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**Dr. S. MURALIDHAR, C.J & M. S. RAMAN, J.**

W.P. (C) NO. 21222 OF 2015

**BIRSA MINEREX,KEONJHAR** ……Petitioner

**.V.**

**SALES TAX OFFICER & ANR.** ……Opp. Parties

**(A) CENTRAL SALES TAX ACT, 1956 – Section 5(3) r/w Rule 12(3), 12(4) of CST(O) Rules, 1957 – The Sales Tax Officer concluded Audit Assessment under Rule 12(3) – The claim of exemption on account of sale in course of export to the tune of Rs.12,23,71,036/- under section 5(3) of the CST Act has been allowed – On the basis of objection raised by the Auditor General, to the effect that said exemption/deduction was wrongly allowed by the Sales Tax Officer – Proceeding under Rule 12(4) was initiated – Whether the exercise of power under Rule 12(4) of the CST(O) Rules by the Sales Tax Officer is legally tenable ? – Held, Not tenable – In absence of power of review conferred by or under the statute, in the garb of re-assessment, the concluded assessment could not be reopened by the Assessing Authority.** (Para 8.1)

**(B) CONSTITUTION OF INDIA, 1950 – Article 226 – Exercise of power– When permissible? – Held, "review" by *quasi judicial* authority in absence of statutory prescription is considered to be without jurisdiction – Hence, exercise of power under Article 226 of the Constitution of India is permissible.** (Paras 9.1 to 9.6)

**Case Laws Relied on and Referred to** :-

1. (2006) 148 STC 61 (Ori) : Indure Ltd. Vs. Commissioner of Sales Tax, Cuttack, Odisha & Ors.
2. AIR 1989 SC 997 : State of U.P. Vs. Maharaja Dharmander Prasad Singh.
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For Petitioner : Mr. Pranaya Kishore Harichandan

For Opp Parties : Mr. Susanta Kumar Pradhan, ASC( CT & GST Org.)

ORDER Date of Order :17.11.2022

***M. S. RAMAN, J.***

1. Invoking provisions of Article 226 of the Constitution of India, the petitioner-Bisra Minerex, a partnership firm, approached this Court assailing Order dated 28.01.2014 passed by the Sales Tax Officer, Barbil Circle, Barbil, who framed assessment under Section 9(2) of the Central Sales Tax Act, 1956 (for brevity, "CST Act"), read with Rule 12(4) of the Central Sales Tax (Odisha) Rules, 1957 (in short, (CST(O) Rules), raising a demand to the tune of Rs.39,68,397/- pertaining to the tax periods from 01.07.2007 to 31.03.2010. This apart, the petitioner also questioned the rejection of petition vide Order dated 28.01.2014 declining to exercise power under Section 81 of the Odisha Value Added Tax Act, 2004, for rectification of aforesaid Assessment Order under the CST Act.

**The writ petition and contention of the counsel for the petitioner**:

2. The Audit Assessment under Rule 12(3) of the CST(O) Rules had been concluded vide Order dated 05.08.2011 by the Sales Tax Officer, Barbil Circle, Barbil for the tax periods from 01.07.2007 to 31.03.2010, wherein the claim of exemption of penultimate sale in course of export under Section 5(3) of the CST Act was allowed on appreciation of Certificate of Export in Form H required to be furnished under Rule 12(10) of the Central Sales Tax (Registration and Turnover) Rules, 1957 (abbreviated as "CST(R&T) Rules") to the extent of Rs.12,23,71,036/- as against disclosed total turnover of Rs.12,64,00,682/- representing such sales.

2.1. On the basis of certain discrepancies, like absence of foreign buyer's agreement in the record, purchase order from buyer and despatch of goods to foreign destination prior to date of agreement, pointed out with reference to Certificate of Export in Form H to the extent of Rs.1,36,25,062/- by the Auditor General, Odisha, the concluded Audit Assessment under Rule 12(3) of the CST(O) Rules has been sought to be reopened by exercising power under Rule 12(4) ibid. by issue of notice in Form IVA on 24.08.2013.

2.2. Though the books of account supported by the documents referred to above as noted in the objection note of the A.G. were produced before the Sales Tax Officer by the petitioner, the following is recorded by the Assessing Authority in the impugned order:

> *"The other documents like the invoices issued by the dealer-assessee could not be furnished by the dealer at this forum. Hence it is difficult to ascertain the authenticity of the above transactions in absence of the invoices. In addition the form has not been filled completely. Hence the total value i.e. Rs.3,07,82,938/- is now taxed instead of Rs.1,36,25,062/- as suggested by A.G. Odisha."*

2.3. Accordingly, the reassessment proceeding under Rule 12(4) of CST(O) Rules culminated in demand to the tune of Rs.39,68,397/-comprising tax of Rs.13,22,799/- + penalty of Rs.26,45,598/-.

2.4. After suffering such demand in the reassessment proceeding, the petitioner filed petitions under Section 81 of the OVAT Act on 14.07.2014 and 29.10.2014 seeking leave of the Sales Tax Officer for rectification of defects pointed out by the A.G., Odisha.However, said petitions came to be rejected by the Sales Tax Officer vide Order dated 29.07.2015.

2.5. Aggrieved by aforesaid Order dated 28.01.2014 and Order dated 29.07.2015, the petitioner filed the writ petition before this Court inter alia raising following contentions:

i. The observation in the Audit Visit Report in Form VAT-303 (Annexure-3) is as follows:

*"Dealer has effected export sale a tune of Rs.12,64,00,682/- and handed over at the time of audit 12 numbers of H Form amounting Rs.12,23,71,037/- without any associated docuemnts in the way of export sale to avail exemption of tax on export sale. Without production of relevant docuemnts the total export sale to be taxed @4% comes to 50,56,027.28 plus penalty two times comes to Rs.1,01,12,054.56, total comes to Rs.1,51,68,081.84 dealer is liable to pay as per provision of law. This is also admitted by the dealer."*

ii. During the course of Audit Assessment under Rule 12(3) of the CST(O) Rules, books of account was produced along with required documents and statements. Being satisfied, the Assessing Authority has recorded the following fact in the Assessment Order dated 29.07.2011 (Annexure-4) passed under Rule 12(3):

*"*** The dealer has disclosed the gross turnover at Rs.27,34,38,227/- as per the revised return filed. The dealer is allowed deduction of Rs.34,87,547/- towards collection of tax and Rs.12,23,71,036/- towards export sale supported by Form H, the balance turnover is determined at Rs.14,75,79,644/- ***"*

iii. Having not applied independent mind and formedopinion, the Sales Tax Officer is not competent to invoke power under Rule 12(4) of the CST(O) Rules by surrendering to the objection raised by the A.G., Odisha. As the Assessing Authority sought to review the matter in the garb of reassessment under Rule 12(4) of the CST(O) Rules and thereby change his opinion as has already been taken while framing Audit Assessment under Rule 12(3) of the CST(O) Rules.

iv. It is urged by Mr. Pranaya Kishore Harichandan, the counsel for the petitioner that the assessment order thus passed under Rule 12(4) of the CST(O) Rules is untenable in the eye of law as the statute is silent about conferment of power of "review".

v. It is further contended that while passing Audit Assessment Order dated 29.07.2011 the Assessing Authority having verified the books of account and found no discrepancy and accepted the return figures, he ought not to have initiated proceeding under Rule 12(4) of the CST(O) Rules on the self-same material fact.

**Objection of the counsel for the Revenue:**

3. Mr. Susanta Kumar Pradhan,Additional Standing Counsel (CT&GST) made valiant attempt to justify the action of Assessing Authority in proceeding with the reassessment and raising demand by rejecting the turnover relating to sales in course of export which was allowed by the Sales Tax Officer in the Audit Assessment. He pressed into service the observations made by the Sales Tax Officer in the reassessment order dated 28.01.2014 passed under Rule 12(4) of the CST(O) Rules wherein it is found mentioned that the dealer (petitioner) failed to produce "relevant documents" in support of Form H in connection with claim of exemption under Section 5(3) of the CST Act. Therefore, it is submitted by the learned Additional Standing Counsel that the order assailed herein is subject matter of appellate jurisdiction and urged not to entertain the writ petition.

***Undisputed fact:***

4. Audit Assessment was concluded under Rule 12(3) of the CST(O) Rules pursuant to objections contained in the Audit Visit Report by an Order dated 29.07.2011 relating to the tax periods from 01.04.2007 to 31.03.2010 after examination of books of account and consideration of written submission. It has been recorded as follows:

> *"On being confronted the authorized representative of the dealer submitted a statement which are verified and kept in the record. No other discrepancy is noticed from the books of account produced. In the absence of any other point of allegation in AVR, the return figures are accepted."*

In the said Audit Assessment turnover of Rs.12,23,71,036/-has been treated to be exempted under Section 5(3) of the CST Act as the same is supported by Certificate of Export in Form H as prescribed under Rule 12(10) of the CST(R&T) Rules and the same was allowed as deduction from total turnover disclosed by the petitioner-assessee. On the basis of objection raised by the A.G., Odisha to the effect that said exemption/deduction was wrongly allowed by the Sales Tax Officer, Barbil Circle, Barbil while concluding Audit Assessment under Rule 12(3), proceeding under Rule 12(4) was initiated by undertaking re-assessment. While passing Reassessment Order dated 28.01.2014, the said Assessing Authority, not only reversed the already allowed claim of exemption of penultimate sale under Section 5(3) of the CST Act, but also varied with the figure of Rs.1,36,25,062/- and recomputed said figure as Rs.3,07,82,938/-.

***Question raised for adjudication:***

5. WHETHER the exercise of power under Rule 12(4) of the CST(O) Rules by the Sales Tax Officer is legally tenable basing on the objection raised by the A.G., Odisha on the ground that no documentary evidence is available in original record relating to Audit Assessment under Rule 12(3) of the said Rules wherein the claim of exemption on account of sale in course of export to the tune of Rs.12,23,71,036/- under Section 5(3) of the CST Act supported by Certificate of Export in Form H as prescribed under Rule 12(10) of the CST(R&T) Rules has been allowed?

