vacate the interim order passed by this Court and to proceed with the execution case. Learned executing Court relying upon paragraphs-35 and 36 of ***Asian Resurfacing of Road Agency Ltd. (supra)*** proceeded with the execution case stating that in the meantime six months has already lapsed and no further extension of interim order of stay has been made by this Court.

4. Mr. Udgadata, learned counsel for the Petitioner relying upon para-36 of ***Asian Resurfacing of Road Agency Ltd. (supra)*** submits that the ratio is applicable to civil and criminal trials only and not to an execution proceeding, because no trial is undertaken in an execution proceeding. It is his submission that the said order has been clarified by the Hon'ble Supreme Court in the case of ***Asian Resurfacing of Road Agency Private Limited and another Vs. Central Bureau of Investigation***, reported in 2022 SCC Online SC 1014, wherein taking note of paragraph 36 of the case law (supra), it is held as under:-

> "We are afraid that the attempt of the applicant todraw inspiration from the above directions as referred to above cannot succeed in view that this Court cannot be understood as having intended to apply the principle to the fact situation which is presented in this case. Accordingly, the miscellaneous application for clarification is disposed of by clarifying that the order of stay granted by the Division Bench in the High Court cannot be treated as having no force. However, we leave it open to the applicant to seek early disposal of the case."

It is his submission that in the said case, a clarification was sought for with regard to an interim order passed by the Division Bench of the High Court on 6th May, 2015. It is his submission that since there is no trial conducted in an execution proceeding, the aforesaid ratio is not applicable in the instant case. He, therefore prays for setting aside the impugned order and issue direction to the executing Court to stay further proceeding of Execution case No.13 of 2018 pending before it till the interim order passed in W.P.(C) No.23443 of 2021 is either vacated or varied.

5. Upon hearing learned counsel for the Petitioner and on perusal of record and the case law, as well cited by learned counsel for the Petitioner, it is clear that in para-36 of ***Asian Resurfacing of Road Agency Ltd. (supra)***, Hon'ble Supreme Court held that the principle decided therein is applicable to civil and criminal trials. There are provisions under the Code of Civil Procedure, 1908 to receive evidence and decide rights of the parties in an execution proceeding like a suit, i.e., in an application under Section 47 and Order XXI Rule 97 of CPC etc. Thus, it cannot be denied that in execution proceeding no trial is being

conducted. Hon'ble Supreme Court has passed the order keeping in mind that in view of order of stay granted by higher forum civil and criminal trials should not be stayed for indefinite period. The same analogy is also applicable to an execution case. Further, in the case of ***Rahul S. Shah Vs. Jinendra Kumar Gandhi and others***, reported in (2021) 6 SCC 418, Hon'ble Supreme Court, while putting stress upon disposal of execution case at the earliest, held as under:-

> "42.12. The executing court must dispose of the execution proceedings within six months from the date of filing, which may be extended only by recording reasons in writing for such delay."

5.1 In that view of the matter, I am of the considered view that the ratio decided in ***Asian Resurfacing of Road Agency Ltd. (supra)*** is squarely applicable to an execution proceeding pending before any Civil Court.

6. It is submitted by Mr.Udgata, learned counsel that the interim order dated 2nd November, 2021 passed in W.P.(C) No. 23443 of 2021 is till next date and the writ petition has not been listed thereafter. Thus, the interim order is continuing till the date. It is also submitted by Mr. Udgata, learned counsel that neither any application under Section 47 nor under Order XXI Rule 97 CPC is pending for adjudication. Hence, occasion of any trial in the execution proceeding does not arise at all. This Court is not in a position to accept the submission of Mr. Udgata, learned counsel for the Petitioner, in view of the fact that only because no application under Section 47 or Order XXI Rule 97 is pending, it cannot be said that the ratio in ***Asian Resurfacing of Road Agency Ltd. (supra)*** is not applicable to execution proceeding, as the said ratio is equally applicable to a stage of the suit or proceeding, where neither any trial is continuing nor has commenced.

7. In view of the above, I do not find any infirmity in the impugned order and hence the CMP is dismissed being devoid of any merit.

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2022 (III) ILR-CUT-517

B. P. ROUTRAY, J.

MACA NO. 75 OF 2021

THE DIVISIONAL MANAGER,
M/s. NATIONAL INSURANCE COMPANY LTD. …… Appellant

.V.

ANUSHAYA @ANASUYA BISWAL & ORS. …….Respondents

MOTOR VEHICLE ACT, 1988 – Section 166 r/w Section 53 & 61 of the Employees' State Insurance Act, 1948 – The husband of claimant being an employee was covered under the Employees' State Insurance Act, 1948 – Whether claimant/wife of deceased is eligible to get Compensation under Section 166 of MV Act inspite of the bar under Section 53 & 61 of the ESI Act ? – Held, the statutes like the ESI Act, EC Act and MV Act, which are containing beneficial provisions for the poor victim, are to be interpreted for the benefit of the poor victim – It would be harsh to send the victim of a motor vehicular accident or his dependents to the ESI court only for the reason that he is/was an insured person under the ESI Act and not under any other suitable forum even if the cause of injury is completely unconnected to the nature of employment – The claim application in the instant case by the claimants under Section 166 is maintainable. (Para 26)

Case Laws Relied on and Referred to :-

1. AIR 2009 SC 2599 : National Insurance Co. Ltd. v. Hamida Khatoon & Ors.
2. (2015) 14 SCC 454 : Dhropadabai & Ors. v. Technocraft Toolings.
3. 2011 (2) TAC 258 (Kant.) : Shridevi & Ors. v. S. Sarojini & Anr.
4. 2020 (3) TAC 508 (Telan.) : New India Assurance Company Ltd. v. Ravula Shanker @Shanker Goud & Anr.
5. (2021) 2 CgL.J 362 : Ashok Yadav v. Shakur Mohammad.
6. 2020(1) TAC 170 (P&H) : United India Insurance Company Ltd. v. Vaneeta & Ors.
7. 2020(1) TAC 909 (Cal) : Ruma Raha Roy & v. United India Insurance Co. Ltd. & Anr.
8. 1996 (4) SCC 255 : A.Trehan v. Associated Electrical Agencies.
9. 2003 (2) SCC 138 : Bharagath Engg. V. R. Rangamayaki.
10. 1993 (4) SCC 361 : ESI Corporation v. Harrison Malayalam (P) Ltd.
11. 1993 Suppl.(4) SCC 100 : Regional Director, ESI Corporation & Anr. v. Francis De Costa & Anr.
12. 2010 ACJ 662 : K.P.Kuriakose Vs. G.Santhosh Kumar & Ors.
13. AIR 1988 A.P. 361 : K. Bharathi Devi v. G.I.C.I.
14. (1982) ACJ 259 : K.S.Vasantha & Ors. v. Karnataka State Road Transport Corporation.
15. (1986) 2 SCC 614 : Bharat Singh Vs- Management of New Tuberculosis Center.

For Appellant : Mr. P.K. Mahali

For Respondents : Mr. S.C. Swain
alongwith K.C. Nayak, (Respondents1-3)

ORDER Date of Order : 16.09.2022

B. P. ROUTRAY, J.

1. The matter is taken up through hybrid mode.

2. Heard Mr. P.K. Mahali, learned counsel for the insurer-Appellant and Mr. S.C. Swain along with Mr. K.C. Nayak, learned counsel for claimant-Respondents 1 to 3.

3. Present appeal by the insurer is against the impugned judgment dated 16th March, 2020 of the learned 3rd MACT, Cuttack passed in MAC Case No. 697 of 2017 wherein compensation to the tune of Rs.23,22,648/- along with interest @ 7% per annum from the date of filing of the claim application, i.e. 12th September, 2017 has been granted on account of death of deceased Anil Kumar Biswal in the motor vehicular accident dated 19th July, 2017.

4. Mr. Mahali, learned counsel submits on behalf of the insurer that involvement of the offending vehicle, i.e. OD 05 E 4173 is doubtful in view of delayed lodging of F.I.R. and there is every possibility that the said vehicle has been subsequently implanted to manage compensation.

5. Admittedly, the police upon investigation has submitted chargesheet against the driver of the vehicle and all the witnesses including the eye witnesses, viz., P.W.3 & 4 have supported the contentions of the claimants regarding death of the deceased involving the offending vehicle. Therefore, by mere delay in lodging the F.I.R., which has been explained in the contents thereof, no such point arises in favour of the insurer to doubt involvement of the offending vehicle in the accident. Accordingly said contention of the insurer-appellant is rejected.

6. The other ground raised by Mr. Mahali, which is the main ground in the appeal, is that, the deceased namely Anil Kumar Biswal was an employee covered under the Employees' State Insurance Act, 1948 (hereinafter referred as 'the ESI Act') and therefore, in view of the bar under Section 53 and 61 of the said Act, the claim filed under Section 166 of the Motor Vehicle Act (hereinafter referred as 'the MV Act') is not maintainable.

7. In support of his contention Mr. Mahali relies on the decisions rendered by Hon'ble Supreme Court in the case of ***National Insurance Co. Ltd. v. Hamida Khatoon & Others [AIR 2009 SC 2599] Dhropadabai and Others v. Technocraft Toolings [(2015) 14 SCC 454***], and order dated 21st August, 2015 of this court passed in MACA No. 297 of 2015, and order dated 24th September, 2016 in MACA No. 91 of 2015.

8. On the other hand it is submitted on behalf of the claimant-Respondents that, though the deceased is admittedly an insured person under the ESI Act, but his death in the accident involving a motor vehicle is neither arising out of nor in course of his employment and therefore, the bar prescribed under the ESI Act is not applicable to this case to deprive him from getting compensation under the MV Act.

9. In support of such submission, the decisions of various High Courts Viz. ***Shridevi and Others v. S. Sarojini and Another, 2011 (2) TAC 258 (Kant.)*** of Karnataka High Court, ***New India Assurance Company Ltd. v. Ravula Shanker @ Shanker Goud and Another, 2020 (3) TAC 508 (Telan.)*** of Telengana High Court, ***Ashok Yadav v. Shakur Mohammad, (2021) 2 CgL.J 362*** of Chhatisgarh High Court, ***United India Insurance Company Ltd. v. Vaneeta and Others, 2020 (1) T.A.C. 170 (P&H.)*** of Punjab and Haryana High Court and ***Ruma Raha Roy and Others v. United India Insurance Co. Ltd. And Another, 2020 (1) TAC 909 (Cal.)*** of Calcutta High Court have been relied on.

10. Before going for further discussions, the requisite facts need to be mentioned here are that, the deceased was aged about 27 years, serving as a Sea man in Sadhab Shipping Pvt. Ltd., Paradeep. On the date of accident he was on leave (as per the admission in the crossexamination of P.W.2). At the time of accident he was going in a motor cycle bearing registration number OD 05 H 6807 and the offending auto rickshaw bearing registration number OD 05 E 4173 dashed it from behind resulting the injuries and consequent death. The deceased died on 20th August, 2017 in the hospital while undergoing treatment.

11. Section 53 of the ESI Act, which prescribes bar against receiving compensation or damages under any other law, reads as follows:

> "**53. Bar against receiving or recovery of compensation or damages under any other law.**- An insured person or his dependents shall not be entitled to receive or recover, whether from the employer of the insured person or from any other person, any compensation or damages under the Workmen's Compensation Act, 1923 (8 of 1923), or any other law for the time being in force or otherwise, in respect of an employment injury sustained by the insured person as an employee under this Act."

'*Insured Person*' means, as defined under Section 2(14), that, a person who is or was an employee in respect of whom contributions are or were payable under the ESI Act and who is, by reason thereof, entitled to any of the benefits provided by the Act.

'*Employment injury*' means, as defined in Section 2(8) that, a personal injury to an employee caused by accident or an occupational disease arising out of and in the course of his employment, being an insurable employment, whether the accident occurs or the occupational disease is contracted within or outside the territorial limits of India.

12. Section 61 of the ESI Act prescribes the bar of getting benefits under other enactments, which reads as follows:-

> "**61. Bar of benefits under other enactments**.- When a person is entitled to any of the benefits provided by this Act, he shall not be entitled to receive any similar benefit admissible under the provisions of any other enactment."

13. It is clear from the language employed in Section 53 and 61 of the ESI Act that, if a person is entitled for the benefits under the ESI Act, he or his dependents shall not be entitled to receive compensation under any other law in respect of the same employment injury. Therefore, it needs to be considered that, when an injury to an employee will be treated as 'arising out of and in course of employment' ?

14. The definition of 'employment injury' as stated above is clear and unambiguous. It is true that an injury arising out of and in course of the employment includes incidental injuries too. Further, if an injured or his dependants admit the injury as an injury 'arising out of and in course of employment' and raises his claim under the ESI Act in appropriate forum, he is of course debarred from raising his claim under other enactments including the MV Act.

15. The Supreme Court in the case of ***Hamida Khatoon*** (supra) has referred to the earlier decisions in A.Trehan v. Associated Electrical Agencies, 1996 (4) SCC 255, Bharagath Engg. V.R.Rangamayaki, 2003 (2) SCC 138, ESI Corporation v. Harrison Malayalam (P) Ltd., 1993 (4) SCC 361, and Regional Director, ESI Corporation and Anr. v. Francis De Costa and Anr., 1993 Suppl. (4) SCC 100 and held that, *"Above being the position in law, the appeal deserves to be allowed. The entitlement shall be worked out by the concerned MACT by taking note of Section 53 of the Act"*.

The cases of ***A.Trehan, Francis De Costa, and Bharagath Engineering*** (supra) are all concerning compensation under the EC Act. In the case of A. Trehan, it has been held that an application under Section 22(2) of the Employee's Compensation Act, 1923 (hereinafter referred as 'the EC Act') attracts the bar under Section 53 of the ESI Act.

The case of ***Dhropadabai and Others*** (supra) is also under the EC Act, where the deceased suffered chest pain when working in his workplace. In the said case, the Supreme Court has held at paragraph 12 that once an employee is an "insured person" under Section 2(14) of the ESI Act, 1948, neither he nor his dependents would be entitled to get any compensation or damages from the employer under the EC Act. 1923, and the plain language used in the Act clearly conveys so.

16. Karnataka High Court in the case of ***Shridevi and Others*** (supra) have held as follows:

> "5. No. doubt, the accident has occurred in the course and out of employment. The petitioners have not made any claim against the employer in the petition. The claim is against the offending lorry and the insurer of the lorry. The insurer of the lorry has

> issued policy under the terms of the Motor Vehicles Act. The deceased would be a third party as against the insurer of the offending vehicle. The prohibition under Section 53 of the ESI Act would come into play only when compensation is claimed against the employer of the deceased."

17. Telangana High Court in the case of ***Ravula Shanker*** (supra), after discussing the case of A. Trehan (supra) and other decisions, came to hold as follows:-

> "35. In the result, the appeal is dismissed confirming the order and decree, dated 27.10.2015, passed in O.P. No.363 of 2013 by the Tribunal, with the following findings:
>
> i) An application filed under MV Act claiming compensation by injured/legal representatives of deceased is maintainable even if the injured/deceased is covered under ESI Scheme as per the provisions of the ESI Act;
>
> ii) Injured/Legal Representatives of deceased are entitled for compensation under the provisions of the MV Act.
>
> iii) Bar under Section 53 of the ESI Act will apply only if claimant received compensation in respect of an employment injury as defined under Section 2 (8) of the ESI Act; and
>
> iv) Injured/Legal Representatives of deceased cannot claim amounts under the provisions of MV Act which were claimed and received by them towards reimbursement under the provisions of ESI Act."

18. Both the cases of Karnataka High Court and Telangana High Court were claims under Section 166 of the MV Act.

19. In the case of ***Vaneeta and Others*** (supra) of Punjab and Haryana High Court, the accident took place in the factory and the deceased was present at the gate. Punjab and Haryana High Court upon discussion of many decisions including the case of ***Francis De Costa*** (supra), have held as follows:-

> "(B) The second issue is as to whether it was an employment injury.
>
> 17. Admittedly, the injury as a result of the accident on account of the truck bearing No.UA-08E-9577 which occurred on account of the negligence of the driver of the said truck who hit into the deceased while reversing it. The negligence of the driver has been upheld beyond doubt. The duty of the respondent was not on the truck or with the truck. He had nothing to do with the truck in question. The only thing was that he was on duty at the work place when
> the incident occurred. Hence, it cannot be said to be an employment injury although the liability of ESI too cannot be diluted just because it is not an outcome of employment injury as long as it was in the work place where the injured was present in his capacity as an employee.
>
> (C) The fact that the claim under the Motor Vehicles Act would amount to claim against the third party and, therefore, maintainable in spite of the bar under Section 53 of the ESI Act stands answered by the Division Bench of Kerala High Court in the judgment rendered in the case of *K.P.Kuriakose Vs. G.Santhosh Kumar & others, 2010 ACJ 662*

by following the judgment rendered in the case of *Regional Director ESI Corporation Vs. Francis De Costa* as under:-

> We are persuaded to agree that the decision in Regl. Director, E.S.I.C., v. Francis De Costa, (supra) covers the specific issue raised in this case. Claim is raised against a stranger to the contract of employment for compensation on the basis of negligence for causing the accident. The claim is not for compensation for employment injury and in these circumstances the observations in para 44 of Regl. Director E.S.I.C. V. Francis De Costa must be preferred. Following the dictum therein we accept that a claim for compensation in tort against a stranger can coexist with a claim for benefits under the E.S.I. Act. The use of the words "any person" in Section 53 of the E.S.I. Act which we extract below cannot take within its sweep the claim in tort against the stranger/tort fearer under Section 166 of the M.V. Act for compensation for the loss suffered in a motor accident caused by negligence.
>
> Bar against receiving or recovery of compensation or damages under any other law. - An insured person or his dependents shall not be entitled to receive or recover, whether from the employer of the insured person or from any other person, any compensation or damages under the Workmen's Compensation Act, 1923 (8 of 1923), or any other law for the time being in force or otherwise, in respect of an employment injury sustained by the insured person as an employee under this Act. (emphasis supplied).
>
> The expression "any other person" in Section 53 can take within its sweep only such other person who is sought to be made liable, under or on the basis of the contract of employment, to compensate the employee for the 'employment injury' suffered by him. If an injury is suffered to a motor accident and such injury is an employment injury also, Section 53 does not bar the claim in tort under Section 166 of the M.V. Act against the stranger tort fearer. But bars the claim against the employer under any other law. As held by Supreme Court in Francis De Costa the insurance coverage under the Act is in addition to and not in substitution of the other remedies against a stranger."
>
> 18. The object of Section 53 as held in the case of *Mangalamma (supra)* was not to burden the Employer twice, whereas, the Motor Vehicles Act is totally separate from ESI and independent, a stranger.
>
> 19. Thus, the above mentioned conditions being satisfied in the case in hand, Section 53 of ESI Act would not come in his way to claim the compensation under the Motor Vehicles Act in the facts of the present case."

20. The Calcutta High Court in ***Ruma Raha Roy's*** case (supra), where the deceased while walking on the road of Kolkata was knocked down by a TATA Sumo vehicle from behind, upon discussion of various decisions including ***Hamida Khatoon*** (supra) observed as follows:-

> "13. None of the above decisions involved interpretation of the 1988 Act, and, therefore, are not decisions which would have a bearing on the issue that we are called upon to decide. In our opinion, the decision relevant for the purpose of deciding this appeal is the one in *Francis De Costa* (supra). There, it was a reverse case where the employee insured under the 1948 Act had laid a claim before the relevant court under Section 75

thereof, whereupon the Court held him to be entitled to the benefits under the 1948 Act. A point was raised before the Supreme Court that since the insured employee had suffered injury as a result of an accident caused by a motor vehicle, he should have moved the relevant tribunal under the 1988 Act. The relevant paragraphs from such decision read as follows:-

"17. The next contention that the Motor Vehicles Act provides the remedy for damages for an accident resulting in death of an injured person and that, therefore, the remedy under the Act cannot be availed of lacks force or substance. The general law of tort or special law in Motor Vehicles Act or Workmen's Compensation Act may provide a remedy for damages. The coverage of insurance under the Act in an insured employment is in addition to but not in substitution of the above remedies and cannot on that account be denied to the employee. In *K. Bharathi Devi v. G.I.C.I, AIR 1988 A.P. 361*, the contention that the deceased contracted life insurance and due to death in air accident the appellant received compensation and the same would be set off and no double advantage of damages under carriage by Air Act be given was negatived.

18. It falls foul from the mouth of the appellant, a trustee *de son tort* who collected the premium from the employee and employer with a promise to expend it for disability, to attempt to wriggle out from the promise or to deprive the employee the medical benefit for employment injury covered by the insurance on the technicalities. It is estopped to deny medical benefit to the insured employee. We are conscious of the fact that the plea of estoppel was not raised by the respondent but it springs from the conduct of the appellant."

14. It is clear from a reading of the aforesaid extract that the remedy under the 1948 Act is in addition to but not in substitution of the remedies available under the 1988 Act or the 1923 Act and on that account, benefits cannot be denied to an insured employee.

15. For the purposes of the present appeal, we may only note that none of the decisions as aforesaid have any application since it was not proved at the trial that the victim suffered injury in the course of his employment, which is the *sine qua non* for a claim to be laid under the 1923 Act or the 1948 Act, as the case may be.

16. We place on record that Mr. Banik relied on the decision of a learned Judge of the Kerala High Court dated February 18, 2009, in *Kuriakose v. Santosh Kumar*. The view that we have taken is in line with the view expressed in such decision. We, therefore, hold that the point raised by Mr. Singh that the claim application was not maintainable is absolutely without merit."

21. Our High Court, by order dated 21st August, 2015 in MACA No. 297 of 2015, where it was admitted that the claimant had already received reimbursement and compensation for the injuries sustained by him in the accident under the ESI Act, held that the claim application filed under Section 166 of the MV Act is not maintainable in view of the law laid down by the apex court in *Hamida Khatoon (supra)*, as per the bar contained in Section 53 of the ESI Act.

22. In MACA No. 91 of 2015, where it was conceded on behalf of the deceased that his death is covered under the ESI Act and no claim for compensation

is maintainable under the MV Act, this court by order dated 24th September, 2016 observed that, keeping in view the provisions under Section 53 and 61 of the ESI Act, the claim application filed by the claimants under Section 166 of the MV Act is not maintainable. The relevant extract of the said order is reproduced below:

> "This appeal by the Insurance Company is directed against the judgment/award dated 30.10.2014, passed by the learned 4th Motor Accident Claims Tribunal, Mayurbhanj, Baripada, in MAC Case No.52/189 of 2013-11, awarding an amount of Rs.6,17,436/- as compensation along with interest @ 6% per annum with effect from 20.12.2013, till payment.
>
> Learned counsel for the appellant-Insurance Company submits that as the deceased Narendra Mohanta was working as a labourer in M/s. Utkal Lamp Works Pvt. Ltd., Takatpur, Baripada, and was covered under E.S.I. Scheme, having Account No. 677198 and E.P.F. Account No.OR/1984/31, he is entitled to the benefits under the E.S.I. Act and therefore, the claim application filed by him under Section 166 of the MV Act is not maintainable. In this regard, it is submitted that Sections 53 and 61 of the E.S.I. Act creates a bar against receiving or recovery of compensation or damages under any other enactments. Accordingly, it is submitted that as the deceased workman was covered under the E.S.I. Act and is entitled to the benefits available under the said Act, the impugned award is liable to be set aside.
>
> Learned counsel for the claimants fairly concedes to the legal position that the deceased being covered under the E.S.I. Act, no claim for compensation is maintainable under the M.V. Act. Learned counsel for the claimants submits that the claimants be granted liberty to move the E.S.I. authority for grant of compensation.
>
> Considering the submissions made and keeping in view the provisions of Sections 53 and 61 of the E.S.I. Act, the claim application filed by the claimants under Section 166 of the M.V. Act is not maintainable. Accordingly, the impugned award is set aside and the claim application of the claimants is dismissed.
>
> It is open for the claimants to move the E.S.I. authority for compensation and / or any other benefits, as are available to them under the E.S.I. Act."

23. Mr. Mahali further places reliance in the case of ***K.S.Vasantha and Others v. Karnataka State Road Transport Corporation, (1982) ACJ 259***. It is a decision rendered by a Division Bench of Karnataka High Court and the injured at the time of accident was going in a bus arranged by the employer to reach the factory in time. The division Bench of Karnataka High Court have thus held it as an employment injury and observed that the claim for compensation is under the ESI Act.

24. Switching back to the facts of the present case, as stated earlier, this is a case for compensation under Section 166 of the MV Act. Admittedly the deceased was on leave on the date of accident and the cause of accident was due to negligent driving of the driver of the offending vehicle. In the instant case the accident has no connection with the employment of the deceased either directly

or incidentally. So as per the language employed in Section 53 and 61 of the ESI Act read with the definitions prescribed under Section 2(8) and 2(14), it implies that if the cause of accident is unrelated to the employment of the injured or the deceased, then the bar will not be applicable. The prohibition under the ESI Act is not in respect of any injury sustained by the insured person irrespective of its connection to his employment. In a case of compensation either under the ESI Act or EC Act or under the MV Act, all such laws, which are beneficial legislations, are to be interpreted to the benefit of the victim of accident. The Supreme Court in the case of ***Bharat Singh Vs- Management of New Tuberculosis Center, (1986) 2 SCC 614*** has taken the view that, welfare legislation should be given a purposive interpretation safeguarding the rights of the have-nots rather than giving a literal construction and in case of doubt the interpretation in favour of the worker should be preferred. It would not be proper to say that all such injuries, which are not connected to the employment, are arising out of or in course of his employment to attract the beneficial provisions of the ESI Act.

25. In the context of compensation, two foremost conditions *sine qua non* for getting benefits under the ESI Act are, first, the injured must be an insured person and secondly, the injury must be an 'employment injury'. Employment injury includes such incidental injury arising out of and in course of his employment. The interpretation cannot be stretched to the extent that whatever injury sustained by an insured employee at wherever place unconnected to his employment would attract the bar under the ESI Act against the claim of compensation before any other forum. The restriction is never meant to prohibit the victim of accident to get benefits suitably under any other law. The object of creating the bar for compensation under other enactments is for the purpose that the employee should not be compensated twice. It is in the benefit of the employer that no one should get compensation twice from the same employer for the same cause. Therefore, when the accident is purely a motor vehicular accident arises by use of a motor vehicle and is completely unconnected to the nature of the employment of the injured, the claim for compensation under Section 166 of the MV Act is definitely maintainable. In such case, the bar prescribed under the ESI Act is not attracted.

26. As stated earlier, the statutes like the ESI Act, EC Act and MV Act, which are containing beneficial provisions for the poor victim, are to be interpreted for the benefit of the poor victim. It would be harsh to send the victim of a motor vehicular accident or his dependents to the ESI court only for the reason that he is/was an insured person under the ESI Act and not under any

other suitable forum even if the cause of injury is completely unconnected to the nature of employment.

27. In view of the discussions made above it is held that the claim application in the instant case by the claimants under Section 166 is maintainable and the contention of the insurer to the contrary is rejected.

28. Next coming to the quantum of compensation, it is submitted by Mr. Mahali that the same has been assessed excessively. The main contention of Mr. Mahali is that the monthly income taken by the tribunal to the tune of Rs. 14,374/- of the deceased is excessive. However, after perusal of the evidence of P.W.2 as produced in course of hearing and Ext.11 – the salary statement, no merit is seen in the contention of Mr. Mahali to disbelieve such amount assessed by the tribunal. As such, the same is rejected.

29. In the result no merit is seen in the contentions of the insurer to interfere with the impugned award. The appeal is dismissed.

30. The Appellant-insurer is directed to deposit the entire compensation amount as directed by the tribunal along with interest @6% per annum from the date of filing of the claim application, i.e. 12thSeptember, 2017 before the tribunal within a period of three months from today; where-after the same shall be disbursed in favour of the claimant-Respondents on same terms and proportion as contained in the impugned award.

31. The statutory deposit made by the insurer-Appellant before this court along with accrued interest be refunded to the Appellant-insurer on proper application and on production of proof of deposit of the awarded amount before the tribunal.

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2022 (III) ILR-CUT-527

Dr. S. K. PANIGRAHI, J.

W.P(C) NOs. 20773 & 25344 OF 2021

KABITA MOHAPATRA …… Petitioner

.V.

STATE OF ODISHA & ORS. …… Opp.Parties

SENIORITY – Determination of – Whether the circular determining the seniority on the basis of date of birth is sustainable under law ? – Held, No – Guidelines dated 31.08.2020 issued by Government of Odisha

quashed with legal position as to determination of seniority in service summarized with reference to case laws. (Paras 14, 15)

Case Laws Relied on and Referred to :-

1. W.P(C) No.230 of 2022 : Kamala Kanta Das v. State of Odisha & Ors.
2. (2022) 1 SCC 352 : Sudhir Kumar Atrey v. Union of India
3. (1994) 2 SCC 622 : Ram Janam Singh v. State of U.P.
4. (1990) 2 SCC 715 : Direct Recruit Class II Engineering Officers' Assn. v. State of Maharashtra.
5. (1993) 3 SCC 371 : State of W.B. v. Aghore Nath Dey.
6. (1998) 5 SCC 457 : Prem Kumar Verma v. Union of India.

For Petitioner : Mr. Budhadev Routray, Sr. Adv.
Mr. K.K. Swain

For Opp.Parties : Mr. Saswat Das, A.G.A (O.Ps. 1 to 4) & (O.Ps. 1 to 3)
Mr. Sameer Ku. Das (O.Ps. 5 & 6) & (O.P. 4)

ORDER Date of Order : 20.09.2022

Dr. S. K.PANIGRAHI, J.

1. Both the matters are taken up through hybrid mode.

2. Both the Writ Petitions have been filed by the same Petitioner. W.P.(C) No. 20773 of 2021 has been filed challenging the order dated 13.07.2021 under Annexure-12 passed by the Director, Higher Secondary Education wherein the Opposite Party No. 4 relying upon the guidelines dated 31.08.2020 fixed the seniority of the Opposite Party No. 6 based on her date of birth above the present Petitioner and consequentially appointed the Opposite Party No. 6 as the Principal-in-charge-cum-secretary of Rani Sukadei Mahila Higher Secondary School, Banki, Cuttack. W.P.(C) No. 25344 of 2021 has been filed challenging the revised seniority list of Teachers of the said School prepared by the then Principal-In-Charge placing the Petitioner at serial No.2 of the said list.

3. Shorn of unnecessary details, the substratum of matter presented before this Court remain that the pursuant to appointment order dated 30.06.1993, the Petitioner was appointed to the post of Lecturer in Economics. The Petitioner received Block Grant Aid with effect from 20.01.2009 as per GIA Order, 2008.

4. The Opposite Party No.6 was appointed to the post of Lecturer in Odia vide appointment order dated 17.07.1993 and she received Block Grant Aid with effect from 20.01.2009 as per GIA Order, 2008. Subsequently, both the Petitioner as well as the Opposite Party No. 6 were allowed to receive the regular grant vide GIA Order 2017 with effect from 01.01.2018.

5. The Government vide letter No. 27964 dated 31.08.2020 issued guidelines towards fixing the seniority of teachers of Non-Govt. Aided Colleges for the appointment of Principal and HODs. In the said notification, it was clarified that the seniority will be determined on the basis of date of birth.

6. After the issuance of letter dated 31.08.2020, the Opposite Party No. 6 who is senior in terms of age, tried to get her name approved as the Principal (I/C) of Rani Sukadei Mahila Higher Secondary School, Banki, Cuttack, ahead of the Petitioner. Furthermore, the revised format seniority list of the teachers of the college prepared by the Principal also enlisted the name of the Petitioner in Sl. No. 2 with her date of joining mentioned as 05.07.1993 whereas the name of the Opposite Party No.6 has been reflected in Sl. No.1 and her date of joining is mentioned as 17.07.1993.

7. In the meantime, Mr. Shyama Sundar Rout, Reader of Banki College who was posted in the Petitioner's college retired on 30.06.2021 and before the retirement of Mr. Rout, the Sub Collector by referring to guidelines dated 31.08.2020 recommended the name of the Opposite Party No. 6 even though she is junior to the Petitioner in terms of date of entry into service.

8. It is submitted by learned Counsel for the Petitioner that the guidelines dated 31.08.2020 under Annexure-8 is arbitrary and discriminatory and vide order dated 11.07. 2022, the same has already been quashed by this court in ***Kamala Kanta Das v. State of Odisha & Ors*** [1].

9. Per Contra, it is contended by Learned Counsel for the Opposite Parties that Rani Sukadei Mahila Higher Secondary School is a junior college and the office order dated 31.08.2020, issued by the Department of Higher Education, Odisha cannot be made applicable to the current set of facts.

10. On perusal of the abovementioned pleadings, this Court is of the view that in the matter of adjudging seniority of the teachers, the principle of initial date of appointment/continuous officiation or date of entry into service is the valid principle for adjudging inter se seniority of the teachers. This principle was iterated in the case of ***Sudhir Kumar Atrey v. Union of India***[2]. The Supreme Court observed:

> *"We are also of the view that in the matter of adjudging seniority of the candidates selected in one and the same selection, placement in the order of merit can be adopted as a principle for determination of seniority but where the selections are held separately by different recruiting authorities, the principle of initial date of appointment/continuous officiation may be the valid principle to be considered for adjudging inter se seniority of the officers in the absence of any rule or guidelines in determining seniority to the contrary."*

1. W.P(C) No.230 of 2022 2. (2022) 1 SCC 352

11. In the case of ***Ram Janam Singh v. State of U.P.***[3], the Supreme Court observed that:

> *"From time to time controversy regarding inter se seniority is raised between persons recruited from different sources to the same service. In past, notional seniority used to be given to one group of officers, purporting to mitigate their hardship or to rectify any alleged wrong done to them in the process of recruitment or promotion. Ultimately it was realised that if liberty is given to fix seniority of an officer or group of officers belonging to a particular category with reference to a notional date, that will lead to great uncertainty in public service. The date of entry into a particular service was considered to be the most safe rule to follow while determining the inter se seniority between one officer or the other or between one group of officers and the other recruited from the different sources. After referring to different judgments of this Court, a Constitution Bench in the case of* ***Direct Recruit Class II Engineering Officers' Assn. v. State of Maharashtra***[4] *came to the same conclusion. The same has been reiterated in the case of* ***State of W.B. v. Aghore Nath Dey***[5]*. It is now almost settled that seniority of an officer in service is determined with reference to the date of his entry in the service which will be consistent with the requirement of Articles 14 and 16 of the Constitution."*

12. Similarly, in another instance, the Supreme Court in the case of ***Prem Kumar Verma v. Union of India***[6] , held that:

> "*the principal mandate of the rule is that seniority is determined on the basis of date of appointment. Proviso (2) lists out two rules. The first is that those selected and appointed through a prior selection would rank senior to those selected and appointed through a later selection process.....The second limb of the second proviso clarifies that when merit based, or seniority based promotions are resorted to, the applicable norm would be seniority in the feeder cadre, to forestall any debate about the rule of merit (in the selection) being the guiding principle". Further, the court observed that "the advertisements were issued one after the other, and more importantly, that this was the first selection and recruitment to a newly created cadre, the delay which occurred on account of administrative exigencies (and also the completion of procedure, such as verification of antecedents) the seniority of the promotees given on the basis of their dates of appointment, is justified by Rule 27 in this case", and hence, dismissed the appeals."*

13. With respect to the issue of "date of birth", the State has contended that in the category of teachers receiving block grant and working in category-III colleges, the date of appointment varies from the date of admissibility of the post in many cases. It will be highly difficult on part of the Department to assess the eligibility date by scrutinizing each and every individual post of such colleges. Hence, they have adopted a common apparatus to fix the date of birth of the employees concerned of the college for determination of inter-se seniority. However, this approach of the State seems to be extremely fallacious and having poor legal sustainability index. Difficulty in following a certain rigorous

3. (1994) 2 SCC 622 4. (1990) 2 SCC 715
5. (1993) 3 SCC 371 6. (1998) 5 SCC 457

procedure does not allow a State Department to deviate from the principal logic established by the Supreme Court. Moreover, the date of entry in a particular service or the date of substantive appointment is the safest criterion for fixing seniority inter se between one officer or the other or between one group of officers and the other recruited from the different sources.

14. From the above, the legal position with regard to determination of seniority in service, it can be summarized as follows:

> **i.** The effective date of selection has to be understood in the context of the service rules under which the appointment is made. It may mean the date on which the process of selection starts with the issuance of advertisement or the factum of preparation of the select list, as the case may be.
>
> **ii**. Inter se seniority in a particular service has to be determined as per the service rules. The date of entry in a particular service or the date of substantive appointment is the safest criterion for fixing seniority inter se between one officer or the other or between one group of officers and the other recruited from the different sources. Any departure there from in the statutory rules, executive instructions or otherwise must be consistent with the requirements of Articles 14 and 16 of the Constitution.

15. In the light of above discussions, and guided by the precedents narrated hereinabove and in accordance to decision of this court in ***Kamala Kanta Das*** (supra), this Court hereby quashes the Guidelines dated 31.08.2020 issued by the Department of Higher Education, Government of Odisha containing the mechanism for fixing the seniority of teachers of non-Government Colleges for the purpose of appointment of Principal and HODs and directive issued by the State Government whereby the inter se seniority was to be adjudged according to the date of birth.

16. Consequently, the Government letter No.4M-50-21-IV dated 13.07.2021 issued to the Opposite Party.No.6 is also invalidated. It is further clarified that all the appointments of Principal-in-Charge made by following the Guidelines dated 31.08.2020 issued by the Department of Higher Education, Government of Odisha be made afresh by taking into consideration of date of entry into service as the basis for seniority. The Opposite Party No.1 is directed to come out with fresh guidelines accommodating the principle of seniority as enunciated by the Supreme Court of India which is an integral part of our service jurisprudence.

17. Both the Writ Petitions are, accordingly, allowed. No order as to cost.

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2022 (III) ILR-CUT-532

Dr. S.K. PANIGRAHI, J.

W.P.(C) NOs.9301 AND 15924 OF 2022

Dr. SULATA MOHAPATRA .....Petitioner

.V.

CHIEF SECRETARY, GOVERNMENT OF ODISHA, (H.&F.W.DEPT), BHUBANESWAR & ORS. .....Opp.Parties

AND

In W.P.(C) No. 15924 of 2022

DR. ARCHANA MISHRA .... Petitioner

-V-

STATE OF ODISHA AND ANR. .... Opp.Parties

(A) SERVICE LAW – Transfer – Whether a person can claim the anticipated vacancy against the "Transfer and Posting Policy" ? – Held, No – The civil servant does not have any vested legal, statutory right to be posted at one particular place – One cannot claim right to an anticipated or future vacancy unless a contrary notion is evident from the concerned notification of appointment/promotion.

(B) SERVICE LAW – Promotion – The petitioner forgo her promotion to the post of Professor by submitting the representation – The petitioner did not join in the promotional post – Whether she can change option to revert back her position ? – Held, Considering the matter in its right perspective, this Court is of the opinion that the petitioner decided to forgo the promotion out of her own volition and was not compelled by the opposite parties – Hence not entitled to the promotion. (Para 48)

Case Laws Relied on and Referred to :-

1. 2022 SCC OnLine Ori 1365 : Suryakanta Parida v. Odisha Public Service Commission.
2. (2010) 6 SCC 777 : State of Orissa v. Rajkishore Nanda.
3. (1991)3 SCC 47 : Shankarsan Dash v. Union of India.
4. (1974) 3 SCC 220 : State of Haryana v. Subash Chander Marwaha.
5. 1993 (2) SCALE 730 : Union of India vs. Ishwar Singh Khatri.
6. (1985) 1 SCC 122 : Jatinder Kumar v. State of Punjab.
7. (2014) 10 SCC 610 : State of M.P.& Ors vs. Ramanand Pandey.
8. 1989 SCR (2) 357 : Gujarat Electricity Board & Anr vs. Atmaram Sungomal Poshani.

For Petitioner : Mr. Basudev Pujari.
Mr. Dayananda Mohapatra

For Opp.Parties : Mr. Saswat Das, AGA,
Mr. R.C. Mohanty, (O.P.4/DMET)
Mr. Dayananda Mohapatra (for Intervener)

JUDGMENT Date of Hearing : 14.09.2022 : Date of Judgment : 30.09.2022

Dr. S.K.PANIGRAHI, J.

1. In this aforementioned writ petition, the petitioner who has been promoted to the post of Professor by virtue of order dated 06.04.2022 of the Assistant Secretary to Government, Health and Family Welfare Department, has challenged the place of posting at Government Medical College at Keonjhar instead of allowing her to continue at SCB Medical College and Hospital, Cuttack. She contends that on account of her seniority within her cadre and the medical condition of her and her husband, the decision of the authorities is illegal, mala fide and violation of the transfer policy introduced by the Department of Health and Family Welfare, Government of Odisha.

2. Now, since the cause of action of both the aforementioned Writ Petitions are broadly similar, these are being taken up together and have been dealt with by this common judgment treating the W.P.(C) No.9301 of 2022 as the leading case.