***Relevant provision contained in CST(O) Rules for under taking reassessment under Rule 12(4):***

6. At the relevant point of time Rule 12(4) stood as follows:

> *"(4)(a) Where, after a dealer is assessed under sub-rule (1), (2) or (3) for any period, the assessing authority, on the basis of any information in his possession, is of the opinion that the whole or any part of the turnover of the dealer in respect of any period or periods has escaped assessment, or has been under-assessed, or has been assessed at a rate lower than the rate at which it is assessable or that the dealer has been allowed wrongly any deduction from his turnover or exemption under the Act or has been wrongly allowed set off of input tax credit in excess of the amount admissible under clause (c) of sub-rule (3) of Rule 7 of these rules, he shall serve a notice in Form IVA on the dealer.*
>
> *(b) The hearing of the dealer shall be concluded in accordance with the provisions of clauses (b) and (d) of subrule (3).*
>
> *(c) The assessing authority shall, after hearing the dealer in the manner specified in clause (b), assess the amount of tax payable by the dealer in respect of such period or periods for which assessment proceedings has been initiated and if he is satisfied that the escapement is without any reasonable cause, he may direct the dealer to pay, by way of penalty, a sum equal to twice the amount of tax additionally assessed.*
>
> *(d) Where a dealer fails to comply with the requirements of the notice referred to in clause (a), the assessing authority may make an ex parte assessment of the tax payable by such dealer and pass an order of assessment in writing, after recording the reasons therein.*
>
> *(e) No order of assessment shall be made under this subrule after expiry of five years from the end of the period in respect of which the tax is assessable."*

***Discussion and legal position***:

7. From the fact and figure narrated in the foregoing paragraphs, it is *ex facie* manifest that the Sales Tax Officer has not formed any"opinion" as required in Rule 12(4). Rather the context is indicative of fact that the Assessing Authority sought to review the Order dated 29.07.2011 passed

under Rule 12(3) in the garb of exercise of power under Rule 12(4) of the CST(O) Rules. In the certified copy of Order Sheet enclosed to writ petition as Annexure-7, the following is recorded by the Sales Tax Officer on 24.08.2013:

> *"Issue notice for assessment of tax in Form IV-A of CST(O) Rules fixing date of hearing on 25.09.2013."*

7.1. Neither any reason is assigned prior to issue of said notice contemplating initiation of proceeding under Rule 12(4) of the CST(O) Rules nor the record of proceeding indicated independent application of mind. Such a course is not approved by this Court in the case of ***Indure Limited Vrs. Commissioner of Sales Tax & Ors., (2006) 148 STC 61 (Ori).***

7.2. This Court in the case of *Gopalpur Port Ltd. Vrs. Assistant Commissioner of Sales Tax & Ors., W.P.(C) No.17746 of 2012*, disposed of vide Order 19.08.2015 recorded the following facts:

> *"In the present writ application, the petitioner has sought to challenge the order dated 31.07.2012 passed by the Sales Tax Officer, Ganjam II Circle, Berhampur under Section 10 of the Orissa Entry Tax Act, 1999 for the period from 01.08.2007 to 31.12.2007 under Anenxure-3, inter alia, on various grounds but, in particular, for the purpose of the present consideration, confines the argument to the issue that the petitioner had already for the self-same period under the O.E.T. Act been subjected to an earlier proceeding under Section 10 of the O.E.T. Act based on a 'vigilance report' and the said proceeding had concluded by an order dated 26.02.2011 holding that the procurement of 66393.87 mts of boulder from the petitioner's own leased quarry and the purchase of boulder by the petitioner of 250977.78 mts from one M/s. Start Trading Pvt. Ltd., Cuttack would not be made subject of levy of entry tax, since it was held that the boulder was not a schedule goods under the Orissa Entry Tax Act, 1999.*
>
> *It is submitted on behalf of the petitioner that, once the authorities (based on a report of the vigilance authority) concluded the reassessment under Section 10 of the O.E.T. Act vide order dated 26.02.2011 under Annexure-1, it was no longer open for the Revenue to once again attempt to re-open the self-same issue for the selfsame period and self-same turnover merely on the basis of having received an audit objection from the Auditor General of Orissa. It is further submitted on behalf of the petitioner that once the issue had become final by way of an order of reassessment under Section 10 of the O-E.T. Act, unless and until the same was in any manner questioned and/or reopened, a further proceeding under Section 10 of the O.E.T. Act, once again for the self-same period, quantity and turnover is not permissible under law."*

After noticing the case laws in ***Indure Ltd. Vrs. Commissioner of Sales Tax, Cuttack, Odisha & Ors., (2006) 148 STC 61 (Ori) and State of U.P. Vrs. Maharaja Dharmander Prasad Singh, AIR 1989 SC 997*** this Court was pleased to opine as follows:

> *"On consideration of the submissions as recorded hereinabove, we are of the considered view that the second proceeding under Section l0 of the O.E.T, Act under Anenxure-3 to the writ application was merely based upon the audit conducted by the Auditor General which once again raised the issue as to whether boulder was a mineral or not. This turnover and the period was covered by the earlier order dated 26.02.2017 passed under Section 10 of the O.E.T. Act under Anenxure-1 and consequently having attained finality and no challenge having been made to thesame, remains final and binding on all parties.*
>
> *In view of the aforesaid conclusion arrived at, we find that the opposite party had no jurisdiction in this matter to initiate a fresh proceeding under Section 10 of the O.E.T Act, resulting in passing of the order dated 31.07.2012 under Annexure-3. Therefore, we have no hesitation in directing quashing of Anenxure-3. This Court orders accordingly."*

7.3. This Court in the case of Tree Nuts India (P) Ltd. Vrs. State of Odisha, STREV Nos.26, 27 & 28 of 2013, vide Order dated 13.07.2022 made the following observation by analysing the fact:

> *"7. But the Tribunal also found the fault with the ACST for quashing the assessment orders without assigning reasons "with reference to the exact objection raised by AG" and according to the Tribunal, the STO and the ACST did not properly interpret the provision of law with reference to exemption allowed by the DIC and the objection raised by AG (O). As a result, the cases were remanded to the STO for a fresh adjudication. ****
>
> *12. The jurisdictional requirement of the STO having to form an independent opinion regarding the escapement of assessment was explained by this Court in The Indure Limited v. Commissioner of Sales Tax (2006) 148 STC 61 (Ori). In that case also the assessment was sought to be reopened by the STO under Section 12 (8) of the OST Act only on the basis of audit objection without forming any independent opinion himself regarding escapement of turnover. This Court referred to the judgment of the Supreme Court in Sales Tax Officer, Ganjam v. Uttareswari Rice Mills, MANU/SC/0556/1972 where it had been explained that the difference in phraseology between "for any reason" appearing in Rule 23(1) of the OST Rules and "if the sales tax authority has reasons to believe" does not make much of difference. It was also noticed that an earlier Division Bench of this Court in Bindlish Chemical and Pharmaceutical Works v.Commissioner of Sales Tax, Orissa (1993) 89 STC 102 had not noticed the above decision of the Supreme Court in Uttareswari Rice Mills (supra). In Indure Limited (supra), this Court also noticed the subsequent decision of Division Bench of this Court in State of Orissa v. Ugratara Bhojanaya (1993) 91 STC 76 (Ori) which explained the requirement of Section 12(8) of the OST Act in consonance with the decision of the Supreme Court in Uttareswari Rice Mills (supra).*
>
> *13. In The Indure Limited (supra) the Division Bench of this Court proceeded to hold as under:*
>
> *"(a) Here no basis has been disclosed either in the notice or in the records. Rather the records show that the issuance of the notice preceded any recording of an order in the file. So it is clear that the notice has been issued mechanically and at a point of time*

*when there could not be even any formation of opinion. So the notice was mechanically issued first and then it was sought to be covered up by recording an opinion in the file.*

*(b) From a perusal of the file, it appears that there was an audit objection. From the affidavit of the Revenue also it appears that notice was issued as suggested by audit objection.*

*(c) Of course audit objection can be a valid factor which can be taken into consideration by the concerned officer for initiating a proceeding for re-opening of assessment. But the concerned Sales Tax Officer must independently apply his mind and form an opinion that on the basis of audit objection, an order for re-opening of assessment can be passed. That would be a valid basis for re-opening. But the Sales Tax Officer's formation of opinion cannot be dictated by audit objection.*

*(d) In the instant case in the audit report it was objected that the tax has been under assessed. The concluding part of the audit objection states 'The desirability of the opening of the case under Section 12(8) of O.S.T. Act for re-assessment may be kindly reexamined under intimation to Audit'. The said audit objection is dated 10.9.98. The impugned noticed of re-opening was issued on 23.9.98. But the Sales Tax Officer recordedan order for issuing the notice under Section 12(8) of O.S.T. Act only on 24.10.98. So the notice was issued mechanically even before the order for issuing the notice was actually passed. This is not permissible in law."*

*14. Again in pagraph-18 of the Indure Limited (supra), it was explained as under:*

*"18. The importance of this doctrine lies in the fact that if a statutory functionary is vested with a power to act, it is that statutory authority alone who will form the necessary objective opinion for exercising its power. In doing so, it may take into consideration whatever is relevant. As in the instant case audit objection may be a relevant consideration. Taking that objection into consideration, the Sales Tax Officer has to form his objective opinion. But the Sales Tax Officer cannot totally abdicate or surrender his discretion to the objection of the audit party by mechanically re-opening assessment under Section 12(8) as has been done in this case. This was frowned upon again by Justice Hegde again while delivering the judgment of the Apex Court in The Purtabpur CompanyLtd. v. Cane Commissioner of Bihar and Ors., The Supreme Court quashed the order of the Cane Commissioner as it found that the Cane Commissioner virtually worked as the mouth piece of the Chief Minister."*

*15. Ultimately in The Indure Limited (supra) the impugned notice of reassessment was quashed since the Sales Tax Officer had "blindly initiated" the assessment proceeding on order to objection "without any independent application of mind."*

*16. The facts of the present case are more or less similar. Here again it is seen from the order of the ACST, that the reopening assessment was made by the STO only on the basis of an audit objection and without any independent application of mind as to whether there had been an escapement of turnover for the periods in question. Following the decision in The Indure Limited (supra), this Court is of the view that the reassessment orders of the STO cannot be sustained in law. The Tribunal erred in remanding the matters to the STO while the jurisdictional requirement of independent satisfaction by the STO in the manner explained in The Indure Limited (supra) was not existent in the present cases."*

7.4. A three-Judge Bench of Hon'ble Supreme Court of India in the case of ***State of Uttar Pradesh & Ors. Vrs. Aryaverth Chawl Udyog & Ors., (2015) 17 SCC 234*** culled out the following fact:

> *"9. The assessing Authority issued a notice under Section 21(2) of the Act to the assessee to show cause as to why should the claim of deduction of the purchase tax as paid on purchase of paddy, within the State of Uttar Pradesh, from the tax liability as computed on the inter-State sales of rice manufactured from such paddy not be inquired into and an order of reassessment ought not be passed accordingly, dated 26.03.2008.*
>
> *10. The assessing Authority in its re-assessment order, dated 31.03.2008, rejected the claim of deduction of purchase tax already paid on the purchase of paddy within the State of Uttar Pradesh and created a demand of Rs.72,408/- in addition to the demand under original assessment order. However, keeping in view the pendency of writ petition before the High Court, the demand notice was not enforced."*