I. FACTUAL MATRIX OF THE CASE:

3. The present writ petitioner was initially appointed as an Asst. Surgeon in Koraput on 30.09.1991 and after completing her Post Graduate in Physiology she was posted as Lecturer in Physiology at SCB Medical College & Hospital, Cuttack in the year 2003. Thereafter, she was promoted to the post of Associate Professor in the year 2006 and was transferred to VIMSAR Burla and served there. Therein, she suffered from PID (Prolapsed Intervertibral Disease) and CVI Grade-III (ChronicVenus Insufficient). Accordingly, the authority considered her representation and transferred her to SCB Medical College & Hospital, Cuttack and posted her as Associate Professor in Physiology on 01.12.2017.

4. Here and now, by virtue of notification No.22051 dated 30.08.2017, the Department of Health and Family Welfare issued guidelines for transfer/promotion of Faculties, Superintendents and Dean and Principals and procedure for counseling respectively.

5. A Departmental Promotion Committee (hereinafter “DPC”) was held on 06.01.2022 to consider the case of 22 Associate Professors who were eligible in different disciplines for promotion to the post of Professor in respect of Government Medical Colleges of the state including the post of Professor in Physiology.

6. In the list of 6 faculty members in the subject, 3 Associate Professors namely Dr. Sulata Mohapatra (petitioner), Dr. Minati Pattnaik, and Dr. Archana

Mishra (petitioner in W.P.(C) No.15924 of 2022) were found suitable and were recommended by the DPC for promotion to the rank of Professor in the discipline of Physiology. The petitioner was placed at the top of the merit-cum-seniority list due to her experience and got to choose the posting first among the selected candidates.

7. The Director of Medical Education and Training, Odisha, Bhubaneswar (hereinafter "DMET") vide its Office Letter No. 2196, dated 21.02.2022 informed the petitioner and other candidates of the counseling for posting(s) on the promotional post of Professor along with the direction to submit their choice(s) by e-mail in order of preference amongst the list of colleges by 21.02.2022, 3.00 PM. The election of option was to be done positively, else the candidate would have no choice regarding place of posting and then it would be the prerogative of the higher authorities to take appropriate decision for the candidates' place of posting.

8. On the date of counseling, the petitioner as well as Dr. Minati Pattnaik were asked by the DMET vide letter No. 2196, dated 21.02.2022, to exercise their choice of posting in respect of:

(i) Govt. Medical College, Keonjhar.
(ii) Govt. Medical College, Sundargarh.

9. However, the petitioner made a representation to the Chief Secretary, Government of Odisha requesting him to allow her to continue in SCB Medical College & Hospital, Cuttack after her promotion to the post of Professor on the ground of her illness as well as the medical condition of her husband and her old mother who is suffering from chronic breast cancer. The said authority after considering her application passed an order to the Addl. Chief Secretary to allow her to face the Medical Board. The petitioner after receiving the same intimated the DMET in that regard with a request to defer the date of counseling for promotion to the post of Professor, Physiology. The petitioner also approached the authority for promotion and posting at SCB Medical College & Hospital, Cuttack against the anticipated vacancy in March, 2022 on the retirement of one Prof. Bipin Bihari Pradhan.

10. Consequently, on the day of counseling i.e., 21.02.2022, the Petitioner did not exercise her choice for the post of Professor; neither in respect of Govt. Medical College, Keonjhar nor in respect of Govt. Medical College, Sundargarh. Instead, the petitioner by an e-mail dated 21.02.2022 requested the DMET not to proceed with the counseling process and to include 3 others Medical Colleges namely Govt. Medical College, Balasore, Govt. Medical College, Baripada and

the anticipated vacancy of SCB Medical College and Hospital, Cuttack. But such request of the petitioner went in vain.

11. Thereafter, the petitioner filed a Writ Petition bearing WP(C) No.5459 of 2022 with a prayer to quash counseling letter dated 21.02.2022. This Court disposed of the said writ petition with a direction to the Chief Secretary to consider her representation.

12. By virtue of the impugned order No. HFW-MEI-CASE-0009-2022670/ H/30.03.2022 the Chief Secretary, Department of H & FW rejected the claim of the petitioner and directed the petitioner to appear before the Standing Medical Board before her case is taken up for special consideration.

13. On 06.04.2022, Dr. Sulata Mohapatra (Petitioner) as well as Dr. Minati Pattnaik were promoted to the rank of Professor on ad-hoc basis and were posted to Govt. Medical College and Hospital, Keonjhar and Govt. Medical College and Hospital, Sundargarh respectively. Pursuant to such order, she was relieved by Dean of SCB Medical College.

14. Following such facts, the petitioner made a representation to the Addl. Chief Secretary, Health and Family welfare Department as well as to the Dean and Principal, SCB Medical College and Hospital, Cuttack to forgo the aforementioned promotion owing to her illness and the medical condition of her husband and mother. Thus, the Dean kept the relief order in abeyance.

15. The petitioner re-made a representation on 19.05.2022 to the Addl. Chief Secretary, Health and Family Welfare Department that she wants to withdraw the application that she had submitted on 08.04.2022 to forego her promotion to the post of Professor in Physiology at Govt. Medical College, Keonjhar. The petitioner also moved an interim application for a prayer not to fill up the post of Professor, Physiology in SCB Medical College and Hospital at Cuttack. This Court issued an order dated 20.06.2022 directing the Addl. Chief Secretary, Department of Health & Family Welfare to consider the representation of the present petitioner.

16. Nevertheless, on 28.04.2022 the Medical Board issued the certificate mentioning findings about the petitioner's mother. The certificate did not mention any infirmities of the petitioner or her husband.

17. The present writ petitioners mainly assail the impugned order dated 21.02.2022 on the ground that it is arbitrary, discriminatory and illegal, for it is violative of the Transfer and Posting Policy for the Government Medical College Teachers issued by Department of Health and Family Welfare, Government of

Odisha in Notification No. HFW-MEI-MISC-0021-2017 and the whole process smacks malafide.

II. PETITIONER'S SUBMISSIONS :

18. Learned counsel for the Petitioner earnestly made the following submissions in support of his contentions:

19. The petitioner submitted that the Commissioner-cum Secretary to Department of Health and Family Welfare Department, Government of Odisha issued a Notification dated 30.08.2017 regarding transfer and posting policy for Medical College Teachers. The objective of such notification is to ensure availability of faculty in all Government Medical Colleges by ensuring equitable choice best deployment of teachers. It was also pointed out that the policy shall not be applicable to faculties who require special consideration on medical ground if recommended by standing medical board wherein the cases of medical grounds also cover the ones of spouse and children.

20. The petitioner alleged that in the instant case the concerned authority, in violation of the aforesaid notification, mentioned only two vacancies, deliberately masking three other vacancies including the anticipated vacancy at SCB Medical College Cuttack, only on the pretext to accommodate their choicest candidate. The present petitioner claims that she is the senior most employee of the said institution and is entitled to exercise her choice first. Moreover, as the petitioner and her husband are suffering from various serious ailments, she is entitled to avail the benefit provided under the said notification but she has been deprived from such benefit. For that, the authorities have distorted and vitiated the policy.

21. The petitioner also submitted that she had approached this Court vide W.P.(C) No. 5459 of 2022 challenging the letter dated 21.02.2022 issued by the DMET. After disposal of the writ application, the Court's order was communicated to the opposite parties for compliance but the Chief Secretary, Department of Health and Family Welfare (O.P. No.1) illegally and by overriding the order of this Court rejected her representation with a non-speaking order.

22. The petitioner submitted that as the DPC recommended three names for promotion to the post of Professor in Physiology, it is very clear that the selection committee considered promotion in respect to three posts in the following colleges, namely SCB MCH, Cuttack, Govt. Medical College, Sundargarh and Govt. Medical College, Keonjhar. Therefore, on 21.02.2022, the decision taken by the authorities to call only two of the three recommended

names, to fill-up only the post(s) at Keonjhar and Sundargarh City, is suggestive of foul play which does not stand the ground of scrutiny and reason.

23. The petitioner argued that even though exigency of situation has been cited as to why the post in SCB Medical College and Hosspital, Cuttack was not considered at that point of time, the appointment to Sundargarh and Keonjhar College was made only on 06.04.2022; after the cut-off date. It is necessary to emphasize that counseling for the post at Keonjhar and Sundargarh had not been completed for before its completion, the petitioner had moved before this Court in W.P.(C)No.5459 of 2022 which was disposed of on 04.03.2022 with a direction the Chief Secretary for disposal of the to the representation. So, counseling for the two posts were never made.

24. On the other hand, as on 06.04.2022 when appropriate orders were issued to fill-up the post at Sundargarh and Keonjhar, three posts were vacant, i.e. posts in the medical colleges at Cuttack, Keonjhar and Sundargarh. It was submitted that the appointment order has been issued without counseling and the counseling ought to have been done in respect to three vacant posts as mentioned above.

25. It was further contended that neither the Chief Secretary nor did the Government consider the petitioner's grievances even after repeated attempts. After this Court’s intervention, however, the Chief Secretary directed that the petitioner's case be considered on the basis of the result of the examination by the Medical Board. Unfortunately, on 06.04.2022, the petitioner was promoted to the rank of Professor on ad-hoc basis and was posted to Govt. Medical College and Hospital,Keonjhar when the representation could not have been said to be decided finally due to the pending Medical Board examination.

26. Regarding the petitioner's appearing before the Medical Board, it was submitted that the authorities’ conduct reek of malafide as they deliberately tried to deprive her from justice.

27. The petitioner submitted that the grounds raised above were compounded by the fact that immediately on receipt of the order of promotion the petitioner was relieved of her current posting. Finding no way out, the petitioner submitted in writing that she wanted to forego the promotion and posting to Keonjhar. Thus, subsequently the Dean, SCB Medical College and Hospital, Cuttack intimated the petitioner that the order relieving from the college has been kept in abeyance.

28. In conclusion, the petitioner alleged that the opposite parties have prepared a faulty and fallacious select list against the direction of law in order to

accommodate their choicest candidates in the advertised posts to deprive her of the rightful posting.

III. OPPOSITE PARTIES' SUBMISSIONS:

29. Per contra, Learned counsel for the Opp. Parties submitted that the total number of post(s) of Professor in Physiology Department across all the Government Medical Colleges & Hospitals, including new Medical Colleges & Hospitals at Keonjhar and Sundargarh, is 09 and the man-in-position was 07. This includes Dr. Rama Raman Mohanty, DMET (I/c) and Dr. Umakanta Satapathy, Addl. DMET (I/c) by virtue of their substantive posting. It was submitted that the said persons are both professor(s) of Physiology and are currently officiating in the respective administrative posts after posting as such by the Government. It has been contended that these persons are both professor(s) of physiology and currently occupy the respective administrative positions after their assignment as such by the Government. Although, technically, there were 04 available vacancies for Professor of Physiology on the date of counseling i.e. PRM MCH, Baripada-01, FM MCH, Balasore-01, Government Medical College, Sundergarh-01, and Government Medical College, Keonjhar-01; 02 vacancies (one at FM MCH, Balasore and one at PRM MCH, Baripada) were decided to be unavailable for accommodating the above said 02 faculties in case of their reversion to their substantive posting on one ground or other.

30. It was strongly argued that the Government, as the appointing authority, has the discretionary power to fill up vacancies selectively on the basis of urgency to meet MCI/ NMC requirement and in public exigencies. It was highlighted that the State Government had decided to open two new Government Medical Colleges, one at Sundergarh and the other at Keonjhar, in academic year 2022-23 and accordingly, the applications for LoP (Letter of Permission) were filed before the NMC for grant of permission against which the MNC had given 03 weeks time vide its letter dated 24.03.2022 and 26.04.2022 to fill up all faculty posts in respect of Government MCH. Keonjhar and Government MCH, Sundergarh, respectively, or else it would not issue LoP for admission in 100 MBBS seats in academic year of 2022-23. In view of the above, the Government has rightly and judiciously decided to fill up 02 vacancies, one at Sundergarh and the other at Keonjhar, on priority during the process of counseling on 21.02.2022.

31. It was also submitted that the petitioner did not indicate her choice of posting during the process of counseling although she had scope to opt one out of two posts i.e., one at Government MCH, Sundargarh and other one at Govt.

MCH, Keonjhar. Ergo, owing to the emergent requirement of faculty in both the MCHs and welfare of the people of Odisha, the Government vide the Department Notification No. 7634 dated 06.04.2022 promoted Dr. Sulata Mohapatra and Dr. Minati Patnaik to the rank of Professor and assigned them Government MCH, Keonjhar and Government MCH, Sundergarh, respectively.

32. The objectives of the 'Transparent Transfer and Posting Policy for the Government Medical College Teacher's vide H & FW Department Notification No. 22051 dated 30.08.2017 is to ensure availability of faculty in all Government Medical Colleges while ensuring equitable choice-based deployment of teachers. As per provision laid down in the said policy, all cases of diseases and disability including those of spouse and children, the certificate from Standing Medical board is to be furnished by the applicant for special consideration of his/her case on medical ground. Accordingly, the petitioner was asked to appear before the Standing Medical Board for consideration of her representation on medical grounds in due course of time in H & FW Department Letter No.7364 dated 04.04.2022. The Standing Medical Board examined all the treatment records of herself, her husband and mother. The Board certificate, however, only mentioned terminal illness of her dependent Mother.

33. It was submitted that on being promoted, the petitioner vide her representation dated 08.04.2022 addressed to the Dean & Principal, SCB MCH, Cuttack had intimated that she is forgoing her promotion to the post of Professor Physiology due to illness of her husband, terminal illness of her mother and her chronic illness. Subsequently, she has put forth another representation dated 19.05.2022 requesting therein to treat this representation as withdrawal of foregoing of promotion. Both her representations are now under consideration of Government.

34. The petitioner had approached this court vide W.P.(C) No.5459 of 2022 challenging the letter dated 21.02.2022 issued by the DMET. In rebuttal it was submitted that the Court's order was duly communicated, however, the Chief Secretary, Department of Health and Family Welfare reasonably rejected her representation on its merits. In this context, the counsel for the Opp. Parties also cited ***Suryakanta Parida v. Odisha Public Service Commission***[1], wherein it was held by this court:

> *"Having heard the learned counsel for the petitioner and upon perusal of the materials on record, it appears that the submission of the petitioner is based on the Advertisement No. 11 of 2018-2019 issued by the opposite party No. 1-Odisha Public Service Commission. In his submission, learned counsel for the petitioner submits that as per the*

1. 2022 SCC OnLine Ori 1365

Advertisement No. 11 of 2018-2019 issued by the opposite party No. 1-Odisha Public Service Commission two posts are lying vacant in Gastroenterology Department of S.C.B. Medical College and Hospital, Cuttack and the petitioner having requisite qualification applied for the same. Whereas, nowhere in the said Advertisement has it been mentioned that two posts were lying vacant in Gastroenterology Department of S.C.B. Medical College and Hospital, Cuttack. Even if vacancies are there, the petitioner does not have any vested right to claim for such posts since it is under the absolute domain of the Government. The Health Department is under no obligation to appoint him in S.C.B. Medical College and Hospital, Cuttack."

35. Under such circumstances, having full authority over the domain of posting and appointment of the posts in question, the Opposite Parties have taken necessary steps to fulfill the objectives of the aforementioned transfer policy.

36. These submissions of the counsel of Opp. Parties were echoed by the learned counsel for the intervener. He also submitted that the petitioner had already forgone her promotion and cannot change her option suited to her whims and requirements. Therefore, she is not entitled to the relief(s) sought for.

IV. ISSUES FOR CONSIDERATION:

37. After having heard learned counsels for both sides and the counsel for the intervener, the following issues arise for consideration before this Court:

A. Whether the authorities erred while not including the other vacancies, including SCB, MCH, at the time ofcounseling?

B. Whether the petitioner can claim the anticipated vacancy of SCB, MCH against the 'Transfer and Posting Policy for the Government Medical College Teachers' issued by Department of Health and FamilyWelfare, Government of Odisha?

C. Whether the petitioner after having forgone her promotion, change her option to revert back to her position?

V. ISSUE A : Whether the authorities erred while not including the other vacancies, including SCB, MCH, at the time of counseling?

38. The mere fact that at some point of time, any vacancy was available but no appointment was made, does not by itself give the candidate a right or a claim to be appointed on a particular post. Even after completion of the selection process, it is the sole prerogative of the state to decide availability of vacancies for appointment/promotion.

39. Reference could be made to the decision of Apex Court in ***State of Orissa v. Rajkishore Nanda:***[2]

"....It is the exclusive prerogative of the employer/State Administration to initiate the selection process for filling up vacancies occurred during a particular year. There may

2. (2010) 6 SCC 777

> *be vacancies available but for financial constraints, the State may not be in a position to initiate the selection process for making appointments. Bona fide decision taken by the appointing authority to leave certain vacancies unfilled, even after preparing the select list cannot be assailed. The courts/tribunals have no competence to issue direction to the State to initiate selection process to fill up the vacancies. A candidate only has a right to be considered for appointment, when the vacancies are advertised and selection process commences, if he possesses the requisite eligibility....." (Emphasis Supplied)*

40. It has also been held by the Supreme court in the case of ***Shankarsan Dash v. Union of India***[3]:

> *"7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post.* ***Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies****. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted." (Emphasis Supplied)*

41. Again, in the case of ***State of Haryana v. Subash Chander Marwaha***[4] the Supreme Court articulated similar sentiment:

> *"10. One fails to see how the existence of vacancies give a legal right to a candidate to be selected for appointment. The examination is for the purpose of showing that a particular candidate is eligible for consideration. The selection for appointment comes later.* ***It is open then to the Government to decide how many appointments shall be made. The mere fact that a candidate's name appears in the list will not entitle him to a mandamus that he be appointed****..." (Emphasis Supplied)*

42. From the facts of the case and above-cited authorities, it seems the allegation about the malafide is more easily made than made out. In the instant case, there are no materials to warrant the conclusion that the action of the State Government has been discriminatory or malafide in not mentioning other available vacancies at the time of counseling. The contentions and citations given by the counsel of Opp. Parties has been satisfactory. Ergo, the court finds it difficult to adjudge that the authorities erred while not including the other vacancies, including SCB, MCH, at the time of counseling.

VI. Issue B: Whether the petitioner can claim the anticipated vacancy of SCB, MCH against the 'Transfer and Posting Policy for the Government Medical College Teachers' issued by Department of Health and Family Welfare, Government of Odisha?

3. (1991) 3 SCC 47 4. (1974) 3 SCC 220

43. The petitioner does not have any vested right to be posted at the choice of her duty. One cannot claim right to an anticipated or future vacancy unless a contrary notion is evident from the concerned notification of appointment/ promotion.

44. Even though the aforementioned transfer policy mentions that: *"The objectives of the policy is to ensure availability of faculty in all Government Medical Colleges while ensuring equitable choice based deployment of teachers. This policy will be adopted by the Government in the matters of Initial posting."* The vacancy at SCB, MCH at the time of counseling was only an anticipated one. At the time of counseling, the authorities were under no obligation to make available SCB, Medial College and Hospital, Cuttack as a potential option for posting.

45. ***The Supreme Court in Union of India vs. Ishwar Singh Khatri***[5] held that:

> *"Mr. Subba Rao for the appellant urged that the candidates included in the panels prepared by the Selection Board as far back in June 1984 cannot be held to have the right to appointment against vacancies arising subsequent to preparation of the panels. According to counsel, if that right is conceded it would be arbitrary and contrary to Article 16(1) of the Constitution which guarantees opportunity for all citizens in matters of employment or appointment to any office under the State. There is little doubt about this proposition.* ***The selected candidates ordinarily will have a right to appointment against vacancies notified or available till the select list is prepared. They in any event cannot have a right against future vacancies****."* *(Emphasis supplied)*

46. In ***Jatinder Kumar v. State of Punjab***[6] the Supreme Court clarified the situation:

> *"The establishment of an independent body like Public Service Commission is to ensure selection of best available persons for appointment in a post to avoid arbitrariness and nepotism in the matter of appointment. It is constituted by reasons of high ability varied experience and of undisputed integrity and further assisted by experts on the subject. It Is true that they are appointed by Government but once they are appointed their independence is secured by various provisions of the Constitution. Whenever the Government is required to make an appointment to a higher public office it is required to consult the Public Service Commission. The selection has to be made by the commission and the Government has to fill up the posts by appointing those selected and recommended by the Commission adhering to the order of merit in the list of candidates sent by the Public Service Commission. The selection by the Commission, however, is only a recommendation of the Commission and the final authority for appointment is the Government. The Government may accept the recommendation or may decline to accept the same. But if it chooses not to accept the recommendation of the Commission the Constitution enjoins the Government to place on the table of the Legislative Assembly its reasons and report for doing so. Thus, the Government is made answerable to the House*

5. 1993 (2) SCALE 730 6. (1985) 1 SCC 122

> *for any departure vide Article 323 of the Constitution, This, however, does not clothe the appellants with any such right. They cannot claim as of right that the Government must accept the recommendation of the Commission. If, however, vacancy is to be filled up, the Government has to make appointment strictly adhering to the order of merit as recommended by the Public Service Commission. It cannot disturb the order of merit according to its own sweet will expect for other good reasons viz., bad conduct or character. The Government also cannot appoint a persons whose names does not appear in the list. But it is open to the Government to decide how many appointments will be made.* ***The process for selection and selection for the purpose of recruitment against anticipated vacancies does not create a right to be appointed to the post which can be enforced by a mandamus****. We are supported in our view by the two earlier decisions of this Court in* ***A.N.D. Silva v. Union of India and State of Haryana v. Subash Chander Marwaha & Ors****.The contention of Mr. Anthony to the contrary cannot be accepted." (Emphasis supplied)*

47. The position of law against anticipated vacancies is clear. Anticipated Vacancies in matters of appointment/promotion is as good as no vacancy at all; unless provisions contrary to it have been notified. Ergo, the contentions of the petitioner against her claim on the anticipated vacancy of SCB, Medical College and Hospital, Cuttack does not hold water.

VII. ISSUE C:Whether the petitioner after having forgone her promotion, change her option to revert back to her position?

48. It is argued on behalf of learned counsel for the Petitioner that the Petitioner was unjustifiably assigned a posting at Government MCH, Keonjhar ignoring her medical condition and her seniority. Per contra, learned counsel for the Opposite Parties submitted that the Petitioner had not joined his promotional post and submitted her representation on 08.04.2022, in writing, to forgo her promotion to the post of Professor, Physiology and requested to allow her to continue as Assistant Professor in the SCB Medical College and Hospital, Cuttack. Indisputably, in the case at hand, it can be consciously ascertained that the Petitioner was promoted to the post of Professor and posted in Government MCH,Keonjhar on the basis of availability of vacancy at that point of time. Considering the matter in its right perspective, this Court is of the opinion that the Petitioner decided to forgo the promotion to the post of Professor out of her own volition and was not compelled by any means by the appointing authority i.e., the opposite parties.

49. At this point, this court would like to refer to decision of the Apex Court's decision in ***State of M.P.& Ors vs. Ramanand Pandey***[7] which overruled the decision of the High Court which had allowed the respondent to challenge the order relating to cancellation of his promotion. The respondent had sent back

7. (2014) 10 SCC 610

the order of promotion out of his own volition but approached the High Court through writ petition after two years; challenging the cancellation of his promotion. The Hon'ble Supreme Court observed that:

> *"The entire approach of the High Court is erroneous in dealing with the matter at hand. In fact, the issue focused and discussed, on the basis of which cancellation order dated November 25, 2006 is passed, itself is extraneous. From the conspectus of factual matrix taken note of above, it becomes clear that insofar as the Department is concerned, the respondent was duly considered for promotion, nay, he was in fact promoted to the post of ADO vide orders dated December 23, 2005 as he was found fit for promotion. It is, thus, not that kind of a case where the respondent was either not considered for promotion or the recommendation of the Departmental Promotion Committee was kept in a sealed cover. On the contrary, promotion orders were issued, which, however, were cancelled subsequently..... As we find that it is the respondent himself who is responsible for cancellation of the promotion order as he did not join the promoted post, the impugned order of the High Court is clearly erroneous and against the law."*

50. The Petitioner's prayer insofar as promoting and repositioning her in the SCB, Medical College and Hospital, Cuttack where she was continuing or at a nearby place, is unsustainable as the Petitioner was holding a transferable post and under the conditions of service applicable to her, she was liable to be transferred and posted at any place within the State of Odisha. The Petitioner had no legal or statutory right to insist for being posted at one particular place.

51. It is worthwhile to stress upon the observations of the Supreme Court in the case of ***Gujarat Electricity Board & Anr vs. Atmaram Sungomal Poshani***[8] The Hon'ble Court held that:

> *"Transfer of a Government servant appointed to a particular cadre of transferable posts from one place to other is an incident of service. No Government servant or employee of public undertaking has legal right for being posted at any particular place. Transfer from one place to other is generally a condition of service and the employee has no choice in the matter. Transfer from one place to other is necessary in public interest and efficiency in the Public Administration."*

VIII. CONCLUSION:

52. As such, the impugned order is legal, fair and not in contravention with the aforesaid notification. The Opposite Parties have not committed any illegality, nor have they run the counseling process in a manner which renders it discriminatory against anyone or in discordance with the state provisions, or the present position of law.

53. However, this Court has taken note of the medical condition of the petitioner and her family. Even though the medical board certificate has not

8. 1989 SCR (2) 357

supported the claims of the petitioner, I would want the authorities to aid the petitioner in any way possible to lessen her worries at this juncture.

54. The Court has now and again stated the role of the State as a model employer with the fond hope that in future a deliberate disregard is not taken recourse to and deviance of such magnitude is not adopted to frustrate the claims of the employees. It should always be borne in mind that legitimate aspirations of the employees are not guillotined and a situation is not created where hopes end in despair. A sense of calm sensibility and concerned sincerity should be reflected in every step. An atmosphere of trust has to prevail and when the employees are absolutely sure that their trust shall not be betrayed and they shall be treated with dignified fairness then only the concept of good governance can be concretized. In the present case the conduct of the Opposite Parties falls short of expectation of a model employer.

55. It is not the case of the Opposite Parties that Petitioner has not been discharging her duties diligently, honestly and faithfully. Therefore, in such circumstances, while she feels helpless in such circumstances, the authorities should not be the unbecoming of her hopes. While the laws could not be her savior today, this Court surely hopes the administration, which she has come to serve and toil for the institutions for many decades, would most certainly be her guardian angel. At the end, this Court is quite hopeful that the authority shall be sensible in accommodating her to a Medical College,considering her predicament in terms of her health and health condition of her family members so that she can concentrate better on her profession.

56. In light of the aforesaid discussion and having regard to the present position of law, this Court has come to the conclusion that the writ petitioners cannot be granted any relief by way of a writ and the present Writ Petitions are liable to be dismissed. No order as to cost.

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2022 (III) ILR-CUT-545

MISS. SAVITRI RATHO, J.

TRP (CRL) NO.30 OF 2022

SHYAM SUNDAR PATEL ……Petitioner

.V.

1. STATE OF ODISHA ……Opp.Parties
2. PRADEEP KUMAR PANDEY

CODE OF CRIMINAL PROCEDURE, 1973 – Section 407 – FIR was lodged against the petitioner with an allegation of sexual harassment to a girl student of his school – The daughter of the complainant died with severe injuries on her head – The Members of the Bar Association have decided not to appear for the petitioner – Whether the petitioner has made out a case for exercise of power conferred under Section 407 of the Code? – Held, No – The situation prevailing now does not make out a case for transfer, but the Court feels that certain directions are necessary to ensure the atmosphere in the Trial Court remains conducive for a fair trial. (Para 12)

Case Laws Relied on and Referred to :-

1. (2011) 1 SCC 307: Nahar Singh Yadav vs Union of India
2. (2009) 6 SCC 260:Captain Amarinder Singh Vs. Parkash Singh Badal & Ors
3. (2004) 4 SCC 158 :Zahira Habibulla H. Sheikh Vs. State of Gujarat & Ors
4. (2004) 3 SCC 767 :K.Anbazhagan Vs. Superintendent of Police & Ors.
5. (2000) 6 SCC 204 :Abdul Nazar Madani Vs. State of T.N. & Anr
6. (1979) 4 SCC 167 :Maneka Sanjay Gandhi & Anr. Vs. Rani Jethmalani
7. (1966) 2 SCR 678 :Gurcharan Das Chadha vs. State of Rajasthan

For Petitioner : Mr. L.N. Patel

For Opp.Parties : Mr. S.S. Pradhan, AGA (for O.P.1)
Mr.G.C.Swain, (for O.P.2-informant)

ORDER Date of Order : 27.09.2022

MISS. SAVITRI RATHO, J.

1. This application has been filed by the petitioner under Section 407 of Cr.P.C. for transfer of the Special G.R. case No.56 of 2022 from the Court of learned Additional District Judge-cum-Special Court (POCSO), Sundargarh (in short "the trial Court") to any other Court under the jurisdiction of this Court.

2. The brief facts of the case is that on 01.04.2022 at 2.35 P.M., the informant-Pradeep Kumar Pandey lodged an FIR before the IIC, Lephripada P.S. alleging therein that his daughter aged about 15 years has been studying at Patuadihi High School (hereinafter referred to as "the School") in Class-X and residing in the School hostel. On the same day at about 1.00 P.M., he received a phone call from the School that his daughter has become senseless and shifted to DHH, Sundargarh. The complainant arrived at the hospital and found his daughter was dead with severe injuries on her head. As the staff of the School did not give any satisfactory reply about this incident, the informant suspected that the head injury was due to a heavy blow with an object and the Head Master of the School-present petitioner, the hostel warden and their associate staff killed

his daughter. She had been beaten earlier by School staff. The complainant learnt that the petitioner had tried to keep sexual relation with his daughter and therefore committed her murder.

3. Learned counsel for the petitioner submitted that the petitioner has been implicated in the case as he was working as the Headmaster of the School at the relevant point of time, although he had no role to play with the crime in question. As the mother of the deceased girl is an Advocate practising in Sundargarh, the lawyers of the Sundargarh Bar Association have decided not to appear on behalf of the petitioner and there is a hostile environment prevailing in the Court, for which he is apprehensive that he will not get a fair trial if the trial is held in any Court in Sundargarh. So, he has prayed for transfer of the aforesaid G.R. Case from the trial Court to any other Court under the jurisdiction of this Court.

4. A report had been called for from the learned trial Court and report dated 07.07.2022 has been received. It is stated therein that the victim's mother is an advocate of Sundargarh Bar Association. The accused was heard in person on 2.4.2022 and his bail application was rejected and police paper have been supplied to him on 20.06.2022 and the case was posted to 27.06.2022 for consideration of charge on which date, the petitioner submitted that he wants to engage his own lawyer to defend his case but as the local lawyers are not willing to take up the case for which he wanted time. The case was posted to 20.07.2022, to permit the petitioner to engage his own counsel. From the report, it is not clear if the lawyers of Sundargarh Bar Association have refused to appear on behalf of the petitioner or the petitioner is not willing to engage a lawyer from Sundargarh Bar Association.

5. Mr. S.S.Pradhan, learned Addl. Government Advocate opposed the prayer for transfer and on the basis of instruction received from the IIC, Lephripada Police Station submitted that the Members of the Sundargarh Bar Association have decided not to defend the accused as mother of the deceased is a member of their Association. But they have no objection if any Advocate or State Defence Counsel is engaged to defend the accused. The instructions is kept in the record.

6. The informant-opposite party No.2 has filed a counter affidavit stating that his wife has not approached anybody in the Sundargarh Bar Association not to conduct the case and there is no decision in the Bar Association not to defend the accused. He has also submitted that a State defence Counsel can be engaged on behalf of the accused by the Court in case he faces difficulty in engaging a counsel himself.

7. Before proceeding to decide whether the petitioner has made out a case for exercise of power conferred by Section-407 of the Code of Criminal Procedure to transfer the case, it would be apposite to refer to the provisions of Section 407 and some of the decisions of the Supreme Court on the question of transfer. Most of these decisions are based on scope of powers of the Supreme Court under the provisions of Section-406 of the Cr.P.C., but are applicable to exercise of power under Section-407 of the Crl.P.C by the High Courts as the provisions are similar.

8. Section-407 is extracted below :

Section-407. Power of High Court to transfer cases and appeals.

(1) Whenever it is made to appear to the High Court-

(a) that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto, or
(b) that some question of law of unusual difficulty is likely to arise, or
(c) that an order under this section is required by any provision of this Code, or will tend to the general convenience of the parties or witnesses, or is expedient for the ends of justice,
it may order-
(i) that any offence be inquired into or tried by any Court not qualified under sections 177 to 185 (both inclusive), but in other respects competent to inquire into or try such offence;
(ii) that any particular case or appeal, or class of cases or appeals, be transferred from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction;
(iii) that any particular case be committed for trial to a Court of Session; or
(iv) that any particular case or appeal be transferred to and tried before itself.

(2) The High Court may act either on the report of the lower Court, or on the application of a party interested, or on its own initiative: Provided that no application shall lie to the High Court for transferring a case from one Criminal Court to another Criminal Court in the same sessions division, unless an application for such transfer has been made to the Sessions Judge and rejected by him.

(3) Every application for an order under sub- section (1) shall be made by motion, which shall, except when the applicant is the Advocate- General of the State, be supported by affidavit or affirmation.

(4) When such application is made by an accused person, the High Court may direct him to execute a bond, with or without sureties, for the payment of any compensation which the High Court may award under sub- section (7).

(5) Every accused person making such application shall give to the Public Prosecutor notice in writing of the application, together with copy of the grounds on which it is made; and no order shall be made on of the merits of the application unless at least twenty- four hours have elapsed between the giving of such notice and the hearing of the application.

(6) Where the application is for the transfer of a case or appeal from any subordinate Court, the High Court may, if it is satisfied that it is necessary so to do in the interests of justice, order that, pending the disposal of the application, the proceedings in the subordinate Court shall be stayed, on such terms as the High Court may think fit to impose: Provided that such stay shall not affect the subordinate Court' s power of remand under section 309.

(7) Where an application for an order under sub- section (1) is dismissed, the High Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of compensation to any person who has opposed the application such sum not exceeding one thousand rupees as it may consider proper in the circumstances of the case.

(8) When the High Court orders under sub- section (1) that a case be transferred from any Court for trial before itself, it shall observe in such trial the same procedure which that Court would have observed if the case had not been so transferred.

(9) Nothing in this section shall be deemed to affect any order of Government under section 197.

Thus, under the provisions of Section-407 of the Code of Criminal Procedure, the High Court has the power to transfer a case (which can be a case, or appeal, or class of cases or appeals) from a Criminal Court subordinate to its authority to any other Criminal Court of equal or superior jurisdiction or even before itself, whenever it is made to appear to it that a fair and impartial inquiry or trial cannot be held in any criminal court subordinate to it or that some question of law of unusual difficulty is likely to arise; or that an order under this section is required by any provision of this Code, or will tend to the general convenience of the parties or witnesses, or is expedient for the ends of justice, it may order that any particular case, or appeal, or class of cases or appeals, be transferred. The High Court may act either on the report of the lower Court or on an application of the party interested or even on its own initiative.

9. In the case of ***Gurcharan Das Chadha vs. State of Rajasthan*** reported in ***(1966) 2 SCR 678***, the Supreme Court has observed as follows:

..... "13….The law with regard to transfer of cases is well settled. A case is transferred if there is a reasonable apprehension on the part of a party to a case that justice will not be done. A petitioner is not required to demonstrate that justice will inevitably fail. He is entitled to a transfer if he shows circumstances from which it can be inferred that he entertains an apprehension and that it is reasonable in the circumstances alleged. It is one of the principles of the administration of justice that justice should not only be done but it should be seen to be done. However, a mere allegation that there is apprehension that justice will not be done in a given case does not office. The Court has further to see whether the apprehension is reasonable or not. To judge of the reasonableness of the apprehension the State of the mind of the person who entertains the apprehension is no doubt relevant but that is not all. The apprehension must not only be entertained but must appear to the Court to be a reasonable apprehension."…..

In the case of ***Maneka Sanjay Gandhi & Anr. Vs. Rani Jethmalani (1979) 4 SCC 167*** , Justice V.R. Krishna Iyer, J. in his inimitable style speaking for the bench of three Judges, has held as follows :

> *....."Assurance of a fair trial is the first imperative of the dispensation of justice and the central criterion for the court to consider when a motion for transfer is made is not the hypersensitivity or relative convenience of a party or easy availability of legal services or like mini-grievances. Something more substantial, more compelling, more imperilling, from the point of view of public justice and its attendant environment, is necessitous if the Court is to exercise its power of transfer. This is the cardinal principle although the circumstances may be myriad and vary from case to case. We have to test the petitioner's grounds on this touchstone bearing in mind the rule that normally the complainant has the right to choose any court having jurisdiction and the accused cannot dictate where the case against him should be tried. Even so, the process of justice should not harass the parties and from that angle the court may weigh the circumstances."....*

In ***Abdul Nazar Madani Vs. State of T.N. & Anr.*** reported in ***(2000) 6 SCC 204*** , the Supreme Court has held :

> *...."The apprehension of not getting a fair and impartial inquiry or trial is required to be reasonable and not imaginary, based upon conjectures and surmises. If it appears that the dispensation of criminal justice is not possible impartially and objectively and without any bias, before any court or even at any place, the appropriate court may transfer the case to another court where it feels that holding of fair and proper trial is conducive. No universal or hard and fast rules can be prescribed for deciding a transfer petition which has always to be decided on the basis of the facts of each case. Convenience of the parties including the witnesses to be produced at the trial is also a relevant consideration for deciding the transfer petition. The convenience of the parties does not necessarily mean the convenience of the petitioners alone who approached the court on misconceived notions of apprehension. Convenience for the purposes of transfer means the convenience of the prosecution, other accused, the witnesses and the larger interest of the society."....*

In ***K.Anbazhagan Vs.Superintendent of Police & Ors.***reported in ***(2004) 3 SCC 767***, the Supreme Court has held as follows :

> *....."Free and fair trial is sine qua non of Article 21 of the Constitution. It is trite law that justice should not only be done but it should be seen to have been done. If the criminal trial is not free and fair and not free from bias, judicial fairness and the criminal justice system would be at stake shaking the confidence of the public in the system and woe would be the rule of law. It is important to note that in such a case the question is not whether the petitioner is actually biased but the question is whether the circumstances are such that there is a reasonable apprehension in the mind of the petitioner."....*

In ***Zahira Habibulla H. Sheikh Vs. State of Gujarat & Others*** reported in ***(2004) 4 SCC 158***, the Supreme Court has observed as follows:

…"Fair trial obviously would mean a trial before animpartial judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial."

A three judge Bench of the Supreme Court in the case of ***Captain Amarinder Singh Vs. Parkash Singh Badal & Ors.*** reported in ***(2009) 6 SCC 260***, has held as follows :

…"18. For a transfer of a criminal case, there must be a reasonable apprehension on the part of the party to a case that justice will not be done. It is one of the principles of administration of justice that justice should not only be done but it should be seen to be done. On the other hand, mere allegations that there is apprehension that justice will not be done in a given case does not suffice. In other words, the court has further to see whether the apprehension alleged is reasonable or not. The apprehension must not only be entertained but must appear to the court to be a reasonable apprehension.

19. Assurance of a fair trial is the first imperative of the dispensation of justice. The purpose of the criminal trial is to dispense fair and impartial justice uninfluenced by extraneous considerations. When it is shown that the public confidence in the fairness of a trial would be seriously undermined, the aggrieved party can seek the transfer of a case within the State under Section 407 and anywhere in the country under Section 406 CrPC.

20. However, the apprehension of not getting a fair and impartial inquiry or trial is required to be reasonable and not imaginary. Free and fair trial is sine qua non of Article 21 of the Constitution. If the criminal trial is not free and fair and if it is biased, judicial fairness and the criminal justice system would be at stake, shaking the confidence of the public in the system. The apprehension must appear to the court to be a reasonable one."…..

In the case of ***Nahar Singh Yadav vs Union of India*** reported in ***(2011) 1 SCC 307***, the Supreme Court after referring to a number of its earlier decisions has held as follows:

…."17. Reverting to the main issue, a true and fair trial is sine qua non of Article 21 of the Constitution, which declares that no person shall be deprived of his "life" or "personal liberty" except according to the procedure established by law. It needs no emphasis that a criminal trial, which may result in depriving a person of not only his personal liberty but also his life has to be unbiased, and without any prejudice for or against the accused. An impartial and uninfluenced trial is the fundamental requirement of a fair trial, the first and the foremost imperative of the criminal justice delivery system. If a criminal trial is not free and fair, the criminal justice system would undoubtedly be at stake, eroding the confidence of a common man in the system, which would not augur well for the society at large. Therefore, as and when it is shown that the public confidence in the fairness of a particular trial is likely to be seriously undermined, for any reason whatsoever, Section 406 of the Cr.P.C. empowers this Court to transfer any case or appeal from one High Court to another High Court or from one criminal court subordinate to one High Court to another criminal court of equal or

superior jurisdiction subordinate to another High Court, to meet the ends of justice. It is, however, the trite law that power under Section 406 of the Cr.P.C. has to be construed strictly and is to be exercised sparingly and with great circumspection. It needs little emphasis that a prayer for transfer should be allowed only when there is a well substantiated apprehension that justice will not be dispensed impartially, objectively and without any bias. In the absence of any material demonstrating such apprehension, this Court will not entertain application for transfer of a trial, as any transfer of trial from one State to another implicitly reflects upon the credibility of not only the entire State judiciary but also the prosecuting agency, which would include the public prosecutors as well.

10. Keeping in mind the provisions of Section-407 and the pronouncements of the Supreme Court and after considering the submissions of the learned counsels, the report of the learned trial Court and the instructions received from the IIC Lephipara Police Station, I find that though it has been reported that the advocates in Sundargarh have decided not to appear on behalf of the petitioner, neither have they passed any resolution to that effect nor have they prevented any counsel from appearing on behalf of the petitioner. The petitioner had sought for adjournment to engage a counsel of his choice on the ground that the local counsels were not agreeing to appear on his behalf and thereafter filed this transfer application. Till date, there has not been any move by anybody to disrupt the Court proceedings or influence the Court by way of demonstration or any type of pressure tactics. It is natural that if relatives of a victim are present in Court, that may give rise to some apprehension in the mind of an accused. But their presence cannot be forbidden, if it does not disrupt the Court proceedings or pressurize the Court in any manner. Hence the circumstances do not make out a case for transfer of Special GR Case No. 56 of 2022 from the Court of the learned Additional District Judge-cum-Special Court (POCSO), Sundargarh to any other Court at present.

11. The learned Counsel has made a request that in case the counsels engaged by the petitioner require police protection for appearing in the Court or moving around the Court premises, necessary protection or security may be provided to them.

12. Although I am convinced that the situation prevailing now, does not make out a case for transfer, but I feel that the following directions are necessary to be issued to ensure that the atmosphere in the trial Court remains conducive for a fair trial.

a) Liberty is granted to the counsels for the petitioner to approach the Superintendent of Police, Sundargarh for police protection in case of any genuine apprehension.

b) The learned trial court will stay the proceedings, if at any time the situation/ atmosphere in the Court changes, preventing holding of a fair trial.

c) The petitioner shall be at liberty to approach the learned Sessions Judge, Sundargarh to permit the learned trial Court to conduct the trial in Rourkela when the trial court holds its circuit bench there, or to approach this Court for transfer of the trial to any other Court in case of necessity.

d) The learned Addl. Government Advocate shall communicate this order to the Superintendent of Police, Sundargarh forthwith so that the latter is not caught unawares, in case of any request for police protection by the counsels appearing on behalf of the petitioner.

13. The TRP (CRL) is disposed of with the aforesaid directions.

14. Urgent certified copy be granted on proper application.

15. A free copy of this order be handed over to Mr. S.S. Pradhan, learned Addl. Government Advocate for compliance.

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2022 (III) ILR-CUT-553

MISS. SAVITRI RATHO, J.

TRP (C) NO. 235 OF 2022

SONALIJA JENA …. Petitioner

.V.

ABINASH MOHAPATRA …. Opp.Party

CODE OF CIVIL PROCEDURE, 1908 – Section 24 – Petitioner/wife filed one C.P in Bhubaneswar where the opposite party/husband appeared and filed written statement – Husband filed C.P. No. 128 of 2022 under Section 25 of the Guardian & Wards Act, 1890 at Rourkela – The Petitioner filed the present case for transfer of C.P. No. 128 of 2022 to Bhubaneswar – Whether the prayer for transfer should be allowed – Held, Yes – Considering certain factors and relying on the decision of Apex court, The Petition allowed. (Paras 6,8)

Case Laws Relied on and Referred to :-

1. AIR 2002 SC 396 : Sumita Singh vs. Kumar Sanjay and another.
2. (2017) 4 SCC 150 : Krishna Veni Nagam vs. Harish Nigam.
3. 2020 (III) ILR CUT 796 : Prabhati Pattnaik vs. Aditya Kumar Pattnaik.
4. (2006) 9 SCC 197 : Anindita Das vs. Srijit Das.
5. (2003) 4 SCC 601 : State of Maharashtra vs Praful B.Desai.
6. (2005) 3 SCC 284 : Kalyan Chandra Sarkar v Rajesh Ranjan.
7. (011) 10 SCC 283 : Budhadev Karmaskar vs State of W.B.
8. (2011) 15 SCC 330) : Maltesh Gudda vs State.
9. 2017 (II) CLR (SC) 981 : Santhini vs.Vijaya Venketesh.
10. 2022 SCC Online SC 1199 : N.C.V. Aishwarya vs. A.S. Saravana Karthik Sha.

11. TRP(C) No. 324 of 2017 (decided on 05.09.2022) : Anuva Choudhury vs. Biswajit Mishra
12. TRP (CRL) No. 98 of 2021 : Biswajit Mishra vs. Anuva Choudhury.

For Petitioner : Mr. B. Parida
For Opp.Party : Mr. R. Prusty

ORDER Date of Order: 19.10.2022

MISS. SAVITRI RATHO, J.

1. This application under Section 24 of Code of Civil Procedure (in short "the C.P.C.") has been filed by the petitioner-wife for transfer of C.P. No. 128 of 2022, filed by the opp. party-husband under Section 25 of the Guardian & Wards Act 1890, in the Court of learned Judge, Family Court, Rourkela, to the Court of learned Judge, Family Court, Bhubaneswar.

TRP(C) No. 86 of 2022 under Section 24 of the C.P.C. has been filed by the petitioner-wife for transfer of C.P. No.48 of 2021 filed by the opposite party – husband under Section 22 of the Special Marriage Act read with Section 7 of the Family Courts Act, for restitution of conjugal rights in the Court of the learned Family Judge, Rourkela to the Court of the learned Judge, Family Court, Bhubaneswar, which is listed today along with this TRP(C) and both were heard together and disposed of today.

2. Vide order dated 08.09.2022 , the matter was referred for mediation to the Orissa High Court Mediation Centre .The Mediator has submitted an interim report dated 27.09.2022 informing that the next date of meditation was 12.10.2022. Today, Mr. Parida, learned counsel for the petitioner files the copy of the mediation report dated 12.10.2022 along with a memo. The mediator has inter alia reported that the mediation became unsuccessful. The same be tagged to the record. As mediation has failed, the two TRP(C)s are taken up for final disposal on the consent of the counsels.

3. Mr. B. Parida, learned counsel for the petitioner- wife submits that the parties had fallen in love and married before the Marriage Officer, Rourkela on 01.03.2011 and thereafter the marriage was solemnized before friends and relatives in the Rourkela Club on 10.02.2012. But soon after her marriage she was tortured at Rourkela the place of her in laws as well as at her husband's workplace in Jharsuguda. They demanded Rs 5 lakhs more as dowry. Their son was born on 23.08.2014. But the opposite party continued to harass her. They stayed in Bhubaneswar between 2015 to 2016, but the opposite party left her and son and went back to Rourkela. She has lodged FIR against him at the Uditnagar Police Station. She has filed C.P.No. 134 of 2019 against him for divorce, permanent alimony and maintenance of their son, in the Court of the

learned Judge, family Court , Bhubaneswar, where he has appeared and filed written statement dated 06.07.2019. Thereafter in order to harass her, he has filed C.P.No, 48 of 2021 in the Court of the learned Judge , Family Court, Rourkela for restitution of conjugal rights. She has filed TRP (C) No. 86 of 2022 before this Court for transfer of C.P. No. 48 of 2021 to Bhubaneswar and during pendency of TRP (C) No. 86 of 2022 , he filed C.P.No. 128 of 2022 in Rourkela for custody of their son. The petitioner and her minor son are residing in Bhubaneswar with her parents and as she has no independent source of income, they are dependent on her parents. As the distance between Rourkela and Bhubaneswar is more than 400 kms., it would be inconvenient for her to go to Rourkela to attend the case. That apart, C.P. No. 134 of 2019 filed by her for divorce is pending in the Court of learned Judge, Family Court, Bhubaneswar in which the opposite party-husband has appeared, so no inconvenience will be caused to him if C.P. No. 128 of 2022 is also transferred to the Court of learned Judge, Family Court, Bhubaneswar. As their son is residing with her in Bhubaneswar, the proceeding praying for his custody should have been filed in Bhubaneswar. In support of his prayer for transfer, Mr.B. Parida, learned counsel for the petitioner submits that it is the settled position of law that in matrimonial cases, the convenience of the wife is to be given paramount importance and the same principle will apply to this case as it relates to custody of the son who is residing with her. He relies on the following decisions to buttress his submissions:-

(i) ***Sumita Singh vs. Kumar Sanjay and another*** reported in AIR 2002 SC 396.

(ii) ***Krishna Veni Nagam vs. Harish Nigam*** reported in (2017) 4 SCC 150.

(iii) ***Prabhati Pattnaik vs. Aditya Kumar Pattnaik*** reported in 2020 (III) ILR CUT 796.

4. Mr. R. Prusty, learned counsel for the opposite party opposes the prayer for transfer stating that learned Judge, Family Court, Rourkela has the jurisdiction to try the case for which the opposite party has rightly filed the case in Rourkela and this Court should also consider the difficulties which will be faced by him if the case is transferred to Bhubaneswar . He apprehends danger to his life in Bhubaneswar and will face inconvenience if the C.P. is transferred to Bhubaneswar as he will have to cover 800 miles to come to Bhubaneswar to attend to all his cases pending there and return to Rourkela.

5. **CPC Section 24.General power of transfer and withdrawal.**

(*1) On the application of any of the parties and after notice to the parties and after hearing such of them as desired to be heard, or of its own motion without such notice, the High Court or the District Court may at any stage-*

(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or

(b) withdraw any suit, appeal or other proceeding pending inany Court subordinate to it, and-

(i) try or dispose of the same; or

(ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or

(iii) retransfer the same for trial or disposal to the Court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn under sub-section (1), the Court which[1] *[is thereafter to try or dispose of such suit or proceeding] may, subject to any special directions in the case of any order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.*

[2]*[(3) For the purposes of this section,-*
(a) Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court;

(b) "proceeding" includes a proceeding for the execution of a decree or order.]

(4) the Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

[3]*[(5) A suit or proceeding may be transferred under this section from a Court which has no jurisdiction to try it.*

6. In the case of ***Sumita Singh*** (supra), the Supreme Court held that since it is the husband's suit against the wife, the wife's convenience must be looked at and found the circumstances sufficient to allow the wife's prayer for transfer of the case.

However , four years thereafter, in the case of ***Anindita Das vs. Srijit Das*** reported in ***(2006) 9 SCC 197***, the Supreme court has held as follows :

..."3. Even otherwise, it must be seen that at one stage this Court was showing leniency to ladies. But since then it has been found that a large number of transfer petitions are filed by women taking advantage of the leniency taken by this Court. On an average at least 10 to 15 transfer petitions are on Board of each Court on each admission day. It is, therefore, clear that leniency of this Court is being misused by the women.

4. This Court is now required to consider each petition on its merit. In this case the ground taken by the wife is that she has a small child and that there is nobody to keep her child. The child, in this case, is six years old and there are grandparents available to look after the child. The Respondent is willing to pay all expenses for travel and stay for the Petitioner and her companion for every visit when the Petitioner is required to attend the Court at Delhi. Thus, the ground that the Petitioner has no source of income is adequately met.

1. Subs, by Act No. 104 of 1976, sec. 10 for "thereafter tries such suit" (w.e.f. 1-2-1977).
2. Subs, by Act No. 104 of 1976, sec. 10 for sub-section (3) (w.e.f. 1-2-1977).
3. Ins. by Act No. 104 of 1976, sec. 10 (w.e.f. 1-2-1977).

5. Except for stating that her health is not good, no particulars are given. On the ground that she is not able to come to Delhi to attend the Court on a particular date, she can always apply for exemption and her application will undoubtedly be considered on its merit. Hence, no ground for transfer has been made out.

6. Accordingly, we dismiss the Transfer Petition. We, however, direct that the Respondent shall pay all travel and stay expenses of the Petitioner and her companion for each and every occasion when she is required to attend the Court at Delhi"....

In the case of ***Krishna Veni Nagam*** (supra), the Supreme Court had held as follows:

14. One cannot ignore the problem faced by a husband if proceedings are transferred on account of genuine difficulties faced by the wife. The husband may find it difficult to contest proceedings at a place which is convenient to the wife. Thus, transfer is not always a solution acceptable to both the parties. It may be appropriate that available technology of video conferencing is used where both the parties have equal difficulty and there is no place which is convenient to both the parties. We understand that in every district in the country videoconferencing is now available. In any case, wherever such facility is available, it ought to be fully utilized and all the High Courts ought to issue appropriate administrative instructions to regulate the use of video conferencing for certain category of cases. Matrimonial cases where one of the parties resides outside court's jurisdiction is one of such categories. Wherever one or both the parties make a request for use of videoconferencing, proceedings may be conducted on video conferencing, obviating the needs of the party to appear in person. In several cases, this Court has directed recording of evidence by videoconferencing. ***(State of Maharashtra vs Praful B.Desai ; (2003) 4 SCC 601 ; Kalyan Chandra Sarkar v Rajesh Ranjan (2005) 3 SCC 284 ;Budhadev Karmaskar vs State of W.B;(011) 10 SCC 283 ; Maltesh Gudda vs State (2011) 15 SCC 330).***

18. We, therefore, direct that in matrimonial or custody matters or in proceedings between parties to a marriage or arising out of disputes between parties to a marriage, wherever the defendants/respondents are located outside the jurisdiction of the court, the court where proceedings are instituted, may examine whether it is in the interest of justice to incorporate any safeguards for ensuring that summoning of defendant/ respondent does not result in denial of justice. Order incorporating such safeguards may be sent along with the summons. The safeguards can be:

(i) Availability of videoconferencing facility.

(ii) Availability of legal aid service.

(iii) Deposit of cost for travel, lodging and boarding in terms of Order 25 CPC.

(iv) Email address/phone number, if any, at which litigant from outstation may communicate.

The decision of the Supreme Court in ***Krishna Veni*** (supra) had been referred to a larger Bench regarding use of video conferencing in matrimonial cases, In its decision in ***Santhini vs.Vijaya Venketesh*** reported in ***2017 (II) CLR (SC) 981***. 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 theother 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 video conferencing.

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 Dr D.Y Chandrachud in his dissenting opinion 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 provisionsof 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.

11. The reference should in my opinion be answered in the above terms."...

This Court in the case of ***Prabhati Pattnaik*** (supra), relying on the decision in Krishna Veni, had observed as follows:

"it will be open to the transferee court to conduct the proceedings or record evidence of the witnesses who are unable to appear in court, by way of videoconferencing."

The Supreme Court in the recent case of ***N.C.V. Aishwarya vs. A.S. Saravana Karthik Sha : 2022 SCC Online SC 1199*** as follows :

....."9. The cardinal principle for exercise of power under Section 24 of the Code of Civil Procedure is that the ends of justice should demand the transfer of the suit, appeal or other proceeding. In matrimonial matters, wherever Courts are called upon to consider the plea of transfer, the Courts have to take into consideration the economic soundness of both the parties, the social strata of the spouses and their behavioural pattern, their standard of life prior to the marriage and subsequent thereto and the circumstances of both the parties in eking out their livelihood and under whose protective umbrella they are seeking their sustenance to life. Given the prevailing socioeconomic paradigm in the Indian society, generally,it is the wife's convenience which must be looked at while considering transfer.

10. Further, when two or more proceedings are pending in different Courts between the same parties which raise common question of fact and law, and when the decisions in the cases are interdependent, it is desirable that they should be tried together by the same Judge so as to avoidmultiplicity in trial of the same issues and conflict of decisions."....

This Court in the case of ***Anuva Choudhury vs. Biswajit Mishra (TRP(C) No. 324 of 2017)*** decided on 05.09.2022 alongwith ***Biswajit Mishra vs***

Anuva Choudhury (TRP (CRL) No. 98 of 2021), after referring to a number of decisions of the Supreme Court and this High Court , has held as follows:

> *"....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."*.....
>
> *....."10. From the aforesaid cases, it is apparent that although the Supreme Court hase 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."...*

7. Section-24 of the C.P.C deals with the power of the High Court and District Court to transfer cases pending in any court subordinate to it. Where there is more than one Court in which a/proceeding case/suit may be instituted, the plaintiff as *arbiter litis* or *dominus litis* has the right to choose where he/she wants to institute the case. Normally, the defendant for the mere asking cannot ask for transfer of a case to any other Court. But in appropriate cases, a superior Court may transfer a case pending in one Court to another Court. The power of transfer must be therefore be exercised with caution keeping in mind the interest

of justice. In matrimonial cases it was the settled position that convenience of the wife is of paramount consideration, for which in majority of transfer applications filed by the wife, the prayer of the wife for transfer of a matrimonial case has been allowed without considering the difficulties which may be faced by the husband. However, in some cases considering the difficulties faced by the husband, the prayer of the wife for transfer have been rejected or while allowing the prayer of the wife for transfer in order to mitigate the difficulties which may be faced by the husband, direction has been issued for hearing all pending cases together on the same date , and not to insist on the personal attendance of the husband if it is not essential and permitting examination and cross-examination of witnesses through video conferencing mode. Certain do and don'ts have however been specified by the Supreme Court regarding recording of evidence through video conferencing.

8. In the present case, apart from the provisions of Section 24 C.P.C., the decisions of the Supreme Court and this Court, the submissions of the learned counsel, the following factors have to be considered in order to decide whether the prayer for transfer should be allowed. They are:-

(a) The son of the petitioner is staying with the petitioner in Bhubaneswar with her parents

(b) The petitioner has no independent source of income and she and her son are dependent on her parents, who stay in Bhubaneswar.

(c) The distance between Bhubaneswar and Rourkela is more than 400 Kms.

(d) C.P. No. 134 of 2019 filed by the petitioner-wife for divorce is pending in Bhubaneswar where the opposite party-husband has already appeared and filed his written statement.

9. Taking a holistic view of the matter and the comparative convenience/ inconvenience the parties may face if the transfer application is allowed or rejected and in view of the pendency of C.P. No. 134 of 2019 in the Court of learned Judge, Family Court, Bhubaneswar, in which the opposite party-husband has appeared and filed his written statement, the prayer for transfer is allowed.

10. The learned Judge, Family Court, Rourkela is requested to send the record of C.P. No. 128 of 2022 ***(Abinash Mohapatra vs. Sonalija Jena)*** to the Court of learned Judge, Family Court, Bhubaneswar by 18.11.2022. Ther eafter , the learned Judge, Family Court , Bhubaneswar shall issue notice to both the parties for their appearance.

11. The apprehension of Mr. Prusty regarding danger to the life of opposite party appears to be unfounded as he has already appeared in C.P. No. 134 of 2019 and filed his written statement. However as the opposite party will definitely

face inconvenience in having to come to Bhubaneswar from Rourkela to contest the cases there , the learned Family Judge, Bhubaneswar is requested to post the Civil proceedings involving the parties on the same date if there is no other legal impediment and to dispose of the proceedings expeditiously.

12. The TRP (C) is accordingly allowed.

13. Registry is directed a send a copy of this order to the Courts of the learned Judge, Family Court, Rourkela and Bhubaneswar forthwith by email for compliance.

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2022 (III) ILR-CUT-562

R.K. PATTANAIK, J.

CRLMC NO. 4710 OF 2014

Dr. ARJUN CHARAN DASH ..... Petitioner

.V.

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

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Offence punishable under Section 304(A) of IPC – Complain lodged against the petitioner with an allegation of medical negligence – Whether sustainable ? – Held, No – An error of judgment does not amount to medical negligence – The allegation may be sufficient for a civil liability but cannot be adequate to sustain a criminal action – Petition allowed.

(Para 10)

Case Laws Relied on and Referred to :-

1. AIR 2005 SC 3180 : Jacob Mathew Vrs. State of Punjab and others.
2. AIR 2009 SC 2049 : Martin F. D'Souza Vrs. Mohd. Ishaq.
3. [1903] 2 KB 100 : McQuire Vrs. Western Morning News.
4. [1957] 1 WLR 582 : Bolam Vrs. Friern Hospital Management Committee.

For Petitioner : Mr. M. Agarwal

For Opp.Parties : Mr. P.K. Muduli, AGA

JUDGMENT Date of Judgment : 19.09.2022

R.K. PATTANAIK, J.

1. Invoking the jurisdiction under Section 482 Cr.P.C. the petitioner moved the present petition for quashing of the FIR, order of cognizance dated 7th January, 2014 and the criminal proceeding in connection with G.R. Case No. 2202 of 2013 pending before the court of learned S.D.J.M., Puri arising out of

Kumbharpada PS Case No. 370(6) dated 5th November, 2013 for an offence punishable under Section 304(A) IPC on the ground that the same is not tenable in law.

2. Briefly stated, the petitioner is a Gynecologist and at the relevant point of time, he was running a clinic by name Shri Krishna Health Care and Reproductive Research Centre situated at Puri. By then, the complainant had been admitted in the clinic on account of being pregnant. In fact, some issues arose when the complainant had completed 39 weeks of pregnancy and for that, she had to be under the treatment of the petitioner. During that time and in course of such treatment, the complainant had leakage of fluid which was responded as a normal symptom. However, the complainant was dissatisfied with the line of treatment and the manner in which the case was handled by the petitioner. Finally, the complainant suffered death of her foetus for which caesarean delivery was initially not advised but at the end, it was resorted to. According to the complainant, she was administered with unnecessary medicines and injections which proved to be fatal for the foetus. With the above allegations, the complainant lodged the FIR consequent upon which Kumbharpada P.S. Case No.370 (6) was registered which ultimately resulted in the submission of chargesheet against the petitioner under the alleged offence.

3. As pleaded by the petitioner, the allegations to be baseless and there has been no medical negligence which is claimed by the complainant and in absence of any material, much less a prima facie case, the criminal proceeding which is otherwise an abuse of process of law should not be allowed to continue, rather, terminated in the interest of justice. It is further pleaded that there was no mensrea for the alleged offence and despite that the learned court below took cognizance of the offence under Section 304(A) IPC and summoned the petitioner which is palpably illegal and thus, not tenable in law.

4. Mr. Agarwal, learned counsel for the petitioner contended that even if the FIR and chargesheet are taken at face value and accepted in its entirety do not prima facie constitute an offence of rashness or negligence and that apart, the learned court below completely lost sight of the fact that *means rea* was conspicuously absent and also was unmindful of the principles concerning medical negligence which have been laid down in the classical judgment of the Apex Court in **Jacob Mathew Vrs. State of Punjab and others** reported in AIR 2005 SC 3180. While advancing such an argument, Mr. Agarwal cited one more decision of the Supreme Court in **Martin F. D'Souza Vrs. Mohd. Ishaq** reported in AIR 2009 SC 2049 which is of course related to a consumer dispute but deals with medical negligence. It is contended by Mr. Agarwal that applying

the standard set by the Apex Court, in absence of negligence and the defence having been vindicated by an opinion of experts, no case is made out vis-à-vis the petitioner. Referring to the decision of **Jacob Mathew** (supra), Mr. Agarwal further contends that negligence by a medical professional demands a different treatment altogether and rashness or negligence on the part of the petitioner being a doctor requires additional consideration so as to form an opinion that the negligence to be gross or in other words, the negligence or recklessness was of higher degree. According to Mr. Agarwal, as per the said decision, the expression 'rash or negligent act' as occurring in Section 304(A) IPC has to be read as qualified by the word 'grossly'. Lastly, it is contended that an Expert Committee was constituted to examine the case of petitioner on the request of the IO and by the orders of the CDMO, Puri outcome of which completely exonerated the petitioner from any kind of medical negligence and while claiming so, the report of the said Committee under Annexure-3 has been cited by Mr. Agarwal. Hence, the contention is that when there has been no *means rea* on the part of the petitioner and no case of medical negligence was prima facie proved and established even after examination of the complainant's claim by an Expert Committee, chargesheet could not have been filed and therefore, the learned court below fell into serious error by taking cognizance of the offence under Section 304(A) IPC against him which therefore is liable to be interfered with and quashed in exercise of this Court's inherent jurisdiction.

5. On the other hand, learned AGA Mr. Muduli justified the impugned order of cognizance dated 7th January, 2014 under Annexue-2 and contended that the very conduct of the petitioner was such, it clearly amounted to an act of medical negligence and the same was revealed during investigation for which the chargesheet was submitted. It is further contended that the opinion which was formed at the end of the investigation is based on facts found against the petitioner which proved his negligence while dealing with the case of the complainant, who had been admitted in the clinic as an indoor patient. Hence, according to the learned AGA, prima facie negligence stood established and therefore, the criminal proceeding cannot be quashed. In other words, the contention of Mr. Muduli is that the materials on record since suggest negligence which is attributed to the petitioner and as a case is made out which needs to be enquired into during trial, therefore, the criminal proceeding in G.R. Case No.2202 of 2013 ought not to be interfered with.

6. It is not denied that an Expert Committee was formed by the CDMO, Puri and a copy of the report of the said Committee is at Annexure-3 which contains the request of the IO of Kumbharpada P.S. for necessary clarification on certain points concerning the treatment of the complainant and the reason behind

for having delivered a dead foetus. According to the Expert Committee report, while answering the queries of the IO, opined differently which is inconsistent with the claim of the complainant. The actual cause of death as per the Committee's report could possibly be on account of true knot of cord in which a chance of *intra uterine* death is maximum. However, at the same time, the CDMO, Puri expressed a contrary view at the end later to the examination carried out by the Expert Committee which has been addressed to the IO by letter No. 17187 dated 31st December, 2013, wherein, he concluded that the petitioner was not at the clinic on the date of occurrence though it was an off day and to justify the cause of death on account of knot of cord, no photograph or any evidence was preserved or even shown to the attendants of the complainant after the surgical operation for the latter's satisfaction and in so far as the Expert Committee's opinion is concerned, it is based on the data maintained at the clinic by the petitioner himself. In such view of the matter, when there are diverse conclusions reached at by the Expert Committee and the CDMO, Puri, the fact which has not been disputed by either of the parties, it is to be ascertained as to whether, in the facts and circumstances of the case, a case of gross medical negligence is prima facie made out against the petitioner requiring him to face trial before a court of law.

7. Before dealing with the rival contentions and engaging the Court to analyze the same, it is apposite to make a mention as to the principles and guidelines set out by judicial pronouncement vis-à-vis medical negligence. The relevant excerpt of the judgment in **Jacob Mathew** case is reproduced herein below.

> "Negligence by professionals in the law of negligence, professionals such as lawyers, doctors, architects and others are included in the category of persons professing some special skill or skilled persons generally. Any task which is required to be performed with a special skill would generally be admitted orundertaken to be performed only if the person possesses the requisite skill for performing that task. Any reasonable man entering into a profession whichrequires a particular level of learning to be called a professional of that branch impliedly assures the person dealing with him that the skill which he professes to possess shall be exercised and exercised with reasonable degree of care and caution. He doesnot assure his client of the result. A lawyer does not tell his client that the client shall win the case in all circumstances. A physician would not assure the patient of full recovery in every case. A surgeon cannot and does not guarantee that the result of surgery would invariably be beneficial much less tothe extent of 100% for the person operated on. The only assurance which such a professional can give or can be understood to have given by implication is that he is possessed of the requisite skill in that branch of profession which he is practising and while undertaking the performance of the task entrusted to him, he would be exercising his skill with reasonable competence. This is all what the person approachingthe professional can expect. Judged by this standard, a professional may be held liable for negligence on one

> of two findings: either he was not possessed ofthe requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not necessary for every professional to possess the highest level of expertise in that branch which he practices. In Michael Hyde and Associates v. J.D. Williams & Co. Ltd., [2001] P.N.L.R. 233, CA, Sedley L.J. said that where a profession embraces a range of views as to what is an acceptable standard of conduct, the competence of the defendant is to be judged by the lowest standard that would be regarded as acceptable. (Charlesworth& Percy, ibid, Para 8.03)Oft quoted passage defining negligence by professionals, generally and not necessarily confined to doctors, is to be found in the opinion of Mc Nair J. in Bolam v. Friern Hospital Management Committee [1957] 1 W.L.R. 582, 586 in the following words: "Where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not thetest of the man on the top of a Clapham Omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising andprofessing to have that special skill…A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art." (Charlesworth& Percy, ibid, Para 8.02) The water of Bolam test has ever since flown and passed under several bridges, having been citedand dealt with in several judicial pronouncements, one after the other and has continued to be well received by every shore it has touched as neat, clean and well-condensed one. After a review of various authorities Bingham L.J. in his speech in Eckersley v. Binnie [1988] 18 Con.L.R. 1, 79 summarized the Bolam test in the following words: "From these general statements, it follows that a professional man should command the corpus of knowledge which forms part of the professional equipment of the ordinary member of his profession. He should not lag behind other ordinary assiduous and intelligent members of his profession in knowledge of new advances, discoveries and developments in his field. He should have such awareness as an ordinarily competent practitioner would have of the deficiencies in his knowledge and the limitations on his skill. He should be alert to the hazards and risks in any professional task he undertakes to the extent that other ordinarily competent members of the profession would be alert. He must bring to any professional task he undertakes no less expertise, skill and care than other ordinarily competent members ofhis profession would bring, but need bring no more.The standard is that of the reasonable average. Thelaw does not require of a professional man that he be a paragon combining the qualities of polymath and prophet." (Charlesworth& Percy, ibid, Para 8.04) The degree of skill and care required by a medical practitioner is so stated in Halsbury's Laws of England (Fourth Edition, Vol.30, Para 35).”

8. While summing up, the Apex Court in the aforesaid decision concluded as following:

> (1) Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. The definition of negligence as given in Law of Torts, Ratanlal & Dhirajlal (edited by Justice G.P. Singh), referred to herein above, holdsgood. Negligence becomes actionable on account of injury resulting from the act or omission amounting to

negligence attributable to the person sued. The essential components of negligence are three: 'duty', 'breach' and 'resulting damage'.

(2) Negligence in the context of medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligenceon the part of a medical professional. So long as adoctor follows a practice acceptable to the medicalprofession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simplybecause a more skilled doctor would not have chosento follow or resort to that practice or procedure which the accused followed. When it comes to the failure of taking precautions what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence. So also, the standard of care, while assessing the practice as adopted, is judged in the light of knowledge available at the time of the incident, and not at the date of trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that particular time (that is, the time of the incident) at which it is suggested it should have been used.

(3) A professional may be held liable for negligence on one of the two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence.

(4) The test for determining medical negligence as laid down in Bolam's case [1957] 1 W.L.R. 582, 586 holdsgood in its applicability in India.

(5) The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of mensrea must be shown to exist. For an act to amount to criminal negligence, the degree ofnegligence should be much higher i.e. gross or of avery high degree. Negligence which is neither grossnor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.

(6) The word 'gross' has not been used in Section 304A of IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be 'gross'. The expression'rash or negligent act' as occurring in Section 304A of the IPC has to be read as qualified by the word 'grossly'.

(7) To prosecute a medical professional for negligence under criminal law, it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would

> have doneor failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent.
>
> (8) Res ipsa loquitur is only a rule of evidence and operates in the domain of civil law specially in cases of torts and helps in determining the onus of proof in actions relating to negligence. It cannot be pressed in service for determining per se the liability for negligence within the domain of criminal law. Res ipsa loquitur has, if at all, a limited application in trial on a charge of criminal negligence.

9. In the decision of **Jacob Mathew**, it has been held that in a situation which involves some kind of a special skill or competence, then the test as to whether there has been negligence or otherwise is not the test of the man on the top of a Clapham Omnibus because he has no special skill, however, a man need not possess the highest expert skill. The only test which is required to be applied if such man exercises the ordinary skill of an ordinary competent man exercising that particular act. In fact, the man on the Clapham Omnibus is a hypothetical ordinary and reasonable person used by the courts in English law where it is necessary to decide whether a party has acted as a reasonable person for instance in a civil action for negligence. The aforesaid phrase was reportedly brought into legal use for the first time in a judgment by an English Court of Appeal in the case of **McQuireVrs. Western Morning News** reported in [1903] 2 KB 100. The essence of the debate was that what significance the opinion of an ordinary man shall have in a libel suit. The phrase of man on the Clapham Omnibus was used in the context of public opinion, the purpose being to examine the liability which is sought to be fastened against someone, a professional alleged of negligence, where the opinion of an unskilled person counts insignificant. The Supreme Court in **Jacob Mathew** held that the test for determining medical negligence as laid down in **BolamVrs. Friern Hospital Management Committee** reported in [1957] 1 WLR 582 runs the field in itsapplicability in India. However, at the same breath, the Apex Court in **Jacob Mathew** case did air a word of caution by observing that it may not be misunderstood that doctors can never be prosecuted for an offence of which rashness or negligence is an essential ingredient; all that was to emphasize the need of care and caution in the interest of the society; for, the service which the medical profession renders to the human being is probably the noblest of all and hence, there is a need for protecting doctors from frivolous or unjust prosecutions and many a complainant prefers recourse to criminal process as a tool for pressurizing the medical professional for extracting uncalled for or unjust compensation and such malicious proceedings have to be guarded against. The principle of *res ipsa loquitur* was also discussed in **Jacob Mathew** which stipulates that near occurrence of some types of accident is sufficient to imply negligence. The aforesaid is a Latin maxim meaning ‘the thing speaks for itself’ which is a doctrine

that infers negligence from the nature of the accident when evidence regarding the conduct of the defendant is lacking. In a case of medical negligence, the conduct of the professional and the explanation offered by him bears relevance apart from considering the line of treatment which he followed which ultimately resulted in a mishap. The above aspects which have been highlighted upon by the Apex Court in the case of **Jacob Mathew** as also referred to in **Martin F. D'Souza** (supra) shall have to be kept in mind while dealing with a matter of medical negligence.

10. In so far as the FIR is concerned which is at Annexure-1, the complainant alleged inappropriate behaviour by the petitioner, while she was informing about leakage of fluid and had asked for immediate delivery. The allegation is that the complainant was admitted in the clinic of the petitioner but was left unattended and when she was in dire need of medical attention, the petitioner was absent as he had left for Bhubaneswar and when he returned in the night and checked her up at 10.30 pm, she was informed about the death of the foetus and thereafter, the petitioner advised her for a normal delivery but on the next day i.e. 27th October, 2013, caesarean delivery was suggested. According to the complainant, the petitioner did not discharge the duty properly with due care and on account of his negligence, she lost her ten month old foetus and also sustained immense mental and physical agony by alleging that the delivery should have been done when it was needed the most but was delayed deliberately for monetary considerations which in fact left the foetus dead and endangered her life too for deferring surgery and insisting for a normal delivery. The manner of treatment has been questioned by the complainant alleging negligence on the part of the petitioner. A preliminary enquiry was conducted. A copy of the report of the Expert Committee is annexed by the petitioner and it is claimed that no medical negligence was established during such enquiry. The Expert Committee reached at a conclusion that after analyzing the case record, no negligence was found or proved against the petitioner. However, the CDMO, Puri offered the final opinion by a report dated 31stDecember, 2013 with a contrary view. In so far as the discharge summary dated 1st November, 2013 is concerned, a copy of which is available in the record, the death of the foetus is suggested to be on account of knot of cord. The complainant was supposed to be attended by the petitioner at the clinic but according to her, the latter left for Bhubaneswar for which there was no timely attention, as a result of which, the foetal death occurred. It is not denied that no specimen was preserved in proof of the cause of death of the foetus. There is no material on record to show that some kind of a medical urgency surfaced during the absence of the petitioner when the complainant was all along at the clinic and receiving check up. It was found during enquiry that the clinic did not have a resident doctor at the relevant point

of time to look after the patients in absence of the petitioner which has been reported by the CDMO, Puri. Yet the complainant while was at the clinic received treatment being attended by the staff nurse and till the very end, she had no complication and was receptive to the movement of foetus, however, such movement could not be felt after 8.30 pm on 26thOctober, 2013 which was informed to the petitioner, who attended her at 10.30 pm in the night and after ultrasonography, the foetal death was confirmed. The line of treatment has not been questioned by the Expert Committee nor by the CDMO, Puri, who reported the absence of the petitioner on the off day and was of the opinion that he should have been present to attend the complainant all throughout. It has not been concluded by the Expert Committee that the petitioner's treatment or approach was in anyway erroneous or a departure from the regular practice while dealing with the delivery case. The findings of the Committee is that after the intra uterine death of the foetus, the usual course of action is always by means of induction of labour and if that fails, caesarean operation is suggested and in the present case, when the normal delivery could not be ensured, the surgery was carried out to remove the dead foetus. There is also no confirmation to the allegation that on account of the medicines and injections administered, the complainant developed some complication and it resulted in the foetal death. Whether merely for the absence of the petitioner and non-preservation of any evidence or specimen at the clinic as to the cause of death of the foetus by itself sufficient to sustain the criminal action? As per the decision in Jacob Mathew, the opinion of a competent professional conversant with the subject shall have to be obtained while deciding a case of medical negligence against another individual who is also no less proficient in that subject and in such matters, a layman's point of view bears no relevance because a finding thereon shall have to be tested considering the expert opinion instead of the views of an ordinary man who carry no skill required to assess the situation. In the present case, the complainant was dissatisfied with the kind of treatment she was meted out at the clinic in the hands of the petitioner but in absence of any opinion from the Expert Committee and also the CDMO, Puri on the line of treatment to be in any manner seriously wrong, it would not be justified to reach at a conclusion otherwise. The complainant no doubt was not satisfied and claimed that she was not attended by the petitioner, who reached late in the evening but would that be sufficient enough to fasten the criminal liability and the answer would be in the negative. At times, dissatisfaction drives a person to believe that there was medical negligence even though the line of treatment is found to be according to the protocol. If a conclusion is reached at that the treatment was grossly wrong or it was a complete departure from the usual practice, in such a situation, medical negligence may be attributed. However, in the case at hand, no such

material could be collected to show that the petitioner was in any way conducted himself improperly in deviation to the regular protocol which is normally followed while attending delivery. The death of the foetus was suggested to be on account of knot of cord and during the stay at the clinic, the complainant did not have any issues or complication of grievous kind except leakage of fluid which was not found to be unconventional or unusual either by the Expert Committee or the CDMO, Puri. The medicines and injections were administered to the complainant in usual course which was also not found fault with during the enquiry. So the only allegation which is left and directed against the petitioner is about his absence but the complainant received check up at the clinic and did not have any major complication except sensing absence of movement of the foetuswhereafter as per the protocol induction of labour was suggested but lastly caesarean was adopted which in the considered view of the Court cannot be a ground to allege gross negligence. Applying the **Bolam** test and the guidelines summed up by the Apex Court in **Jacob Mathew** (supra) wherein it has been held that negligence may be on account of having not possessed of requisite skill which the person professed to have; or he did not exercise with reasonable competence the skill which he did posses and standard to be applied for judging whether the person charged has been negligent or not would be that of an ordinary competent person exercising skill in that profession. Unless there is gross negligence clearly discernable from the materials, for minor or not so significant lapses by a doctor or a professional in terms of treatment would not be sufficient to prove gross medical negligence. A word of caution is that for each and every lapse which is not related to skill and competence of a professional or of some other kind unless there is evidence to establish negligence of higher degree, it should not be followed by a criminal action which is what has been held by the Supreme Court in **Jacob Mathew** case. A similar cautious approach is suggested in the aforesaid decision that a medical professional may be charged of negligence but it necessarily calls for a treatment with difference. In the instant case, except absence of the petitioner and non-preservation of any specimen, no other error or wrong was noticed by the Expert Committee or for that matter, the CDMO, Puri with regard to the line of treatment. The final opinion of the CDMO rather based on facts which may not be so relevant when the complainant had no urgent medical complication during her entire stay at the clinic. If for temporary absence of the petitioner, medical negligence is alleged, it would not be wise to say so. Likewise, non-preservation of specimen and not taking the complainant and her attendant into confidence by showing any part of the operated specimen is not sufficient either to allege an act of serious negligence. As it appears, the chargesheet was filed on the strength of final opinion of the CDMO, Puri despite the fact that it did not receive any

confirmation from the Expert Committee which rather had an opinion that cannot be entirely brushed aside. To hold that there has been medical negligence from the side of the petitioner for certain lapses which neither directly nor indirectly proved to be the cause of the foetal death, it would be grossly inappropriate and an overstatement. The Court does have sympathy for the complainant for the loss suffered which cannot be compensated in any manner but at the same time, it shall have to consider whether medical negligence is prima facie established. In the case, for whatever lapses attributed to the petitioner regarding his absence on a particular day but without any comment being received from the Expert Committee and also the CDMO, Puri vis-à-vis the line of treatment, it would not at all be safe to allege medical negligence. It may even be said that due to not so concrete and convincing evidence about gross negligence, there is also a remote possibility of proving the guilt of the petitioner. An error of judgment does not amount to medical negligence. The petitioner appears to have followed an acceptable medical practice or protocol standard vis-àvis the case of the complainant. For a medical negligence, a higher degree of culpability is required and not ordinary or average kind which may be sufficient for a civil liability but cannot be adequate to sustain a criminal action. Hence, the Court reaches at an inescapable conclusion that the petitioner could not have been criminally prosecuted even though he was found guilty during enquiry of some lapses which are not so significant to stretch it far and allege him of medical negligence.