After reviewing legal position as set forth in earlier cases, the Hon'ble Apex Court in the aforesaid reported case has succinctly restated the law on the point of "change of opinion" in the context of reassessment as follows:

> *"29. The standard of reason exercised by the Assessing Authority is laid down as that of an honest and prudent person who would act on reasonable grounds and come to a cogent conclusion. The necessary sequitur is that a mere change of opinion while perusing the same material cannot be a "reason to believe" that a case of escaped assessment exists requiring assessment proceedings to be reopened. (See: Binani Industries Ltd., Kerala vs. Respondent: Assistant Commissioner of Commercial Taxes, VI Circle, Bangalore and Ors., (2007) 15 SCC 435; A.L.A. Firm v. CIT, (1991) 2 SCC 558). If a conscious application of mind is made to the relevant facts and material available or existing at the relevant point of time while making the assessment and again a different or divergent view is reached, it would tantamount to "change of opinion". If an assessing Authority forms an opinion during the original assessment proceedings on the basis of material facts and subsequently finds it to be erroneous; it is not a valid reason under the law for re-assessment. Thus, reason to believe cannot be said to be the subjective satisfaction of the assessing Authority but means an objective view on the disclosed information in the particular case and must be based on firm and concrete facts that some income has escaped assessment.*
>
> *30. In case of there being a change of opinion, there must necessarily be a nexus that requires to be established between the "change of opinion" and the material present before the assessing Authority. Discovery of an inadvertent mistake or non-application of mind during assessment would not be a justified ground to reinitiate proceedings under Section 21(1) of the Act on the basis of change in subjective opinion (CIT v. Dinesh Chandra H. Shah, (1972) 3 SCC 231; CIT v. Nawab Mir Barkat Ali Khan Bahadur, (1975) 4 SCC 360)."*

*7.5. This Court has, in the case of Kalinga Institute of Industrial Technology (KIIT), Bhubaneswar, Vrs. Assistant Commissioner of Income Tax Exemption Circle, Bhubaneswar & Others, W.P.(C) No. 4440 of 2022, disposed of vide Order dated 21.07.2022, observed as follows:*

*"7. *** Further the original assessment order in a tabular form sets out the cost of medicines and the selling price of the medicines as was done in identical terms in the reasons for reopening the assessment. This is a text book example of reopening of assessment being made on exactly the same materials that were available to the AO in the first instance.*

*8. This is precisely what has been disapproved by the Supreme Court of India in its decision in Commissioner of Income Tax v. Kelvinator of India Ltd.(2010) 320 ITR 561(SC) where it observed as under:*

*".....post-1st April, 1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfillment of certain pre-conditions and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the grab of reopening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer."*

*9. This Court too has in similar circumstances, where there was a mere change of opinion on the same materials, set aside the reassessment notice and the consequential assessment order by its judgment dated 15th February, 2022 in Writ Petition (Civil) No. 25229 of 2017 (M/s. Tuff Tubes (Orissa) Pvt. Ltd. v. The Deputy Commissioner of Income Tax, Corporate Circle-1(2), Bhubaneswar)."*

*7.6. In the matter of Sri Jagannath Promoters & Builders, Giri Road Berhampur, Ganjam Vrs. Deputy Commissioner of Income Tax, Berhampur Circle, Berhampur, Ganjam and others, W.P.(C) No. 14603 of 2014, this Court vide Order dated 26.10.2021 held as follows:*

*"13. In the present case, the reasons for reopening the assessment do not point to any new material that was available with the Department. What appears to have happened is that the same material viz., the accounts produced by the Assessee were re-examined and a fresh opinion was arrived at by the Opposite Party No.1 regarding the claim of the deduction of Rs.48,183/- onaccount of the loss of sale of assets. This had already been disclosed in the detailed accounts filed by the Assessee. In fact, a questionnaire had been issued by the AO in the course of the original assessment proceedings to the Assessee which was responded to by the Assessee. In other words, there was conscious application of mind by the AO to the said materials. Therefore, the inevitable conclusion as far as the present case is concerned is that the 'reason to believe' of Opposite Party No.1 that income for the AY in question had escaped assessment is based on a mere' change of opinion'.*

*14. In this context, the following observations of the Delhi High Court in Jindal Photo Films Ltd. v. the Deputy Commissioner of Income Tax (1998) 234 ITR 170 (Del) are relevant:*

> *"Following the settled trend of judicial opinion and the law laid down by their Lordships of the Supreme Court time and again different High Courts of the country have taken the view that if an expenditure or a deduction was wrongly allowed while computing the taxable income of the Assesses, the same could not be brought to tax by reopening the assessment merely on account of subsequently the assessing officer forming an opinion that earlier he had erred in allowing the expenditure or the deduction."*
>
> *"Though he has used the phrase 'reason to believe' in his order, admittedly, between the date of orders of assessment sought to be reopened and the date of forming of opinion by the ITO nothing new has happened. There is no change of law. No new material has come on record. No information has been received. It is merely a fresh application of mind by the same assessing officer to the same set of facts."*

7.7. The Hon'ble Supreme Court in the case of ***Income Tax Officer Vrs. Techspan India Ltd. & Anr., (2018) 6 SCC 685*** has dealt with the law on the point of "change of opinion" in the context of reassessment to the following effect:

> *"16. To check whether it is a case of change of opinion or not one has to see its meaning in literal as well as legal terms. The word change of opinion implies formulation of opinion and then a change thereof. In terms of assessment proceedings, it means formulation of belief by an assessing officer resulting from what he thinks on a particular question. It is a result of understanding, experience and reflection.*
>
> ***
>
> *18. Before interfering with the proposed re-opening of the assessment on the ground that the same is based only on a change in opinion, the court ought to verify whether the assessment earlier made has either expressly or by necessary implication expressed an opinion on a matter which is the basis of the alleged escapement of income that was taxable. If the assessment order is nonspeaking, cryptic or perfunctory in nature, it may be difficult to attribute to the assessing officer any opinion on the questions that are raised in the proposed re-assessment proceedings. Every attempt to bring to tax, income that has escaped assessment, cannot be absorbed by judicial intervention on an assumed change of opinion even in cases where the order of assessment does not address itself to a given aspect sought to be examined in the reassessment proceedings."*

7.8. The expression "change of opinion" has been explained by this Court in the case of ***Bharat Petroleum Corporation Ltd. Vrs. Sales Tax Officer, (2012) 52 VST 137 (Ori***), wherein it has been laid down as follows:

> *"17. Before proceeding further, it is necessary to know what is the meaning of making assessment on 'change of opinion' under direct or indirect tax. It means, in respect of a particular income/transaction if the Assessing Officer after application of mind, takes a view that the particular goods or income is not liable to tax and completed the assessment, reopening of said assessment is not permissible by mere change of opinion of the Assessing Officer to levy tax on such goods or income.*

*18. The Hon'ble Supreme Court in the case of Binani Industries Ltd. vs. Asst. Commissioner of Commercial Taxes, [2007] 6 VST 783 (SC), held that reopening of assessment is not permissible by mere change of opinion of the Assessing Officer. Merely because the Assessing Officer changes his opinion that cannot have any effect on the assessment which has been completed on the basis of the view taken on turnover considered in the earlier assessment."*

7.9. In ***Goyal Traders Vrs. Sales Tax Officer, Sambalpur-I Circle, Sambalpur, W.P.(C) No.3821 of 2013***, vide Order dated 22.03.2021, this Court laid down as follows:

*"2. Perusal of Form E-32 (A-3) which reflects the decision of the Assessing Officer to reopen the assessment gives simply one reason 'that case has been reopened due to receipt of objection raised by the A.G., Odisha, Bhubaneswar'. There is no indication of what the objection was. Even the order-sheet of 9th November, 2002 simply states issue notice to appear and in the note call, again reference simply is made to report receipt from A.G., Odisha, Bhubaneswar on 6th November, 2012 without actually indicating what was in the said objection raised by the A.G.,Odisha.*

*3. An order reopening the assessment must reflect the reasons for such reopening in the body of the order itself. The reasons cannot be supplied later. If the reason is simply due to the 'objection raised by the A.G., Odisha', it must state what the nature of such objection was. Only then will the assessee be in a position to answer the notice issued effectively. Since this basic principle has not been adhered to, the Court sets aside the impugned order reopening the assessment."*

7.10. This Court on perusal of the Order Sheet at Annexure-7 finds that no reason whatsoever has been assigned in the Order dated 24.08.2013 while issuing "notice for assessment of tax in Form IVA of CST(O) Rules".

7.11. This Court in the case of Essel Mining & Industries Ltd. Vrs. State of Odisha, 2017 (Supp.-II) OLR 825 in the context of nonassignment of reason observed as follows:

*"11. Franz Schubert said—*

*"Reason is nothing but analysis of belief"*

*In Black's Law Dictionary, reason has been defined as a –*

*"faculty of the mind by which it distinguishes truth from falsehood, good from evil, and which enables the possessor to deduce inferences from facts or from propositions."*

*It means the faculty of rational thought rather than some abstract relationship between propositions and by this faculty, it is meant the capacity to make correct inferences from propositions, to size up facts for what they are and what they imply, and to identify the best means to some end, and, in general, to distinguish what we should believe from what we merely do believe.*

*12. 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 theconclusion and decision 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 in Uma Charan v. State of Madhya Pradesh, AIR 1981 SC 1915.*

*13. Reasons being a necessary concomitant to passing an order, the appellate authority can thus discharge its duty in a meaningful manner either by furnishing the same expressly or by necessary reference to those given by the original authority."*

7.12. In ***Steel Authority of India Ltd. Vrs. Sales Tax Officer, (2008) 16 VST 181 (SC)*** with regard to order bereft of reason, the following has been stated:

*"Reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same it becomes lifeless. (See Raj Kishore Jha v. State of Bihar (2003) 11 SCC 519).*

*Even in respect of administrative orders Lord Denning M. R. in Breen v. Amalgamated Engg. Union U97U 1 All ER 1148, observed : 'The giving of reasons is one of the fundamentals of good administration.' In Alexander Machinery (Dudley) Ltd. v. Crabtree (1974) ICR 120 (NIRC)it was observed: 'Failure to give reasons amounts to denial of justice'. 'Reasons are live links between the mind of the decision-taker to the controversy in question and the decision or conclusion arrived at.' Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if thedecision reveals the 'inscrutable face of the sphinx', it can, by its silence, render it virtually impossible for the courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system; at least sufficient to indicate an application of mind to the matter before court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made; in other words, a speaking-out. The 'inscrutable face of the sphinx' is ordinarily incongruous with a judicial or quasi-judicial performance."*