11. Accordingly, it is ordered.

12. In the result, the petition under Section 482 Cr.P.C. stands allowed. As a consequence, order of cognizance dated 7th January, 2014 under Annexure-2 and the criminal proceeding in connection with G.R.Case No.2202 of 2013 corresponding to Kumbharpada PS Case No.370(6) dated 5th November, 2013 pending before the learned S.D.J.M., Puri are hereby set aside for the reasons indicated herein above.

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2022 (III) ILR-CUT-572

SASHIKANTA MISHRA, J.

WPC (OAC) NO. 4264 OF 2016

SULTAN KHAN …….. Petitioner

.V.

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

ODISHA REVENUE SERVICE (RECRUITMENT) RULES, 2011 – Rule-4(b) – The criteria for promotion is merit-cum-seniority – Rule-4 provides 30% shall be filled up by way of promotion amongst the officers of outstanding merit from the Department as envisaged under Rule-6 – The petitioner have five outstanding CCRs to his credit –Though the petitioner was granted promotion by order dated 08.10.2015, but again was reverted to his parent post – Whether such reversion is sustainable under law? – Held, No – Where the Rule-4(b) of the 2011 Rules provide for promotion on the basis of "outstanding merit", the same cannot be nullified in any manner. (Para 10)

For Petitioner : M/s. Dr. J.K. Lenka, P.K. Behera
For Opp.Parties: Mr. H.K. Panigrahi, ASC

JUDGMENT Date of Judgment : 14.09.2022

SASHIKANTA MISHRA, J.

The petitioner, being recruited as a Junior Clerk under the Collector, Cuttack joined as such on 04.05.1991. In the year 2004 he was promoted to the post of Sr. Clerk. He was further promoted to the post of Head Clerk in the year 2014 and joined as such in the office of B.A.O., LFA, Cuttack on 21.05.2016. By letter dated13.09.2012, the Collector recommended the name of the petitioner for promotion to Odisha Revenue Service (GroupB) for the recruitment year 2011 as per Rule-4(b) of Odisha Revenue Service (Recruitment) Rules, 2011 (in short "2011 Rules"). The petitioner had outstanding CCRs for the preceding five years. However, the petitioner was deprived of being promoted to ORS by the DPC held on 04.02.2013. A similarly placed employee, namely Akhaya Kumar Mohanty approached the erstwhile Odisha Administrative Tribunal by filing O.A. No. 1764 (C) of 2013. By order dated 01.05.2014, learned Tribunal held that the promotion of less meritorious candidates ignoring the case of persons like the applicant (Akhaya Kumar Mohanty) was not proper and as such, quashed the recommendation of the DPC dated 04.02.2013 and directed the authorities to convene a review DPC in order to consider suitability of the applicant (Akhaya Kumar Mohanty) along with others for promotion and if found suitable for promotion, to recommend his name for the same. Accordingly, a selection committee was held on 22.09.2014, wherein it was, inter alia, decided to wait till the final decision of the High Court in W.P.(C) No.13210 of 2014, which was filed by the State challenging the order of the Tribunal in O.A. No. 1764 of 2013 (Akhaya Kumar Mohanty). The petitioner in the meantime, also approached the Tribunal by filing O.A. No. 1346 (C) of 2015. By order dated 23.04.2015, the Tribunal disposed of the O.A. by directing the authorities to

extend the same benefits to the petitioner as per the ratio decided in O.A. No. 1764 of 2013 (Akhaya Kumar Mohanty). Accordingly, by order dated 08.10.2015, the petitioner was promoted and appointed to ORS (Group-B) against the recruitment year 2011 and was posted as Additional Tahasildar, Bhuban. The writ petition filed by the State being W.P.(C) No. 13210 of 2014 was withdrawn on 19.10.2016. Thereafter, acting purportedly as per the recommendation of the Review Selection Committee held pursuant to the order of the Tribunal passed in O.A. No.1764 of 2013, the petitioner was reverted to his parent post i.e., Senior Clerk and was posted in PattamundaiTahasil, Kendrapara and his name was placed in the waiting list for the recruitment year 2012 to be considered after availability of vacancy for the said year after vacation of the stay order passed by the Tribunal in O.A. No. 2983 of 2014, filed by one Gauranga Kumar Gouda for promotion to the rank of ORS for the recruitment year 2012. The order of reversion dated 11.11.2016, which is impugned in the present application, is enclosed as Annexure-12. O.A. No. 2983 of 2014 was disposed of by the Tribunal by order dated 12.05.2016 with a direction to constitute review DPC. In the review DPC held on 19.03.2016, the names of 106 officers were recommended for promotion to ORS for the recruitment year 2011 including employees, who are less meritorious than the petitioner as also some employees who had forgone their promotion. It is the petitioner's case that as per the gradation list, his name finds place at serial no. 262, whereas the names of Smruti Ranjan Sahoo, Susanta Kumar Pattnaik and Akhaya Kumar Mohanty find place at serial nos. 263, 264 and 265 respectively. All the said persons were promoted whereas the petitioner was reverted and that too to a post below the post which he was holding prior to promotion. Being thus aggrieved, the petitioner originally approached the Odisha Administrative Tribunal seeking the following relief:

> *"In view of the facts mentioned in para-6 above, the applicant prays for the following relief(s):-*
> *(a) Quash the impugned revision order No. 35083/RDM dated 11.11.2016 at Annexure-12 and the decision of Review selection committee dated 06.01.2016 communicated under memo dated 28.07.2016 vide Annexure-13 so far as it relates to the Applicant.*
>
> *(b) Declare that appointment of the applicant to ORS (Group-B) by way of promotion for the recruitment year-2011 as per letter No.-28763/R dated 08.10.2015 at Annexure-11 is valid and the Applicant is entitled all consequential and financial benefits w.e.f. 20.04.2013.*
>
> *(c) Declare that consideration the cases of 32 candidates/persons those who were forego their promotion for the recruitment year 2011 in the review selection committee dated 06.01.2016 is illegal, arbitrary and contrary to the law/executive instruction.*
>
> *(d) Issue any other order/direction which would afford complete relief to the applicant, in the facts & circumstances of the case;"*

The said O.A. has since been transferred to this Court and registered as the instant writ petition.

2. A counter affidavit has been filed by opposite parties No. 2 and 3. In the said counter affidavit, 2011 Rules has been referred to. It is admitted that for the recruitment year 2011, the name of the petitioner was recommended as he had five outstanding CCRs to his credit, for which he was promoted. It is further admitted that even though the promotion was to be made against 73 vacancies meant for UR category and he had five outstanding CCRs, yet due to selection of the UR candidates having three outstanding CCRs are their credit, the vacancies meant for UR category was exhausted at serial no.100 of the common gradation list. Subsequently, in pursuance of the order passed by the Tribunal in O.A. No. 1346(C) of 2015, the applicant was recommended for promotion against the recruitment year 2011. Thereafter several O.As. have been filed for which it was decided to consider the cases of all candidates afresh as per direction given by the Tribunal in O.A. No.1764 of 2013 and to withdraw the writ application pending before this Court. Accordingly, the review DPC was convened on 06.01.2016 and several decisions were taken. In so far as the petitioner is concerned, it was found that he was promoted in pursuance of order of the Tribunal in O.A. No.1346(C) of 2015 having fulfilled the benchmark decided in the review DPC held on 06.01.2016 but presently, appears below the last man recommended in the waiting list for promotion against the recruitment year 2012. It is further stated that his name will appear at serial no.236 of the common gradation list for the year 2012 and will remain below Umakanta Biswal at serial no. 17 of the waiting list for the year 2012 and can now to be adjusted for the year 2012.

3. The petitioner filed a rejoinder to the counter affidavit taking the stand that the petitioner had already joined in the promotional cadre but was reverted without giving him an opportunity of hearing. Further, the petitioner has been ignored while persons such as, Smruti Ranjan Sahoo and Akhaya Kumar Mohanty, who are placed much below him in the common gradation list for the year 2011, were promoted. There was no legal impediment for considering the case of the petitioner since he had fulfilled the benchmark as decided in the Review Selection Committee held on 06.01.2016. The gradation list published on 13.05.2021 does not contain the name of the petitioner and is placed in the separate list at serial no.4. One of the officers, namely, D. Maleswar Patra, whose name finds place at serial no.11 in the said separate list, filed an O.A. before the Tribunal being O.A. No. 913(C)/2017 which was subsequently transferred to this Court and registered as WPC (OAC) No.913 (C) of 2017. By order dated 06.08.2021, a co-ordinate Bench of this Court held that the order of

reversion of the petitioner (D. Maleswar Patra) without granting opportunity of hearing was illegal and therefore, the same was quashed. Pursuant to such order, the authorities restored his original promotion. Since the petitioner stands exactly on same footing, the impugned order of reversion also needs to be quashed and his promotion should be restored.

4. Heard Dr. J.K. Lenka, learned counsel for the petitioner and Mr. H.K. Panigrahi, learned Addl. Standing Counsel for the State.

5. It is argued by Dr. J.K. Lenka that as per the 2011 Rules, promotion is to be granted on the principle of merit-cum-suitability with due regard to seniority. In so far as merit is concerned, the CCRs of the past five years is to be taken into consideration. Admittedly, the petitioner had five outstanding CCRs to his credit and therefore, he should have been promoted at the first instance. The petitioner was promoted only after he had approached the Tribunal in O.A. No.1346(C)/ 2015. Prior to being thus promoted, the petitioner was admittedly occupying the post of Head Clerk since 21.05.2014. It is further contended by Dr. Lenka that reversion of the petitioner is illegal mainly for the reason that he was not given any opportunity of hearing. Secondly, less meritorious officers having been promoted ahead of him, he could not have been reverted. That apart, he could not have been reverted to the grade lower than the grade which he was occupying prior to promotion. It is further contended by Dr. Lenka that the petitioner's case is exactly the same as that of D. Maleswar Patra and batch, in which the order of reversion was quashed and the Government has implemented such order by allowing them to continue in ORS cadre against their original promotion.

6. Mr. H.K. Panigrahi, on the other hand submits that though the criteria for promotion is meritcum-seniority, yet seniority cannot altogether be ignored. As per the common gradation list published for the year 2011, the petitioner was placed at serial no. 173. Since the vacancies, namely, 73 meant for UR category hadalready been exhausted at serial no. 100 of the common gradation list, he could not have been granted promotion. It is further contended by Mr. Panigrahi that though the petitioner was promoted subsequently as per the order passed by the Tribunal, yet keeping in view the large number of litigations, the Government decided to review the entire process and to consider the case of all candidates afresh. In the process, the petitioner had to be reverted but was kept in the waiting list for promotion for the recruitment year 2012.

7. In order to appreciate the rival contentions better, it would be apposite to refer to the provisions of Orissa Revenue Service (Recruitment) Rules, 2011. Rule-4 provides that 50% of the posts shall be filled up by way of direct

recruitment and 30% shall be filled up by way of promotion of officers of outstanding merit from among the officers of the Department as envisaged under Rule-6. Rule-6 is quoted hereinbelow for immediate reference.

> *"**6. Eligibility Criteria for Promotion**:-*
> *(1) No person shall be considered for appointment by promotion under clause (b) of rule 4 to the service unless:*
> *1.(a) He/She is a graduate; and has worked for at least ten years in any one or more than one post taken together as Consolidator Grade-I Kanungo, Revenue Supervisor, Revenue Inspector or Ministerial Officer under Board of Revenue/RDCs/Collectors/and other Revenue Offices on the 1st day of January of the year in which the Committee meets; and*
> *(b) He/She has passed departmental examination, if any; and*
> *(2) He/She is not more than 53 years of age as on 1st day of January in which the Committee meets."*

Rule-9 provides that Secretary, Board of Revenue, Orissa shall call for the recommendations for promotion and selection, the names of eligible officers for consideration by the Committee. The constitution ofcommittee is laid down under Rule-10. Rule-8 deals with preparation of gradation list for Promotion, which reads as under;

> *"**8. Preparation of Gradation List for Promotion** :- (1) For the purpose of consideration of promotion to the service under clause (b) of rule 4 a common gradation list of eligible officers shall beprepared by the Secretary, Board of Revenue, Orissa on the basis of their date of appointment totheir respective cadres:*
> ***Explanation –** While preparing the common Gradation list the officers in higher pay scale or with higher grade pay in a pay band will be placed above those in the lower pay scale or lower grade pay in same pay band.*
> *Provided that the inter-se-seniority fixed in their respective cadre shall not be violated.*
> *Provided further that in case, the date of appointment of two or more officers happens to be the same, the person elder in age shall be placed above the younger."*

8. Admittedly, the petitioner was placed at Serial No. 173 of the common gradation list. It is also not disputed that the petitioner had five outstanding CCRs to his credit for the period from 2005-2006 to 2009-2010 as per the information obtained by the petitioner under the RTI Act, the copy of which has been enclosed as Annexure-5. It has been argued that out of 120 persons recommended for promotion by the selection committee and appointed to ORS for the recruitment year 2011 there are some candidates who do not possess five outstanding CCRs but only 2, 3 and 4 outstanding CCRs. In the case of Akhaya Kumar Mohanty (OA No. 1764 of 2013), the learned Tribunal in its order dated 01.05.2014 inter alia observed as follows:

> *"xxxxxx*

In the instant case, even though many employees, have 5 years outstanding CCRs, they have been ignored from being recommended for promotion. Surprisingly, in the instant case the DPC in its meeting dated 04.02.2013 (Annexure-5) took adecision in paragraph-8 that the Selection Committee will take into consideration all recommended cases by the respective recommending authorities and relied on three Outstanding CCRs during last five years preceding to the Recruitment year 2011 for selection. In paragraph-8 (iii) they have decided that the employees having at least three Outstanding CCRs during last five years preceding to the Recruitment year 2011 will be considered for promotion. In such consideration outstanding CCR for a part of the year will be treated as for the whose year. Such decision taken by the DPC is completely again the prescribed Rules and even instruction, which has been imparted by the State Government.

Law is well settled that when a principle of merit-cum-suitability with due regard to seniority will be considered, then first of all merit-cum-suitability is to be taken into account for consideration of promotion. In the instant case, the persons concerned, who have got two outstanding or one Outstanding CCRs have been ignored. In that view of the matter, the process of selection is completely against the settled principle of law and hence liable to be quashed.

xxxxxx"

The Tribunal further held as follows:

"As such, the person concerned having five outstanding CCRs ought to have been selected at thefirst instance. If required number of candidates were not available from out of the persons of five outstanding CCRs, then the DPC would have gone to consider and select the persons concerned having four outstanding CCRs, three outstanding CCRs, two outstanding CCRs and one outstanding CCR."

9. Holding thus, the Tribunal directed to convene a review DPC to consider the case of the applicant (Akhaya Kumar Mohanty). It has already been stated hereinbefore that the State had challenged the said order before this Court in W.P.(C) No.13210 of 2014 but the same was withdrawn. In so far as the petitioner is concerned, the Tribunal in O.A. No. 1346(C) of 2015 filed by him, held as follows:

"Considering the submission of the learned counsel for the applicant and learned Standing Counsel as well as taking into account the ratio decided by this Tribunal in O.A No. 1764/2013 dated 01.05.2014, the applicant in this case may be extended the same benefits. The entire exercise be completed within a period of one month from the date of receipt of copy of this order."

10. From the above narration it is evident that as directed by the Tribunal in its order dated 23.04.2015, which incidentally has never been challenged and has become final, the same benefit as granted in the case of Akhaya Kumar Mohanty was required to be granted to the petitioner also. Such benefit was also granted to him though by order dated 08.10.2015. In the impugned order dated 11.11.2016 in reverting the petitioner to the post of Sr. Clerk reference has been made to the recommendation of the Review Selection Committee held in pursuance of orders

of the Tribunal passed in O.A. No.1764 of 2013. The order of the Tribunal in the said O.A. has been quoted in extenso before. There is nothing in the said order which can even remotely justify the action taken by the authority to revert the petitioner to the post of Senior Clerk. In the counter affidavit, it has been admitted that the petitioner had five outstanding CCRs to his credit and was therefore, eligible for consideration for promotion. It is also forthcoming from the counter and on a reading of the order of the Tribunal in O.A. No.1764 of 2014 that persons though senior to the petitioner but less meritorious were granted promotion for the recruitment year 2011. It is reiterated that where the Rules provide for promotion on the basis of "outstanding merit" as per Rule-4(b) of the 2011 Rules, the same cannot be nullified in any manner whatsoever by harping upon the so called seniority of less meritorious candidates. Therefore, there was no justified or valid reason to revert the petitioner to the post of Senior Clerk.

11. Another important aspect that strikes at the very basis of the impugned order of reversion is, no opportunity of hearing was granted to the petitioner before reverting him to a lower post. Such an act is entirely contrary to the principles of natural justice and therefore, cannot meet with the approval of law. Be it noted here that the petitioner having been promoted to the ORS by order dated 08.10.2015 was reverted by order dated 11.11.2016, i.e., after working in the promotional post for a little more than a year. It is stated at the bar that the persons who were promoted earlier 2011 have in the meantime acquired right to be considered for further promotion to the OAS. As has already been stated hereinbefore a coordinate Bench of this Court in the case of D. Maleswar Patra (WPC (OAC) No. 913 of 2017) disapproved the order of reversion issued against the petitioner in the said case and quashed the same with a direction to the authority to reconsider the same and to pass appropriate order by affording opportunity of hearing to the petitioner. It is not disputed that pursuant to such order, the authority by order dated 23.11.2021 has allowed the petitioner (D. Maleswar Patra) to continue in ORS Cadre against his original recruitment by promotion. Having regard to the fact that the petitioner stands exactly on the same footing there is no reason why similar benefit shall not be granted to him.

12. For the forgoing reasons therefore, this Court is of the considered view that the impugned order, looked at from the angle of justifiability or legality, cannot be sustained in the eye of law. The petitioner deserves to be restored in his promotional post as originally granted vide order dated 08.10.2015 with all consequential service and financial benefits.

13. In so far as the prayer for a declaration that consideration of the case of 32 candidates, who hadforegone their promotion for the recruitment year 2011 is

concerned, this Court is of the view that the said candidates not having been impleaded in the present case, no order operating to their detriment can be passed in the present case.

14. In the result, the writ petition is allowed. The impugned order under Annexure-12 dated 11.11.2016 is hereby quashed. The petitioner shall be deemed to be continuing in the promotional post as per order dated 08.10.2015 and consequently, shall be granted all service and financial benefits within a period of four weeks.

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2022 (III) ILR-CUT-580

SASHIKANTA MISHRA, J.

W.P.(C) NO. 2456 OF 2018

MITRA MOHAPATRA ……..Petitioner

.V.

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

SERVICE LAW – Promotion – Whether an employee can be denied promotion on the ground of pendency of a criminal proceeding ? – Held, No – The pendency of preliminary investigation without submission of charge-sheet cannot be a ground to deny promotion to an employee who is found otherwise suitable for the same. (Paras 10,11)

Case Law Relied on and Referred to :-

1. (1991) 4 SCC 109 : Union of India and others vs. K.V.Jankiraman and others.

For Petitioner : M/s. Saswati Mohapatra & P.Mangaraj.
For Opp.Parties: Mr. B.P. Tripathy, A.G.A.

JUDGMENT Date of Judgment : 20.09.2022

SASHIKANTA MISHRA, J.

The short point that arises for consideration in the present writ application is, can an employee be denied promotion on the ground of pendency of a criminal proceeding?

2. Bereft of unnecessary details, the facts of the case are that the petitioner was appointed as a Lecturer in History on 01.11.1988 by the Management of BalasoreMahila College (+3 wing) and was subsequently transferred and posted at Soro Women's College, Soro. On 14.11.2015 the Principal-cum-Secretary of BalasoreMahila College submitted the CCRs of 3 Lecturers, including that of the

petitioner to the Director, Higher Education, Odisha for consideration of their cases for placement in Lecturer Grade A and State Scale under the Placement Rule, 2014. The Director, after scrutiny, published a report of the colleges of whom CCRs of employees, other documents etc. were not furnished. The name of Balasore Mahila College was mentioned in the said list but the petitioner's name was not indicated. On enquiry, the petitioner came to know that the higher scale had not been granted to her because of pendency of a Vigilance case against her. Further, the opposite party No.3, who is junior to the petitioner, was granted higher scale and State Scale w.e.f. 04.06.2001 and 04.06.2011. It is the case of the petitioner that mere pendency of a criminal case cannot be a bar to grant higher scale of pay to an employee. On such facts the petitioner has filed the instant writ petition seeking the following relief:

> *"Under the aforesaid facts and circumstances, it istherefore, prayed that this Hon'ble Court may graciously be pleased to:*
>
> *(i) direct/order State Opp.Parties, more particularly the Opp.Party No.2 to place the petitioner under Lecturer (Gr.A) and Reader (State Scale) from 04.05.2001 and 04.06.2011 i.e., with effect from the date admitted juniors received the consequential and monetary benefits;*
> *(ii) pass such other order(s) or issue direction(s) as may be deemed fit and proper in the bona fide interest of justice.*
> *And for this act of kindness, the petitioner shall as in duty bound every pray."*

The petitioner also filed an additional affidavit intimating that in the Vigilance Case bearing VGR No. 28/2015 Final Form has not yet been submitted.

3. A Preliminary counter affidavit has been filed by the Opposite Party No.1. It is basically stated in the affidavit that the petitioner could not submit necessary vigilance clearance as required under the Rules. Further, upon information submitted by the Principal of Balasore Mahila College it is ascertained that Balasore Vigilance P.S. Case Nos. 57 dated 28.12.2015 and 7 dated 16.02.2018 are pending against the petitioner. That apart, the S.P., Vigilance, Balasore by his letter dated 25.02.2016 has informed that the charges against the petitioner are serious in nature. Therefore, having regard to the provision under Rule-6 of the Odisha Non-Govt. Aided College Lecturers Placement Rules, 2014 (in short "Placement Rules, 2014"), it is not permissible to grant the relief claimed by the petitioner.

4. Heard Ms. Saswati Mohapatra, learned counsel for the petitioner and Mr. B.P. Tripathy, learned Addl. Govt. Advocate for the State.

5. Ms. Mohapatra would contend that notwithstanding the provision under Rule 6 of the Placement Rules, 2014, law is well settled that mere pendency of a

criminal proceeding cannot be a bar to deprive an employee from the higher scale, particularly when charge-sheet has not been submitted in the said proceeding. It is further submitted that when her juniors have received the benefit, non-grant of the same amounts to gross discrimination as also contrary to Article 14 of the Constitution.

6. Per Contra, Mr. Tripathy submits that Rule-6 of the Placement Rules, 2014 mandates that the Screening Committee is required to examine the status of all departmental and criminal or vigilance proceedings pending against the employee including vigilance clearance certificate. In the instant case, such necessary information in respect of the petitioner was not available and therefore, her claim for placement in the higher scale was rightly not considered.

7. The facts of the case being more or less undisputed, it would be proper to examine the relevant rule at the outset. Rules 5 and 6 of the Placement Rules, 2014 provide as under:

> *5. **Constitution of Screening Committee**: There shall be a screening committee consisting of the following members for selection for placement of a Lecturer/Junior Lecturer to Lecturer (Group-A) and Reader (State Scale) Scale of Pay under rule 9, namely:-*
>
> | | |
> |---|---|
> | *(i) Principal Secretary/Secretary to Government, Higher Education Department.* | *- Chairperson* |
> | *(ii) Director Higher Education, Odisha* | *- Member* |
> | *(iii) A Senior Principal/Professor of a Government College* | *- Member* |
> | *(iv) Additional/Joint/Deputy Secretary to Government, Higher Education Department.* | *- Convenor.* |
>
> *6. **Verification of documents**: The Screening Committee shall examine the following documents at the time of screening for selection for placement to Lecturer (Group-A) and Reader (State Scale) of pay under rule 9, namely,-*
>
> *(i) Attested list of eligible Junior Lecturers/Lecturers*
>
> *(ii) Annual Confidential Reports (ACRs) for any five including preceding three years prior to the date of eligibility.*
>
> *(iii) Indication about the pending representation against adverse remarks in the Annual Confidential reports,if any.*
>
> *(iv) Indication of detail status on Departmental or Criminal proceedings or Vigilance case, if any, pending or contemplated as the case may be.*
>
> *(v) Vigilance clearance certificate.*
>
> *(vi) Sealed cover procedure shall be followed in case of Junior Lecturer/Lecturer who is placed under suspension and against whom Disciplinary or Criminal proceedings or Vigilance case is pending."*

8. Obviously, an employee cannot obtain and produce the vigilance clearance certificate as it is for the concerned authorities to inform whether any vigilance case is pending against the employee concerned or not. In any case, there is material to show that two vigilance cases, being Balasore Vigilance P.S.

Case No 57 of 2015 and 7 of 2016 were pending against the petitioner. Mr. Tripathy has informed the Court that the case of the petitioner was not considered by the DPC at the relevant time. Such being the case, it is now to be seen if mere pendency of vigilance cases can act a bar for grant of placement in the higher scale.

9. Law is no more *res integra* that a vigilance (criminal) case can be said to be pending only uponsubmission of charge-sheet by the investigating agency. Mere filing of an FIR or continuance of investigation cannot be treated as a criminal proceeding in so far as the question of considering the employee's case for promotion is concerned. Reference may be had to the decision of the Apex Court in the case of ***Union of India and others vs. K.V.Jankiraman and others***, reported in ***(1991) 4 SCC 109***. It would be profitable to quote the observations of the Apex Court under Paragraph 16 and 17 of the said judgment:

> *"**16**. On the first question, viz., as to when for the purposes of the sealed cover procedure the disciplinary/criminal proceedings can be said to have commenced, the Full Bench of the Tribunal has held that it is only when a charge-memo in a disciplinary proceedings or a charge-sheet in a criminal prosecution is issued to the employee that it can be said that the departmental proceedings/criminal prosecution is initiated against the employee. The sealed cover procedure is to be resorted to only after the charge-memo/charge-sheet is issued. The pendency of preliminary investigation prior to thatstage will not be sufficient to enable the authorities to adopt the sealed cover procedure. We are in agreement with the Tribunal on this point. The contention advanced by the learned counsel for the appellant-authorities that when there are serious allegations and it takes time to collect necessary evidence to prepare and issue charge-memo/chargesheet, it would not be in the interest of the purity of administration to reward the employee with a promotion, increment etc. does not impress us. The acceptance of this contention would result in injustice to the employees in many cases. As has been the experience so far, the preliminary investigations take an inordinately long time and particularly when they are initiated at the instance of the interested persons, they are kept pending deliberately. Many times theynever result in the issue of any charge-memo/chargesheet. If the allegations are serious and the authorities are keen in investigating them, ordinarily it should not take much time to collect the relevant evidence andfinalise the charges. What is further, if the charges are that serious, the authorities have the power to suspend the employee under the relevant rules, and the suspension by itself permits a resort to the sealed cover procedure. The authorities thus are not without a remedy. It was then contended on behalf of the authorities that conclusions Nos. 1 and 4 of the Full Bench of the Tribunal are inconsistent with each other. Those conclusions are as follows: (ATC p. 196, para39)*
>
> *"(1) consideration for promotion, selection grade, crossing the efficiency bar or higher scale of pay cannot be withheld merely on the ground of pendency of a disciplinary or criminal proceedings against an official;*
>
> *(2) xx xx xx*
> *(3) xx xx xx*

(4) the sealed cover procedure can be resorted to only after a charge memo is served on the concerned official or the charge-sheet filed beforethe criminal court and not before;"

***17**. There is no doubt that there is a seeming contradiction between the two conclusions. But readharmoniously, and that is what the Full Bench has intended, the two conclusions can be reconciled with each other. The conclusion No. 1 should be read to mean that the promotion etc. cannot be withheld merely because some disciplinary/ criminal proceedings are pending against the employee. To deny the said benefit, they must be at the relevanttime pending at the stage when charge-memo/chargesheet has already been issued to the employee. Thus read, there is no inconsistency in the two conclusions."*

10. The decision in ***Jankiraman*** (*supra*) has since been followed in number of decisions by the Apex Court and other High Courts of the country. It would be unnecessary to refer to all those decisions. But the common point decided in all these decisions, which has now become law of the land is, the pendency of preliminary investigation without submission of charge-sheet cannot be a ground to deny promotion to an employee who is found otherwise suitable for the same.

11. As has already been seen, in the instant case, charge-sheet has not yet been filed in VGR Case No. 28 of 2015 (arising out of Balasore Vigilance Case No. 57 dated 28.12.2015). There is of course no information regarding the other case, namely, Balasore Vigilance P.S. Case No. 7 dated 16.02.2018. But as submitted by learned counsel for the petitioner, the pendency of the said case is of no consequence because by the time of initiation of the said latter case, the decision regarding placement in the higher scale had already been taken. Thus, the position of law being what has been discussed hereinbefore, it can be safely held that the action of the concerned authorities in not considering the case of the petitioner at the relevant time for placement in the higher scale only on the ground of pendency of the vigilance case, in which charge-sheet has not yet been submitted, cannot be sustained in the eye of law. Moreover, Rule 6 is a matter of procedure and cannot be cited as a reason to deprive the petitioner of her legitimate right.

12. For the foregoing reasons, the writ application is disposed of with a direction to opposite party No. 1 to consider the case of the petitioner for placement under Lecturer (Grade A) and Reader (State Scale) w.e.f. 04.06.2001 and 04.06.2011 respectively having regard to the settled position of law discussed herein before. Decision in this regard shall be taken as early as possible, preferably within a period of three months from the date of communication of copy of this order or on production of certified copy thereof.

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2022 (III) ILR-CUT-585

A.K. MOHAPATRA, J.

CRA NO. 146 OF 1991

UDIT KUMAR KHALKO ……..Appellant

.V.

STATE OF ORISSA ……..Respondent

ESSENTIAL COMMODITIES ACT, 1955 – Sections 3 & 7 r/w Clause-6(i) & (ii) of (fixation of selling price) of the Kerosene Control Order, 1962 and 1970 – The Trial Court while acquitting a co-accused held that the conduct of the present appellant falls within the mischief of the Section 3 of the Act and as such liable for commission of an offence under Section 7 of the Act – Whether Such order sustainable?– Held, No – When the co-accused is acquitted and that the sale transaction has not been established, merely because some discrepancies were found in the Stock Register the accused/appellant could not have been convicted for commission of offence under Section 7 of the Act – The impugned order set aside and Criminal Appeal is allowed.

(Paras 13,14)

For Appellant : Mr. L.N.Patel (Amicus Curie)

For Respondent : Mr. P.C. Das, A.S.C

JUDGMENT Date of Hearing : 10.08.2022 : Date of Judgment : 30.09.2022

A.K. MOHAPATRA, J.

1. The present appeal has been filed at the instance of the accused-appellant assailing the judgment dated 25th of May, 1991 passed in 2(c) CC No. 7 of 1990/ T.R. No.7 of 1990 by the learned District and Sessions Judge-cum-Special Judge, Sundargarh convicting the accused-appellant under Section 7 of the Essential Commodities Act (in short 'E.C. Act') and sentenced him to undergo rigorous imprisonment for one year and to pay a fine of Rs.3,000/- (rupees three thousand) in default to undergo a further period of rigorous imprisonment for three months. While convicting the accused-appellant, learned trial court has acquitted the co-accused, namely, Ramchandra Sahu as he was found to be no guilty of the offence under Section 7 of the E.C. Act.

2. The prosecution case, in short, is that one Santara Kumar Hati, Marketing Inspector, Sadar Sundargarh lodged a complaint against the two accused persons including the appellant inter alia alleging that on 07.11.1989 he proceeded to village Deobhubanpur, on enquiry, he came to learnt that the appellant and the other accused persons were transporting 178 liters of Kerosene oil from the house of the appellant which was detected by the witnesses kept at

Janakalyan Youth Club and the same were kept in custody of one Dilip Oram(P.w.3), who happens to be the President of the aforesaid club. The appellant was a dealt in Kerosene oil. On verification of stock, it was found that there was shortage of 200 liters of Kerosene oil. Thereafter the statement of the appellant was recorded and the P.R. was prepared and submitted by the complainant (P.W.1)

3. In order to bring home the charge, the prosecution had examined four witnesses and the defence has examined only one witness. The defence had taken plea of complete denial.

4. The accused-appellant in his statement recorded under Section 313, Cr.P.C. has stated that the Kerosene tins were carried to his new house. The other co-accused, namely. Ramchandra Sahu in his statement recorded under Section 313, Cr.P.C. had stated that he had been engaged by the accused-appellant and he along with others was transporting the Kerosene tins to the old house of the appellant. It is further stated that when the local people detected the shifting of the stock, they took it to the club house and informed the Supply Inspector. Thereafter, the Supply Inspector came and seized the Kerosene oil.

5. Upon careful scrutiny of the impugned judgment, it appears that the learned trial court has taken into consideration the materials on record as well as depositions of the witnesses. Learned trial court while coming to a conclusion that the appellant is guilty of the offence as alleged against him has taken into considered the evidence of P.W.1 i.e. Marketing Inspector. The Marketing Inspector had supported his own statement to the effect that upon receiving information that the stocks have been moved authorizedly and he had seized the stock and the stock registers of the appellant. Further, P.W.1 has stated that he had recorded the statement of the present appellant, who had stated before him that he had sold the entire stock of Kerosene to Ramchandra Sahu, i.e. other co-accused in this case. It is further stated that the appellant had himself written the statement in presence of the witnesses and had also put his signature on the said statement.

6. It is further alleged and established that Kerosene has been sold @ Rs.3.50p. per liter as against market rate of 85 paise at the relevant point of time permissible limt was 10 liters . P.W.1 has further stated that upon a complaint made by the Sukra Oram and Sadhu Oram, the complainant conducted the enquiry and accordingly seized 12 tins of keronene containing 178 liters of Kerosene oil. P.W.2 who is a student and is an independent witness stated that on 05.11.1989, which was Sunday at about 10.30 A.M. accused Ramchandra Sahu were carrying 12 tins from the shop of the present appellant and when the

P.W.2 and othes intercepted the accused Ramchandra Sahu asked him as to from where he has got such huge quantity of Kerosene, in his statement Ramchandra Sahu replied that he was taking Kerosene from the shop of the appellant by purchasing the same @ Rs.3.50p per liter. Further P.W.2 has also stated that 12 tins of Kerosene oil to brought their club and in the club meeting was held. After the meeting, Sub-collector, Sundargarh was informed whereafter the Marketing Inspector came and seized 12 tins of Kerosene. P.W.2 is also witness recording of statement of the accused. Further P.W.2 in his cross-examination has categorically stated that Ramu Khadia and Khetra Khadia and two other labourers engaged by Ramachandra Sahu for the transportation of the Kerosene oil. However, P.W.1 has further stated that he has not seen Ramchandra Sahu carrying those seized Kerosene oil from the shop of the appellant.

7. P.W.3, namely, Dilip Oram in his evidence stated that the present accused appellant is a Kerosene dealer and that he took Kerosene from Kutra. He had further stated that when Ramchandra Sahu was transporting the aforesaid 12 tins of Kerosene oil through his labourers . The P.W.3 along with others intervened and brought the Kerosene to the club house. P.W.2 and P.W.3 were concerning for their evidence and supported the prosecution story to the hilt and further nothing substantial was elicited from these two witnesses during cross-examination at the instance of the defence. Therefore, the testimony of those two witnesses remains unimpeached.

8. The defence, on the other hand, examined D.W.1, namely, Sami Tirki to establish the fact that he was engaged by the accused-appellant to carry Kerosene tins along with other members is newly constructed house to old house and that on the way, the villagers intervened and took away Kerosene tins to the club house. However, the evidence of the D.w.1 is unable to desterilize and dempt in the testimony of the numbers 2 and 3. On the contrary, D.W.1 has admitted that the accused-appellant was a Kerosene dealer and 12 tins of Kerosene containing 178 liters were being carried from the sop of the accused appellant.

9. In view of the testimony of the prosecution witnesses, the prosecution has been successful in establishing the prosecution case except the sale of Kerosene to Ramchandra Sahu the co-accused in this case. Learned trial court while examining the issue of sale of Kerosene has relied upon the statement of the accused appellant, which has been written on his own handwriting and marked as Ext.3 further on perusal of Ext.3 it reveals that the accused appellant had admitted that on 01.11.1989, he brought 200 liters of Kerosene from Sundargarh Depo and on 05.11.1989 he had sent 12 tins of Kerosene through Ramchandra Saho and as such, he had no stock of Kerosene on 07.11.1989. Further, the accused appellant was unable to produce the Tally register before

the Supply Inspector besides the above evidence, the learned trial court has also led emphasis on the fact that the accused appellant who is a Kerosene Dealer supposed to keep the Kerosene at Deobhubanpur and nowhere else. Learned trial court has also relied upon Ext.4 i.e. statement of accused Ramchandra Sahu. Both the statement of accused persons were confronted to both accused while recording their statements under Section 313, Cr.P.C. However, they replied in negative.

10. The present appellant being an authorized Kerosene dealer is supposed to maintain Kerosene stock and sell register and under legal obligation to produce the same before the Marketing Inspector on demand. However, in the present case, the accused appellant was unable to produce both the registers before P.W.1 i.e. Marketing Inspector. Upon failure of the accused appellant to produce the registers, P.W.1 had recorded statement of the accused appellant wherein the accused appellant had categorically admitted by writing on his own handwriting that he had sold the entire Kerosene stock to Ramchandra Sahu. In such view of the matter, when no Kerosene stock available on 07.11.1989, this Court is unable to understand how 12 tins of Kerosene containing 178 liters were being shifted from the new house to old house of the accused appellant. Further the aforesaid registers which are statutory to be required to be maintained were not even produced at the stage of examination of defence witnesses, who supported the case of the defence and to prove the bana fide of the accused appellant.

11. It is uncontroverted fact that the above named accused-appellant Udit Kumar Khalko is a licensee dealer of Kerosene oil as defined under clause-6(i) and (ii) (fixation of selling price) storing and transportation of Kerosene oil by the said Udit Kumar Khalko any way violates in required provision. Moreover, the independent witnesses examined in this case have only stated about the transportation and seizure of Kerosene oil. It is indeed true that the dealer was unable to produce statutory records before the competent authority. However, such non-production of record can at best construed as violation of Control Order 1970 and further, on that ground alone no criminal liability could be fasten which the accused-appellant Udit Kumar Khalko to draw inference with regard to criminal liability, this Court has to come to a conclusion that there was *mens rea* to commit the crime in violation of statutory provisions. However, upon careful consideration of the materials available on record, this Court is not satisfied with there is any material on record to convict the appellant under Section 7 of the Essential Commodities Act.

12. So far as the transportation of the aforesaid tins of Kerosene oil by Ramachandra Sahu is concerned, it is crystal clear that P.W.1 has not seen the same. Moreover, P.Ws.2 and 3 have also not seen the purchase of Kerosene oil

by above named accused Ramachandra Sahu. Neither any material is coming forth to establish the sale/purchase of Kerosene oil by the above named two accused persons. Under such circumstances, merely basing upon some extra judicial confession made by some persons cannot be the sole basis to hold the accused persons are guilty and accordingly, convict them for contravention of the provisions of Essential Commodities Act. Moreover, there is no evidence whatsoever on record to establish the fact that the Kerosene oil was sold to the accused Ramachandra Sahu @ 3.50P per liter. P.W.3 is not an eye witness to the sale transaction. On the contrary, the evidence laid by the defence that the Kerosene oil was being transported from the newly constructed house of Udit Kumar Khalko to his old house appears to be more reasonable and believable. This is more so, because the D.W.1, who is prior witness for the defence was put to cross-examination, however, nothing substantial has been elicited from the cross-examination to impeach the credibility to his testimony before the court. In such view of the matter, learned trial court has rightly to come to the conclusion that there is no question of any contravention of any clause of the Control Order, 1970 and accordingly, learned trial court has rightly acquitted the accused Ramchandra Sahu.

13. Learned trial court having acquitted the accused Ramachandra Sahu of the alleged charges, has gone to hold the accused Udit Kumar Khalko his guilt of violation of provision of clause-6(i) and (ii) (fixation of selling price) of the Kerosene Control Order, 1962 and 1970 and as such, has hold that the conduct of the accused Udit Kuamr Khalko falls within the mischief of the Section 3 of the Essential Commodities Act and as such, he is liable for commission of an offence under Section 7 of the Essential Commodities Act. In this context, this Court is of the considered view that when the accused Ramchandra Sahu is acquitted and that the sale transaction has not been established, merely because some discrepancies were found in the Stock Register the accused-appellant could not have been convicted for commission of offence under Section 7 of the Essential Commodities Act. Therefore, the conviction of the accused-appellant is illegal and not based on materials on record.

14. In view of the aforesaid facts and circumstances and appreciation of material evidence on record, this Court is of the considered view that the accused-appellant has not violated the Kerosene Control Orders of 1962 and 1970 and as such, he should not have been held guilty for violation of such Control Orders. Accordingly, the impugned judgment passed by the learned District and Sessions Judge-cum-Special Judge, Sundargarh in 2(c) CC No. 7 pg 1990/T.R. No. 7 of 1090 is hereby set aside and the accused-appellant is acquitted of all charges.

15. Accordingly, the Criminal Appeal is hereby allowed. However, there shall be no order as to cost in the facts and circumstances of the present case.

Before parting, this Court would like to appreciate the assistance of Mr. L.N. Patel, Advocate Amicus Curie and further directs the Registrar (Judicial) of this Court to pay professional fee to the above named Advocate for the assistance rendered by him to this Court as Amicus Curie.

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2022 (III) ILR-CUT-590

A.K. MOHAPATRA, J.

BLAPL NO. 2430 OF 2021

RAGHU@RAHUL RAJPUT THAKUR …….. Petitioner

.V.

STATE OF ODISHA …….. Opp.Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 439 – Bail – Commission of offence punishable under Section 20(b)(ii)(C) of the N.D.P.S. Act – Whether non-compliance of Sections 42 & 50 of Act could be considered and should be taken as a ground to enlarge the petitioner on bail ? – Held, Yes – Non-compliance of mandatory provisions like Sections 42 & 50 of the N.D.P.S. Act would vitiate the entire proceeding like search, seizure and recovery – Therefore, if there is a possibility that the accused is likely to be acquitted for non-compliance of mandatory provision of the N.D.P.S Act, allowing the petitioner to continue in custody would not serve the ends of justice – Bail application allowed with certain terms and conditions.

(Paras 20,23)

Case Laws Relied on and Referred to :-

1. (2018) 9 SCC 708 : Sk. Raj Alias Abdul Haque Alias Jagga vrs. State of West Bengal.
2. (2004) 12 SCC 266 : Sarija Banu(A) Janarthani & Ors.vrs. State (Inspector of Police).
3. Criminal Appeal No.870 of 2016 : Sanjev and another vrs. State of Himachal Pradesh.
4. CRM-M-25498-2021 : Pankaj vrs. State of Punjab.
5. 2019(2) CRR (Criminal) 488 : Basanth Balram vrs. State of Kerala.
6. 2011(9) RCR (Criminal) 922 : Sudesh Singh @Tandu vrs. State of Punjab.
7. (1999) 6 SCC 172 : Balbev Singh vrs. State of Punjab.
8. Criminal Appeal No.1043 of 2021 (arising out of SLP (Crl.) No.1771 of 2021) disposed of dated 22.09.2021 : Union of India (Narcotics Control Bureau of Lucknow) vrs. Mohammad Nawaj Khan.
9. Hon'ble Karnataka High Court (Criminal Petition No. 6916 of 2021) decided on 02.02.2022 : Jaswin Lobo vrs. State of Karnataka.
10. (2007) 7 SCC 798 : Union of India vrs. Shiv Shankar Kesari.
11. (2009) 8 SCC 539 : Karnail Singh vrs. State of Haryana.

12. (2011) 2 SCC 609 : Vijay Singh Chandubha Jadeja vrs. Stae of Gujarat.
13. (2018) 9 SCC 708 : Sk.Raju @Abdul Haque Alias Jagga vrs. State of West Bengal.

For Petitioner : Mr. Shyam Manohar
For Opp.Party : Mr. P.C. Das, A.S.C

ORDER Date of Hearing : 24.09.2022 : Date of Order : 14.10.2022

A.K. MOHAPATRA, J.

1. This matter is taken up through Hybrid Arrangement (Virtual /Physical Mode).

2. Heard Mr. S. Manohar, learned counsel appearing for the Petitioner and Mr. P.C. Das, learned counsel appearing for the State.Perused the F.I.R., case diary, statement of the witnesses and other relevant documents placed before this Court for consideration.

3. The present bail application has been filed by the accusedpetitioner under Section 439, Cr.P.C. for his release on regular bail in connection with Mathili P.S. Case No.42 of 2021 dated 07.03.2021 corresponding to Special G.R. Case No.36 of 2021 pending in the court of leaned Sessions Judge-cum-Special Judge, Malkangiri for commission of offence punishable under Section 20(b)(ii)(C) of the N.D.P.S. Act.

4. The prosecution case, in gist, is that on 07.03.2021 at about 12.35 A.M. on the main road of Govindpally Bus Stand, the police found two vehicles were coming in high speed from Malkangiri side. On suspicion, the police officials on duty intercepted the vehicles and stopped it. On search, it was found by the police party that four persons are sitting inside the vehicle bearing Registration No.HR-22-R-4972. Similarly, the 2nd vehicle which was stopped is a Toyota Corolla vehicle bearing Registration No.HR-12-J-1000. From the 2ndvehicle also four persons were found sitting inside the vehicle. On further verification, police party found two plastic sacks in the 1stvehicle and three sacks in the 2nd vehicle which were loaded in the dicky of the above described cars. After opening the dicky of the vehicle for search police team present at the spot could found pungent smell of Ganja was coming out from the dicky of both cars. On interrogation by the police, passengers of both the vehicles confessed before the police that they were carrying ganja, which were kept in the plastic sacks and loaded in the dicky of the aforesaid two vehicles. They further confessed that the ganja, which was seized from the vehicles, were procured from Chitrokonda Swabhiman area and they were transporting the same in the above noted two vehicles. Upon seizure and measurement of the contraband articles, it was found that the said articles were being transported from the place of procurement to the

place of destination by using the above noted two vehicles and further police team recovered a total contraband article weighing 137 Kgs. and 300 grams. Accordingly, the F.I.R. was lodged by one Siba Prasad Bhadra, S.I. of Mathili P.S. on 07.03.2021.

5. Mr. S. Manohar, learned counsel appearing for the petitioner submits that the petitioner is in custody since 07.03.2021 and he further submits that the investigation of the case has been concluded in the meantime and charge-sheet has been filed. In course of his argument, learned counsel appearing for the petitioner laid much emphasis on non-compliance of mandatory provisions like Sections 42 and 50 of the N.D.P.S. Act. In the said context, learned counsel for the petitioner drew attention of this Court to the F.I.R. and submitted that with regard to compliance of Sections 42 and 50 of the N.D.P.S. Act, nothing has been mentioned in the F.I.R. Therefore, he contends that due to non-compliance of mandatory provisions like Sections 42 and 50 of the N.D.P.S. Act, the entire seizure is vitiated and further the accused petitioner is most likely to be acquitted in the trial on the aforesaid ground. He further contends that the F.I.R. was registered after delay of seven hours from the time when the vehicle was intercepted and contraband articles were seized.

6. In course of his argument, learned counsel for the petitioner tried to demonstrate the flaws/laches in the procedure adopted by the police party. By referring to various provisions of the N.D.P.S. Act, learned counsel for the petitioner tried to impress upon this Court that the procedure prescribed by law particularly with regard to compliance of mandatory provisions under Sections 42 and 50 of the N.D.P.S. Act have neither been complied with nor there is anything in the F.I.R. to reveal as to whether any attempt was made by the police raiding party to comply the above noted provision of the N.D.P.S. Act.

7. Mr. S. Monhar, learned counsel appearing for the petitioner submits that a bare perusal of the F.I.R. would reveal that nowhere in the F.I.R. anything has been whispered with regard to compliance of the mandatory provision contained in Section 50 of the N.D.P.S. Act. He further submits that in view of Section 50 of the N.D.P.S. Act, the petitioner is required to be informed about his legal right by the police with regard to search and seizure, which is to be carried out in presence of a Gazetted Officer or a Magistrate. He further submits that the F.I.R. does not reveal as to whether an option was given to the accused petitioner when the search and seizure was being conducted by the police patrolling party. It is also contended by learned counsel for the petitioner that such non-mentioning of compliance of the requirement under Sections 42 and 50 of the N.D.P.S. Act in the F.I.R. amounts to admission by the Police Officer that such mandatory

provisions were not complied in the aforesaid context, learned counsel for the petitioner replied upon several judgments which are mentioned herein below :-

1. ***Sk. Raj Alias Abdul Haque Alias Jagga vrs. State of West Bengal*** : (2018) 9 SCC 708.
2. ***Sarija Banu(A) Janarthani and others vrs. State through Inspector of Police*** : (2004) 12 SCC 266.
3. ***Sanjev and another vrs. State of Himachal Pradesh in Criminal Appeal No.870 of 2016***.
4. ***Pankaj vrs. State of Punjab***: CRM-M-25498-2021
5. ***Basanth Balram vrs. State of Kerala*** : 2019(2) CRR (Criminal) 488.
6. ***Sudesh Singh @ Tandu vrs. State of Punjab***: 2011(9) RCR (Criminal) 922.

8. With regard to the importance of compliance of mandatory provision like Sections 42 and 50 of the N.D.P.S. Act. Mr. Monhar, learned counsel appearing for the petitioner referring to the judgments of the Hon'ble Supreme Court in the case ***Balbev Singh vrs. State of Punjab:*** reported ***(1999) 6 SCC 172*** submitted that noncompliance of said mandatory provision would vitiate the entire trial and the sanctity of the entire trial would be lost. Further, he led specific emphasis on paragraph-28 of the said judgment which is quoted herein below:-

> "The Remedy Cannot be worse than the disease itself. It must be borne in mind that severer the punishment greater has to be the care taken to see that all the safeguards provided in a statute are scrupulously followed. The legitimacy of the judicial process may come under a cloud if the court is seen to have condoned acts of lawlessness conducted by the investigating agency during search operations & may also undermine respect for the law & may have the effect of unconscionably compromising the administration of justice. That cannot be permitted."

9. On a careful scrutiny of the judgments relied upon by learned counsel for the petitioner, this Court observes that most of the judgments relied upon are dealing with the issue of non-compliance of Sections 42 and 50 of the N.D.P.S. Act are final judgments delivered after trial. However, the judgment of the Hon'ble Supreme Court in the case of ***Sarija Banu (A) Janarthani and others*** (supra), the Hon'ble Supreme Court considering the bail application involving the provisions of the N.D.P.S. Act.

While disposing of the aforesaid bail application vide order dated 26.02.2004 in paragraph-7 of the order, it has been observed as followed:-

> "7. It is pertinent to note that in the bail application the applicants, it was alleged that there was serious violation of Section 42 of the N.D.P.S. Act. In the impugned order nothing is stated about the alleged violation of Section 42, and it is observed that it was not necessary to consider such violation at this stage. <u>The compliance of Section 42 is mandatory and that is a relevant fact which should have engaged attention of the Court while considering the bail application</u>. In the aforesaid circumstances having regard to the special facts of the case, we direct that the applicants 1 and 2 be released on bail in

> executing a bail bond for Rs.50,000/- each with two solvent sureties for the like amount to the satisfaction of the Special Judge, EC/NDPS, Madurai on the following conditions." **(emphasis supplied)**

So far as the other judgments relied upon by the learned counsel for the petitioner are concerned, this Court upon careful scrutiny of such judgments is of the considered view that there is no dispute with regard to the settled position of law that compliance of Sections 42 and 50 of the N.D.P.S. Act is a mandatory requirement as has been held by the Hon'ble Apex Court as well as this Court. Therefore, there is no necessity to refer to such judgments in the instant case. Moreover, as has been stated earlier most of the judgments referred to by the learned counsel for the petitioner are final judgments delivered after conclusion of the trial while dealing with the legal issue of non-compliance of Sections 42 and 50 of the N.D.P.S. Act. Therefore, such judgments are not applicable to the facts of the case in hand. Hearing the specific issue that has been raised on behalf of the accused-petitioner i.e. whether the trial court or this Court while considering the bail application of an accused alleged to have committed a crime under the N.D.P.S. Act, the requirement of compliance of mandatory provisions like Sections 42 and 50 of the N.D.P.S. Act could be considered at the stage of bail or not? Learned counsel for the petitioner emphasized that noncompliance of Sections 42 and 50 of the N.D.P.S. Act could be examined by the courts while considering the bail application of an accused. On the contrary, leaned counsel appearing for the State submits that the court is under no legal obligation to consider the non-compliance/compliance of Sections 42 and 50 of the N.D.P.S. Act while considering the bail application of an accused alleged to have committed an offence under the provision of the N.D.P.S. Act.

10. Mr. P.C. Das, learned Additional Standing Counsel appearing on behalf of the State submits that the police party which was on patrolling duty, saw the vehicle in question from Malkangiri side had come at a very high speed. On suspicion, the vehicles were intercepted and stopped and search was conducted. Therefore, there is no occasion on the part of the police party for immediate compliance of Sections 42 and 50 of the N.D.P.S. Act. He further submits that the issue of compliance or non-compliance of the mandatory provisions like Sections 42 and 50 of the N.D.P.S. Act can only be taken up during the trial where the parties would get fullfledged opportunity to lead evidence in support of their respective contentions.

11. Mr. Das, learned Additional Standing Counsel appearing on behalf of the State emphatically submits that at the stage of considering the bail application of an accused, the court was not under any legal obligation to examine as to whether the provisions contained in Section 42 and 50 of the N.D.P.S. Act has

been complied with or not. It is further contended by learned Additional Standing Counsel appearing on behalf of the State that the accused has no legal right to insist compliance of Section 42 as he was arrested from the spot and from the vehicle wherein the contraband ganja was kept. He further submits that the petitioner along with other accused persons have also confessed before the police that they were transporting the seized contraband articles. Further, learned Additional Standing Counsel appearing on behalf of the State draws attention of this court to the fact that the illegal transportation of contraband articles within the State of Odisha is rising every day and as such, this Court should not show any leniency while considering the bail application of the present petitioner, who has been caught red handed at the spot. With the aforesaid submissions, learned counsel for the State urges that the bail application of the petitioner be rejected at this juncture.

12. Both sides have filed their written note of submissions and the judgments and citations relied upon by them. Note of submissions filed by learned counsel for the State has been prepared by giving much emphasis on the fact that at the stage of considering the bail application, this Court is under legal obligation to consider the aspect of non-compliance of the mandatory provisions as contained in the N.D.P.S. Act.

13. Mr. Das, learned Additional Standing Counsel appearing on behalf of the State lays specific emphasis on the judgment of the Hon'ble Supreme Court in the case of ***Union of India through Narcotics Control Bureau of Lucknow vrs. Mohammad Nawaj Khan*** in Criminal Appeal No.1043 of 2021 (arising out of SLP (Crl.) No.1771 of 2021) disposed of vide order dated 22.09.2021. It is further submitted by learned counsel for the State that the judgment of the Hon'ble Supreme Court in the case of ***Mohammad Nawaj Khan*** (supra) has also been followed by the Hon'ble Karnataka High Court in the case of ***Jaswin Lobo vrs. State of Karnataka*** in Criminal Petition No. 6916 of 2021 decided on 02.02.2022. It is further submitted by learned counsel for the State that since the vehicles in question were intercepted and stopped by the police night patrolling party and the petitioner along with co-accused persons were arrested from the spot. He further submits that once contraband articles were detected, the matter was reported to the I.I.C. of the concerned Police Station and on his direction, the investigation continued and accordingly search and seizure were made. Further, it is submitted by learned counsel for the State that there was no time and opportunity to comply the mandatory provision as contained in the N.D.P.S. Act and as such Section 42 has not been followed in the present case. Further to establish such facts, evidence is required to be adduced and as such, the same can only be done when the matter is taken up for trial.

14. Further a careful scrutiny of note of argument submitted on behalf of the prosecution, this court observed that no specific stand has been taken in the said note of argument with regard to the compliance/non-compliance of Sections 42 and 50 of the N.D.P.S. Act. Moreover, learned counsel for the State in support of his contention contended that compliance/non-compliance of Sections 42 and 50 of the N.D.P.S. Act is a matter of trial and in that context, he relies upon judgment of the Hon'ble Supreme court in the case of ***Union of India through N.C.B., Lucknowvrs. Mohammad Nawaj Khan*** (Criminal Appeal No.1043 of 2021 disposed of on 22.09.2022) and ***Joswin Loba vrs. State of Karnataka*** vide order dated 02.02.2022 passed by Hon'ble Karnataka High Court in Criminal Petition No.6916 of 2021.

15. Having heard learned counsel for the respective parties and upon perusal of the written note of submissions submitted by either side, this Court is of the considered view that the sole question involved in the present case is whether the compliance/noncompliance of the mandatory provisions under Sections 42 and 50 of the N.D.P.S. Act is to be examined and considered at the stage of consideration of the bail application of the petitioner or the same is required to be considered by the trial court during trial after evidence is laid by both the sides before the trial court? Learned counsel for the petitioner while supporting the stand that non-compliance of Sections 42 and 50 of the N.D.P.S. Act has to be examined at the stage of consideration of the bail application of the petitioner upon the order of the Hon'ble Supreme Court dated 26.09.2004 passed in the case of ***Sarija Banu(A) Janarthani and others*** (supra). On a careful consideration of the judgment relied upon by the petitioner, this Court observed that the compliance of Section 42 is mandatory and that is a relevant fact which should engage attention of the Court while considering the bail application of an accused. Further, in the aforesaid case the Hon'ble Supreme Court while taking note of Section 37 of the N.D.P.S. Act was pleased to release the appellant on bail subject to certain terms and conditions. Further the aforesaid order of the Hon'ble Supreme Court, as it appears, has been followed by some of the High Courts' while considering the bail applications involving the offences under N.D.P.S. Act.

16. Per contra, learned counsel for the State in support of his contentions relied upon the judgment of the Hon'ble Supreme Court in the case of ***Union of India through N.C.B., Lucknow vrs. Mohammad Nawaj Khan*** (supra). At the outset, it is submitted that in the case of ***Sarija Banu(A) Janarthani and others*** (supra), the Hon'ble Supreme Court decided the matter by passing an order. However, in the case of ***Union of India through N.C.B., Lucknow vrs. Mohammad Nawaj Khan*** (supra) which was decided on 2.09.2021 in a Criminal

Appeal has been disposed of by a judgment. On perusal of the judgment it appears that the respondent in the said case was allegedly involved in the case involving the provisions of the N.D.P.S. Act and accordingly, he was arrested by the NCB, Lucknow. Thereafter, the bail application was filed before the High Court of judicature at Allahabad vide order dated 01.10.2020, the bail application of the respondent was allowed. Challenging the order dated 01.10.2020, N.C.B. Lucknow approached before the Hon'ble Supreme Court by filing Criminal Appeal No.1043 of 2021, which was allowed by the Hon'ble Supreme Court vide judgment dated 22.09.2021 and the order dated 01.10.2020 passed by the Allahabad High Court releasing the accused on bail was set aside and the bail application of the accused-respondent was dismissed.

17. Upon close scrutiny of the judgment of the Hon'ble Supreme Court in the date of ***Union of India through N.C.B., Lucknow vrs. Mohammad Nawaj Khan*** (supra), this Court observed that search was conducted in the presence of a Gazetted Officer in view of the provisions under Section 50 of the N.D.P.S. Act but, nothing objectionable was recovered in course of personal search. Despite such fact, a ground was taken that Sections 42 and 50 of the N.D.P.S. Act were not complied with. Further, before the Hon'ble Supreme Court, N.C.B. took an additional ground that after the petitioner was released on bail he is avoiding to appear before the learned Sessions Judge at Lucknow as a result of which charges could not be framed and eventually non-bailable warrant was issued against the respondent. Moreover, in the above noted case, the CDR details were produced before the court which revealed that the accused-petitioner was in touch with other accused persons.

While considering the validity of the order passed by the Allahabad High Court in ***Union of India through N.C.B., Lucknow vrs. Mohammad Nawaj Khan*** (supra), the Hon'ble Supreme Court had an occasion to consider the scope and ambit of Section 37 of the N.D.P.S. Act. While analyzing the provision of Section 37 of the N.D.P.S. Act, the Hon'ble Supreme Court has referred to a judgment in the case of ***Union of India vrs. Shiv Shankar Kesari*** : reported in ***(2007) 7 SCC 798*** where in paragraph-11 of the judgment of the Hon'ble Supreme Court, it has been observed as follows:-

> "11. The court while considering the application for bail with reference to Section 37 of the Act is not calledupon to record a finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the court is called upon to see if there are reasonable grounds for believing that the accused is not guilty and records its satisfaction about the existence of such grounds. But the court has not to consider the matter as if it is pronouncing a judgment of acquittal and recording a finding of not guilty." **(emphasis supplied)**

So far as non-compliance of Section 42 of the N.D.P.S. Act is concerned, in paragraph-29 of the judgment in ***Union of India through N.C.B., Lucknow vrs. Mohammad Nawaj Khan*** (supra)

> "29. In the complaint that was filled on 16th October, 2019 it is alleged that at about 1400 hours on 26th March, 2019, information was received that between 1500-1700 hours on the same day, the three accused persons would be reaching Uttar Pradesh. The complaint states that the information was immediately reduced to writing. Therefore, the contention that "**Section 42 of the NDPS Act was not complied with is prima facie misplaced**". The question is one that should be raised in the course of the trial."

18. In the present case from the allegations made in the prosecution report / F.I.R., it is to be ascertained as to whether Section 42 has been complied with or not. Before going to the relevant portion of the F.I.R., it is imperative that the provisions contained in Section 42 of the N.D.P.S. Act be looked into once again at this juncture and accordingly, same is quoted herein below:-

> **"Section 42 in The Narcotic Drugs and Psychotropic Substances Act, 1985**
>
> 42. **Power** of entry, search, seizure and arrest without warrant or authorisation.—
>
> (1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue **intellegence** or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered inthis behalf by general or special order of the State Government, if he has reason to believe from persons knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,—
>
> (a) enter into and search any such building, conveyance or place;
>
> (b) in case of resistance, break open any door and remove any obstacle to such entry;
>
> (c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable forseizure or freezing or forfeiture under Chapter VA of this Act; and
>
> (d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act: Provided that if such 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.
>
> (2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventytwo hours send a copy thereof to his immediate official superior."

Keeping in view the legal position as has been enshrined in Section 42 of the N.D.P.S. Act, this court upon careful consideration of the F.I.R./P.R. is of the considered view that the police patrolling party on suspicion intercepted the vehicle and upon verification found contraband ganja was being transported in the two vehicles in question. Therefore, they had no time or scope to record such informant and intimate to their superior as is required under Section 42 of the N.D.P.S. Act. Further in this context law has been succinctly laid down by the Hon'ble Supreme Court in the case of ***Karnail Singh vrs. State of Haryana*** : reported in ***(2009) 8 SCC 539*** in paragraph-15 of the said judgment. The Hon'ble Supreme Court in the context of compliance of Section 42 of the N.D.P.S. Act has observed as follows :-

> "15) Under Section 42(2), as it stood prior to amendment, such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same would adversely affect the prosecution case and to that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case, it is to be concluded that the mandatory enforcement of the provisions of Section 42 of the Act non-compliance of which may vitiate a trial has been restricted only to the provision of sending a copy of the information written down by the empowered officer to immediate official superior and not to any other condition of the Section. Abdul Rashid (supra) has been decided on 01.02.2000 but thereafter Section 42 has been amended with effect from 02.10.2001 and the time of sending such report of the required information has been specified to be within 72 hours of writing down the same. The relaxation by the legislature is evidently only to uphold the object of the Act. The question of mandatory application of the provision can be answered in the light of the said amendment. The non-compliance of the said provisionmay not vitiate the trial if it does not cause any prejudice to the accused.
>
> 16) The advent of cellular phones and wireless services in India has assured certain expectation regarding the quality, reliability and usefulness of the instantaneous messages. This technology has taken part in the system of police administration and investigation while growing consensus among the policy makers about it. Now forthe last two decades police investigation has gone through a sea- change. Law enforcement officials can easily access any information anywhere even when they are on the move and not physically present in the police station or their respective offices. For this change of circumstances, it may not be possible all the time to record the information which is collected through mobile phone communication in the Register/Records kept for those purposes in the police station or the respective offices of the authorized officials in the Act if the emergency of the situation so requires. As a result, if the

statutory provisions under Section 41(2) and 42(2) of the Act of writing down the information is interpreted as a mandatory provision, it will disable the haste of an emergency situation and may turn out to be in vain with regard to the criminal search and seizure. These provisions should not be misused by the wrong doers/ offenders as a major ground for acquittal. Consequently, these provisions should be taken as discretionary measure which should check the misuse of the Act rather than providing an escape to the hardened drug-peddlers.

17. In conclusion, what is to be noticed is Abdul Rashid did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham hold that the requirements of Section 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:

(a) The officer on receiving the information (of the nature referred to in Sub-section (1) of section 42 from any person had to record it in writing in the concerned Register and forthwith send a copy to his immediateofficial superior, before proceeding to take action in terms of clauses (a) to (d) of section 42(1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

(c) In other words, the compliance with the requirements of Sections 42 (1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance of requirements of subsections (1) and (2) of section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of section 42.To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending a copy of such information to the official superior forthwith, may not be treated as violation of section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspiciouscircumstance being a clear violation of section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of section 42 of the Act. Whether there is adequate or substantial compliance with section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to section 42 by Act 9 of 2001."

Therefore, in view of the aforesaid clear pronouncement of law by the Hon'ble Supreme Court, this Court has no hesitation in coming to conclusion that the present case involves a special circumstances and an emergent situation where the recording of information in writing and sending copy thereof to the official superior could not have been done at the spot and hence, the postponement of the same is permissible under the law. Accordingly, this Court is of the considered view that in the instant case, the petitioner cannot take the ground that non-compliance of Section 42 of the N.D.P.S. Act. Further on a bare reading of F.I.R., it appears that the police party had intimated the fact to their Superior over phone. Therefore, non-compliance of Section 42 involves factual aspects and hence the same is a matter of trial.

19. With regard to the petitioner's assertion that mandatory provision of Section 50 of the N.D.P.S. Act has not been complied with is concerned, this Court is of the considered view that in the judgment of the Hon'ble Supreme court in the case of ***Union of India through N.C.B., Lucknow vrs. Mohammad Nawaj Khan*** (supra), the Hon'ble Supreme Court has categorically observed that search was conducted in presence of the Gazetted Officer in compliance to the provision of Section 50 of the N.D.P.S. Act and the same is also found to have been mentioned in the F.I.R. also. On the other hand, in the present case, upon careful examination of the F.I.R. / P.R., it is seen that there is no whisper with regard to compliance of Section 50 of the N.D.P.S. Act. So far as Section 50 of the N.D.P.S. Act is concerned, the same has been interpreted by a Constitution Bench of the Hon'ble Supreme Court in the case of ***Vijay Singh Chandubha Jadeja vrs. Stae of Gujarat*** : reported ***(2011) 2 SCC 609*** it has been held by the Constitution Bench that sofar the obligation of the authorized Officer under Section 50 of the N.D.P.S. Act is concerned, it is mandatory and requires strict compliance. The said proposition of law has also been reiterated by the Hon'ble Supreme Court of India in the case of ***Sk.Raju @Abdul Haque Alias Jagga vrs. State of West Bengal*** : reported in ***(2018) 9 SCC 708*** for better appreciation of the provision of Section 50 of the N.D.P.S. Act, the same is quoted herein below:-

> "50. Conditions under which search of persons shall be conducted.— (1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such personwithout unnecessary delay to nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.
>
> (2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking suchperson to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior." According to Section 50(1), an empowered officer should necessarily inform the suspect about his legal right, if he so requires, to be searched in the presence of a gazetted officer or a magistrate.

In ***Vijaysinh Chandubha Jadeja v State of Gujarat*** *("Vijaysinh")*, case a Constitution Bench of this Court interpreted Section 50 thus:-

"The mandate of Section 50 is precise and clear, viz. if the person intended to be searched expresses to theauthorised officer his desire to be taken to the nearest gazetted officer or the Magistrate, he cannot be searched till the gazetted officer or the Magistrate, as the case may be, directs the authorised officer to do so … In view of the foregoing discussion, we are of the firm opinion that the object with which right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect, viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that in so far as the obligation of the authorised officer under Sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires a strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision … We are of the opinion that the concept of "substantial compliance" with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said Section in Joseph Fernandez(supra) and Prabha Shankar Dubey (supra) is neitherborne out from the language of Sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in Baldev Singh's case (supra)."

The principle which emerges from Vijaysinh is that the concept of "substantial compliance" with the requirement of Section 50 is neither in accordance with the law laid down in Baldev Singh, nor can it be construed from its language. [Reference may also bemade to the decision of a two judge Bench

of this Court in Venkateswarlu]. Therefore, strict compliance with Section 50(1) by the empowered officer is mandatory. Section 50, however, applies only in the case of a search of a person. In Baldev Singh, the Court held "on its plain reading, Section 50 would come into play only in the case of a search of a person as distinguished from search of any premises, etc." In State of Himachal Pradesh v Pawan Kumar ("Pawan Kumar" case), a three judge Bench of this Court held that the search of an article which was being carried by a person in his hand, or on his shoulder or head, etc., would not attract Section 50. It was held thus:

> "In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word "person" occurring in Section 50 of the Act …After the decision in Baldev Singh, this Court has consistently held that Section 50 would only apply to search of a person and not to any bag, article or container, etc. being carried by him." In Parmanand, on a search of the person of the respondent, no substance was found. However, subsequently, opium was recovered from the bag of the respondent. A twojudge Bench of this Court considered whether compliance with Section 50(1) was required. This Court held that the empowered officer was required to comply with the requirements of Section 50(1) as the person of the respondent was also searched. [Reference may also be made to the decision of a two judge Bench of this Court in Dilip v State of Madhya Pradesh]. It was held thus:
>
> "Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application." Moreover, in the above case, the empowered officer at the time of conducting the search informed the respondent that he could be searched before the nearest Magistrate or before the nearestgazetted officer or before the Superintendent, who was also a part of the raiding party. The Court held that the search of the respondent was not in consonance with the requirements of Section 50(1) as the empowered officer erred in giving the respondent an option of being searched before the Superintendent, who was not an independent officer.
>
> It was held thus:
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> "We also notice that PW 10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate or before the nearest gazetted officer or before PW 5 J.S. Negi, the Superintendent, who was a part of the raiding party. It is the prosecution case that the respondents informed the officers that they would like to be searched before PW 5 J.S. Negi by PW 10 SI Qureshi. This, in our opinion, is again a breach of Section 50(1) of the NDPS Act. The idea behind taking an accused to the nearest Magistrate or the nearest gazetted officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer.
>
> Therefore, it was improper for PW 10 SI Qureshi to tell the respondents that a third alternative was available and that they could be searched before PW 5 J.S. Negi, the Superintendent, who was part of the raiding party. PW 5 J.S. Negi cannot be called an independent officer. We are not expressing any opinion on the question whether if the

> respondents had voluntarily expressed that they wanted to be searched before PW 5 J.S. Negi, the search would have been vitiated or not. But PW 10 SI Qureshi could not have given a third option to the respondents when Section 50(1) of the NDPS Act does not provide for it and when such option would frustrate the provisions of Section 50(1) of the NDPS Act. On this ground also, in our opinion, the search conducted by PW 10 SI Qureshi is vitiated." The question which arises before us is whether Section 50(1) was required to be complied with when charas was recovered only from the bag of the appellant and no charas was found on his person. Further, if the first question is answered in the affirmative, whether the requirements of Section 50 were strictly complied with by PW-2 and PW-4."

20. Upon a careful scrutiny of the provisions contained in Section 50 of the N.D.P.S. Act and further keeping in view the aforesaid analysis of law by the Hon'ble Supreme Court and applying the same to the facts of the present case and also considering the mandatory nature of the provisions, this Court upon careful scrutiny of the F.I.R. as well as record produced before this Court, is of the considered opinion that no opportunity as has been provided under Section 50 of the N.D.P.S. Act was ever given to the petitioner in the present case. Therefore, on the basis of the materials available on record, this Court is constrained to hold that prima facie provisions contained in Section 50 of the N.D.P.S. Act has not been complied with in the case in hand, of course such finding is subject to detail evidence to be laid during trial.

21. To release the petitioner on bail, this Court has to examine whether the twin conditions as prescribed under Section 37 of the N.D.P.S. Act is complied with before any order is passed to enlarge the petitioner on regular bail. So far the twin conditions prescribed in Section 37 of the N.D.P.S. Act is concerned, the first condition i.e. the prosecutor must be given opportunity at the time of hearing of application for bail is duly complied with in the present case. So far as the second condition i.e. Court is satisfied that there are reasonable grounds for believing that the accused-petitioner is not guilty of such offence and that he is likely to commit such offence while on bail is concerned, due to non-compliance of Section 50 of the N.D.P.S. Act, this Court is of the prima facie opinion that there exists a reasonable ground to hold that the petitioner prima facie is not guilty due to non-compliance of mandatory provision of Section 50 and the petitioner is likely to be acquitted by the trial court, if there are no other materials/evidence brought on record in course of trial. Further so far the condition that the petitioner is not likely to commit any such offence while on bail is concerned, this Court is of the humble view that the same can be regulated by imposing stringent conditions with power to the prosecution to seek for cancellation of bail in the event the petitioner indulges in similar nature of offence while on bail. On a conspectus of the aforesaid analysis and further taking into consideration the allegation made in the F.I.R./P.R. the bar contained

under Section 37 of the N.D.P.S. Act would not be strictly applicable to the facts of the present case.

22. The next question that falls for consideration is whether the fact of compliance/non-compliance of mandatory provisions like Sections 42 and 50 of the N.D.P.S. Act could be examined by the Court while considering the bail application? There is no doubt that often to consider the compliance/non-compliance of the mandatory provisions like Sections 42 and 50 of the N.D.P.S. Act, the court is required to look into the facts and materials collected by the prosecution or the records maintained by the prosecution in course of search and seizure and investigation. Further to come to such a conclusion, the Court is required to scan the evidence and examine the records. Therefore, this Court is of the considered view that if the non-compliance of mandatory provision of Sections 42 and 50 of the N.D.P.S. Act is clear and self-explanatory from a bare reading of the F.I.R./Prosecution Report and the prosecution is not in a position to explain that the same has been substantially complied with, in such eventuality such non-compliance of Sections 42 and 50 of the N.D.P.S. Act could be considered and should be taken as a ground to enlarge the petitioner on bail following the Constitution Bench judgment(supra) on non-compliance of mandatory provisions like Sections 42 and 50 of the N.D.P.S. Act would vitiate the entire search, seizure and recovery. Therefore, if there is a possibility that the accused is likely to be acquitted for non-compliance of mandatory provision like Sections 42 and 50 of the N.D.P.S. Act, allowing the petitioner to continue in custody would not serve the ends of justice. Therefore, this Court has no hesitation to hold that if prima facie from record/F.I.R., it can be established that Sections 42 and 50 of the N.D.P.S. Act, which is mandatory in nature, has not been complied with, the court considering the bail application can always use the same as ground to enlarge the petitioner on bail and in such event the power contained in Section 37 of the N.D.P.S. Act would not be attracted to the facts of the case.

23. Having heard learned counsel for the parties and upon careful examination of the records placed before this Court and further in view of the analysis of law made hereinabove, this Court is inclined to release the petitioner on regular bail subject to certain terms and conditions. Therefore, it is directed that the petitioner be released on bail subject to furnishing a bail bond of Rs. 50,000/- (rupees fifty thousand) with two local solvent sureties each for the like to the satisfaction of the Court in seisin over the matter. Further the release of the petitioner shall also be subject to verification of similar criminal antecedents of the petitioner. In the event, it is found that the petitioner has similar criminal antecedents, then this order shall stand automatically revoked and shall not be given effect to. Release of the petitioner shall also subject to following additional conditions:-

I. The petitioner shall not leave the jurisdiction of the Court in seisin over the matter without specific permission of the court;

II. he shall appear before the jurisdictional Police Station once in a fortnight preferably on 'Sunday' in between 10.00 A.M. to 1.00 P.M. for period of two months and thereafter once in a month preferably on 'Sunday' in between 10.00 A.M. to 1.00 P.M. till conclusion of trial;

III. he shall surrender his passport/travel documents before the court in seisin over the matter at the time of his release on bail, if does not have a passport then he has to file an affidavit in the court in seisin over the matter indicating such facts;

IV. he shall appear before the court in seisin over the matter on each date of posting without fail;

V. he shall furnish his address and mobile number to the police station from time to time;

VI. he shall not indulge in any similar nature of offence while on bail; and

VII. he shall furnish his address and mobile number to the jurisdictional police station regarding his whereabouts, his address, mobile number and other details and shall up-date the same at regular intervals.

Violation of any of the terms and conditions shall entail cancellation of bail.

24. The Bail Application is accordingly disposed of.

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2022 (III) ILR-CUT-606

V. NARASINGH, J.

W.P.(C) NO.15225 OF 2015

ULLASH CH. KHANDAYATRAY ……..Petitioner

.V.

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

CONSTITUTION OF INDIA, 1950 – Articles 226 & 227 – Enhancement of superannuation age – Power of Court – Held, judicial review in case of enhancement of superannuation age, falls within a very narrow compass – Whether the age of superannuation should be increased and if so, the date from which this should be effected is a matter of policy, into which the High Court ought not to have entered.

(Paras 6, 6A)

Case Law Relied on and Referred to :-

1. AIR 2021 SC 3457 : New Okhla Industries Development Authority & Ors. Vrs. B.D. Singhal and other.

For Petitioner : Mr. S.K. Das

For Opp.Parties: Mr. C.A. Rao,
Mr. S.N. Pattnaik, AGA

JUDGMENT Date of Hearing & Judgment : 20.09.2022

V. NARASINGH, J.

1. Heard learned counsel for the petitioner and learned Senior counsel for the Odisha State Financial Corporation (OSFC) and learned Additional Government Advocate for the Opposite Party No. 1.

2. The petitioner has assailed the decision of OSFC regarding fixation of date for implementation of the enhanced age of retirement of superannuation.

3. It is not in dispute that the petitioner working as Manager in the OSFC retired on attaining age of superannuation of 58 on 31.07.2014.

4. He assails the decision of OSFC (Corporation) whereby during the age of superannuation of the employees of the Corporation has been enhanced from 58 to 60 w.e.f. 06.09.2014 inter alia, on the ground, that since the Government of Odisha in the Finance Department has enhanced the departmental age of State Government Employees by the resolution dated 28.06.2014, the same ought to be applied retrospectively to the employees of the OSFC.

5. Such stand of the petitioner is resisted by the learned senior counsel relying on the counter affidavit in which it has inter alia been indicated that the resolution of the State Government is not automatically applicable to the Corporation and the corporation as per the Board of Directors meeting held on 12.09.2014 decided to enhance the retirement age from 58 to 60 w.e.f. 06.09.2014. As such the same cannot have any retrospective effect. And, the petitioner having admittedly retired on 31.07.2014 attaining age of superannuation of 58 as prevailing then cannot claim for enhancement of retirement age to be applicable retrospectively.

6. It is trite law that power of this Court of judicial review in case of enhancement of age of superannuation falls within a very narrow compass and such view of this Court is fortified from the judgment of the Apex Court reported in ***AIR 2021 SC 3457 (New Okhla Industries Development Authority and others Vrs. B.D. Singhal and other)***.

6.A. Paragraphs 19 of the said judgment is of relevance is quoted hereunder;

> ***xxxxx"19****. Whether the age of superannuation should be enhanced is a matter of policy. If a decision has been taken to enhance the age of superannuation, the date with effect from which the enhancement should be made falls within the realm of policy. The High*

Court in ordering that the decision of the State Government to accept the proposal to enhance the age of superannuation must date back to 29 June 2002 has evidently lost sight of the above factual background, more specifically (i) the rejection of the original proposal on 22 September 2009; and (ii) the judgment of the Division Bench dated 17 January 2012 refusing to set aside the order rejecting the proposal on 22 September 2009 which has attained finality. But there is a more fundamental objection to the basis of the decision of the High Court. The infirmity in the judgment lies in the fact that the High Court has trenched upon the realm of policy making and has assumed to itself, jurisdiction over a matter which lies in the domain of the executive. ***Whether the age of superannuation should be increased and if so, the date from which this should be effected is a matter of policy into which the High Court ought not to have entered."***

x x x x x

(Emphasized)

7. On an examination of the materials on record, this Court is constrained to hold that the prayer for retrospective enhancement of age of retirement as made by the learned counsel for the petitioner does not merit consideration and the same accordingly stands rejected.

8. The Writ Petition being devoid of merit is dismissed.

9. No costs.

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2022 (III) ILR-CUT-608

BIRAJA PRASANNA SATAPATHY, J.

WPC (OAC) NO. 4660 OF 2016

RABINARAYAN MOHANTY ……..Petitioner

.V.

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

SERVICE LAW – Pension – The Petitioner appointed as a helper in the Work Charged Establishment on 01.04.1981 in Upper Kolab Irrigation Project – The Opp.Parties never took any step to absorb the petitioner in the regular establishment – The petitioner claimed pension and other retiral benefits – O.P. No. 2 rejected the claim – Whether the petitioner is eligible for pension and other pensionary benefits ? – Held, Yes – The petitioner like other similarly situated persons should be extended with the benefits of regularisation and consequential sanction of pension and other pensionary benefits under OCS (Pension) Rules, 1992. (Paras 29,30)

Case Laws Relied on and Referred to :-

1. (2006) 4 SCC-1 : Secretary, State of Karnataka vs. Uma Devi(3).
2. (2010) 9 SCC 247 : State of Karnatak vs. M.L. Keshari.
3. 2013 (14) SCC 65: Nihal Singh & Others vs. State of Punjab & Others.