7.13. In the case of ***Prabhat Agarwal Vrs. Deputy Commissioner of Income Tax, 2018 SCC OnLine Del 10598***, the Hon'ble Delhi High Court was in seisin of reassessment notice under Section 147/148 of the Income Tax Act, 1961 and exercised writ jurisdiction under Article 226 of the Constitution of India held as follows:

*"11. This Court has considered the record. The reassessment notice is based on reasons, which the revenue asserts, was recorded on 28 May, 2007. The question is whether the assesse is correct in asserting- as he does in this case, that these reasons were inserted later and did not exist, or were not reflected when the notice was issued. In other words, the veracity of the revenue's position that reasons existed on the file, before the notice was issued, is disputed. ****

> *16. It goes without saying that whilst the 'reasons' shown to the court and the petitioner may ipso facto not be faulted, yet the file tells a different story; they were not recorded before the impugned notice was issued. In fact, the revenue played a subterfuge, in trying to cover up its omission, and in ante-dating the record., in the attempt to establish that such reasons existed…"*

7.14. As is manifest from bare reading of provision as it existed in Rule 12(4) of the CST(O) Rules, 1957, at the relevant point of time that the Assessing Authority is empowered to serve notice in Form IVA on the dealer to proceed with the reassessment, if "on the basis of any information in his possession" he is "of the opinion" that the whole or any part of the turnover of the dealer in respect of any period(s) has escaped assessment, or has been under-assessed, or has been assessed at a rate lower than the rate at which it is assessable or that the dealer has been allowed wrongly any deduction from his turnover or exemption under the Act or has been wrongly allowed set off of input tax credit in excess of the amount admissible under clause (c) of sub-rule (3) of Rule 7. Whereas formation of "opinion" is sine qua non for initiation of proceeding under Rule 12(4) of the CST(O) Rules, assignment of reason for such forming "opinion" is necessary concomitant factor. In the instant case, scrutiny of Order Sheet at Annexure-7 shows that vide Order dated 24.08.2013 the Assessing Authority merely directed for issue of notice in Form IVA without forming any "opinion" much less ascribing "reason". This is indicative of non-application of mind and mechanical application of mind.

***Decision on the issue of forming opinion prior to issue of notice in Form IVA as per Rule 12(4) of the CST(O) Rules:***

8. Considering the facts of the instant case in the above perspective, it is apparent from Order Sheet that no opinion has been formed by the Assessing Authority prior to or at the time of issue of notice for reassessment under Rule 12(4) of the CST(O) Rules. Further the Assessing Authority while framing Audit Assessment under Rule 12(3) vide Order dated 29.07.2011 has taken into consideration the objection pertaining to erroneous claim of penultimate sale in course of export under Section 5(3) of the CST Act as contained in the Audit Visit Report dated 04.12.2010submitted in Form VAT-303 and accordingly, after examining the books of account being produced before him by the petitioner during the course of said Audit Assessment allowed such claim of exemption under Section 5(3) of the CST Act in respect of impugned turnover representing penultimate sale in course of export. By recording following reason in the said assessment order, the Assessing Authority arrived the such conclusion:

> *"On being confronted the authorized representative of the dealer submitted a statement which are verified and kept in the record. No other discrepancy is noticed from the books of account produced. In the absence of any other point of allegation in AVR, the return figures are accepted."*

8.1. In absence of power of review conferred by or under the statute, in the garb of reassessment, the concluded assessment could not be reopened by the Assessing Authority. As the material available on record does not show independent application of mind of the Assessing Authority having regard to the material in his possession, if any, merely based on objection of Auditor General, Odisha issue of notice in Form IVA in exercise of power under Rule 12(4) of the CST(O) Rules for reopening Audit Assessment concluded under Rule 12(3) on examination of books of account, etc. is impermissible in law and such an action is without jurisdiction.

***Availability of alternative remedy:***

9. Noteworthy here that way back in 2016, vide Order dated 04.01.2016 while issuing notice in the writ petition, this Court passed the following Order:

> *"Misc. Case No.19771 of 2015*
>
> *Heard.*
>
> *It is directed that the impugned demand shall remain in abeyance till disposal of the writ application.*
>
> *The Misc. Case is disposed of.*"

9.1. Though more than 6 years have been elapsed in the meantime neither record is produced nor does the CT&GST Organisation opposite parties file counter-affidavit in the matter. Therefore, this Court is inclined to proceed with the matter on its merit on the basis of material as available on record.

9.2. Conspectus of enunciation of law on the subject as discussed in the preceding paragraphs applied to the fact-situation of the instant case vis-à-vis Order dated 24.08.2013 as maintained in the Order Sheet vide Annexure-7 drives this Court to safely conclude that the initiation of proceeding for reassessment was not in consonance with the statutory requirement. This view is further fortified by proposition as propounded by the Hon'ble Supreme Court of India in the case of Commissioner of Income Tax Vrs. Chhabil Dass Agarwal, (2014) 1 SCC 603 = (2013) 357 ITR 357(SC), in the context of exercise of writ jurisdiction under Article 226 of the Constitution of India when alternative statutory remedy is available. The Hon'ble Supreme Court has recognized some exceptions to the rule of alternative remedy, viz., where the statutory authority has not acted in accordance with the provisions of the enactment in question, or

in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice.

9.3. There is no quarrel over the proposition that availability of alternative remedy under the statute is not absolute bar for exercise of power under Article 226 of the Constitution of India, moreso when the facts are not disputed and in identical fact-situation this Court earlier accepted the writ petition.

9.4. The Hon'ble Supreme Court of India in the case of Dr. (Smt.) Kuntesh Gupta Vrs. Management of Hindu Kanya Mahavidyalaya, Sitapur (UP) and Ors., (1987) 4 SCC 525 held that "review" by quasi judicial authority in absence of statutory prescription being without jurisdiction, exercise of power under Article 226 of the Constitution of India is permissible.

9.5. This Court has already found that the Assessing Authority has reviewed order of assessment dated 29.11.2011 (Annexure-4) passed under Rule 12(3) of the CST(O) Rules and passed order of reassessment dated 28.01.2014 under Rule 12(4) ibid. reconsidering same transaction. In this respect, reliance is placed on the ruling of the Hon'ble Apex Court as laid down in Dr. (Smt.) Kuntesh Gupta (supra):

> *"11. It is now well established that a quasi judicial authority cannot review its own order, unless the power of review is expressly conferred on it by the statute under which it derives its jurisdiction. The Vice-Chancellor in considering the question of approval of an order of dismissal of the Principal, acts as a quasi judicial authority. It is not disputed that the provisions of the U.P. State Universities Act, 1973 or of the Statutes of the University do not confer any power of review on the Vice-Chancellor. In the circumstances, it must be held that the Vice-Chancellor acted wholly without jurisdiction in reviewing her order dated January 24, 1987 by her order dated March 7, 1987. The said order of the Vice Chancellor dated March 7, 1987 was a nullity.*
>
> *12. The next question that falls for our consideration is whether the High Court was justified in dismissing the writ petition of the appellant on the ground of availability of an alternative remedy. It is true that there was an alternative remedy for challenging the impugned order by referring the question to the Chancellor under section 68 of the U.P. State Universities Act. It is well established that an alternative remedy is not an absolute bar to the maintainability of a writ petition. When an authority has acted wholly without jurisdiction, the High Court should not refuse to exercise its jurisdiction under Article 226 of the Constitution on the ground of existence of an alternative remedy. In the instant case., the Vice-Chancellor had no power of review and the exercise of such a power by her was absolutely without jurisdiction. Indeed, the order passed by the Vice-Chancellor on review was a nullity; such an order could surely be challenged before the High Court by a petition under Article 226 of the Constitution and, in our opinion, the High Court was not justified in dismissing the writ petition on the ground that an alternative remedy was available to the appellant under section 68 of the U.P. State Universities Act.*

> *13. As the impugned order of the Vice-Chancellor is a nullity, it would be a useless formality to send the matter back to the High Court for disposal of the writ petition on merits. We would, accordingly, quash the impugned order of the Vice-Chancellor dated March 7, 1987 and direct the reinstatement of the appellant forthwith to the post of Principal of the Institution. The judgment of the High Court is set aside and the appeal is allowed. There will, however, be no order as to costs."*

9.6. Under the above premise, the objection as raised in connection with the maintainability of writ petition and exercise of power under Article 226 of the Constitution of India by Sri Susanta Kumar Pradhan, learned Additional Standing Counsel (CT&GST) is overruled. Taking into consideration the legal position as well as undisputed factual position, this Court is inclined to entertain this writ petition.

***ORDER:***

10. For the reasons stated above, the Assessment Order dated 28.01.2014 passed under Rule 12(4) of the Central Sales Tax (Odisha) Rules, 1957, by the Sales Tax Officer, Barbil Circle, Barbil pertaining to tax periods from 01.07.2007 to 31.03.2010 is set aside.

10.1. Since the Assessment Order itself is set aside, the Order dated 29.07.2015 refusing to entertain petitions dated 14.07.2014 and 29.10.2014 to rectify the defect(s) does not survive, hence, the same is quashed.

10.2. In the result, the writ petition is allowed, but there is no order as to costs in the facts and circumstances of the case.

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## 2023 (I) ILR - CUT- 17

**Dr. S. MURALIDHAR, C.J & M.S. RAMAN, J.**

OTAPL NO. 1 OF 2007

**PRINCIPAL COMMISSIONER OF GST AND CENTRAL EXCISE, BHUBANESWAR COMMISSIONERATE, BHUBANESWAR** .....Appellant

.V.

**M/s. NEELACHAL ISPAT NIGAM LTD.** .....Respondent

**CENTRAL EXCISE CUSTOMS AND SERVICE TAX r/w CENTRAL EXCISE RULES, 1944 – Whether CENVAT Credit can be allowed to an assessee on capital goods used in the factory (Power Plant of KMCL) meant for another company/assessee (NINL) for manufacture of final**

**products which are different and distinct, i.e., KMCL manufactures 'Coke' and NINL manufactures 'Steel' as the final product? – Held, Yes – The Coke Oven Plant and CPP have factually been shown to be part of the same factory premises and CENVAT Credit can be allowed in the facts and circumstances of the case.** (Para 22)

**Case Law Relied on and Referred to** :-

1. 2018 (16) G.S.T.L. 196 (Raj) : Commissioner of Central Goods & S.T., Jaipur Vs. Shree Cement Ltd.