4. 2015 (8) SCC 265 : Amarkant Rai vs. State of Bihar & Others.
5. (2003) 6 SCC 1 : Kapila Hingorani v. State of Bihar.
6. (1984) 4 SCC 251:Prabodh Verma and others v. State of U.P. and others.
7. (1990) 2 SCC746:AIR1990SC1402 : Km.Neelima Mishra v. Harinder Kaur Paintal & Ors.
8. (1974) 4 SGC 3 : E.P.Royappa v. State of Tamilnadu & Anr.
9. O.A. No.1189(C) of 2006 : Narusu Pradhan Vs. State of Odisha.
10. O.A. No.4189(C) of 2013 : Pitambar Sahoo Vs. State of Odisha.
11. W.P.(C) No.19950 of 2011 (decided on 03.02.2021) : Chandra Nandi Vs. State of Odisha & Ors.

For Petitioner : M/s. S.B. Jena, S. Behera

For Opp.Parties: Mr. M.K. Balabantaray, Standing Counsel.

JUDGMENT Date of Hearing : 22.07.2022 : Date of Judgment : 26.09.2022

BIRAJA PRASANNA SATAPATHY, J.

1. This matter is taken up through Hybrid Arrangement (Virtual/Physical) Mode.

2. Heard Mr. S.Behera, learned counsel for the Petitioner & Mr. M.K. Balabantaray, learned Standing Counsel appearing for the Opp. Parties.

3. The present writ Petition has been filed with the following prayer:-

"Under the circumstances it is humbly prayed therefore that the Hon'ble Tribunal may graciously be pleased to quash the impugned order dated 16.09.2016 passed by the Respondent No.2 under Annexure-11;

And further be pleased to direct the Respondents togrant pension and other pensionary benefits in favour of the applicant, taking into account the order of the Hon'ble Tribunal underAnnexure-6 and the orders of the Respondent No.2 dated 16.09.2009 under Annexure-7 forthwith;

And further be pleased to give all consequential service benefits to the applicant;

or pass such other order(s)/direction(s) as this Hon'ble Tribunal may think fit and proper, and allow this Original Application with Cost;"

4. Mr. Behera, learned counsel for the Petitioner submitted that the Petitioner was initially appointed as a helper in the Work Charged Establishment and posted as such in Upper Kolab Irrigation Project, where he joined on 01.04.1981.

5. It is submitted that the Petitioner was engaged as such after his name was duly sponsored by the employment exchange vide order under Annexure-1. It is also submitted that in the common seniority list of Work Charged staff of Subarnarekha Irrigation Project issued under Annexure-2, the date of joining of the Petitioner in the Work Charged Establishment is also reflected as 01.04.1981.

6. Mr. Behera, learned counsel for the Petitioner submitted that since the Petitioner was appointed in the Work Charged Establishment, where he joined on 01.04.1981 and allowed to continue as such, the Petitioner became eligible for his absorption in the regular establishment in view of different circulars issued by the Govt. at different point of time as well as the decision of the Hon'ble Apex Court and this Hon'ble Court. It is also submitted that the claim of the Petitioner for his absorption in the regular establishment was more fortified with issuance of the resolution dtd.15.05.1997 under Annexure-5.

7. It is submitted that as per the scheme issued vide resolution dtd. 15.05.1997 under Annexure-5, a person working as a NMR/DLR/Job Contract Establishment in order to be eligible for his absorption in the regular establishment must have been engaged prior to 12.04.1993 and he must have completed minimum 10 years of service. It is also stipulated in the said resolution that while filling up regular vacant post, preference shall be given to Work Charged employees first.

8. Taking a cue from the resolution dtd.15.05.1997 Mr. Behera, learned counsel for the Petitioner submitted that by the time the resolution under Annexure-5 was issued the Petitioner had not only completed more than 16 years of engagement in the Work Charged Establishment, but also his claim is covered by the said resolution as the Petitioner is admittedly engaged prior to 12.04.1993. It is submitted that in spite of issuance of such resolution on 15.05.1997 under Annexure-5 the Opp. Parties never took any step to absorb the Petitioner in the regular establishment.

9. Learned counsel for the Petitioner submitted that in spite of his eligibility the Petitioner was never absorbed in the regular establishment and his case was never considered in terms of resolution issued on 15.05.1997 and previous guidelines issued in that regard. It is submitted that in the meantime the Hon'ble Apex Court in the case of ***Secretary, State of Karnataka vs. Uma Devi (3), (2006) 4 SCC-1*** issued certain guidelines for absorption of such irregular recruitees. In Para 53 of the said Judgment Hon'ble Apex Court held as follows:-

> *"53. One aspect needs to be clarified. There may be cases where irregular R.N. Nanjundappa2 and B.N. Nagarajan and referred to in para 15 above. appointments (not illegal appointments) as explained in S.V. Narayanappa". of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of the courts or of tribunals. The question of regularisation of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases abovereferred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularise as a one-time measure, the services of such irregularly appointed, who have worked for ten years*

or more in duly sanctioned posts but not under cover of orders of the courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion f within six months from this date. We also clarify that regularisation, if any already made, but not sub judice, need not be reopened based on this judgment, but there should be no further bypassing of the constitutional requirement and regularising or making permanent, those not duly appointed as per the constitutional scheme."

10. It is submitted that in spite of the clear stipulation issued by the Hon'ble Apex Court in the above noted reported case, the State-Opp. Parties never took any step to absorb the Petitioner in the regular establishment. It is also submitted that since his initial engagement on 01.04.1981 the Petitioner not only worked continuously, but also he was never protected by any interim order passed by any Court of law. Hence, it is submitted that the claim of the Petitioner for his absorption in the regular establishment clearly falls within the parameter issued by the Hon'ble Apex Court in Para 53 of the above noted reported case.

11. But, it is submitted that instead of taking step to absorb the Petitioner in the regular establishment in terms of the decision in the above noted case of ***State of Karnatak vs. Uma Devi***, the Opp. Parties intentionally and deliberately did not initiate any process to absorb the Petitioner in the regular establishment.

12. Mr. Behera, learned counsel for the Petitioner in support of his claim also relied on decisions of the Hon'ble Apex Court reported in the case of ***State of Karnatak vs. M.L. Keshari, (2010) 9 SCC 247, Nihal Singh & Others vs. State of Punjab & Others, 2013 (14) SCC 65 and Amarkant Rai vs. State of Bihar & Others, 2015 (8) SCC 265***. It is submitted that in the meantime the Hon'ble Apex Court in the case of ***State of Karnatak vs. M.L. Keshari, (2010) 9 SCC 247*** issued certain guidelines for absorption of such irregular recruitees. In Para 7 to 13 of the said Judgment Hon'ble Apex Court held as follows:-

"7. It is evident from the above that there is an exception to the general principles against "regularization" enunciated in Umadevi (3), if the following conditions are fulfilled:

(i) The employee concerned should have worked for 10 years or more in duly sanctioned post without the benefit or protection of the interim order of any court or tribunal. In other words, the State Government or its instrumentality should have employed the employee and continued him in service voluntarily and continuously for more than ten years.

(ii) The appointment of such employee should not be illegal, even if irregular. Where the appointments are not made or continued against sanctioned posts or where the persons appointed do not possess the prescribed minimum qualifications, the appointments will be considered to be illegal. But where the person employed possessed the prescribed

qualifications and was working against sanctioned posts, but had been selected without undergoing the process of open competitive selection, such appointments are considered to be irregular.

8. Umadevi (3) casts a duty upon the Government or instrumentality concerned, to take steps to regularise the services of those irregularly appointed employees who had served for more than ten years without the benefit or protection of any interim orders of courts or tribunals, as a one-time measure. Umadevi (3) directed that such one-time measure must be set in motion within six months from the date of its decision (rendered on 10 4-2006).

9. The term "one-time measure" has to be understood in its proper perspective. This would normally mean that after the decision in Umadevi (3), each department or each instrumentality should undertake a one-time exercise and prepare a list of all casual, daily-wage or ad hoc employees who g have been working for more than ten years without the intervention of courts and tribunals and subject them to a process verification as to whether they are working against vacant posts and possess the requisite qualification for the post and if so, regularise their services.

10. At the end of six months from the date of decision in Umadevi (3)[1], cases of several daily-wage/ad hoc/casual employees were still pending before courts. Consequently, several departments and instrumentalities did not commence the one-time regularisation process. On the other hand, some government departments or instrumentalities undertook the one time exercise excluding several employees from consideration either on the ground that their cases were pending in courts or due to sheer oversight. In such circumstances, the employees who were entitled to be considered in terms of para 53 of the decision in Umadevi (3), will not lose their right to be considered for regularisation, merely because the one-time exercise was completed without considering their cases, or because the six-month period mentioned in para 53 of Umadevi (3) has expired. The one-time exercise should consider all dailywage/ad hoc/casual employees who had put in 10 years of continuous service as on 104-2006 without availing the protection of any interim orders of courts or tribunals. If any employer had held the one time exercise in terms of para 53 of Umadevi (3), but did not consider the cases of some employees who were entitled to the benefit of para 53 of Umadevi (3), the employer concerned should consider their cases also, as a continuation of the one-time exercise. The one-time exercise will be concluded only when all the employees who are entitled to be considered in terms of para 53 of Umadevi (3), are so considered.

11. The object behind the said direction in para 53 of Umadevi (3) is twofold. First is to ensure that those who have put in more than ten years of d continuous service without the protection of any interim orders of courts or tribunals, before the date of decision in Umadevi (3) was rendered, are considered for regularisation in view of their long service. Second is to ensure that the departments/instrumentalities do not perpetuate the practice of employing persons on daily-wage/ad hoc/casual basis for long periods and then periodically regularise them on the ground that they have served for more than ten years, thereby defeating the constitutional or statutory provisions relating to recruitment and appointment. The true effect of the direction is that all persons who have worked for more than ten years as on 10-4-2006 (the date of decision in Umadevi (3)] without the protection of any interim order of any court or tribunal, in vacant posts, possessing the requisite qualification, are entitled to be considered for regularisation. The f fact that the employer has not undertaken such exercise of regularisation within six months of the

decision in Umadevi (3) or that such exercise was undertaken only in regard to a limited few, will not disentitle such employees, the right to be considered for regularisation in terms of the above directions in Umadevi (3) as a one-time measure.

12. These appeals have been pending for more than four years after the 9 decision in Umadevi (3). The appellant (ZilaPanchayat, Gadag) has not considered the cases of the respondents for regularisation within six months of the decision in Umadevi (3)[1] or thereafter.

13. The Division Bench of the High Court has directed that the cases of the respondents should be considered in accordance with law. The only further direction that needs to be given, in view of Umadevi (3), is that the ZilaPanchayat, Gadag should now undertake an exercise within six months, as a general onetime regularisation exercise, to find out whether there are any daily-wage/casual/ad hoc employees serving the ZilaPanchayat and if so whether such employees (including the respondents) fulfil the requirements mentioned in para 53 of Umadevi (3). If they fulfil them, their services have to be regularised. If such an exercise has already been undertaken by ignoring or omitting the cases of Respondents 1 to 3 because of the pendency of these cases, then their cases shall have to be considered in continuation of the said one-time exercise within three months. It is needless to say that if the respondents do not fulfil the requirements of para 53 of Umadevi (3), their services need not be regularised. If the employees who have completed ten b years' service do not possess the educational qualifications prescribed for the post, at the time of their appointment, they may be considered for regularisation in suitable lower posts."

It is submitted that in the meantime the Hon'ble Apex Court in the case of ***Nihal Singh & Others vs. State of Punjab & Others, 2013 (14) SCC 65*** issued certain guidelines for absorption of such irregular recruitees. In Para 8 to 10 and 13 to 15 of the said Judgment Hon'ble Apex Court held as follows:-

"8. Insofar as contention of the respondent that the appointment of the appellant was made by the principal who is not a competent authority to make such appointment and is in violation of the Bihar State Universities Act and hence the appointment is illegal appointment, it is pertinent to note that the appointment of the appellant as Night Guard was done out of necessity and concern for the college. As noticed earlier, the Principal of the college vide letters dated 11.03.1988, 07.10.1993, 08.01.2002 and 12.07.2004 recommended the case of the appellant for regularization on the post of Night Guard and the University was thus well acquainted with the appointment of the appellant by the then principal even though Principal was not a competent authority to make such appointments and thus the appointment of the appellant and other employees was brought to the notice of the University in 1988. In spite of that, the process for termination was initiated only in the year 2001 and the appellant was reinstated w.e.f. 3.01.2002 and was removed from services finally in the year 2007. As rightly contended by the learned counsel for the appellant, for a considerable time, University never raised the issue that the appointment of the appellant by the Principal is ultra vires the rules of BSU Act. Having regard to the various communications between the Principal and the University and also the education authorities and the facts of the case, in our view, the appointment of the appellant cannot be termed to be illegal, but it can only be termed as irregular.

9. The Human Resources Development, Department of Bihar Government, vide its letter dated 11.07.1989 intimated to the Registrar of all the Colleges that as per the settlement dated 26.04.1989 held between Bihar State University and College Employees Federation and the Government it was agreed that the services of the employees working in the education institutions on the basis of prescribed staffing pattern are to be regularized. As per sanctioned staffing pattern, in Ramashray Baleshwar College, there were two vacant posts of Class IV employees and the appellant was appointed against the same. Further, Resolution No. 989 dated 10.05.1991 issued by the Human Resources Development Department provides that employees working upto 10.5.1986 shall be adjusted against the vacancies arising in future. Although, the appellant was appointed in 1983 temporarily on the post that was not sanctioned by the State Government, as per the above communication of Human Resources Development Department, it is evident that the State Government issued orders to regularise the services of the employees who worked upto 10.5.1986. In our considered view, the High Court ought to have examined the case of the appellant in the light of the various communications issued by the State Government and in the light of the circular, the appellant is eligible for consideration for regularization.

10. As noticed earlier, the case of the appellant was referred to Three Members Committee and Three Members Committee rejected the claim of the appellant declaring that his appointment is not in consonance with the ratio of the decision laid down by this Court in Umadevi's case (supra). In Umadevi's case, even though this Court has held that the appointments made against temporary or ad-hoc are not to be regularized, in para 53 of the judgment, it provided that irregular appointment of duly qualified persons in duly sanctioned posts who have worked for 10 years or more can be considered on merits and steps to be taken one time measure to regularize them. In para 53, the Court observed as under:-

"53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V. Narayanappa, R.N. Nanjundappa and B.N. Nagarajan and referred to in para 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of the courts or of tribunals. The question of regularisation of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularise as a one-time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of the courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularisation, if any already made, but not sub judice, need not be reopened based on this judgment, but there should be no further bypassing of the constitutional requirement and regularising or making permanent, those not duly appointed as per the constitutional scheme."

The objective behind the exception carved out in this case was prohibiting regularization of such appointments, appointed persons whose appointments is irregular but not illegal, ensure security of employment of those persons who served the State Government and their instrumentalities for more than ten years.

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 appellanthas 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 w.e.f. 03.01.2002 (the date on which he rejoined the post as per direction of Registrar).

15. The impugned order of the High Court in LPA No.1312 of 2012 dated 20.02.2013 is set aside and this appeal is allowed. The authorities are directed to notionally regularize the services of the appellant retrospectively w.e.f. 03.01.2002, or the date on which the post became vacant whichever is later and without monetary benefit for the above period. However, the appellant shall be entitled to monetary benefits from 01.01.2010. The period from 03.01.2002 shall be taken for continuity of service and pensionary benefits."

It is submitted that in the meantime the Hon'ble Apex Court in the case of ***Amarkant Rai vs. State of Bihar & Others, 2015 (8) SCC 265*** issued certain guidelines for absorption of such irregular recruitees. In Para 18 to 35 of the said Judgment Hon'ble Apex Court held as follows:-

"18. Coming to the judgment of the division bench of the High Court of Punjab & Haryana in LPA No.209 of 1992 where the claims for regularization of the similarly situated persons were rejected on the ground that no regular cadre or sanctioned posts are available for regularization of their services, the High Court may be factually right in recording that there is no regularly constituted cadre and sanctioned posts against which recruitments of persons like the appellants herein were made. However, that does not conclusively decide the issue on hand. The creation of a cadre or sanctioning of posts for a cadre is a matter exclusively within the authority of the State. That the State did not choose to create a cadre but chose to make appointments of persons creating contractual relationship only demonstrates the arbitrary nature of the exercise of the power available under section 17 of the Act. The appointments made have never been terminated thereby enabling various banks to utilize the services of employees of the State for a long period on nominal wages and without making available any other service benefits which are available to the other employees of the State, who are discharging functions similar to the functions that are being discharged by the appellants.

19. No doubt that the powers under section 17 are meant for meeting the exigencies contemplated under it, such as, riot or disturbance which are normally expected to be of

a short duration. Therefore, the State might not have initially thought of creating either a cadre or permanent posts.

20. But we do not see any justification for the State to take a defence that after permitting the utilisation of the services of large number of people like the appellants for decades to say that there are no sanctioned posts to absorb the appellants. Sanctioned posts do not fall from heaven. State has to create them by a conscious choice on the basis of some rational assessment of the need.

21. The question is whether this court can compel the State of Punjab to create posts and absorb the appellants into the services of the State on a permanent basis consistent with the Constitution Bench decision of this court in Umadevi's case. To answer this question, the ratio decidendi of the Umadevi's case is required to be examined. In that case, this Court was considering the legality of the action of the State in resorting to irregular appointments without reference to the duty to comply with the proper appointment procedure contemplated by the Constitution.

"4. … The Union, the States, their departments and instrumentalities have resorted to irregular appointments, especially in the lower rungs of the service, without reference to the duty to ensure a proper appointment procedure through the Public Service Commissions or otherwise as per the rules adopted and to permit these irregular appointees or those appointed on contract or on daily wages, to continue year after year, thus, keeping out those who are qualified to apply for the post concerned and depriving them of an opportunity to compete for the post. It has also led to persons who get employed, without the following of a regular procedure or even through the backdoor or on daily wages, approaching the courts, seeking directions to make them permanent in their posts and to prevent regular recruitment to the posts concerned. The courts have not always kept the legal aspects in mind and have occasionally even stayed the regular process of employment being set in motion and in some cases, even directed that these illegal, irregular or improper entrants be absorbed into service. A class of employment which can only be called "litigious employment", has risen like a phoenix seriously impairing the constitutional scheme. Such orders are passed apparently in exercise of the wide powers under Article 226 of the Constitution. Whether the wide powers under Article 226 of the Constitution are intended to be used for a purpose certain to defeat the concept of social justice and equal opportunity for all, subject to affirmative action in the matter of public employment as recognised by our Constitution, has to be seriously pondered over."

It can be seen from the above that the entire issue pivoted around the fact that the State initially made appointments without following any rational procedure envisaged under the Scheme of the Constitution in the matters of public appointments. This court while recognising the authority of the State to make temporary appointments engaging workers on daily wages declared that the regularisation of the employment of such persons which was made without following the procedure conforming to the requirement of the Scheme of the Constitution in the matter of public appointments cannot become an alternate mode of recruitment to public appointment.

22. It was further declared that the jurisdiction of the Constitutional Courts under Article 226 or Article 32 cannot be exercised to compel the State or to enable the State to perpetuate an illegality. This court held that compelling the State to absorb persons who were employed by the State as casual workers or daily-wage workers for a long period on the ground that such a practice would be an arbitrary practice and violative

of Article 14 and would itself offend another aspect of Article 14 i.e. the State chose initially to appoint such persons without any rational procedure recognized by law thereby depriving vast number of other eligible candidates who were similarly situated to compete for such employment.

23. Even going by the principles laid down in Umadevi's case, we are of the opinion that the State of Punjab cannot be heard to say that the appellants are not entitled to be absorbed into the services of the State on permanent basis as their appointments were purely temporary and not against any sanctioned posts created by the State.

24. In our opinion, the initial appointment of the appellants can never be categorized as an irregular appointment. The initial appointment of the appellants is made in accordance with the statutory procedure contemplated under the Act. The decision to resort to such a procedure was taken at the highest level of the State by conscious choice as already noticed by us.

25. The High Court in its decision in LPA No.209 of 1992 recorded that the decision to resort to the procedure under Section 17 of the Act was taken in a meeting dated 24.3.1984 between the Advisor to the Government of Punjab and senior officers of the various Banks in the public sector. Such a decision was taken as there was a need to provide necessary security to the public sector banks. As the State was not in a position to provide requisite police guards to the banks, it was decided by the State to resort to Section 17 of the Act. As the employment of such additional force would create a further financial burden on the State, various public sector banks undertook to take over the financial burden arising out of such employment. In this regard, the written statement filed before the High Court in the instant case by respondent nos.1 to 3 through the Assistant Inspector General of Police (Welfare & Litigation) is necessary to be noticed. It is stated in the said affidavit:

"2. That in meeting of higher officers held on 27.3.1984 in Governor House Chandigarh with ShriSurinderNath, IPS, Advisor to Governor of Punjab, in which following decisions were taken:-

(i) That it will not be possible to provide police guard to banks unless the Banks were willing to pay for the same and additional force could be arranged on that basis, it was decided that police guards should be requisitioned by the Banks for their biggest branches located at the Distt. and Sub Divisional towns. They should place the requisition with the Distt. SSPs endorsing a copy of IG CID. In the requisition, they should clearly state that the costs of guard would be met by them. It will then be for the police department to get additional force sanctioned. This task should be done on a top priority. In the meantime depending upon the urgency of the need of any particular branch, police Deptt. may provide from police strength for its protection.

(ii) For all other branches guards will be provided by Distt. SSP after selecting suitable ex-servicemen or other able bodied persons who will be appointed as Special Police Officer in terms of Section 17 of the Police Act. Preference may be given to persons who may already be in possession of licence weapons. All persons appointed as SPO for this purpose will be given a brief training for about 7 days in the Police Lines in the handling of weapons taking suitable position for protection of branches. These SPOs will work under the discipline and control and as per Police Act, they will have the same powers, privileges and protection and shall be amenable to same penalty as an ordinary police personnel."

It can be seen from the above that a selection process was designed under which the District Senior Superintendent of Police is required to choose suitable ex-servicemen or other able bodied persons for being appointed as Special Police Officers in terms of Section 17 of the Act. It is indicated that the persons who are already in possession of a licensed weapon are to be given priority.

26. It is also asserted by the appellants that pursuant to the requisition by the police department options were called upon from ex-servicemen who were willing to be enrolled as Special Police Officer (SPOs) under section 17 of the Police Act, 1861.

27. Such a procedure making recruitments through the employment exchanges was held to be consistent with the requirement of Articles 14 and 16 of the Constitution by this Court in Union of India and Ors. v. N. Hargopal.

28. The abovementioned process clearly indicates it is not a case where persons like the appellants were arbitrarily chosen to the exclusion of other eligible candidates. It required all able bodied persons to be considered by the SSP who was charged with the responsibility of selecting suitable candidates.

Para 4 of the writ petition and at p. 34 of the SLP paperbook:

"That the Government made a policy to enrol the ex-servicemen to guard the life and property of the government employees as well as government employees. All the petitioners being ex-servicemen enrolled themselves in the employment exchange. The Police Department sent the intimation to the employment exchange and thereafter all the ex-servicemen who were enrolled with the employment exchange were called upon and got their option to be enrolled in as Special Police Officer (SPOs) under Section 17 of the Police Act, 1861 (hereinafter called as the SPOS). Those persons who were having armed licence were enrolled as SPOS and this enrolment was made by the Superintendent of Police, Amritsar."

7 (1987) 3 SCC 308: 1987 SCC (L&S) 227: (1987) 4 ATC 51:

"9... We, therefore, consider that insistence on recruitment through employment exchanges advances rather than restricts the rights guaranteed by Articles 14 and 16 of the Constitution. The submission that employment exchanges do not reach everywhere applies equally to whatever method of advertising vacancies is adopted. Advertisement in the daily press, for example, is also equally ineffective as it does not reach everyone desiring employment."

29. Such a process of selection is sanctioned by law under section 17 of the Act. Viewed in the context of the situation prevailing at that point of time in the State of Punjab, such a process cannot be said to be irrational. The need was to obtain the services of persons who had some experience and training in handling an extraordinary situation of dealing with armed miscreants.

30. It can also be noticed from the written statement of the Assistant Inspector General of Police (Welfare & Litigation) that preference was given to persons who are in possession of licensed weapons. The recruitment of the appellants and other similarly situated persons was made in the background of terrorism prevailing in the State of Punjab at that time as acknowledged in the order dated 23.4.2002 of the SSP. The procedure which is followed during the normal times of making recruitment by inviting applications and scrutinising the same to identify the suitable candidates would itself take considerable time. Even after such a selection the selected candidates are required

to be provided with necessary arms and also be trained in the use of such arms. All this process is certainly time consuming. The requirement of the State was to take swift action in an extra-ordinary situation.

31. Therefore, we are of the opinion that the process of selection adopted in identifying the appellants herein cannot be said to be unreasonable or arbitrary in the sense that it was devised to eliminate other eligible candidates. It may be worthwhile to note that in Umadevi's case, this Court was dealing with appointments made without following any rational procedure in the lower rungs of various services of the Union and the States.

32. Coming to the other aspect of the matter pointed out by the High Court - that in the absence of sanctioned posts the State cannot be compelled to absorb the persons like the appellants into the services of the State, we can only say that posts are to be created by the State depending upon the need to employ people having regard to various functions the State undertakes to discharge.

"Every sovereign Government has within its own jurisdiction right and power to create whatever public offices it may regard as necessary to its proper functioning and its own internal administration."

33. It is no doubt that the assessment of the need to employ a certain number of people for discharging a particular responsibility of the State under the Constitution is always with the executive Government of the day subject to the overall control of the Legislature. That does not mean that an examination by a Constitutional Court regarding the accuracy of the assessment of the need is barred.

34. This Court in S.S. Dhanoa v. Union of India (1991) 3 SCC 567 did examine the correctness of the assessment made by the executive government. It was a case where Union of India appointed two Election Commissioners in addition to the Chief Election Commissioner just before the general elections to the LokSabha. Subsequent to the elections, the new government abolished those posts. While examining the legality of such abolition, this Court had to deal with an argument[6] whether the need to have additional commissioners ceased subsequent to the election. It was the case of the Union of India that on the date posts were created there was a need to have additional commissioners in viewof certain factors such as the reduction of the lower age limit of the voters etc. This Court categorically held that:

"27. The truth of the matter as is apparent from the record is that …….there was no need for the said appointments…..".

35. Therefore, it is clear that the existence of the need for creation of the posts is a relevant factor 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.

"21. In the first instance, the petitioner and the other Election Commissioners were appointed when the work of the Commission did not warrant their appointment. The reason given by Respondent (Union of India), that on account of the Constitution (61st Amendment) Act reducing the voting age and the Constitution (64th Amendment) and (65th Amendment) Bills relating to election to the Panchayats and Nagar Palikas, the

work of the Commission was expected to increase and, therefore, there was need for more Election Commissioners, cuts no ice. As has been pointed out by Respondent 2, the work relating to revision of electoral rolls on account of the reduction of voting age was completed in all the States except Assam by the end of July 1989 itself, and at the Conference of the Chief Electoral Officers at Tirupati, Respondent 2 had declared that the entire preparatory work relating to the conduct of the then ensuing general elections to the LokSabha would be completed by August in the whole of the country except Assam. Further, the Constitution (64th and 65th Amendment) Bills had already fallen in Parliament, before the appointments. In fact, what was needed was more secretarial staff for which the Commission was pressing, and not more Election Commissioners. What instead was done was to appoint the petitioner and the other Election Commissioner on 16-10-1989. Admittedly, further the views of the Chief Election Commissioner were not ascertained before making the said appointments. In fact, he was presented with them for the first time in the afternoon of the same day i.e. 16-10-1989." (SCC p. 581, para 21)

In the case of ***Rajendra Kumar Nayak Vs. Orissa Mining Corporation Ltd. &Ors***. the Hon'ble Apex Court issued certain guidelines for absorption of such irregular recruitees. In Para 8 to 14 of the said Judgment Hon'ble Apex Court held as follows:-

"8. It is worthwhile to mention here that the Court comes into the picture only to ensure observance of fundamental rights, and to ensure the rule of law and to see that the executive acts fairly and gives a fair deal to its employees consistent with requirements of Articles 14 and 16 of the Constitution, and that the authority 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. For this very reason, it is held that a person should not be kept in temporary or ad hoc status for a long period. Where a temporary or ad hoc appointment is continued for long, the Court presumes that there is need of a regular post and accordingly directs for regularization. While issuing direction for regularization, the Court must first ascertain the relevant fact, and must be cognizant of the several situations and eventualities that may arise on account of such direction. If for any reason, 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 rules, and his service record is satisfactory and his appointment does not run counter to the reservation policy of the State. Even though a casual labourer is continued for a fairly long spell, say two or three years, a presumption may arise that there is regular need for his service. In such a situation, it becomes obligatory for the concerned authority to examine the feasibility of his regularization. While doing so, the authorities ought to adopt a positive approach coupled with empathy for the person. But here is a case where even though the petitioner is continuing in the post for last more than 30 years, his service has not yet been regularized, though persons appointed after him have already been regularized.

9. In Umadevi (3) (supra) the apex Court held as follows:

"One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in State of Mysore v. S.V. Narayanappa, AIR 1967 SC 1071; R.N. Nanjundappa v. T. Thimmaiah, (1972) 1 SCC 409 and B.N. Nagarajan v. State of Karnataka (1979) 4 SCC 507 and referred to in para 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the

employees have continued to work for ten years or more but without the intervention of orders of the courts or of tribunals. The question of regularisation of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularise as a one-time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of the courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularisation, if any already made, but not sub judice, need not be reopened based on this judgment, but there should be no further bypassing of the constitutional requirement and regularising or making permanent, those not duly appointed as per the constitutional scheme."

10. Further, in M.L. Kesari (supra), following the ratio decided in Umadevi (3) (supra), the apex Court in paragraphs 9 and 10 of the judgment held as follows:

"9. The term "one-time measure" has to be understood in its proper perspective. This would normally mean that after the decision in Umadevi(3), each department or each instrumentality should undertake a one-time exercise and prepare a list of all casual, daily-wage or ad hoc employees who have been working for more than ten years without the intervention of courts and tribunals and subject them to a process verification as to whether they are working against vacant posts and possess the requisite qualification for the post and if so, regularise their services.

10. At the end of six months from the date of decision in Umadevi (3), cases of several daily- wage/ad hoc/casual employees were still pending before courts. Consequently, several departments and instrumentalities did not commence the one-time regularisation process. On the other hand, some government departments or instrumentalities undertook the one-time exercise excluding several employees from consideration either on the ground that their cases were pending in courts or due to sheer oversight. In such circumstances, the employees who were entitled to be considered in terms of para 53 of the decision in Umadevi (3), will not lose their right to be considered for regularisation, merely because the one-time exercise was completed without considering their cases, or because the six-month period mentioned in para 53 of Umadevi (3) has expired. The one- time exercise should consider all daily-wage/ad hoc/casual employees who had put in 10 years of continuous service as on 10-4-2006 without availing the protection of any interim orders of courts or tribunals. If any employer had held the onetime exercise in terms of para 53 of Umadevi (3), but did not consider the cases of some employees who were entitled to the benefit of para 53 of Umadevi (3), the employer concerned should consider their cases also, as a continuation of the one-time exercise. The one-time exercise will be concluded only when all the employees who are entitled to be considered in terms of para 53 of Umadevi (3), are so considered.

11. In Malathi Das (supra) relying upon the ratio decided in Umadevi(3) (supra), the apex Court held that refusing regularization of service cannot be countenanced to such decision and, therefore, clarified that the appellants therein so also all other competent authorities of the State would be obliged and duty bound to regularize the services of employees which will be done forthwith.

12. In Amarendra Kumar Mohapatra (supra) the apex Court clarified the ratio decided in Umadevi (3) (supra) at paragraphs 34 and 35 as follows:

"34. A Constitution Bench of this Court in Secretary, State of Karnataka and Ors. v. Umadevi(3) and Ors. (2006) 4 SCC 1 : (AIR 2006 SC 1806 : 2006 AIR SCW 1991) ruled that regularisation of illegal or irregularly appointed persons could never be an alternative mode of recruitment to public service. Such recruitments were, in the opinion of this Court, in complete negation of the guarantees contained in Articles 14 and 16 of the Constitution. Having said so, this Court did not upset the regularisations that had already taken place, regardless of whether such regularisations related to illegal or irregular appointments. The ratio of the decision in that sense was prospective in its application, leaving untouched that which had already happened before the pronouncement of that decision. This is evident from the following passage appearing in the decision:

"We also clarify that regularization, if any already made, but not subjudice, need not be reopened based on this judgment, but there should be no further by-passing of the constitutional requirement and regularizing or making permanent, those not duly appointed as per the constitutional scheme."

35. The above is a significant feature of the pronouncement of this Court in Umadevi's case (supra). The second and equally significant feature is the exception which this Court made in para 53 of the decision permitting a one-time exception for regularising services of such employees as had been irregularly appointed and had served for ten years or more. The State Government and its instrumentalities were required to formulate schemes within a period of six months from the date of the decision for regularisation of such employees. This is evident from a reading of para 53 (of SCC) : (Para 44 of AIR, AIR SCW) of the decision which is reproduced in extenso:

"One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V. Narayanappa (AIR 1967 SC 1071) (supra), R.N. Nanjundappa (AIR 1972 SC 1767) (supra), and B.N. Nagarajan (AIR 1979 SC 1676) (supra), and referred to in paragraph 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of courts or of tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularize as a one time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date."

13. So far as irregular appointment is concerned, the same has alsobeen clarified in M.L. Kesari (supra) at paragraph-41 as follows:

"41. As to what would constitute an irregular appointment is no longer res integra. The decision of this Court in State of Karnataka v. M.L. Kesari and Ors. (2010) 9 SCC 247 : (AIR 2010 SC 2587 : 2010 AIR SCW 4577), has examined that question and explained

the principle regarding regularisation as enunciated in Umadevi's case (supra). The decision in that case summed up the following three essentials for regularisation (1) the employees worked for ten years or more, (2) that they have so worked in a duly sanctioned post without the benefit or protection of the interim order of any court or tribunal and (3) they should have possessed the minimum qualification stipulated for the appointment. Subject to these three requirements being satisfied, even if the appointment process did not involve open competitive selection, the appointment would be treated irregular and not illegal and thereby qualify for regularisation. Para 7 in this regard is apposite and may be extracted at this stage:

"7. It is evident from the above that there is an exception to the general principles against "regularisation" enunciated in Umadevi, if the following conditions are fulfilled:

(i) The employee concerned should have worked for 10 years or more in duly sanctioned post without the benefit or protection of the interim order of any court or tribunal. In other words, the State Government or its instrumentality should have employed the employee and continued him in service voluntarily and continuously for more than ten years.

(ii) The appointment of such employee should not be illegal, even if irregular.

Where the appointments are not made or continued against sanctioned posts or where the persons appointed do not possess the prescribed minimum qualifications, the appointments will be considered to be illegal. But where the person employed possessed the prescribed qualifications and was working against sanctioned posts, but had been selected without undergoing the process of open competitive selection, such appointments are considered to be irregular."

14. The above being the settled principles of law, there is no iota of doubt that the petitioner, who has been continuing in service for more than 30 years, is entitled to be regularized, particularly when the persons appointed after him have already been regularized. Therefore, the opposite parties are directed to regularize the service of the petitioner and grant him all consequential service and financial benefits as admissible to the post held by him, i.e., Junior Assistant in accordance with law as expeditiously as possible, preferably within a period of three months from the date of communication of the judgment."

In the case of ***Dr. Prasanna Kumar Mishra Vs. State of Orissa &Ors.*** the Hon'ble Apex Court issued certain guidelines for absorption of such irregular recruitees. In Para 7 to 13 and 22 of the said Judgment Hon'ble Apex Court held as follows:-

*"7. In **Binan Kumar Mohanty & others** (supra) referring to **Kapila Hingorani v. State of Bihar** (2003) 6 SCC 1 the Apex Court held that the Government company/public sector undertakings being "States) would be constitutionally liable to respect life and liberty of all persons in terms of Article 21 of the Constitution of India. Therefore, if the petitioner has rendered service for around 20 years, keeping in view the ratio decided in KapilaHingorani (supra), this Court issues direction to the opposite parties to mitigate the hardship of the employees. Financial stringency is no ground for not issuing requisite directions when there is violation of fundamental rights of the petitioner. Allowing a person to continue for a quite long period of 20 years of service and exploiting him on the pretext of financial crunch in violation of Article 21 of the Constitution of India is sheer arbitrariness of the authority, which is highly condemnable.*

8. In Narendra Kumar Ratha and others (supra) this Court has taken into consideration the object of Article 16 of the Constitution of India to create a constitutional right to equality of opportunity and employment in public offices. The word 'employment of appointment cover not merely the initial appointment, but also other attributes like salary, increments, revision of pay, promotion, gratuity, leave pension and age of superannuation etc. Appointment to any post under the State can only be made in accordance with provisions and procedure envisage under the law and guidelines governing the field.

9. In ***Prabodh Verma and others v. State of U.P. and others****,(1984) 4 SCC 251, the apex Court held that Article 16 is an instance of the application of the general rule of equality laid down in Article. 14, with special reference to the opportunity for appointment and employment under the Government.*

10. Similar view has also been taken by the apex Court in Km. ***Neelima Mishra v. Harinder Kaur Paintal and others,*** *(1990) 2 SCC 746. AIR 1990 SC 1402 and* ***E.P. Royappa v. State of Tamilnadu and another****, (1974) 4 SGC 3. Clause-1 of Article 16 guarantees equality of opportunity for all citizens in the matters of employment or appointment to any office under the State. The very concept of equality implies recourse to valid classification for preference in favour of the disadvantaged classes of citizens to improve their conditions so as to enable them to raise themselves to positions of equality with the more fortunate classes of citizens. This view has been taken note of by the apex Court in the case of IndraSawhney and others v. Union of India and others, 1992 Supp. (3) SCC 217: AIR 1993 SC 477.*

11. In view of such position, if the petitioner has been allowed to continue for a quite long period on contractual basis due to financial crunch, he cannot be thrown out stating that he has not been recruited as per the provisions of BPUT Act and Rules framed thereunder. Therefore, the petitioner's case should be taken into consideration for regularization of his service.

12. In ***Suvendu Mohanty*** *(supra) this Court has taken into consideration the judgment of the apex Court in* ***Secretary, State of Karnataka v. Umadevi,*** *2006 (4) SCC 1: AIR 2006 SC 1806 wherein the apex Court held that the appointments made against temporary or ad-hoc basis are not to be regularized. In paragraph 53 of the said judgment, it is provided that irregular appointment of duly qualified persons against sanctioned posts, who have worked for 10 years or more can be considered on merits and steps to be taken as one time measure to regularize them. In Paragraph 53 of the said judgment, the apex Court has held as follows:*

53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V. Narayanapp, R.N. Nanjundappa and B.N. Nagarajan and referred to in para 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of the Courts or of tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularise as a non-time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of the Courts or of

tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up. in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularization, if any already made, but not sub judice, need not be reopened based on this judgment, but there should be no further bypassing of the constitutional requirement and regularising or making permanent, those not duly appointed as per the constitutional scheme."

13. The object behind the exception carved out in this case was to permit regularization of such appointments, when are irregular but not illegal, and to ensure security of employment of those persons who served the State Government and their instrumentalities for more than ten years. Similar question came up for consideration before the apex Court in Civlil Appeal No.2835 of 2015 (arising out of SLP (Civil) No 20169 of 2013 disposed of on 13.3.2015. In paragraphs 12 and 13. the apex Court has held as follows:

"12. Elaborating upon the principles laid down in Umadevi's case (supra) and explaining the difference between irregular and illegal appointments in State of Karnataka & Ors. V. M.L. Kesari & Ors., (2010) 9 SCC 247, this Court held as under: "7. It is evident from the above that there is an exception to the general principles against "regularisation" enunciated in Umadevi (3) if the following conditions are fulfilled:

(i) The employee concerned should have worked for 10 years or more in duly sanctioned post without the benefit or protection of the interim order of any Court or tribunal. In other words, the State Government or its instrumentality should have employed the employee and continued him in service voluntarily and continuously for more than ten years.

(ii) The appointment of such employee should not be illegal, even if irregular. Where the appointments are not made or continued against sanctioned posts or where the persons appointed do not possess the prescribed minimum qualifications the appointments will be considered to be illegal. But where the persons employed possessed the prescribed qualifications and was working against sanctioned posts, but had been selected without undergoing the process of open competitive selection, such appointments are considered to be irregular."