For Appellant : Mr. Choudhury Satyajit Mishra,Sr. Standing Counsel

For Respondent: Mr. R. Raghavan, Mr.J. Mohanty.

JUDGMENT Date of Judgment:22.11.2022

***Dr. S. MURALIDHAR, C.J.***

1. The present appeal by the Commissioner of Central Excise,Customs and Service Tax, Bhubaneswar is against an order dated 4th September, 2006 passed by the Customs, Excise & Services Tax Appellate Tribunal (CESTAT), Kolkata in Appeal No.EDM10/03 allowing the appeal of the Respondent-Assessee and reversing the Order-in-Original dated 26th September, 2002 passed by the Commissioner, Central Excise & Customs, Bhubaneswar-I. At the outset, it must be noticed that the Respondent-Assessee originally was M/s. Konark Met Coke Ltd. (KMCL) which was subsequently substituted by M/s. Neelachal Ispat Nigam Ltd. (NINL). The further development was that NINL has since been taken over by M/s. Tata Steel Long Products Limited.

2. The original Appellant was the Commissioner of Central Excise, Customs & Service Tax and by virtue of the amendment has been substituted by the Principal Commissioner of GST and Central Excise, Bhubaneswar Commissionerate.

3. While admitting the present appeal on 7th May, 2021 the following questions were framed for consideration:

> "(i) Whether CENVAT Credit can be allowed to an assessee on capital goods used in the factory (Power Plant of KMCL) meant for another company/assessee (NINL) for manufacture of final products which are different and distinct i.e. KMCL manufactures 'Coke' and NINL manufactures 'Steel' as the final product?
>
> (ii) Whether under Rule 57AA of the Central Excise Rules, 1944 or Rule 2 of CENVAT Credit Rules, 2001,the capital goods used in the power plant of KMCL is Cenvatable when the final products (Power) is non excisable?

(iii) KMCL having consciously established the Captive Power Plant within the premises of another company (NINL) which requires 75% of power, whether CENVAT Credit can be allowed on capital goods for the captive power plant when it is not exclusively used in the manufacture of Coke, that too when the coke oven plant is situated at a different place?

(iv) Whether the Captive Power Plant of KMCL, consciously installed centrally within the premises of NINL to meet 75% of NINL's power, satisfies the definition of factory under Section 2(e) of the Central Excise Act, 1944?"

4. The background facts are that KMCL set up a Metallurgical Coke Plant along with a Captive Power Plant (CPP) for its own consumption as well as for sale of power to NINL. KMCL applied for registration on 12th January, 1998 under Rule 174 of the Central Excise Rules, 1944 (CE Rules) for setting up a Coke Oven Plant to manufacture excisable goods. It procured various capital goods defined under Rule 57Q of the CE Rules on payment of duty and filed a declaration under Rule 57D. The capital goods received were also entered in RG-23-C Part-I. KMCL availed credit on the capital goods as well as the inputs.

5. According to the Appellant, while applying for registration, a ground plan of the Coke Oven Plant and CPP was submitted. This showed that the CPP was situated within the premises of NINL, which was a different company. The Range Superintendent deleted the CPP from the ground plan. The contention of KMCL was that the ground plan had to be modified since the two plants, i.e., the CPP and the Coke Oven Plant were two sections of the same manufacturing unit and that the electricity was essential for carrying out the manufacturing activity. According to the Department, 75% of the power generated was meant for NINL.

6. On completion of the project, KMCL entered the duty paying documents in respect of the capital goods received up to 31stMarch, 2001 in the RG-23-C Part-II register. The accumulated credit as of that date was to the tune of Rs.16,43,75,008. On 9thApril, 2001 KMCL filed with the Range Superintendent the necessary data showing the earning and availing of the said credit.

7. The Commissioner, Central Excise & Customs, Bhubaneswar issued a Show Cause Notice (SCN) dated 1st April, 2002 to the KMCL for contravention of the Rule 57AA and Rule 2 of the CE Rules and CENVAT Credit Rules (CC Rules), 2001 respectively for having availed the credit of duty paid on capital goods and inputs during the period of March and July,

2001. According to the Department, to be eligible for availment of MODVAT/CENVAT Credit, the inputs and capital goods should be:

> "(i) received in the factory of manufacture of final product;
>
> (ii) used in the factory of manufacture of the final products in or in relation to manufacture of the said final product."

8. According to the Department, even if the CPP of KMCL were to be situated inside the factory of NINL and satisfied the criteria laid down by the Central Board of Excise & Customs (CBEC) to constitute as part of the same factory, no MODVAT/CENVAT credit would still be available since the Power Plant was designed predominately to cater to the requirements, not of KMCL, but of NINL. It must be mentioned here that according to the Department, 75% of the power generated in the CPP was meant for NINL. Thus, it was contented by the Department that the entire power and steam generated in the CPP was not being used in the manufacture of final products of KMCL but in the manufacture of final products of NINL, which was a different factory and, therefore, such CENVAT/Credit could not be availed of.

9. The Department contended that the CC Rules specifically mentioned that capital goods and inputs for the purposes of the said Rules should be used in or in relation to the manufacture of final products within the factory of production. Use of the capital goods or inputs outside the factory of manufacture of final products and/or any use not in or in relation to the manufacture of the final products would render the said inputs/capital goods ineligible for the purposes of availment of CENVAT Credits. Accordingly, on 26th September, 2002 the Commissioner, Central Excise & Customs passed an adjudication order disallowing the above CENVAT Credit and imposing penalty of Rs.1 Lakh on KMCL under Rule 173Q of the CE Rules and Rule 13 of the CC Rules.

10. KMCL then filed an appeal before the CESTAT being Appeal No.EDM-10 of 2003. The CESTAT, by the impugned order held as under:

> "(a) That Coke Oven Plant and Power Plant of KMCL located at different cities i.e. not inside the premises of Coke Oven Plant cannot be denied especially when land has subsequently been transferred to KMCL. The Commissioner did not disentitle the capital goods credit on the duty paid on capital goods brought to set up the Power Plant. So long as the Power Plant is used, to generate electricity, to manufacture the goods in the appellant's Coke Oven Plant, which is not disputed, capital goods credit would be eligible.

> (b) That the power generated, in the power plant of KMCL is meant for use by NINL would not disentitle the credit, since power cannot be stored. It has to be rolled out and gainfully utilized Rolling out of Power is a technological necessity.
>
> (c) That the credit eligibility on inputs, which was not pressed by the Learned Advocate before us, therefore we arrive at no findings as regards the eligibility of credit on inputs, i.e. goods other than capital goods and would allow this appeal, granting the capital goods credit and holding that the input credit not pressed."

11. Mr. Choudhury Satyajit Mishra, learned Senior Standing Counsel appearing for the Appellant made the following submissions:

(i) The twin conditions are to be cumulatively fulfilled in terms of Rule 57A of the CE Rules read with Rule 2 of the CC Rules in order that the capital goods are cenvatable and not satisfied in the present case.

(ii) The CESTAT had failed to appreciate the fact that while issuing registration certificate under Rule 174 of the CE Rules to KMCL, the Power Plant portion was excluded from the approved ground plan. KMCL and NINL were two separate public limited companies with independent legal identities. The Power Plant located inside the factory premises of NINL, which was a separate premises altogether, could not be included in the ground plan of KMCL. Therefore, the installation of a Captive Power Plant inside the premises of NINL did not satisfy the definition of 'Factory' under Section 2(e) of the CE Act. The premises of KMCL and that of NINL were two disjoint premises. One had the Coke Oven Plant and the other was the Power Plant. The Power Plant was surrounded completely by the registered premises of NINL.

(iii) The power or electricity produced by KMCL was not an excisable commodity, therefore, CENVAT Credit of duty paid on the capital goods and inputs used in the power plant was not admissible in terms of Rule 57AH of the CE Rules read with Rule 12 of the CC Rules. 75% of the power generated in the Captive Power Plant was in fact used by NINL and not KMCL.

> "The power generated should have been meant for manufacture of excisable goods inside the factory premises but in the instant case, the power has been sold to other unit. The unit could not fulfil the conditions of Rule 57AA of Central Excise Rules, 1944/ Rule 2 of the CENVAT Credit Rule, 2001."

12. Mr. Mishra, learned Senior Standing Counsel for the Appellant, also drew attention to the following finding in the order of the Commissioner:

> "From the above, it is evident that the "Power Plant" of KMCL is running with the help of blast furnace gas generated as a by-product in another separate registered factory i.e. NINL. In view of this, there is no inter-linkage of processes between the Power Plant

> and the final products to be manufactured in the Coke Oven Plant of KMCL. Accordingly, even in the context of the above guidelines of CBEC relied upon by KMCL, the Power Plant which is situated in a separate premises away from the factory premises of KMCL manufacturing the final products, cannot constitute part of the same factory, i.e. KMCL. Even otherwise, going by the definition of the factory as quoted in Para 3.1 above, the Power Plant of KMCL which is not situated either inside the premises of KMCL or in the precincts thereof, does not qualify to be part of the factory of KMCL."

It was submitted that the CESTAT assigned no reason to discard the above finding.

13. Countering the above submissions, Mr. R. Raghavan, learned counsel appearing for the Respondent supported the order of the CESTAT and submitted as under:

(i) Under Scheme of Amalgamation Sanctioned by this Court in COPET No.26 of 2004 by order dated 5th November 2004, KMCL was amalgamated with NINL with effect from 8th December, 2004. Going by the definition of 'Factory' under Section 2(e) of the CE Act read with the guidelines of the CBEC, it could not be said that the Coke Oven Plant and the CPP were located in different locations. The land on which the Power Plant was situated was subsequently transferred to KMCL and, therefore, it could not be said to be different premises.

(ii) So long as the Power Plant was used to generate electricity to manufacture the goods in the Appellant's Coke Oven Plant, capital goods credit would still be available.

(iii) Merely because 75% of the power generated in the Captive Power Plant of KMCL is sold to NINL, would not disentitle KMCL to CENVAT credit. Power cannot be stored and has to be rolled out and gainfully utilized. Rolling out of power was a technological necessity. The relief was granted by CESTAT only in relation to capital goods credit and not to input credit since the latter was not pressed.

14. It was further submitted by Mr. Raghavan, learned counsel for the Respondent, that initially NINL was promoted by MMTC Limited, a Government of India undertaking along with the Government of Odisha for setting up an Integrated Iron & Steel Plant at Duburi on the basis of a single feasibility report. In order to meet the institutional norms pertaining to Promoters' contribution and for arranging the required funds, the Promoters decided to bifurcate NINL into two units. One unit was to be KMCL which

would manufacture Blast Furnace Coke for exclusive use by NINL. The idea was to make the industrial unit an Integrated Conventional Iron and Steel Plant. Thus, NINL and KMCL were to be inter-dependent both technologically and operationally. Both the plants were to be inter-linked and inseparable. The manufacturing activity in the Coke Oven Plant could not be conceived without power supply from the Power Plant.

15. Although the Coke Oven complex and CPP were in different locations, they belonged to the same factory and satisfied the requirement that "the said goods are to be used in the factory of the manufacturer of final products".The only restriction for availing credit under the CENVAT Scheme was that the capital goods were not to be exclusively used for manufacture of exempted products. In the present case, the manufactured goods for which the registration certificate has been issued are dutiable final products. Accordingly, CENVAT Credit was admissible on the capital goods. Further, there was no restriction under the CENVAT Scheme that after Captive use of power, the surplus power cannot be supplied to any other party. The power/electricity was not a final product of KMCL and was used directly in the manufacture of excisable goods in the Coke Oven Plant. Both units constituted one factory where excisable goods were manufactured. Therefore, the excisability of power/electricity was not at all relevant or determinative for resolving the dispute.

16. The above submissions have been considered. To begin with, the Court would like to refer to the definition of "Factory" under Section 2(e) of the CE Act which reads as under:

> "Factory means any premises, including the precincts thereof, wherein or in any part of which excisable goods other than salt are manufactured, or wherein or in any part of which any manufacturing process connected with the production of these goods is being carried on or is ordinarily carried on."

17. This has to be read together with the relevant portion of the CBEC's Manual of Supplementary Instructions dated 1st September, 2001, which reads thus:

> "Separate registration is required in respect of separate premises except in cases where two or more premises are actually part of the same factory (where processes are interlinked), but are segregated by public road, canal or railway line. The fact that the two premises are part of the same factory will be decided by the Commissioner of Central Excise based on factors, such as:
>
> (a) Interlinked process- product manufactured/ produced in one premise are substantially in other premises for manufacture of final products.

(b) Large number of raw materials is common and received/ proposed to be received commonly for both/ all the premises.

(c) Common electric supplies.

(d) There is common labour/ work force.

(e) Common administration/ works management.

(f) Common Sales Tax registration and assessment.

(g) Common Income Tax assessment.

(h) Any other factor as may be indicative of inter linkage of the manufacturing process."

18. The above definition does not preclude the possibility of there being two or more premises which can be "segregated by public road, canal or railway line." How the two premises are to be considered to be part of the same factory by the Commissioner of the Central Excise has been set out in the above instructions of the CBEC. It only shows that as long as the two portions are integrally connected and inter-linked with the manufacturing process of excisable goods, it can be considered to be part of the same factory premises. In other words, merely because the Coke Oven Plant and the CPP may have been in two separate locations would not result in there being considered to be not part of the same factory premises.

19. An important factor which has to be taken note of in this context is that an agreement was executed between the Government of Odisha and KMCL on 28th June, 2000 where under a land to an extent of 249.45 acres on which both the Coke Oven Plant as well as the CPP Plant were located had subsequently been transferred to KMCL.

20. As regards the selling of 75% of the power to NINL, there is indeed no restriction under the CENVAT Scheme that after captive use of power, the surplus power cannot be sold to any other party. The only restriction is that the capital goods are not to be exclusively used for manufacture of 'exempted products'. It is nobody's case that the final manufactured products of KMCL or that of NINL are 'exempted products'. In this context, it should be noticed that 'power/ electricity' is not a final product. It is generated in the CPP of KMCL and is used in the manufacture of excisable goods in the Coke Oven Plant.

21. In ***Commissioner of Central Goods & S.T., Jaipur v. Shree Cement Ltd. 2018 (16) G.S.T.L. 196 (Raj)***, a similar question arose. There, one factory manufactured duplex board and the other paper. They were separately registered with the Central Excise Department. The question that arose was

whether the excess electricity cleared by the Assessee in favour of its sister concern units would make it ineligible for CENVAT Credit. The Court answered the question in the negative. It was held that electricity generated by the CPP was being used for the sister concern which was part of the company itself and, therefore, would still constitute captive consumption of electricity. In other words, the Assessee was held to be eligible for the CENVAT Credit.

22. The question to be asked is only this: whether the power generated in the CPP of KMCL is used in the manufacture of the excisable goods by KMCL? If the answer to that question is in the affirmative, the mere fact that the surplus power may have been sold to NINL would not disentitle KMCL to the benefit of CENVAT Credit on capital goods. In that view of the matter, the questions framed by this Court are answered as under:

(i) Question No.(i) is answered in the affirmative, i.e., in favour of the Respondent and against the Appellant.

(ii) Question No.(ii) is answered by holding that the power generated in the CPP is not a final product and, therefore, this question does not arise in the facts and circumstances of the case. In other words, with the electricity generated in the CPP being used in the manufacture of the final excisable product of KMCL, CENVAT Credit would be available to KMCL.

(iii) Question Nos.(iii) and (iv) are answered in favour of the Respondent and against the Appellant by holding that the Coke Oven Plant and the CPP have factually been shown to be part of the same factory premises and CENVAT Credit can be allowed in the facts and circumstances of the case.

23. For the aforementioned reasons, the appeal is dismissed, but in the circumstances, with no order as to costs.

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**2023 (I) ILR - CUT- 25**

**Dr. S. MURALIDHAR, C.J & M.S. RAMAN, J.**

OTAPL NO.7 OF 2016

**PARADIP PORT TRUST,JAGATSINGHPUR** .....Appellant

.V.

**COMMISSIONER OF CENTRAL EXCISE, C&ST, BHUBANESWAR & ANR.** .....Respondents

**MAJOR PORT TRUSTS ACT, 1963 – Sections 45(3), 48 r/w sections 114A & 117 of the Customs Act, 1962 – MESCO Steel imported 28502.1 MT of LAM Coke of Chinese origin – The said consignment was discharged at the Paradip Port – MESCO cleared 27,500.6 MT of LAM Coke – The remaining 1001.5 MT of LAM Coke assessed under the remaining 2 B/Es, – MESCO failed to pay the assessed customs duty of Rs.17,41,843/ – The reason given was that the goods were not in existence – Whether PPT is liable to pay customs duty on cargo covered by Bills of Entry (B/E) but not cleared by M/s. MESCO Steel?– Held, No – The goods in question were in fact lost in the super cyclone. Therefore, any attempt to fasten liability on PPT i.e. the Port Authority under section 45(3) of the Act would not only be misconceived but legally unsustainable.** (Para 22)

**Case Law Relied on and Referred to** :-

1. 2009 (241) ELT 513 (Bom.) :Board of Trusties of the Port of Bombay Vs. Union of India.

For Appellant : Mr. Rudra Prasad Kar.

For Respondents : Mr. Choudhury Satyajit Mishra, Sr. Standing for Revenue Department

ORDER Date of Order:13.12.2022

***Dr. S. MURALIDHAR, C.J.***

1. The present appeal by the Paradip Port Trust (PPT) is directed against an order dated 29th April, 2016 of the Customs, Excise & Service Tax Appellate Tribunal, Kolkata Bench (CESTAT) dismissing the Appellant's appeal against an order dated 27th July,2006 passed by the Commissioner (Appeals), Bhubaneswar upholding an order dated 17th February, 2005 passed by the Commissioner of Central Excise and Customs, Bhubaneswar thereby a demand of Rs.17,41,843/- was conformed along with interest and an equivalent penalty was also imposed under Section 114A read with Section 117 of the Customs Act, 1962 (Act).

2. The present appeal was admitted by this Court by an order dated 7th October, 2016 and an interim order was passed to the effect that with the Appellant already having deposited 50% of the impugned demand, no further amount need be deposited during the pendency of the present appeal.

3. The following questions of law are framed for consideration by this Court:

> "I. Whether on the facts and in the circumstances of the case, PPT is liable to pay customs duty on cargo covered by Bills of Entry (B/E) but not cleared by M/s. MESCO Steel?
>
> II. If the answer to 'I' is in the affirmative, is the Appellant-PPT liable to pay penalty as assessed in terms of Section 114A read with Section 117 of the Act?"

4. The PPT is a Government of India undertaking and is also governed by the Major Port Trust Act, 1963 (MPT Act). M/s. MESCO Steel (MESCO) imported 28502.1 MT of LAM Coke of Chinese origin. The said consignment was discharged at the Paradip Port by a ship that berthed on 19th June, 1999. The vessel completed the discharge of the cargo on 27th June, 1999 and sailed away.

5. MESCO cleared 25,500.6 MT of LAM Coke under 8 B/Es after complying with the provisions of the Act. As regards the balance cargo of 3001.5 MT, including 1.5 MT of excess discharged cargo, MESCO neither submitted B/E nor applied for further extension of time for doing the same despite repeated reminders. When the proper officer on 8th December 1999 asked the PPT to initiate the auction process for disposal of the aforementioned cargo, MESCO on the following day i.e. 9th December 1999, requested the Assistant Commissioner, Customs to extend time under Section 48 of the Act to file B/E for the balance cargo. The delay by the MESCO in filing B/E was waived and 4 B/Es were noted and processed action. PPT was informed on 16th December, 1999 not to put the goods to public auction. The 4 B/Es filed by MESCO were assessed provisionally to duty on 17th December, 1999.

6. MESCO paid the duty only in respect of 1B/E for 1000 MT of LAM Coke on 18th December, 1999 and in respect of another B/E for 1000 MT of LAM Coke on 7th January, 2000 along with interest under Section 47 of the Act. On the remaining 1001.5 MT of LAM Coke assessed under the remaining 2 B/Es, MESCO failed to pay the assessed customs duty of Rs.17,41,843/-. The reason given was that the goods were not in existence.

7. On 1st April 2000, MESCO informed the Customs Department that the entire quantity of goods under the above B/Es had been washed away due to the super cyclone which occurred on 29th October, 1999 and which hit the Paradip area with severity. For about three years thereafter, no steps were taken by the Customs Department. However, all of a sudden on 18th July, 2003 a Show Cause Notice (SCN) was issued to the Appellant PPT (with a corrigendum dated 14th August, 2003) requiring it to show-cause why the aforementioned import duty amounting to Rs.17,41,843/- shall not be recovered from it under Section 45(3) of the Act for contravention of Section 48(1) and (2) read with Circular dated 1st February, 1998 issued under Section 48 of the Act read with the uncleared goods (B/E) Regulations, 1972; and why interest and penalty should not be recovered thereon.