In the case of ***Kalyani Pattnaik Vs. Registrar, Utkal University &Ors***. the Hon'ble Apex Court issued certain guidelines for absorption of such irregular recruitees. In Para 6 to 8 of the said Judgment Hon'ble Apex Court held as follows:-

"The decision of the Hon'ble Apex Court with regard to regularisation is squarely applicable to the petitioner's case for regularisation of her service. It would be apposite to refer the case in Uma Devi (supra), Narendra Kumar Tiwari (supra), State of Jharkhand and others (supra) and Bhupinder Singh (supra).

7. In view of the decision of the Hon'ble Apex Court, the petitioner case deserves to be regularised taking into consideration her considerable period of service from 20.03.1975 to 31.03.2005 for that the petitioner is entitled to all retirement benefits.

8. On cumulative effect of the reasons and judicial pronouncements and in order to subserve the interest of justice, the opposite parties are directed to regularise the

services of the petitioner since the opposite parties utilised her service for a prolonged period of 37 years.

9. In the back drop of the aforesaid reasons, the opposite parties are directed to regularise the petitioner's service from 20.03.1975 to 31.03.2005 and consequent upon the regularisation, appropriate order be passed to compute the said period for grant of admissible post retirement benefits and thereby disburse the same to the petitioner as expeditiously as possible. The entire exercise be completed within a period of four months from the date of receipt of certified copy of the order. With the aforesaid observation and direction, the writ petition stands disposed of."

13. Mr. Behera, learned counsel for the Petitioner submitted that as in spite of his eligibility the Petitioner was not absorbed in the regular establishment, he approached the learned Tribunal in O.A. No. 987(C) of 2012 with a prayer to direct the Opp. Parties to absorb him in the regular establishment and thereby enabling him to get the benefit of pension and another pensionary benefits under OCS (Pension) Rules, 1992.

14. It is submitted that the said claim of the Petitioner as made in O.A. No. 987(C) of 2012 was disposed of by the learned Tribunal vide order dtd.04.07.2016 with the following directions:-

"In view of the above position, as the applicant has completed more than five years of service in the Work Chargeddstablishment before retirement, he is entitled to be regularized against the post available, in the regular establishment. Accordingly, the O.A. is allowed to the extent that the respondent authorities may examine and take appropriate action Vor regularization of the applicant in any available vacancy in the regular establishment prior to his retirement and in the event such vacancy was available, he was to be regularized with effect from the said date and consequently his pay is to be fixed in the regular establishment and thereafter extend the benefits of pension and other pensionary benefits on the basis of the last pay fixed. Such action be taken within a period of four months from the date of receipt of a copy of this order.

With these orders, the O.A. is disposed of.
No order as to cost."

15. It is submitted that without considering the claim of the Petitioner as directed by the learned Tribunal in its Order under Annexure-10, O.P. No. 2 vide the impugned order dtd.16.09.2016 rejected the Petitioner's claim. The present writ Petition has been filed by challenging the said order and with a further prayer to direct the Opp. Parties to grant pension and other pensionary benefits in favour of the Petitioner.

16. Mr. Behera, learned counsel for the Petitioner brought to the notice of this Court various orders issued in favour of similarly situated Work Charged employees passed under Annexure-12 series, wherein similar claim has been dealt with by the learned Tribunal.

17. It is submitted that in similar claim made by one ***Narusu Pradhan*** in ***O.A. No. 1189(C) of 2006***, the claim was not only allowed by the learned Tribunal vide its Order dtd.11.06.2009 under Annexure-13, but also the said order was confirmed by this Court while dismissing the writ Petition filed by the State Opp. Parties under Annexure-14 and by the Hon'ble Apex Court in its order under Annexure-15.

18. Mr. Behera, learned counsel for the Petitioner also brought to the notice of this Court the order passed by the learned Tribunal in another similar case in ***O.A. No. 4189(C) of 2013 (Pitambar Sahoo Vs. State of Odisha)***.

19. Learned Tribunal not only allowed similar claim as made by the Petitioner in O.A. No.4189(C) of 2013 vide its order dtd.18.04.2017, but the said order was confirmed by this Court in its order dtd.20.12.1917 in W.P.(C) No. 24041 of 2017. It is also submitted that the challenge made by the State-Opp. Parties before the Hon'ble Apex Court in Special Leave Petition (Civil) No.30806 of 2018 was also dismissed vide order dtd.10.09.2018.

20. Mr. Behera, learned counsel for the Petitioner further submitted that the order passed in the case of ***Narusu Pradhan Vs. State of Odisha*** as well as ***Pitambar Sahoo Vs. State of Odisha*** after being confirmed by the Hon'ble Apex Court were implemented by the State-Opp. Parties by extending the benefit of pension and other pensionary benefits in their favour. Mr. Behera, learned counsel for the Petitioner also brought to the notice of this Court an order passed by this Court on 12.08.2019 in W.P.(C) No.9099 of 2016.

21. Learned counsel for the Petitioner also relied on another decision passed in the case of ***Chandra Nandi Vs. State of Odisha &Ors., (W.P.(C) No.19950 of 2011***, decided on 03.02.2021) by this Court. It is submitted that when similar claim raised by the said Chandra Nandi was initially allowed by this Court, the same was challenged before the Hon'ble Apex Court and Hon'ble Apex Court when remanded the matter for fresh consideration, this Court again vide order dtd.03.02.2021 reiterated its earlier view. It is submitted that the said order passed by this Court on 03.02.2021 was thereafter confirmed by the Hon'ble Apex Court and the Petitioner therein has been extended with the benefits of pension and other pensionary benefits.

22. Mr. Behera, learned counsel for the Petitioner also brought to the notice of this Court a similar issue decided by this Court in its Order dtd.20.06.2022 in W.P.(C) No. 14787 of 2022. This Court relying on the decision rendered in the case of ***Narusu Pradhan*** and ***Chandra Nandi,*** allowed the claim of the Petitioner therein by directing the Opp. Parties to grant similar benefits.

23. Making all such submissions, Mr. Behera, learned counsel for the Petitioner submitted that the Petitioner being similarly situated, he is also eligible and entitled to get the benefit of pension and other pensionary benefits as has been extended in favour of similarly situated persons.

24. Mr. Balabantaray, learned Standing Counsel on the other hand made his submission basing on the stand taken in the counter filed by the Opp. Parties. It is submitted that the claim of the Petitioner as made in O.A. No. 907(C) of 2012 when was disposed of by the learned Tribunal vide order dtd.04.07.2016, the same was duly considered and rejected vide order dtd.16.09.2016.

25. It is submitted that prior to rejection of the said claim in terms of the order passed by the learned Tribunal on 04.07.2016, the Petitioner had approached this Court in W.P.(C) No. 1846 of 2017. This Court vide order dtd. 26.04.2017 was not inclined to interfere with the order and observed as follows:-

> *"As it appears from the impugned order that the Tribunal while disposing of the Original Application has directed the respondents to examine the mater and take appropriate action for regularization of the applicant in any available vacancy in the regular establishment prior to his retirement and in the event such vacancy was available, he was to be regularize with effect from the said date.*
>
> *In view of such observation, it is open to the petitioners to examine the matter as directed by the Tribunal and take appropriate action.*
>
> *The Writ Petition is disposed of accordingly."*

26. It is also submitted that the service condition of the Petitioner is governed by the instruction i.e. Odisha Work Charged Employees (Appointment & Condition of Service) instruction, 1974 and in the said instruction, there is no provision to grant pension at par with regular employees. It is also submitted that the claim of parity as made by the Petitioner is not applicable as the persons brought over to the regular establishment vide order under Annexure-12 series were so absorbed taking into account their position in the seniority list of the said project.

27. Mr. Balabantaray, learned Standing Counsel further submitted that since the Petitioner has retired in the meantime, his claim of regularization is not maintainable and accordingly he is not eligible to get the benefit of pension and other pensionary benefits.

28. Heard learned counsel appearing for the Parties. Perused the materials available on record. This Court after going through the same finds that there is no dispute with regard to the appointment of the Petitioner in the Work Charged Establishment, where he joined on 01.04.1981. It is also not disputed that the Petitioner on such appointment w.e.f.01.04.1981 was allowed to continue in the Work Charged Establishment and in spite of his clear eligibility, the State-Opp.Parties never initiated any process to absorb the Petitioner in the regular establishment pursuant to the resolution issued on 15.05.1997 under Annexure-5 and

the direction of the Hon'ble Apex Court contained in Para 53 in the case of ***State of Karnatak vs. Uma Devi(3)***.

29. This Court further finds that similar claim raised by similarly situated persons in the case of ***Narusu Pradhan Vs. State of Odisha and Pitambar Sahoo Vs. State of Odisha*** as well as ***Chandra Nandi Vs. State of Odisha*** were not only allowed by the learned Tribunal, but also the said direction was upheld by this Court as well as by the Hon'ble Apex Court. After such confirmation of the order by the Hon'ble Apex Court, the Petitioners like Narusu Pradhan, Pitambar Sahoo & Chandra Nandi have been extended with the benefit of regularization and consequential sanction of pension and other pensionary benefits under OCS (Pension) Rules, 1992.

30. Therefore, in view of such decision of this Court, which has been upheld by the Hon'ble Apex Court in the case of ***Narusu Pradhan, Pitambar Sahoo & Chandra Nandi***, the claim of the Petitioner as per the considered view of this Court is coming within the parameters of the said decisions. Hence, this Court is of the view that O.P. No. 2 without proper appreciation of the Petitioner's claim, rejected the same vide the impugned order dtd.16.09.2016 under Annexure-11. This Court has therefore got no hesitation in quashing the said order and while quashing the same, directs the Opp. Parties to grant similar benefits as has been done in the case of ***Narusu Pradhan, Pitambar Sahoo as well as Chandra Nandi***.

31. This Court directs the Opp. Parties to complete the entire exercise within a period of three (3) months from the date of receipt of this order. The Petitioner is directed to provide a copy of this order before O.P. No. 1 within a period of seven (7) days from the date of receipt of this order.

32. The writ Petition is disposed of with the aforesaid observation and directions.

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2022 (III) ILR-CUT-629

BIRAJA PRASANNA SATAPATHY, J.

WPC (TAC) NO. 50 OF 2014

PANCHANAN DAS …….. Petitioner

.V.

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

SERVICE LAW – Scale of Pay – Petitioner claim Headmaster scale of pay from 9.9.1974 – Opp.Party rejected the claim on the ground that the Petitioner does not possess 7 years of teaching experience as a Trained Graduate Teacher as required by Board's Regulation dated

29.4.1977 – Effect of – Held, as the petitioner was already appointed against the Post of Headmaster prior to coming into effect of the Board's Regulation, he is entitled to get the benefit of the Headmaster scale of pay w.e.f. 9.9.1974. (Para 20)

Case Law Relied on and Referred to :-

1. (2001) 2 SCC-480 : Pabitra Mohan Das & others vs. State of Orissa & Others.

For Petitioner : M/s. S.N.Sahoo & B.K.Nayak
For Opp.Parties: Mr. B.A.Prusty, Standing Counsel.

JUDGMENT Date of Hearing : 12.09.2022 : Date of Judgment : 30.09.2022

BIRAJA PRASANNA SATAPATHY, J.

1. This matter is taken up through Hybrid Mode.

2. Heard Mr. M.K. Rath, learned counsel appearing on behalf of Mr. B.K.Nayak, learned counsel for the Petitioner and Mr. Prusty, learned Standing counsel for the State Opposite Parties.

3. The present Writ Petition has been filed by the Petitioner challenging the order dated 15.02.1993 passed by the Opposite Party No.3, wherein the prayer of the Petitioner to allow Headmaster scale of pay in his favourw.e.f. 9.9.1974 was rejected.

4. Learned counsel for the Petitioner submitted that the Petitioner was initially appointed as an Asst. Teacher (T.G) in Chintamani Bidyapitha, Narayangarh on 03.08.1965 and continued in the said school till 31.12.1972 as against a Trained Graduate Post.

5. It is submitted that during his continuance in thesaid school, the Petitioner completed his B.Ed degree from Regional College of Education, Bhubaneswar on 05.11.1971.

6. It is further submitted that the Petitioner subsequently was appointed as a Trained Graduate Teacher in Nagapur High School w.e.f. 1.1.1973 where he continued till 8.9.1974. The Petitioner subsequently was appointed as Headmaster in Panchayat High School, Benapanjari vide order of appointment issued on 26.08.1974 under Annexure-1.

7. Mr. Rath, learned counsel for the Petitioner submitted that the Petitioner pursuant to the said order under Annexure-1 joined as a Headmaster in Panchayat HighSchool, Benapanjari on 9.9.1974.

8. It is also submitted that the services of the Petitioner vide officer order dated 29.07.1976 under Annexure-2, though was approved as against the post of Headmaster, but the scale of pay as due and admissible when was not extended, the

Petitioner approached the Opposite Parties time and again seeking extension of the Headmaster scale of pay w.e.f.9.9.1974.

9. Mr. Rath, learned counsel for the Petitioner submitted that the claim of the Petitioner to get the Headmaster scale of pay when was allowed w.e.f. 20.10.1982, the Petitioner again represented the Opposite Parties to extend the said benefit w.e.f 9.9.1974 i.e. date of his appointment as against the post of Headmaster.

10. It is submitted that the Opposite Party No.3 vide his letter dated 05.04.1991 under Annexure-5 when recommended the case of the Petitioner for grant of Headmaster scale of pay w.e.f. 9.9.1974 in place of 20.10.1982, the Opposite Party No.2 vide his letter dated 19.06.1991 requested the Opposite Party No.3 to submit various documents for consideration of the Petitioner's claim.

11. It is submitted that subsequently the Petitioner was communicated with the impugned order dated 15.02.1993 under Annexure-7, wherein his prayer to extend the Headmaster scale of pay w.e.f. 9.9.1974 was rejected basing on the order passed by the Government.

12. It is submitted that since the Petitioner continued as against a Trained Graduate Post w.e.f 03.08.1965 to 31.12.1972 and from 01.01.1973 to 08.09.1974 and completed the B.Ed. degree on 05.11.1971, the Petitioner because of his appointment and joining as Headmaster on 9.9.1974, became eligible to get the Headmaster scale of pay from the said date.

13. It is submitted that the Petitioner being an appointee prior to coming into effect of the Board's Regulation which came into effect from 29.4.1977, the Petitioner is entitled to get the benefit of the Headmaster scale of pay w.e.f. 9.9.1974. But it is submitted that the Opposite Party No.3 basing on the order passed by the Government illegally rejected the said claim by holding that the Petitioner is not entitled to get the said scale of pay w.e.f.9.9.1974 and the same has been rightly extended in his favour from 20.10.1982.

14. Mr. Rath, learned counsel for the Petitioner in support of his submission relied on the decision of the Hon'ble Apex Court in the case of **Pabitra Mohan Das & others vs. State of Orissa & Others** reported in **(2001) 2 SCC-480**.

15. It is submitted that the Hon'ble Apex Court in the said reported judgment upheld the decision of the Special Bench of this Court. Hon'ble Apex Court in Para-7 of the said judgment held as follows-

> *"7. Having examined the rival contentions and on a thorough scrutiny of two earlier Full Bench decisions as well as the impugned judgment of the Special Bench we are of the considered opinion that the Special Bench rightly thought it appropriate to reconsider the entire matter afresh and re-determine the issues involved in the light of the relevant provisions of the Act, Rules and Regulations after hearing at length on all issues and there was no infirmity on that score even though the point of reference was of a limited nature. Courts exist to interpret the law and while examining the provisions of any Act, Rule or*

Regulation, if it is felt that the earlier decision on the question is not clear on any particular issue of has created confusion in resolving the disputes of has caused hardship to a group of people, it would be the duty of the court to re- examine the matter after giving opportunity to all parties concerned and by such process question of taking away anybody's vested right does not arise. In the case in hand it is not a particular writ or order that had been issued in favour of any individual is sought to be nullified by the subsequent Special Bench decision. On the other hand the erroneous conclusion of the relevant provisions of the Act, Regulation and Rules are sought to be corrected and we see no infirmity in thisapproach of the Special Bench. That apart, though point of reference may be of a limited nature but in answering the same if the Court feels that it would be in the interest of justice to constitute a larger Bench and examine the correctness of any earlier conclusion which might have been made on an erroneous interpretation of any provision, then there would be no fetter for adopting that procedure. In this view of the matter we see no infirmity with the approach of the Special Bench in re-examining the issues afresh in the light of the relevant provisions of the Act, Rules and Regulations. We have also carefully examined the conclusions of the impugned judgment of the Special Bench and we are unable to persuade ourselves to agree with the submission of Mr. Ranjit Kumar that the said conclusions are either erroneous on interpretation of relevant provisions or in any way intended to take away the rights of any persons who have got the benefit of the earlier Full Bench decision. It is not disputed that with effect from 29.5.1977 Regulation 17 in the Board of Secondary Education has been brought into force which makes it obligatory for every institution to have a Headmaster who must be a trained graduate and must have 7 years of teaching experience as a trained graduate teacher. If subsequent to 29.5.1977 any appointment has been made to the post of Head Master contrary to the aforesaid provisions of the Regulation then the said appointment would be invalid appointment and would not confer any right on the appointee. The expression 'approval' used in the second direction in Golakh Chandra Mohanty's case is referable to the approval contemplated under Rule 8(2)(b) of the Recruitment Rule and, therefore, if there has been an approval by the Director then in such a case the appointment made after the prior approval would not be invalidated. In our considered opinion the conclusion of the Special Bench that an approval of the Inspector is no approval in the eye of law is the correct position, and as such, does not require any interference by this Court. We would further make it clear that a person who has been appointed as Headmaster in charge cannot claim any right on the basis of that appointment even if the same might have been approved by any Competent Educational Authority. The In charge Headmaster is not the same as the Headmaster of the school and it merely entitles a person to remain in charge and discharge the duties of a Headmaster. In this view of the matter where the appointment itself has been to the post of Headmaster as in-charge, and such appointment had been approved, obviously the said appointee cannot claim to be continued as Headmaster or to be entitled to get the scale of pay attached to the post of Headmaster. The Special Bench in the impugned judgment has correctly analysed the different provisions of the Rules and Regulations and have rightly come to the finding on the directions 2, 3, 4 and 5 of the earlier Full Bench decision in Golakh Chandra Mohanty's case".

16. Mr. Rath, relying on the aforesaid decision submitted that since the Petitioner was appointed prior to coming into force of the Boards Regulation, the Petitioner is eligible and entitled to get the Headmaster scale of pay w.e.f. 9.9.1974.

17. Mr. Prusty, learned Standing Counsel for the State on the other hand made his submission basing on the stand taken in the counter affidavit.

18. Mr. Prusty, learned Standing Counsel for the State also relying on the aforesaid decision in the case of **Pabitra Mohan Das & others vs. State of Orissa & Others** submitted that since by the time the Petitioner was appointed as Headmaster vide order under Annexure-1, he was not having 7 years of teaching experience as a Trained Graduate Teacher, the Petitioner is not eligible to get the benefit of Headmaster scale of pay w.e.f 9.9.1974 and he has been rightly allowed the same.

19. Heard learned counsel for the Parties.

20. Perused the materials available on record. This Court after going through the materials available on record vis-àvis the ratio decided by the Hon'ble Apex Court in the aforesaid case found that the Petitioner prior to coming into force of the Board Regulation on 29.04.1977 was already appointed as against the Post of Headmaster vide order under Annexure-1, where he joined on 09.09.1974. The Petitioner prior to such appointment as Headmaster was working as against a Trained Graduate Post in two different schools from 3.8.1965 to 31.12.1972 and from 1.1.1973 and 8.9.1974. Therefore, basing on the decision in the case of **Pabitra Mohan Das & others vs. State of Orissa & Others**, the Petitioner is entitled to get the benefit of Headmaster scale of pay w.e.f. 09.09.1974. Therefore, this Court is of the opinion that the claim of the Petitioner has not been considered properly while rejecting the same vide order at Annexure-7.

21. Therefore, this Court is inclined to quash the said order under Annexure-7 and while quashing the same directs the Opposite Parties to extend the benefit of Headmaster scale of pay in favour of the Petitioner w.e.f. 09.09.1974. Since the Petitioner has already retired since long, the Opposite Parties are directed to fix the scale of pay of the Petitioner on such sanction of the Headmaster scale of pay and release the differential salary as well as differential pension with due calculation of the same within a period of four months from the date of receipt of this order.

22. With the aforesaid observations and directions, the WPC (TAC) stands disposed of. There shall be no order as to costs.

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2022 (III) ILR-CUT-633

SANJAY KUMAR MISHRA, J.

W.P.(C) NO. 32662 OF 2021

PRATIMA DASH …….. Petitioner

.V.

UNION OF INDIA & ORS. ……..Opp.Parties

SERVICE LAW – Transfer – Petitioner is having a mentally retarded child – Petitioner requested the concerned Authority for her transfer to Bhubaneswar – Previously a Co-ordinate Bench passed an Order in favour of the petitioner – The Authority rejected the representation – Effect of – Held, law is well settled that the issue once decided by the Court of law, is also binding on the Administrative and Executive Authorities until and unless the same is modified and varied by the Higher Judiciary or by way of making appropriate legislation to declare it in-operative. (Para 14)

For Petitioner : Mr. S.K. Ojha
For Opp.Parties: Mr. D.R. Mohapatra (CGC)

JUDGMENT Date of Hearing & Judgment : 09.09.2022

SANJAY KUMAR MISHRA, J.

The present Writ Petition has been filed by the Petitioner to quash the Order of rejection dated 05.08.2021, as at Annexure-9, so far as the Petitioner is concerned, with further prayer to issue writ in the nature of certiorari directing the Opposite Parties to accept the request of the Petitioner for her posting at Bhubaneswar on the basis of policy decision taken vide Orders dated 06.10.2020, as at Annexure-4 and dated 14.01.2021, as at Annexure-5, respectively.

2. The factual matrix leading to filing of the present Writ Petition is that being recruited through direct recruitment, the Petitioner joined in the C.R.P.F. as Constable/GD (MAH) on 02.03.1995. On being deputed for training and completion thereof, she was posted in various parts in India except Odisha Zone. However, for the first time, acceding her request, the Petitioner was posted at Odisha in 2008.

In the meantime, after ten year of her marriage, the Petitioner was blessed with a male mentally retarded child in the year, 2011. As per assessment made, the child is 90% mentally disabled and requires frequent medical care and attention. Accordingly, looking into his infirmities, he has been admitted in the Centre for Autism Therapy Counseling and Help, shortly, 'CATCH', Bhubaneswar.

It is further case of the Petitioner is that in the year, 2015, when the child was only 4 years old, vide Office Order dated 08.05.2015, she was transferred to 232(M) Battalion, Base Camp at Ajmer, Rajasthan. Challenging the said Order of transfer, the Petitioner approached this Court in W.P.(C) No. 9808/2015, which was disposed of vide Order dated 21.05.2015 directing the present Opposite Parties to consider the grievance of the Petitioner. Despite such direction, since her representation was rejected, she was again constrained to approach this Court in W.P.(C) No.12873/2015, which was disposed of on 03.12.2015 with the following observations:

> "….The petitioner having blessed with a mentally retarded child, her transfer should be regulated bythe DoP& T Circular vide Annexure-5 and transfer policy framed by the Director General of C.R.P.F. vide Annexure-6 mentioned (supra) and she may be posted anywhere against the available vacancy in the State of Orissa enabling her to give attention as well as better treatment to her mentally retarded child…."

3. In terms of the Order of this Court, the Order of transfer was modified and she was posted under the newly created Group Centre, shortly, GC at Sambalpur vide Office Order dated 09.02.2016. After continuing for about 4 months at Sambalpur, once again the Petitioner was transferred vide Office Order dated 20.06.2016 in the guise of promotion to the earlier place of transfer i.e. 232 (M) Battalion. However, as the Petitioner refused to accept the said promotion, she was allowed to continue at Sambalpur.

In the year, 2018, the Petitioner was again blessed with a female child and as per procedure, she was allowed maternity leave as well as child care leave for a period of one year. However, despite her refusal to accept promotion, after one year, once again the Petitioner was promoted to the next higher Grade and also posted in 232(M) Battalion. However, in view of such refusal of promotion, warranting in the Departmental Proceedings against her, finding no other alternative, she made a request to the Authority for her posting within the State of Odisha. Though her application was forwarded to the Competent Authority,vide letter dated 10.04.2018, no decision was taken in the said regard. After availing the maternity and child care leave, the Petitioner submitted her joining report on 02.05.2019 at GC, Sambalpur. While accepting joining report by the Centre In-charge, she was handed over the Order of promotion and transfer to 232(M) Battalion and without allowing her to stay with her family, she was relieved forthwith with some caution and was directed to report at the new place of posting on 12.05.2019. It has also been stated in the Writ Petition that though the decision of the Authority was arbitrary and against the decision of this Court, but the attitude of the relieving Authority created fear in the mind of the Petitioner to approach the Court of law once again and hence, in obedience of the said Office Order, the Petitioner joined in her new place of posting on 12.05.2019 with much difficulty.

It is the further case of the Petitioner that she has completed two years of mandatory field duty as per the Standing Order No. 3/2015 issued by the Department. The Petitioner is unable to keep the newly born baby with her and even unable to meet the family members intermittently.

It is also the case of the Petitioner that to facilitate the transfer of employees, those who are care giver to the disabled child, DoP&T issued O.M. dated 08.10.2018 exempting the tenure restriction of such employees. In consonance with the DoP&T instruction issued, the Department accepted the same and took a policy decision that the employees, those who are care giver, may be posted in the areas indicated in the Order dated 06.10.2020.

Looking into the prevailing situation and condition of her family, the Petitioner, vide her representation dated 21.04.2021, requested the Authority concerned for her transfer to Bhubaneswar as per the Circulars/Policy decisions taken in the said regard. She also submitted all the relevant Medical Certificates, so also Order passed by this Court in W.P.(C) No. 12873/2015 appended to the said representation for necessary consideration of the Authority, which was duly forwarded by the Opposite Party No. 5 to the concerned Authority, vide letter dated 17.05.2021, as at Annexure-7 and 8, respectively.

However, the said representation of the Petitioner was turned down by the concerned Authority, vide Order dated 05.08.2021, as at Annexure-9, without assigning any reason though in case of another employee, namely, Jyoti Pal, a similar request was acceded to by the Authority concerned on the plea of her minor child and treatment of Mother-In-Law. Being aggrieved by such communication dated 05.08.2021, as at Annexure-9, the Petitioner has preferred the present Writ Petition.

4. Being noticed, the Opposite Parties appeared and filed their Counter, wherein, apart from reiterating the facts pleaded in the Writ Petition, a stand has been taken that the Petitioner was posted in her home State i.e. Odisha, near about 11 years, out of her 27 years of service. Her posting to GC, C.R.P.F Bhubaneswar and GC, C.R.P.F., Sambalpur were ordered on her request by the competent transferring Authority in spite of non-completion of her 20 years of service. It has further been stated in the said Counter that in view of the Standing Order No.SO07/2015, the extract of which has been annexed to the Counter as Annexure-J/5, i.e. Transfer of Mahila Personnel, since the Petitioner has not completed a tenure of 4 years in the present place of posting in terms of Clause-h of the Standing Order, her request for transfer to Bhubaneswar (Odisha Zone) could not be considered and because of the administrative constraints, the Authority was justify to reject her prayer vide Order dated 05.08.2021, as at Annexure-9.

5. This Court heard Mr. S. K. Ojha, learned Counsel for the Petitioner and Mr. D.R. Mohapatra, learned Central Government Counsel for the Opposite Parties and perused the record. Pleading having been exchanged between the Parties, with the consent of learned Counsel for the Parties, this Writ Petition is being disposed of finally at the stage of admission.

6. Learned Counsel for the Petitioner contended that in view of the Order of this Court dated 03.12.2015, passed in W.P.(C) No.12873 of 2015, wherein there is a reference to the Office Order dated 05.01.1993 of Ministry of Personnel, Public Grievance, Department of Personnel and Training, so also in view of the Clause-XV of the Transfer Policy framed by the Director General of C.R.P.F., the Petitioner should be kept at the place of her choice to facilitate specialized treatment to her child. Further, earlier, a coordinate Bench has rightly interfered with the Order of

transfer passed earlier by the said Authority and matter was remanded back to the Authority concerned for reconsideration of her case in accordance with law.Learned Counsel for the Petitioner further submits that in view of the Office Memorandum dated 08.10.2018, as at Annexure-3, Clause-h of the Standing Order, as at Annexure-J/5, with regard to tenure of Mahila personnel in Mahila BNs and RAF, is not applicable to the case of the Petitioner.

7. Learned Counsel for the Petitioner submitted that the Order of rejection dated 05.08.2021 is clearly illegal and arbitrary, so also bears no reason. Even though thediscretionary power is available with the Authority to take a decision, but the same has to be exercised in an indiscriminatory manner. However, in the present case, the Order of rejection was passed in a discriminatory manner and the said Order of rejection also bears no reason for which the same needs to be scrutinized by this Court.

8. It is also contended by the learned Counsel for the Petitioner that since the said decision of the Authority is against the policy/guidelines issued by the appropriate Government in subordinate legislation, the said policy/guidelines, so also beneficiary clauses therein is enforceable under the law as the same is the subordinate legislation framed by the Government and implementing Authority cannot go beyond the same and are estopped to take any such action prejudice to the interest of the beneficiary.

9. Learned Counsel for the Opposite Parties submitted that though the Office Memorandum dated 08.10.2018, as at Annexure-3, entitles a person for exemption fromroutine exercise of transfer/rotational transfer, but the same is subject to the administrative constraints, so also administrative feasibility and the Authority concerned was justified to reject the representation of the Petitioner vide Order dated 05.08.2021.

10. Para-2 and 3(i) of the Office Memorandum dated 08.10.2018 read as follows:

> "2. The scope of disability initially had covered (i) blindness or low vision (ii) hearing impairment (iii) locomotor disability or cerebral Palsy (iv) leprosycured (v) mental retardation (vi) mental illness and (vii) multiple disabilities, which subsequently, vide OMs of even number dated November 17, 2014 and January 5, 2016, was further extended to include'Autism', 'Thalassemia' and 'Haemophilia'.
>
> 3. With the enactment of the Rights of Persons withDisabilities Act, 2016 on April 17, 2017, the following instructions are issued in supersession of the above-mentioned OMs of even number dated June 6, 2014, November 17, 2014 and January 5, 2016 with regard to the eligibility for seeking exemption from routine exercise of transfer/ rotational transfer:
>
> (i) A Government employee who is a care-giver of dependent daughter/son/parents/ spouse/ brother/ sister with Specified Disability, as certified by the certifying authority as a Person with Benchmark Disability as defined under Section 2(r) of the Rights of Persons with Disability Act, 2016 may be exempted from the routine exercise of transfer/rotational transfer subject to the administrative constraints." Emphasis supplied

11. In pursuance of the Office Memorandum dated 08.10.2018, Order dated 06.10.2020, as at Annexure-4, was issued by the Directorate General, CRPF ordering therein as follows:

> " Of late it is seen that a large number of officers and personnel are requesting for transfer to any specific place or retention at their presentplace of posting due to disability of their children. The case has been examined in this Directorate with DOP&T guidelines on the matter.
>
> 2. DOP&T vide OM dated 08/10/2018 has stipulated that a Govt. employee who is a caregiver of deponent daughter/son/parents spouse/brother/sister with specified disability, as certified by the certifying authority as a Person with Benchmarks Disability as defined under Section 2(r) of the Rights of Persons with Disabilities Act, 2016 may be exempted from the routine exercise of transfer/rotational transfer subject to administrative constraints. The term of specified disability has also been defined in para 3(ii) of aforesaid OM. 'Autism is one of the disability comes under the said clause.
>
> 3. After considering all aspects of the matter, now the following locations of CRPF have been declared as Hubs for Autistic child so that posting of CRPF employees having such child can be considered sympathetically at these places on the basis of production of medical certificate issued by the appropriate medical authority subject to administrative feasibility :-
>
> (a) GC Bangalore
> (b) GC Hyderabad
> (c) GC G/Noida
> (d) GC Lucknow
> (e) GC Pinjore
> (f) GC Pune
> (g) GC Ranchi
> (h) GC Durgapur
> (i) GC Bhopal
> (j) GC Guwahati
>
> 4. This has the approval of DG.
>
> Sd/-- 06/10/2020
> (Vitual Kumar)
> IG (Pers)"
>
> Emphasis supplied

12. Admittedly, vide subsequent Order dated 14.01.2021, as at Annexure-5, the effect of the said Order, as at Annexure-4, was extended to GC, CRPF, Bhubaneswar, which was also declared as Hub for autistic children.

13. As is revealed from the communication dated 05.08.2021, which is impugned in this Writ Petition, the Authority concerned entertained the request of a coemployee, namely, Jyoti Pal to transfer her to her place of choice on the ground of care of her minor child and treatment of Mother-in-law. But in case of the present Petitioner, where a request was made to transfer her to GC Bhubaneswar, has been turned down without assigning any reason and that too, contrary to the observations made by this Court in the earlier Order dated 03.12.2015 passed in W.P.(C) No.12873 of 2015 and the DoP& T Circular in terms of the Office Order dated 05.01.1993 of Ministry of Personnel, Public Grievance, Department of Personnel and Training, so also Clause-XV of Transfer Policy framed by the Director General

of C.R.P.F. vide Annexure-6, as has been referred to in the said Order dated 03.12.2015, passed in W.P.(C) No.12873 of 2015.

14. Further, law is well settled that the issue once decided by the Court of law, is also binding on the administrative and executive Authorities until and unless the same is modified and varied by the higher judiciary or by way of making appropriate legislation, it is made inoperative. Admittedly, a coordinate Bench vide Order dated 03.12.2015, passed in W.P.(C) No.12873 of 2015, has held the Order of transfer dated 30.04.2015 and consequential Order of relieve dated 08.05.2015, so also the Order of rejection of the representation of the Petitioner dated 18.06.2015 to be illegal, which were set aside vide the said judgment relying on the Office Order dated 05.01.1993 (supra), so also Transfer Policy framed by the Director General of Police, CRPF, New Delhi.

15. In view of such observation made above, this Court is of the view that the impugned Order dated 05.08.2021, as at Annexure-9, is illegal, arbitrary and discriminatory and deserves to be set aside.

16. Accordingly, the impugned communication dated 05.08.2021, as at Annexure-9, so far as the present Petitioner is concerned, is set aside.

17. The matter is remitted back to the Opposite Party No.2-Director General of Police, CRPF, New Delhi, with a direction to reconsider the case of the present Petitioner for her posting at GC, Bhubaneswar in terms of the observations made hereinabove, so also keeping in mind the previous Order passed by this Court in W.P.(C) No.12873/2015. The entire exercise shall be completed within a period of six weeks from the date of communication/ production of the certified copy of this Order.

18. With the above observation, the Writ Petition stands disposed of. No order as to the cost.

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2022 (III) ILR-CUT-639

SANJAY KUMAR MISHRA, J.

W.P.(C) NO. 19346 OF 2021

MANAGING DIRECTOR, ODISHA SMALL INDUSTRIES CORPORATION LTD., CUTTACK. …….. Petitioner

.V.

ABHAY KUMAR SAMANTRAY …….. Opp.Party

PAYMENT OF GRATUITY ACT, 1972 – Section 7(7) Proviso – Non-deposit of statutory amount before filing of appeal – Appellate Authority

dismissed the appeal filed by the Corporation – Effect of – Held, no infirmity or illegal, because of non-deposit of the awarded amount in terms of Section 7(7) of the P.G. Act, 1972, the Appellate Authority was justified to dismiss the Appeal. (Paras 24, 25)

For Petitioner : Mr. J.K. Mohapatra
For Opp.Party : Mr. L. M. Nanda

JUDGMENT Date of Hearing & Judgment : 14.09.2022

SANJAY KUMAR MISHRA, J.

Being aggrieved by the judgment dated 14.08.2020 passed by the Controlling Authority under Payment of Gratuity Act-Cum-Divisional Labour Commissioner, Cuttack, in P.G. Case No.06 of 2019, as at Annexure-4, so also Order dated 13.04.2021 passed by the Appellate Authority under Payment of Gratuity Act-Cum-Joint Labour Commissioner, Cuttack, in P.G. Appeal No.1 of 2021, as at Annexure-6, the Petitioner has preferred the present Writ Petition.

2. The factual matrix leading to filing of the present Writ Petition in brief is that Opposite Party No.1, after retirement from service w.e.f. 31.03.2018, because of non-payment of Gratuity by the Petitioner-Corporation, preferred application in Form 'N' in terms of Rule-10(1) of the Orissa Payment of Gratuity Rules, 1974 on 22.02.2019 claiming therein an amount of Rs.5,42,055/- towards Gratuity with accrued interest on the ground that his initial appointment being 14.11.1991 and date of superannuation being 31.03.2018, he is entitled to the said Gratuity amount in terms of the last wages drawn by him, i.e. Rs.36,137/-, for the total period of 26 years of service.

3. Being noticed, the Petitioner-Corporation appeared before the Controlling Authority and filed its Written Statement, as at Annexure-3, taking a plea therein that since Opposite Party was appointed in the regular establishment on 04.06.2015 and retired on 31.03.2018, after completion of 2 years 9 months and 27 days of regular service and in terms of Section-4 of the Payment of Gratuity Act, 1972, shortly, the P.G. Act, 1972, he has not filed any application for payment of Gratuity before 30 days of his superannuation i.e. on or before 01.03.2018, the said application in Form 'N' in terms of Rule-10(1) of the Orissa Payment of Gratuity Rules, 1974 filed on 22.02.2019 is not maintainable.

4. Based on the pleadings of the Parties, issues were framed and present Opposite Party examined himself as the sole witness and exhibited documents, as Exhibits 1 to 4, to prove his employment under the Petitioner-Corporation, whereas the Petitioner-Corporation did not examine any witness in the said proceeding, although it was accorded necessary opportunity to do so. Finally, based on the pleadings and evidence on record, the Controlling Authority under the P.G. Act, 1972 passed the judgment on 14.08.2020, as at Annexure-4.

5. Based on the said findings, the Controlling Authority, taking into consideration the last drawn wages of the present Opposite Party and his qualifying period of service as 26 years, determined Gratuity amount payable to the present Opposite Party to be Rs. 5,42,055/-. That apart, in view of Provision enshrined under Section 7(3-A) of the P.G. Act, 1972, so also based on the judgments of the apex Court, the Controlling Authority ordered that the Opposite Party is entitled to get Rs. 1,28,608/- towards interest and in toto, he is entitled to get Rs. 6,70,663/-. Accordingly, a direction was given to make such payment to the present Opposite Party within 30 days from the date of pronouncement of the judgment, failing which simple interest @ 10% per annum would be charged further till the actual payment is made.

6. Being aggrieved by the said judgment dated 14.08.2020 passed in P.G. Case No.06 of 2019, the Petitioner approached this Court in W.P.(C) No. 25919 of 2020, which was disposed of on 22.03.2021, giving opportunity to the Petitioner Corporation to prefer an Appeal before the Appellate Authority. Accordingly, the Petitioner-Corporation preferred P.G. Appeal No.1 of 2021 before the Appellate Authority under P.G. ActCum-Joint Labour Commissioner, Cuttack. However, in view of non-deposit of the awarded amount in terms of Section 7(7) of the P.G. Act, 1972, the said Appeal was dismissed vide Order dated 13.04.2021, as at Annexure-6.

7. Aggrieved by the said judgment dated 14.08.2020 passed in P.G. Case No.06 of 2019, so also Order of dismissal dated 13.04.2021 passed in P.G. Appeal No.1 of 2021, the present Writ Petition has been filed by the Petitioner-Corporation on the plea that both the impugned Orders suffer from irregularity, illegality and are arbitrary, so also contrary to the statutory provision.

8. Being noticed, the sole Opposite Party, who was the applicant before the Controlling Authority, has filed Counter Affidavit stating therein that there is no infirmity in the impugned judgment passed by the Controlling Authority under the P.G. Act, 1972.

9. Heard learned Counsel for the Parties. Since pleadings have been completed, the Writ Petition is being disposed of finally at the stage of admission.

10. It is submitted by the learned Counsel for the PetitionerCorporation that the Appellate Authority was not justified to dismiss the P.G. Appeal No.1 of 2021 because of non-deposit of Gratuity amount, as awarded by the Controlling Authority, in terms of Section 7(7) of P.G. Act, 1972.

11. Though no such plea has been taken in the Written Statement filed by the Petitioner-Corporation in P.G. Case No. 6 of 2019, for the first time, it is submitted by the learned Counsel for the Petitioner that though Sub-Section (3-A) of Section 7 of the P.G. Act, 1972 prescribes for simple interest from the date the Gratuity is payable till the date, on which it is paid at such rate, not exceeding the

rate notified by the Central Government from time to time for repayment of long term deposits, as that Government may, by notification specify, the Controlling Authority was not justified to award 10% interest on the awarded Gratuity amount.

12. Learned Counsel for the Petitioner-Corporation further submits that though the Opposite Party had worked for 26 years, but his services were regularized only w.e.f. 04.06.2015 and after rendering only 2 years 9 months 27 days of total period of regular service, since the Opposite Party retired on 31.03.2018, he is not entitled to the Gratuity and the Corporation was justified not to deposit the awarded amount at the time of preferring P.G. Appeal No.1 of 2021 and the Appellate Authority was not justified to dismiss P.G. Appeal No.1 of 2021 solely on the ground of non-deposit of statutory amount within the period of limitation of 120 days, as has been indicated in the impugned Order dated 13.04.2021, as at Annexure-6.