8. On 16th September 2003, the Appellant replied to the SCN inter alia pointing out that MESCO was leased out an open stock yard for storage of the LAM Coke in question. The condition 5 of the lease permit stated as under:

> *"Goods stored in the open spaces, stocking yards, sheds of other places shall remain at owner's risk and port will not responsible for any pilferage, theft, damage or loss."*

9. PPT pointed out that under Section 42(2) of the MPT Act, PPT was not a bailee in respect of bulk cargo. In the severe super cyclone of 29th October, 1999 many importers and exporters lost substantial quantity of the cargo on account of flooding of the stock yard. PPT pointed out that it had no communication from MESCO and PPT was not even aware of the letter dated 1st April, 2000 sent by the MESCO to the Customs Authorities.

10. PPT pointed out that Section 45(3) of the Act would have no application (i) since the goods were not pilfered in the customs bonded area; (ii) the port was not in-charge/custody of the goods; (iii) the goods had been lost due to natural events like super cyclone which was not in the control of the PPT. Further, as regards the liability under Section 48 of the Act, it was pointed out by PPT that the goods in question were not warehoused under the port and, therefore, no responsibility thereunder attached to the PPT.

11. On 30th July 2004, the Joint Commissioner (Customs), Bhubaneswar gave PPT a personal hearing. The hearings continued on 8th and 15th October, 2004. Written submissions were also filed by the PPT. In the adjudication order dated 17th February 2005, the Joint Commissioner concluded that the PPT had failed to account for the 1001.5 MT of LAM Coke in respect of which MESCO had filed B/Es. It was observed that in the absence of any information from the PPT regarding loss/destruction of the said quantity of LAM Coke by natural calamity and since PPT belatedly asked MESCO to account for the said cargo, it appeared that "the said goods have been pilfered from the port premises after discharge from the vessels." Accordingly, the demand was confirmed, and interest and penalty were also levied.

12. PPT then carried the matter in appeal to the Commissioner (Appeals). In the order dated 27th July, 2006 dismissing the appeal, it was held that PPT was the custodian of the aforementioned imported goods and it had not established that the said goods had been lost or destroyed. Accordingly, the adjudication order was upheld.

13. The PPT then went in appeal before the CESTAT which has by the impugned order dated 29th April, 2016 concurred with the Joint Commissioner and Commissioner (Appeals). It was held that "imported goods lying in the Customs area in the custody of the Appellant can only be cleared on payment of duty and cannot be handed over to an importer by taking shelter of Sections 42 and 43 of the MPT Act." It was further held that the quantity not accounted for by the custodian had to be treated as pilfered and, therefore, PPT was liable under Section 45(3) of the Act.

14. This Court has heard the submissions of Mr. Rudra Prasad Kar, learned counsel for the Appellant and Mr. Choudhury Satyajit Mishra, learned Senior Standing Counsel for the Revenue Department.

15. Sections 45(3) and 48 of the Act read as under:

> *"**45 Restrictions on custody and removal of imported goods—xxx***
> *(3) Notwithstanding anything contained in any law for the time being in force, if any imported goods are pilfered after unloading thereof in a customs area while in the custody of a person referred to in sub section (1), that person shall be liable to pay duty on such goods at the rate prevailing on the date of delivery of an [arrival manifest or import manifest] or, as the case may be, an import report to the proper officer under Section 30 for the arrival of the conveyance in which the said goods were carried.*
>
> *"**48. Procedure in case of goods not cleared, warehoused, or transhipped within [thirty days] after unloading**.— If any goods brought into India from a place outside India are not cleared for home consumption or warehoused or transshipped within (thirty days) from the date of the unloading thereof at a Customs station or within such further time as the proper officer may allow or if the title to any imported goods is relinquished, such goods may, after notice to the importer and with the permission of the proper officer be sold by the person having the custody thereof."*

16. It must be noticed that in terms of Section 48 of the Act, there was no statutory obligation on PPT to inform the Customs Authorities about the loss of goods stocked in the customs bonded area. Further, it was within the knowledge of the Customs Authorities that the goods had been washed away in the super cyclone since the MESCO had informed them of that occurrence by letter dated 1st April, 2000. With MESCO not being traceable, the Customs Authorities appear to have turned to PPT to recover the customs duty, which was otherwise the liability of MESCO.

17. It has not been able to be disputed by the Customs Authorities that goods stored in open spaces, stocking yards remained at owner's risk. Section 42(2) of the MPT Act clearly states that the Port Authority would not be responsible for any pilferage or damage or loss. This was also incorporated in the license issued to MESCO as a condition.

18. The Customs Authorities, also have not been able to dispute the fact that although MESCO sent a letter on 1st April, 2000 informing them of the loss of cargo in the super cyclone, no action was taken till the issuance of SCN three years later on 18th July, 2003. This delay has not been explained. If the goods themselves were not available on account of the super cyclone, it is inconceivable how the PPT could be made liable to pay customs duty on such goods under Section 45(3) of the Act which applies only in a situation where imported goods are "pilfered after unloading". There is absolutely no material to come to the conclusion that the aforementioned goods not cleared by MESCO were 'pilfered'. There cannot be any presumption on this score as has been done in the adjudication order and the appellate orders. The three orders run contrary to the factual position regarding loss of the cargo on account of the super cyclone as informed by MESCO to the Customs Authorities on 1st April, 2000 itself.

19. ***In Board of Trusties of the Port of Bombay v. Union of India, 2009 (241) ELT 513 (Bom.)***, the facts were that the liability for payment of customs duty was sought to be fastened on the Bombay Port Trust under Section 45(3) of the Act on the ground that goods in question had been pilfered or lost. It was concluded by the Bombay High Court on an analysis of the Act as well as the MPT Act that

> "considering the language of Section 45(3) of the Customs Act, the liability to pay duty is of the person who remains in custody of the goods as an approved person under Section 45 of the Customs Act. Considering that possession of the goods by the Port Trust is by virtue of powers conferred on the Port Trust under the Port Trust Act, it will not be possible to hold that the Port Trust is an approved person or can be notified as an approved person. To that extent, Section 45(3) of the Customs Act will have to be restricted to mean to the second category of person, namely such persons approved who have approved warehouses in terms of Sections 9 and 10 of the Customs Act."

20. The Bombay High Court further concluded that

> "under Section 45 of the Customs Act, the person referred to in sub section (1) thereof can only be the person approved by the Commissioner of Customs. It excludes a body of persons who by virtue of a law for the time being in force is entrusted with the custody of goods by incorporation of law under another enactment, i.e. the Port Trust Act. We see no reason what mischief Parliament sought to undo by sub-section (3) of Section 45 of the Customs Act. At the highest, it has to be read in the context that pilferage may take place from a private warehouse or a customs warehouse run by a private party. The negligence on such private parties should not cause loss to the exchequer. No purpose would be served by one arm of the Government imposing a duty on another arm of the Government which is discharging statutory duties."

21. The above observations and findings were rendered in a case which proceeded on the basis that the goods were pilfered. The Court has been informed that the aforementioned decision of the Bombay High Court is pending consideration before the Supreme Court of India in Civil Appeal No.4477 of 2010 but there has been no stay of the operation of the said judgment.

22. The case on hand is on an even better footing. As far as the present case is concerned, there is sufficient material available on record to show that the goods in question were in fact lost in the super cyclone. Therefore, any attempt to fasten liability on PPT i.e. the Port Authority under Section 45(3) of the Act would not only be misconceived but legally unsustainable.

23. Consequently, this Court has no hesitation in setting aside the adjudication order, and the Appellate Orders of the Commissioner (Appeals) and CESTAT affirming such order has been entirely without legal basis. Question No. I is answered in the negative i.e. in favour of the Appellant and against the Customs Department. Consequently, there is no need to consider question No. II.

24. The appeal is accordingly allowed.

**2023 (I) ILR - CUT- 31**

**Dr. S. MURALIDHAR,C.J & M.S. RAMAN,J.**

STREV NO. 102 OF 2017

**M/s. NEW KHADI NIKETAN,BHUBANESWAR** ……..Petitioner

.V.

**STATE OF ODISHA REPRESENTED THROUGH COMMISSIONER OF SALES TAX, CUTTACK.** …….Opp. Party

**(A) ODISHA ENTRY TAX ACT, 1999 – Schedule Part-II – Entry 3 – Whether SAREE, PATTA, DHOTI and GAMUCHHA fall under Entry No.3 of Part-II of Schedule appended to the OET Act? – Held, Yes.** (Para 9)

**(B) WORD & PHRASES –"INCLUDING" – Meaning and use under entry 3 of Part-II of Schedule appended to the OET Act, 1999 – Explained with case laws.**

**(C) WORD & PHRASES – "TEXTILE PRODUCTS" – Meaning and use – Explained with case laws.** (Para 8)

**Case Laws Relied on and Referred to**:-

1. (2016) 7 SCC 585 = 2016 SCC OnLine SC 299 = 2016 (334) ELT 3 (SC): Ramala Sahkari Chini Mills Ltd. Vs. Commissioner of Central Excise.
2. (1981) 48 STC 254 (SC) : Annapurna Biscuit Manufacturing Co. Vs. Commissioner of Sales Tax,
3. 1993 Supp. (3) SCC 361 : Krishi Utpadan Mandi Samiti Vs. Shankar Industries.
4. (1997) 107 STC 219 (SC) = AIR 1997 SC 3550 = (1998) 1 SCC 458 : Black Diamond Beverages Pvt. Ltd. Vs. CTO.
5. (2002) 126 STC 239 (MP) :Asian Paints India Ltd.Vs.Commissioner of Sales Tax.
6. (1978) 42 STC 433 (SC) : Porritts & Spencer (Asia) Ltd. Vs. State of Haryana.
7. (1980) 46 STC 256 (SC) = (1980) 4 SCC 71 : Delhi Cloth & General Mills Co. Ltd. Vs. State of Rajasthan.
8. (1974) 1 SCC 468 : Meenakshi Mills Ltd. Vs. Union of India.
9. (2010) 34 VST 84 : Haryana Vs. Crown Agencies P. Ltd.
10. (1964) 15 STC 437 (Guj) : Vrajlal Bhukhandas Vs. State of Gujarat.
11. (1979) 43 STC 374 : Dayal Singh Kulfiwala Vs. CST.
12. (1978) 2 SCC 552 : Alladi Venkateswarlu Vs. State of Andhra Pradesh.