13. Learned Counsel for the Opposite Party submits that in view of the settled position of law, so also pleadings and evidence on record, taking into his total period of employment, the Controlling Authority was justified to answer issue No.III in favour of the Opposite Party, so also award 10% interest on the said awarded amount in terms of Notification dated 01.10.1987 of the Central Government and the Appellate Authority was also justified to dismiss the said Appeal on the ground of non-deposit of the statutory amount in terms of Proviso under Section 7(7) of the P.G. Act, 1972 and the impugned Orders need no interference.

14. Admittedly, the present Petitioner-Corporation did not dispute as to the total period of employment of the Opposite Party, who was working as Production Supervisor on contract basis before regularization of his service as Junior Manager w.e.f 04.06.2015, though it was contended before the Controlling Authority that only the period of service after regularization of the services of the Petitioner should have been taken into consideration for the purpose of payment of Gratuity. That apart, with regard to the last drawn salary, the same was never disputed before the Controlling Authority by the Petitioner-Corporation nor it led any evidence in P.G. Case No.06 of 2019 and the Controlling Authority under the P. G. Act, 1972, after taking into consideration the evidence on record, answered Issue No.III with the following observations:

> **" IssueNo. III)**
>
> The applicant in his application has stated that the date of joining is 14.11.1991 and date of retirement is 31.03.2018 which he has corroborated in his evidence-in-chief. The Opp. Party has not disputed the same. Ext.1 is the letter issued by the Opp. Party which speaks that as per letter No.11958 dtd 01.11.1991 the applicant was appointed as production supervisor on contract basis and the office order No.1542 dtd 28.03.2018 is the superannuation letter which says his retirement on 31.03.2018. Hence, the total qualifying period of service of the applicant comes to 26 years 4 months and 17 days or says 26 years. The applicant in his evidence in chief has stated that he was receiving Rs.36,137/- towards salary from the Opp. Party when he was retired from service. The Opp. Party has not disputed the salary of the applicant. Hence, the qualifying period of service of the applicant is taken as 26 years last monthly wages at Rs.36,137/-."

15. That apart, the Controlling Authority, while awarding 10% simple interest on the determined amount, relied on number of judgments of the Apex Court, as detailed in the impugned judgment, as at Annexure-4, and ordered that the present Opposite Party is entitled to receive the said unpaid Gratuity amount along with 10% interest on the said awarded amount for the period from 01.04.2018 till 14.08.2020..

16. As per the definition of Continuous Service under Section 2(c) of the P.G. Act, 1972, "Continuous Service" means continuous service as defined under Section 2-A of the P.G. Act, 1972, which reads as follows:

> **"2-A Continuous Service-** For the purposes of this Act**,-**
>
> (1) An employee shall be said to be in continuous service for a period if he has, for that period, been in uninterrupted service, including service which may be interrupted on account of sickness, accident, leave, absence from duty without leave (not being absence in respect of which an order [The words "imposing a punishment or penalty or" omitted by Act 22 of 1987, Section 3(w.e.f. 1-10-1987)] treating the absence as break in service has been passed in accordance with the standing orders, rules or regulations governing theemployees of the establishment), lay-off, strike or a lockout or cessation of work not due to any fault of the employee, whether such uninterrupted or interruptedservice was rendered before or after the commencement of this Act.
>
> (2) Where an employee (not being an employee employed in a seasonal establishment) is not in continuous service within the meaning of clause (1), for any period of one year or six months, he shall be deemed to be in continuous service under the employer-
>
> (a) For the said period of one year, if the employee during the period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
>
> (i) one hundred and ninety days, in the case of an employee employed below the ground in a mine or in an establishment which works for less than six days in a week; and
> (ii) two hundred and forty days, in any other case;
>
> (b) For the said period of six months, if the employee during the period of six calendar months preceding the date with reference to which the calculation is to be made, has actually worked under the employer for not less than-
>
> (i) ninety-five days, in the case of an employee employed below the ground in a mine or in an establishment which works for less than six days in a week; and
> (ii) one hundred and twenty days, in any other case.
>
> [Explanation- For the purposes of clause (2), the number of days on which an employee has actually worked under an employer shall include the days on which-
>
> (i) he has been laid-off under an agreement or as permitted by standing orders made under the Industrial Employment (Standing Orders) Act, 1946 (20 of 2946), or under the Industrial Disputes Act, 1947 (14 of 1947), or under any other law applicable to the establishment;
>
> (ii) he has been on leave with full wages, earned in the previous year;
>
> (iii) he has been absent due to temporary disablement caused by accident arising out of and in the course of his employment; and
>
> (iv) in the case of a female, she has been on maternity leave; so, however, that the total period of such maternity leave does not exceed [such period as may be notified by the Central Government from time to time]

> (3) Where an employee, employed in a seasonal establishment, is not in continuous service within the meaning of clause (1), for any period of one year or six months, he shall be deemed to be in continuous service under the employer for such period if he has actually worked for not less than seventy five per cent, of the number of days on which the establishment was in operation during such period."

17. Similarly, the word "employee" has been defined under Section 2(e) of the P.G. Act, 1972, which reads as follows:

> "(e) "employee" means any person (other than an apprentice), who is employed on wages, whether the terms of suchemployment are express or implied, in any kind of work, manual or otherwise, in or in connection with the work of a factory, mine, oilfield, plantation, port, railway company, shop or other establishment, to which this Act applies, but does not include any such person who holds a post under the Central Government or a State Government and is governed by any other Act or by any rules providing for payment of gratuity;" (Emphasis supplied)

18. It is amply clear from the definition of "employee", as defined under Section 2(e) of the P.G. Act, 1972, that the employee means any person other than an apprentice, employed on wages, in any establishment, factory, mine etc., to do any skilled, semi-skilled, or an unskilled, manual, supervisory, technical or clerical work, whether the terms of such employment are express or implied, but does not include any such person, who holds a post of Central Government or State Government and is governed by any Act or by any rules providing for payment of Gratuity.

19. Admittedly, the P.G. Act, 1972 is applicable to the Petitioner's establishment. There is no such provision under the P.G. Act, 1972 that the same is only applicable to permanent employee of an Establishment. Rather, from the definition of "employee" as defined under Section 2(e) of the P.G. Act, 1972, it is amply clear that, except apprentice, the definition of Employee covers all persons.

20. So far as awarding 10% simple interest on the determined amount, it may not be out of place to mention that the Central Government,in exercise of the powers conferred by Sub-Section (3-A) of Section 7 of the P.G. Act, 1972, vide Notification dated 01.10.1987, notified as follows:

> "TO BE PUBLISHED IN PART II, SECTION 3, SUB-SECTION (II) OF THE GAZETTE OF INDIA-EXTRAORINARY) PUBLISED ON 01.10.1987
>
> New Delhi, the 1st October, 87
>
> NOTIFICATION
>
> S.O. 874(E), In exercise of the powers conferred by sub-section (3A) of section 7 of the Payment of Gratuity Act, 1972 (39 of 1972), the Central hereby specifies ten percent per annum as the rate of simple interest payable for the time being by the employer to his employee in cases where the gratuity is not paid within the specified period.
>
> 2. This notification shall come into force on the date of its publication in the Official Gazette."
>
> (No.S-70012/6/87.SS-II)
> (A.K. Bhattarai)
> Under Secretary"

21. Admittedly, the said Notification dated 01.10.1987 is still in force not being superseded by any fresh Notification varying the rate of interest as was notified by the Government of India on 01.10.1987.

22. Hence, this Court is of the view that the Controlling Authority under P.G. Act-Cum-Divisional Labour Commissioner, Cuttack, was justified to take into consideration the total period of service of the Opposite Party from the date of his initial engagement (14.11.1991) till the date of his superannuation (31.03.2018), so also award 10% simple interest on the awarded amount for the delayed period, so also ordering to pay further simple interest @ 10% per annum till the payment is made, if the Petitioner-Corporation fails to deposit the said ordered amount within 30 days from the date of pronouncement of the judgment.

23. Admittedly, though opportunity was given by this Court in W.P. No.25919 of 2020 on 12.02.2021 to the PetitionerCorporation to approach the Appellate Authority under the P.G. Act, 1972, misinterpreting the said Order of this Court, the Petitioner-Corporation preferred P.G. Appeal No.1 of 2021 without depositing the statutory amount, as has been prescribed in the Proviso under Section 7(7) of the P. G. Act, 1972, which reads as follows:

> " Provided further that no appeal by an employer shall be admitted unless at the time of preferring the appeal, the appellant either produces a certificate of the controlling authority to the effect that the appellant has deposited with him an amount equal to the amount of gratuity required to be deposited under sub-section (4), or deposits with the appellate authority such amount." (Emphasis supplied)

24. In view of the specific provision as to deposit the statutory amount, because of non-deposit of the awarded amount in terms of Section 7(7) of the P.G. Act, 1972, the Appellate Authority was justified to dismiss P.G. Appeal No.1 of 2021 vide Order dated 13.04.2021.

25. In view of the observations as detailed above, there being no infirmity or illegal in the impugned judgment dated 14.08.2020 passed in P.G. Case No.6 of 2019, so also Order dated 13.04.2021 passed in P.G. Appeal No.1 of 2021, this Court is not inclined to interfere with regard to the impugned Orders, as at Annexures 4 and 6.

26. Accordingly, the Writ Petition stands dismissed. No Order as to cost.

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2022 (III) ILR-CUT-645

CHITTARANJAN DASH, J.

CRLMC NO. 478 OF 2016

SUBHASREE SAHOO @SWAIN & ANR. …….. Petitioners

.V.

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

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Petitioners challenge the continuation of G.R. Case No.225 of 2012 pending before the learned S.D.J.M., Jagatsinghpur which involves the Petitioner No.2 for the offence U/s. 363/34 of IPC – Petitioner No.1 married to Petitioner No. 2 in the year 2012, they having been blessed with a male child and enjoying marital life peacefully – The father of petitioner lodged a FIR with the allegation of forcible kidnapping of minor daughter – In the circumstances above, whether it is a fit case to quash the proceeding? – Held, Yes – When the victim, after being major declared that it was an elopement from her side without any enticement being induced and after their marriage, they are living as husband and wife since the year 2012 – This is a fit case to invoke the jurisdiction U/s. 482 Cr.P.C and quash the criminal proceeding. (Para 10)

Case Law Relied on and Referred to :-

1. (2003)4 SCC 675 : B.S. Joshi and others Vs. State of Haryana and another.
2. [2008)9 SCC 677] : Nikhil Merchant Vs. Central Bureau of Investigation.
3. (2008) 16 SCC 1 : Manoj Sharma Vs. State and others.
4. 2011 (10) SCC 705 : Shiji @ Pappu and Others VS. Radhika and Another.
5. (2012) 10 SCC 303 : Gian Singh Vs. State of Punjab.
6. (2014) 6 SCC 466 : Narindra Singh and others Vs. State of Punjab.
7. 2014 (9) SCC 653 : Yagendra Yadav and Ors. Vs. State of Jharkhand and another.
8. AIR online 2019 SC 1716 : Rampal Vs. State of Haryana.
9. 2019 (5) SCC 688 : State of M.P. V/s Laxmi Narayan & Ors.

For Petitioners : Mr. S. Mohanty
For Opp.Parties: Mrs. S. Patnaik, A.G.A

JUDGMENT Date of Judgment : 21.10.2022

CHITTARANJAN DASH, J.

1. Heard learned counsel for the parties.

2. By means of this application, the Petitioners seeks to challenge the continuation of and/or validity of the criminal proceeding initiated against the Petitioners in G.R. Case No.225 of 2012 pending before the learned S.D.J.M., Jagatsinghpur corresponding to Tirtol P.S. Case No.63 of 2012 that involves the Petitioner No.2 in the offence U/s. 363/34 Cr.P.C.

3. The background facts of the case are that Opposite Party No.2, the informant lodged an F.I.R. on 8th March, 2012 before the IIC, Tirtol P.S. alleging that his daughter, a minor (Petitioner No.1) was forcibly kidnapped on 7th March, 2012 in the evening by Petitioner No.2 with the assistance of some other persons. It was further alleged that he made a thorough search and could ascertain that Petitioner No.2 along with his daughter had taken shelter in the house of one Fagu Sahu. It was further alleged that when the informant went to the house of Fagu Sahu, the Petitioners made good their escape. Consequent upon registration of the F.I.R. the investigation commenced.

4. It is contended by the learned counsel for the Petitioners that Petitioner No.1 i.e. the victim aged about 18 years, then, at the time of making application in the year 2016 was major and Petitioner No.2 was 21 years voluntarily eloped to avoid the societal constrained and married in a temple and have been residing as wife and husband since the year 2012. They having been blessed with a male child are enjoying a peaceful married life with their sole child who is now nine (9) years old. According to the learned counsel for the Petitioners in view of the fact that the marital life of the accused Petitioner and the victim who had eloped with a pious intention to remain together as husband and wife which they continued to maintain as such, would be scattered in case the proceeding is allowed to continue which could be a futile exercise and would be an abuse of the process of Court and as under no stretch of imagination it would yield any fruitful result, rather would pose detrimental to the interest of the family and the child as well as the mother i.e. the alleged victim would unnecessarily be thrown to exposure to the society and as such canvassed for quashing of the proceeding.

5. Learned AGA, on the other hand, while not opposing the factual scenario presented in Court, the present status of the accused and the victim on the direction of the Court submitted by the IIC, Tirtol P.S. The report that narrates the present status of the Petitioners absolutely supports the contention of the Petitioners. To be more specific, the learned AGA made it clear that the accused and the victim are maintaining a peaceful married life along with their sole child aged about nine years who is prosecuting his study in Standard III at St. Xavier School, Rahama.

6. Before being delved into the merit of the case, the Court finds it necessary to recapitulate the principles laid down by the Apex Court in the matter of quashing of cognizance invoking jurisdiction U/s. 482 Cr.P.C and they may be summed up as follows:

1. B.S. Joshi and others Vs. State of Haryana and another (2003)4 SCC 675
2. Nikhil Merchant Vs. Central Bureau of Investigation[2008)9 SCC 677]
3. Manoj Sharma Vs. State and others (2008) 16 SCC 1
4. Shiji @ Pappu and Others VS. Radhika and Another, 2011 (10) SCC 705
5. Gian Singh Vs. State of Punjab (2012) 10 SCC 303
6. Narindra Singh and others Vs. State of Punjab (2014) 6 SCC 466
7. Yagendra Yadav and Ors. Vs. State of Jharkhand and another 2014 (9) SCC 653
8. Rampal Vs. State of Haryana, AIR online 2019 SC 1716
9. State of M.P. V/s Laxmi Narayan & Ors., 2019 (5) SCC 688

7. In the matter of ***Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur (supra)*** has laid down the following guidelines with regard to quashing of criminal proceeding as well compromise in criminal proceeding in paragraph-16 to 16.10 which read as under :

> "16. The broad principles which emerge from the precedents on the subject, may be summarized in the following propositions 16.1. Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognizes and preserves powers which inhere in the High Court;

> 16.2. The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.
>
> 16.3. In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482 , the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;
>
> 16.4. While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;
>
> 16.5. 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;
>
> 16.6. 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 has 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;
>
> 16.7. 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;
>
> 16.8. Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;
>
> 16.9. In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of aconviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and 16.10. There is yet an exception to the principle set out in propositions 16.8 and 16.9 above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance."

8. Having regard to the principles enunciated as above, the Court does not find any impediment in quashing the criminal proceeding if in view of the compromise between the disputant, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice.

9. In the case in hand, admittedly at the time of the incident the victim was a minor and accordingly the F.I.R. was lodged by the father of the victim. Needless to say that the detail of the incident that transpired between the victim and the accused

could not have come to the knowledge of the father at the time of lodging of the F.I.R. Consequently,the allegation appearing in the F.I.R. is based on the knowledge of the father of the victim only that speaks about the kidnapping of the victim. Even otherwise, the victim being a minor the fact that she got eloped with the accused who is voluntarily act without an element of enticement of any kind from the side of the Petitioner No.2 would not attract the penal provision enumerated U/s.363 IPC.

10. Be that as it may, the fact narrated by the victim in her present application seeking to quash the continuation of the criminal proceeding initiated against her husband candidly suggest that there is no element of criminality attributed to the accused. In the facts and circumstances of the case when the victim, after being major declared that it was an elopement from her side without any enticement being induced and that the very fact that the accused and the Petitioners subsequent to their marriage continuing as such in their capacity as husband and wife since the year 2012 and have begotten a child now aged about nine years and prosecuting his study in Standard III, sufficiently indicate that the very elopement of the victim with the accused was a voluntary one and that the Petitioner along with the accused are leading a peaceful married life which of course will be put to jeopardy in case the continuation of the criminal proceeding would be insisted upon. Further it would yield no result much less to say about a conviction vis-a-vis the accused.

11. In the above facts and circumstances, in the opinion of the Court this is a fit case to invoke the jurisdiction U/s. 482 Cr.P.C. to press into service to the aid of the Petitioners in quashing the criminal proceeding I question.

12. The CRLMC is accordingly allowed. The criminal proceeding in connection with G.R. Case No. 225 of 2012 pending in the court of learned S.D.J.M., Jagatsinghpur is herby quashed.

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2022 (III) ILR-CUT-649

CHITTARANJAN DASH, J.

W.P.C (OAC) NO. 413 OF 2017

LAXMAN SAGAR …….. Petitioner

.V.

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

SERVICE LAW – Disciplinary Proceeding – Judicial interference – Termination – Suppression of fact about antecedent and character at the time of submission of application – Effect of – Held, non-disclosure of antecedent by the Petitioner as to the pendency of criminal case obviously goes to the root of his employment in as much as the offences

alleged against the Petitioner pending at the time of making application are not only grave in nature but involved moral turpitude – The impugned order needs no interference. (Para 9)

Case Law Relied on and Referred to :-

1. Hon'ble Apex Court, WRIT APPEAL No.270 of 2021 : Indla Ashok Reddy Versus The Principal Secretary (HOME), Government of Andhra Pradesh and others.
2. (1996) 11 SCC 605 : Delhi Administration v. Sushil Kumar.
3. (1994) 1 SCC 541 : Management of Reserve Bank of India, New Delhi v. Bhopal Singh Panchal.
4. AIR 1964 SC 787 : R.P.Kapoor v. Union of India.
5. (1996) 4 SCC 17 : Pawan Kumar. V. State of Haryana and another.

For Petitioner : Mr. P.K. Mohapatra
For Opp.Parties: Mr. M.K.Khuntia, A.G.A

JUDGMENT Date of Judgment : 21.10.2022

CHITTARANJAN DASH, J.

1. Challenge in the Writ Petition is to the Order No.CCE/LSP (Estt.)-166 dated 31stJanuary 2017 under Annexure-3 issued by the Chief Construction Engineer, Lower Suktel Project, Bolangir where by the services of the present Petitioner is terminated from the Government services from the date of issue of the order.

2. The back ground facts of the case is that the Petitioner moved before the Opp.Party No.3 for his appointment as Peon under Rehabilitation Assistance Scheme (R.A.S) under Rules 1990 as against his father who expired while in service being posted as NWCS. Upon consideration of the application of the Petitioner, Opposite Party No.3 after preliminary verification as to the eligibility of the Petitioner, issued the office Order No.CCC/LSP (Estt.)-III-135/ 206 dated 27th January, 2014 under Annexure-1 i.e. the Office order wherein the Petitioner was given appointment as Peon under R.A.S under Rules 1990 and G.A. Department Notification No.28761/Gen dated 07.10.1998 in the office of the Executive Engineer, Lower Suktel R.R.C & B. Division, Bolangir against the existing vacancy. The said appointment was subject to final outcome of the OA No.3470 of 2013 filed by G.Ranjita Vrs. State of Odisha & others.

3. At the time of submission of application for appointment as Peon under R.A.S as required, the Petitioner had submitted his character certificates from two Gazetted Officers and had also submitted the Attestation form along with other required documents before the Executive Engineer, Lower Suktel R.R.C & B Division, Bolangir as against verification of his characters and antecedent which was forwarded to the Collector, Koraput. The Attestation Form was forwarded to the Collector & District Magistrate, Koraput for verification vide letter No.510 dated 11.03.2014.

4. The Additional District Magistrate, Koraput intimated vide his letter No.2114 dated 10.10.2014 that the present petitioner Laxman Sagar was involved in Jeypore Town P.S.Case No. 118 dated 30thAugust, 2008 for the offence U/ss. 147/148/341/332/

294/323/324/283/448/336/337/338/435/427/307/506/149 IPC read with Section 4 of PDPP Act 17 of Crl. Amendment Act and charge sheet was submitted in the Court vide Jeypore Town P.S.Case No.96 dated 05th November 2009. On the basis of the application moved by the Petitioner for his appointment as Peon under R.A.S, the Authority having approved the same, desired the Petitioner to submit the documents for disposal of his application for appointment in accordance with Sub-Rule (9) & (10) of Rule 9 of OCS (RA) Rules, 1990 and the guidelines/instructions issued by the G.A. Department from time to time. Vide letter No. FE-III-RAS-161/13339/WR-Bhubaneswar, dated the 4th January, 2014 under Annexure-B in pursuance whereof the Petitioner had submitted the documents along with the Attestation form.

5. Upon receipt of the report from the A.D.M, Koraput as regards the antecedents of the Petitioner regarding his involvement in criminal case, the Authority found the Petitioner to have suppressed material facts at the time of submission of Attestation form thereby attracted the provision enumerated in para 4 of G.A. Department Resolution No.34438/Gen dated 20.11.1999 and the provision laid down in sub-clause (ii) of clause (h) of Explanation under rule-13 of the Odisha Civil Services (Classification, Control and Appeal) Rules,1962 entailing the termination of the Petitioner as stated under Annexure-3.

6. The learned Counsel for the Petitioner while assailing the impugned order under Annexure-3, *inter alia,* submitted that there was no suppression of fact on the part of the Petitioner in as much as he made a declaration as against the Form supplied by the office i.e. Annexure-5 (Attestation form) wherein at clause 12 the query pose was " Have you ever been convicted by a court of any offence, if the answer is 'Yes' the full particulars of the convictions and the sentences should be given". The Petitioner answered 'No'. According to the learned Counsel there was no scope for the Petitioner other than answering the said clause-12 to disclose the pendency of the criminal case. It is also contended by the learned counsel that the Petitioner has been acquitted from the said offences charged against him by the competent court of law i.e. the Court of the Chief Judicial Magistrate-cum-Asst. Sessions Judge, Jeypore in Criminal Trial No.23(B) of 2013 corresponding to Jeypore Town P.S.Case No.118 of 2008 and as such the Petitioner cannot be said to have had any criminal antecedent appearing against him and that there was no such antecedent against the Petitioner that would have attracted the relevant provision as enumerated under Annexure-3 resorting to which the Opp.Party No.3 terminated the services of the Petitioner which is against the Rule of law and as such the said termination is liable to be set aside and claimed the Petitioner to be reinstated in services with all consequential benefits.

7. Per contra, the learned A.G.A in separate counter reply submitted from the side of the Opp.Parties contended that the pendency of the criminal case against the Petitioner at the time of submission of the application form and filling up of the Attestation form was within his knowledge. Had he disclosed his antecedent, the Authority could have been in a position to take a decision as to if the application for appointment of the Petitioner under RAS deserved consideration. The suppression of

material facts as to the criminal antecedent of the Petitioner put the Authority in dark thereby misled the Authority who proceeded in allowing the proposal of the Petitioner for appointment under RAS. However, upon disclosure of the antecedent of the Petitioner through the in house method as intimated by Addl. District Magistrate, Koraput regarding involvement of the Petitioner in Jeypore Town P.S. Case No.118 dated 30.08.2008 as stated above, attracted the relevant provision under the rules enumerated in Odisha Civil Services (Classification, Control & Appeal) Rules, 1962 thereby rightly issued termination letter under challenge in the writ petition and the action of the Authority in terminating the services of the Petitioner is legal and justified and there was no scope for the Authority to take a view other than one under Annexure-1.

8. Andhra Pradesh High Court referring to various Judgments of the Apex Court in WRIT APPEAL No.270 of 2021 in the matter of ***Indla Ashok Reddy Versus The Principal Secretary (HOME), Home Department, Government of Andhra Pradesh, Secretariat Buildings, Velagapudi, Guntur District and others*** took the effort in summarizing the law in this regard in great detail and held as under.

> "In ***Avtar Sing v. Union of India and Others (supra),*** the Hon'ble Supreme Court observed that the whole idea of verification of HCJ & NJS,J W.A.No.270 of 2021 character and antecedents is that the person suitable for the post in question is appointed. It is one of the important criteria which is necessary to be fulfilled before appointment is made. An incumbent should not have antecedents of such a nature which may adjudge him unsuitable for the post. In paragraph 35, it was observed as follows:
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> "35. Suppression of 'material' information presupposes that what is suppressed that 'matters' not every technical or trivial matter. The employer has to act on due consideration of rules/instructions, if any, in exercise of powers in order to cancel candidature or for terminating the services of employee. Though a person who has suppressed the material information cannot claim unfettered right for appointment or continuity in service but he has a right not to be dealt with arbitrarily and exercise of power has to be in reasonable manner with objectivity having due regard to facts of cases."
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> 21. In ***Delhi Administration v. Sushil Kumar reported in (1996) 11 SCC 605***, appointment was denied to an incumbent who was duly selected for the post of Constable in Police Service subject to verification of character and antecedents, as it was found that he was involved in a criminal case under Sections 304,324/34 and 324 IPC. It was held by the Hon'ble Supreme Court that mere acquittal in the criminal case was not enough once it was found that it was not desirable to appoint such a person as a constable in the disciplined force. It was further held that the view taken by the employer in the background of the case cannot be said to be unwarranted, though he was discharged or acquitted. Antecedents of the incumbents could not be said to be proper. The aforesaid decision does not deal with the effect of suppression but the case has turned on the background of the facts of the case in which the incumbent was involved.
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> 22. In ***B.Ramakrishna Yadav (supra)*** the question that had fallen for consideration of the Full Bench of the High Court of Andhra Pradesh in a reference was as to whether suppression of information by the candidate, applying for an employment, regarding his involvement in a criminal case, would be a ground for either rejecting his candidature or cancelling his HCJ & NJS,J W.A.No.270 of 2021 selection or terminating the service, if he has already been selected as appointed? The Full Bench answered the reference as follows:
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> "13. Verification of character and antecedents is one of the important features in service jurisprudence so as to find out whether a selected candidate is suitable to the post. Having regard to the antecedents of a candidate, if appointing authority finds that it is not desirable to appoint such person, in particular to a disciplined force, it can deny employment or even terminate such person, if appointed, within the shortest possible time from the date of verification of character and antecedents. This has to be scrupulously followed in case of recruitment in police force, it being a disciplined force. As observed by the Supreme Court in ***Mehar Singh (supra)***, people repose great faith and confidence in the police force,

and therefore, the selected candidate must be of confidence, impeccable character and integrity. A person having criminal antecedents is, undoubtedly, not fit in this category, more particularly when he has suppressed the information about his involvement in criminal case(s) irrespective of the fact whether the case was pending or he was acquitted.

14. It is common practice that in the application form, a specific information relating to involvement in a criminal case, conviction or detention, irrespective of acquittal, is sought for and if a candidate keeps relevant columns HCJ & NJS,J W.A.No.270 of 2021 blank or answer the columns in negative, when in fact he was involved in criminal case, that would undoubtedly amount to suppression of information relating to his involvement in criminal case. In a given case, if such a candidate was acquitted long back, for instance, more than 5 to 10 years before, and that too of a petty offence, it may be for the employer to decide whether to appoint him or to terminate his service having regard to his performance and other relevant factors. However, such a decision should be fair. In other words, such a decision should not be arbitrary and mala fide. As observed by the Supreme Court in Pawan Kumar (supra), if the conviction or involvement was in traffic, municipal and other petty offences under the Penal Code, 1860 committed at an young age, such conviction or involvement could, in a given case, be ignored by an employer. The candidate, however, is expected to disclose all such information leaving it open to the appointing authority to decide whether to appoint such person having regard to gravity of the offence allegedly committed and proximity of time having regard to the nature of job for which he is being considered or to be appointed. While considering such candidate, who in all fairness has disclosed such information, the employer should not act mechanically to deny employment or reject application of such a candidate at threshold. In any case, a candidate having suppressed the information and/or HCJ & NJS,J W.A.No.270 of 2021 giving false information in respect of his character and antecedents, cannot, as of right, seek an order of appointment contending that he has been acquitted of the case. If such a candidate is selected and appointed and if at the stage of verification of antecedents, any information is gathered or surfaced, which would amount to misrepresentation and fraud on the employer or suppression of information, it would not create equity in his favour or any estoppel against the employer while resorting to his termination. Such candidate cannot claim any right to continue in service and the employer, having regard to the nature of employment as well as other relevant factors, has a discretion to either reject his candidature or not to appoint such candidate or to terminate his services, if he was appointed, on the basis of the information received at that stage (i.e. verification of character and antecedents). In short, the candidate, who suppressed material information and/or given false information regarding his antecedents and character, cannot have any right of appointment or continuity in service. It is, however, always open to the employer/appointing authority to exercise its discretion in the facts and circumstances of each case keeping in view the principles laid down by the Supreme Court.

15. The judgment of this Court in A. Sagar (supra), in our opinion, does not state the correct position of law. Thus, HCJ & NJS,J W.A.No.270 of 2021 the question framed by us stands answered in terms of this judgment."

23. The prosecution case in C.C.No.454 of 2007 on the file of the Additional Junior Civil Judge, Markapuram, arising out of Crime No.132 of 2007, in a nutshell, was that on 02.08.2007 at 9 a.m., the 3rd year Mathematics-III Paper examination had started and when the process of verification of hall tickets of the students was being undertaken, the petitioner started running away from the examination hall leaving the answer sheet behind. The petitioner was caught and on verification, it was found that the petitioner, impersonating himself as one Srikanth, was writing the examination for him.

24. The learned trial Court, by judgment and order dated 26.04.2009, observed that there is a reasonable doubt on the evidence of the prosecution and, therefore, the accused (the appellant and another) are entitled for benefit of doubt and, accordingly, acquitted them.

25. In the context of acquittal in a criminal case qua appointment in public service, an expression "honourable acquittal" has come to be acknowledged by virtue of judicial pronouncements.

26. The meaning of expression "honourable acquittal" came up for consideration in S. Samuthiram (supra), wherein the Hon'ble Supreme Court, at paragraphs 21 and 22, observed as follows:

"21. The meaning of the expression 'honourable acquittal' came up for consideration before this Court in ***Management of Reserve Bank of India, New Delhi v. Bhopal Singh Panchal (1994) 1 SCC 541.*** In that case, this Court HCJ & NJS,J W.A.No.270 of 2021 has considered the impact of Regulation 46(4) dealing with honourable acquittal by a criminal court on the disciplinary proceedings. In that context, this Court held that the mere acquittal does not entitle an employee to reinstatement in service, the acquittal, it was held, has to be honourable.

The expressions 'honourable acquittal', 'acquitted of blame', 'fully exonerated' are unknown to the Code of Criminal Procedure or the Penal Code, which are coined by judicial pronouncements. It is difficult to define precisely what is meant by the expression 'honourably acquitted'. When the accused is acquitted after full consideration of prosecution evidence and that the prosecution had miserably failed to prove the charges levelled against the accused, it can possibly be said that the accused was honourably acquitted.

22. In ***R.P.Kapoor v. Union of India, AIR 1964 SC 787***, it was held even in the case of acquittal, departmental proceedings may follow where the acquittal is other than honourable. In State of Assam and another v. Raghava Rajgopalachari reported in 1972 SLR 45, this Court quoted with approval the views expressed by Lord Williams, J. in (1934) 61 ILR Cal. 168 which is as follows:

"The expression "honourably acquitted" is one which is unknown to court of justice. Apparently it is a form of order used in courts martial and other extra judicial tribunals. We said in our judgment that we accepted the explanation given by the appellant believed it to be true and considered that it ought to have been accepted by the Government HCJ & NJS,J W.A.No.270 of 2021 authorities and by the magistrate. Further, we decided that the appellant had not misappropriated the monies referred to in the charge. It is thus clear that the effect of our judgment was that the appellant was acquitted as fully and completely as it was possible for him to be acquitted. Presumably, this is equivalent to what Government authorities term 'honourably acquitted'."

27. In State of Rajasthan (supra), at paragraphs 15 and 27, the Hon'ble Supreme Court observed as follows:

"15. It is pointed out that various nuances arising in this judgment has been considered even in the subsequent judgments. In ***Union territory, Chandigarh Administration v. Pradeep Kumar***, a two Judge Bench of this Court dealt with the expression "honourable acquittal". It was opined that acquittal in a criminal case was not conclusive for suitability of the candidate concerned and it could not always be inferred from an acquittal or discharge that the person was falsely involved or has no criminal antecedents. Thus, unless it is an honourable acquittal, the candidate cannot claim the benefit of the case. No doubt, it was mentioned by relying on the earlier judgment of this Court in ***Inspector General of Police v. S.Samuthiram*** that while it was difficult to define precisely what is meant by the expression "honourable acquittal", an accused who is acquitted after full consideration of the prosecution evidence and prosecution has miserably failed to prove the HCJ & NJS,J W.A.No.270 of 2021 charges levelled against the accused, it can possibly be said that the accused was honourably acquitted. In this context, it has been specifically noticed by this Court that entry into the police service required a candidate to be of good character, integrity and clean antecedents. Finally, it was opined that the acquittal in a criminal case does not automatically entitle a candidate for appointment to the post, as a person having criminal antecedents will not fit in this category.

27. We may note here that the circular dated 28.03.2017 is undoubtedly very wide in its application. It seeks to give the benefit to candidates including those acquitted by the Court by giving benefit of doubt. However, such circular has to be read in the context of the judicial pronouncements and when this Court has repeatedly opined that giving benefit of doubt would not entitle candidate for appointment, despite the circular, the impugned decision of the competent authority dated 23.05.2017 cannot be said to suffer from infirmity as being in violation of the circular when it is in conformity with the law laid down by this Court."

28. A perusal of the above judgments would go to show that while it is difficult to give a precise definition of the expression "honourable acquittal", it can possibly be said that when the accused is acquitted after full consideration of prosecution evidence and the prosecution had HCJ & NJS,J W.A.No.270 of 2021 miserably failed to prove the charges, it can possibly be said that the accused was honourably acquitted.

29. Acquittal in a criminal case is not conclusive for suitability of a candidate. It cannot always be inferred from an acquittal or discharge that the person was falsely implicated or has no criminal antecedents. Unless it is a case of honourable acquittal, the candidate cannot claim the benefit of the case.

30. Having regard to the judgments of the Hon'ble Supreme Court elucidating on the expression "honourable acquittal", we are of the considered opinion that in the facts and circumstances of the case, when the petitioner was acquitted on benefit of doubt, it would not come within the category of "honourable acquittal", as rightly observed by the learned single Judge.

31. In the context of the order which came to be challenged in the writ petition by which provisional selection of the petitioner was cancelled taking recourse to Rule 3(G)(vi) of the Rules of 1999, dealing with offence involving moral turpitude, it will also be necessary to go into the question as to whether the petitioner was involved in an offence involving moral turpitude.

32. In ***Pawan Kumar. V. State of Haryana and another reported in (1996) 4 SCC 17***, the Hon'ble Supreme Court observed that "moral turpitude" is an expression which is used in legal as also societal parlance to describe conduct which is inherently base, vile, depraved or having any connection showing depravity.

HCJ & NJS,J W.A.No.270 of 2021

33. In ***State Bank of India v. P.Soupramaniane***, at paragraphs 8 and 9, the Hon'ble Supreme Court observed as follows:

"8. There is no doubt that there is an obligation on the Management of the Bank to discontinue the services of an employee who has been convicted by a criminal court for an offence involving moral turpitude. Though every offence is a crime against the society, discontinuance from service according to the Banking Regulation Act can be only for committing an offence involving moral turpitude. Acts which disclose depravity and wickedness of character can be categorized as offences involving moral turpitude. Whether an offence involves moral turpitude or not depends upon the facts and the circumstances of the case. Ordinarily, the tests that can be applied for judging an offence involving moral turpitude are:

a) Whether the act leading to a conviction was such as could shock the moral conscience of society in general;
b) Whether the motive which led to the act was a base one, and
c) Whether on account of the act having been committed the perpetrators could be considered to be of a depraved character or a person who was to be looked down upon by the society.

The other important factors that are to be kept in mind to conclude that an offence involves moral turpitude are :- the HCJ & NJS,J W.A.No.270 of 2021 person who commits the offence; the person against whom it is committed; the manner and circumstances in which it is alleged to have been committed; and the values of the society.

According to the National Incident - Based Reporting System (NIBRS), a crime data collection system used in the United States of America, each offence belongs to one of the three categories which are: crimes against persons, crimes against property, and crimes against society. Crimes against persons include murder, rape, and assault where the victims are always individuals. The object of crimes against property, for example, robbery and burglary is to obtain money, property, or some other benefits. Crimes against society for example gambling, prostitution, and drug violations, represent society's prohibition against engaging in certain types of activities. Conviction of any alien of a crime involving moral turpitude is a ground for deportation under the Immigration Law in the United States of America. To qualify as a crime involving moral turpitude for such purpose, it requires both reprehensible conduct and scienter, whether with specific intent, deliberateness, willfulness or recklessness.

9. There can be no manner of doubt about certain offences which can straightaway be termed as involving moral turpitude e.g. offences under the Prevention of Corruption Act, NDPS Act etc. The question that arises for our HCJ & NJS,J W.A.No.270 of 2021 consideration in this case is whether an offence involving bodily injury can be categorized as a crime involving moral turpitude. In this case, we are concerned with an assault. It is very difficult to state that every assault is not an offence involving moral turpitude. A simple assault is different from an aggravated assault. All cases of assault or simple hurt cannot be categorized as crimes involving moral turpitude. On the other hand, the use of a dangerous weapon which can cause the death of the victim may result in an offence involving moral turpitude. In the instant case, there was no motive for the Respondent to cause the death of the victims. The criminal courts below found that the injuries caused to the victims were simple in nature. On an overall consideration of the facts of this case, we are of the opinion that the crime committed by the Respondent does not involve moral turpitude. As the Respondent is not guilty of an offence involving moral turpitude, he is not liable to be discharged from service."

34. A perusal of the aforesaid judgments goes to show that all offences do not come in the category of moral turpitude. It was observed that acts which disclose depravity and wickedness of character, motive which lead to the act is a base one, acts which can shock the moral conscience of society in general and

upon committing which the society considers a person committing the offence to be of a depraved character, can be said to come within the meaning of moral turpitude.

HCJ & NJS,J W.A.No.270 of 2021

35. The Hon'ble Supreme Court held that while a simple assault cannot be categorized as a crime involving moral turpitude, the use of a dangerous weapon which can cause the death of the victim may result in an offence involving moral turpitude.

36. In the instant case, the allegation against the petitioner, as noted earlier, is that he had impersonated himself as one Srikanth and was writing the Mathematics-III paper examination for him. Impersonating a person for writing an examination for someone else cannot be said to be an act done on the spur of the moment but with deliberate planning and it shows lack of character. It is another matter that the petitioner was acquitted on benefit of doubt.

37. Moral turpitude has to be understood to mean something which is contrary to honesty and morality. We have no hesitation to hold that the offence in which the petitioner was involved is an offence which comes within the purview of moral turpitude. A person aspiring
for appointment in police force has to possess good character, integrity and good antecedents. It goes without saying that members of the police force have to be of good moral character in order to inspire confidence in the people.

38. In view of the above discussion, we are of the opinion that no interference is called for with the judgment under challenge and accordingly, the writ appeal is dismissed. No costs. All pending miscellaneous applications shall stand closed."

9. In view of the above discussion and the proposition of law laid down by the Apex Court, the Court comes to the conclusion that non disclosure of antecedent by the Petitioner as to the pendency of criminal case obviously goes to the root of his employment in as much as the offences alleged against the Petitioner pending at the time of making application are not only grave in nature but involved moral turpitude. The mere acquittal of the Petitioner from the said offences itself is not a ground to suggest his innocence from the point of view the purpose for which the Authority requires the character and antecedent of the incumbent/applicant at the time of entry into Government service. This is more so when the Petitioner had abundant scope to mention against the clause 12 in the Attestation form where he was specifically asked if he has been convicted in any offence, thereby the Authority could have come to the just conclusion in approving the application of the Petitioner for his appointment under RAS. The suppression of such material fact persuaded the Authority to believe that the Petitioner to be of good character having no criminal antecedent thereby fell in trap in approving his application and issued the offer of appointment under Annexure-1.

10. The Court finds no illegality committed by Opposite Party No.2 in the impugned order under Annexure-3. As such, no interference is called for. The writ application stands dismissed. No order as to costs.

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