For Petitioner : Mr. Chitta Ranjan Das

For Opp. party : Mr. Sunil Mishra, ASC (CT & GST Organisation)

JUDGMENT Date of Judgment:15.12.2022

***M.S. RAMAN, J.***

1. The petitioner, a proprietorship concern, assailed Order dated 22nd September, 2017 in Second Appeal No.205 (ET) of 2014-15 passed by the

learned Odisha Sales Tax Tribunal, Cuttack (for short, 'OSTT') by way of revision petition under Section 19 of the Odisha Entry Tax Act, 1999 (referred to as,"OET Act") directed against Order dated 30.09.2014 of the Deputy Commissioner of Sales Tax, (Appeal), Bhubaneswar Range, Berhampur in connection with Audit Assessment framed under Section 9C of the OET Act by the Sales Tax Officer, Bhubaneswar-II Circle, Bhubaneswar pertaining to tax periods from 01.04.2006 to 30.09.2011.

***Question of law framed by this Court***:

2. While entertaining the revision petition, this Court *vide* Order dated 3rd May, 2018 framed the question of law that whether *SAREE, PATTA, DHOTI* and *GAMUCHHA* fall under Entry Serial No.3 of Part-II of Schedule appended to the OET Act?

***Facts of the case***:

3. Tax Audit being undertaken, on the basis of Audit Visit Report submitted under Section 9B of the OET Act, Assessment was framed under Section 9C vide Order dated 05.11.2012 raising a demand to the tune of Rs.7,54,898/- (tax of Rs.2,51,632.82 + penalty of Rs.5,03,265.64) by the Sales Tax Officer, Bhubaneswar-II Circle, Bhubaneswar (be called, "Assessing Authority") rejecting the claim of the petitioner-dealer that Odisha entry tax is not exigible on the goods, such as *"saree, patta, dhoti and gamuchha",* bought from persons, not registered under the statute, within the State of Odisha and, as such, brought into the "local area" for consumption, use or sale therein, as such goods do not find place at Entry 3, Part-II of Schedule to the OET Act.

3.1. The relevant fact as reflected in the Assessment Order is quoted hereunder for better understanding:

> *"*** When confronted the facts of observations, the proprietor of the business admitted that he has not paid ET on intra-State purchase effected from unregistered dealers but furnished the check-gate money receipts at the assessment stage for verification and acceptance."*

3.2. The petitioner availed remedy of appeal under Section 16 of the OET Act before the Deputy Commissioner of Sales Tax (Appeal), Bhubaneswar, who vide Order dated 30.09.2014 held that the subject-goods, being "handloom products" are not comprehended within the meaning of "textile" and therefore, they are not amenable to levy of Odisha entry tax.

3.3. The State of Odisha, represented by the Commissioner of Sales Tax, Odisha, carried the matter before the Tribunal in Second Appeal being S.A.

No.205 (ET) of 2014-15 invoking provisions of Section 17 of the OET Act. The learned Tribunal interfered with the Appellate Order by holding that the goods in question are "textile products" and thereby affirmed the view of the Assessing Authority.

***The contentions of the counsel for the petitioner***:

4. Sri Chitta Ranjan Das, Advocate for the petitioner submitted that the word "including" appearing in Entry Serial No.3, Part-II of Schedule appended to the OET Act is not always understood in expansive sense, but as interpreted in the cases of *N.D.P. Namboodripad Vrs. Union of India & Ors.*, AIR 2007 SC 1762 and *Sterlite Optical Technologies Ltd. Vrs. Oil India Limited & Ors*., (2008) 14 VST 9 (Gau), said word is to be construed to be restrictive. Therefore, he would submit that the term "textile" in the said entry is to be restricted to the words "cotton fabrics and ready-made garments" which follow it. Had the intention to tax entire range of "textile products", the words "cotton fabrics and ready-made garments" would not have been placed in the said Entry No.3 of Part-II of Schedule.

4.1. Further plea of learned counsel for the petitioner is that aforesaid Entry No.3, Part-II of Schedule when pitted against Entry No.5, Part-I of same Schedule, it must mean that the intent under the OET Act for levy of tax is restricted to those goods specified therein, namely "pure silk fabric, silk, artificial silk yarn, raw silk".

***Contention of the opponent-Revenue***:

5. Per contra, Sri Sunil Mishra, learned Additional Standing Counsel (CT&GST Organisation) submitted that the learned OSTT has flawlessly decided the issue at hand and correctly interpreted the classification of commodity vis-à-vis leviability of entry tax on the goods namely "*saree, patta, dhoti, gamuchha*".

5.1. The learned Additional Standing Counsel has pressed into service the following observations of the learned OSTT:

> *"9. This Tribunal is, therefore, of the considered view that a conjoint reading of the relevant entries in Part-I and Part-II of the Schedule would imply that by using the word 'textile products' along with the cotton fabrics and ready-made garments, the Legislature never intended to restrict the meaning thereof, rather the intention was to impose a particular tax for a specific group of textile products like pure silk fabric etc. under Part-I and another rate of tax for all textile products in general. The use of the words 'including cotton fabrics and readymade garments' after the words 'textile products' must be held to be for the purpose of clarification only and to distinguish it from specific items mentioned in Part I least there is any confusion on such score.*

*10. It is further observed that the goods in question have been mechanically treated as handloom goods even though such a specific stand was never taken by the dealer and it is common knowledge that the goods in question can be prepared not only through handloom but also mechanically, i.e. by using power looms. Therefore, learned Appellate Authority has fallen into error in mechanically treating the goods in question as handloom products. That apart, learned First Appellate Authority has held that the word 'textile' must be understood in common parlance and that, being handloom products, the goods in question cannot be considered as textile as nobody purchases it as a textile in common parlance. This Tribunal is unable to accept the above reasoning for the reason that in common parlance the word 'textile' means any article produced as a result of weaving, i.e. woven fabrics. The above view was taken by the Hon'ble Madras High Court in the case of The State of Madras Vs. T.T. Gopalier and another, reported in (1968) 21 STC 451 (Mad.) and in the case of Silver Chem Industries Vs. The State of Tamil Nadu, reported in (1980) 45 STC 315 (Mad.). Surprisingly, both the decisions stated above were referred by learned First Appellate Authority, but a different meaning appears to have been ascribed to the ratio laid down therein.*

*11. In the ultimate analysis, this Tribunal holds that the goods in question are 'textile products' with the meaning of entry No.5 of Part-I (sic. Entry No.3 of Part-II) of Schedule to OET Act. This Tribunal is fortified in its reasoning by the meaning given to the word 'textile' by the Hon'ble Apex Court in the case of Porritts (supra) as under:*

*'The word 'Textile is derived from the Latin 'texere' which means 'to weave' and it means any woven fabric. When yarn, whether cotton, silk, woolen, rayon, nylon or of any other description or made out of any other material is woven into a fabric, what comes into being is a 'textile' and it is known as such. The Apex Court further held that whatever be the mode of weaving employed, woven fabric would be 'textiles'.'*

*****

*In such view of the matter, the impugned order is liable to be interfered with and the tax liability to be assessed accordingly. The order of the Assessing Authority to the above extent is hereby confirmed."*

5.2. The learned Additional Standing Counsel, therefore, urged that clear and loud reasoning ascribed by the learned OSTT repelling the contentions of the petitioner raised before it and distinguishing the ratio of case laws insisted upon to be applied does not deserve indulgence by this Court in the instant revision.

***Discussion and reasons***:

6. The relevant entries fall for consideration in the present revision petition are as follows:

| Part-I | |
|---|---|
| 5 | Pure silk fabric, silk, artificial silk yarn and raw silk |
| Part-II | |
| 3 | Textile products including cotton fabrics and ready-made garments |

7. Scrutiny of both the competing entries would suggest that whereas Entry 5 of Part-I relates to items of "silk" which are subject to entry tax @1% in terms of Rule 3(3) of the Odisha Entry Tax Rules, 1999, Entry 3 of Part-II indicates levy of tax @2% as per Rule 3(2) ibid. on "textile products including cotton fabrics and ready-made garments". It can be culled out from what has been laid down in *Annapurna Biscuit Manufacturing Co. Vrs. Commissioner of Sales Tax, (1981) 48 STC 254 (SC)* that the words used in a law imposing a tax should be construed in the same way in which they are understood in ordinary parlance in the area in which the law is in force and if an expression is capable of a wider meaning as well as narrower meaning the question whether the wider or narrower meaning should be given depends on the context and the background of the case.

7.1. In understanding the use of the word "including" in Entry 3 of Part-II reference to the following words as spoken by the Hon'ble Supreme Court of India in the case of *Ramala Sahkari Chini Mills Ltd. Vrs. Commissioner of Central Excise, (2016) 7 SCC 585 = 2016 SCC OnLine SC 299 = 2016 (334) ELT 3 (SC)* would suffice:

> *"2. The answer to the question referred, according to us, is self-contained in the order of reference which has referred, inter alia, to a three-Judge Bench decision of this Court in ESI Corpn. Vrs. High Land Coffee Works [ESI Corpn. v. High Land Coffee Works, (1991) 3 SCC 617]. There are other decisions of this Court by Coordinate Benches (three Judge) on the issue which need not be adverted to specifically inasmuch as it has been clearly held in ESI Corpn. [ESI Corpn. v. High Land Coffee Works, (1991) 3 SCC 617] that the word "include" in the statutory definition is generally used to enlarge the meaning of the preceding words and it is by way of extension, and not with restriction."*

7.2. It, therefore, seems to be correct approach of the learned OSTT in distinguishing the cases on which reliance was placed by the learned counsel for the petitioner. The learned Tribunal came to hold that:

> *"8. *** In the case of Sterlite Optical Technologies Vrs. Oil India Limited and Ors., (2008) 14 VST 9 (Gau), the Hon'ble Gauhati High Court was seized with the question whether the word 'including' used in Entry No.4 of Assam Entry Tax Act, 2001, is exhaustive or used in a restrictive sense and in such context, it was held that 'sound transmitting equipment' including telephones, mobile phones, pagers and components and parts thereof shall be treated as inclusive to mean only those products as has been stated in the entry itself. In the present case, however, the situation is different inasmuch as different types of textile products have been included under different parts of the schedule with reference to the rate of taxation as has been discussed in detail herein before. Therefore, the restrictive meaning used for the word 'including' occurring under Entry 4 of the Schedule to Assam Entry Tax Act cannot be applied to the entries under Part-I and II of the Schedule to the OET Act."*

7.3. In *Krishi Utpadan Mandi Samiti Vrs. Shankar Industries, 1993 Supp. (3) SCC 361* it is laid down that where the Legislature uses the words 'means and includes' such definition is to be given a wider meaning and is not exhaustive or restricted to the items contained or included in such definition.

7.4. *In Black Diamond Beverages Pvt. Ltd. Vrs. CTO, (1997) 107 STC 219 (SC) = AIR 1997 SC 3550 = (1998) 1 SCC 458*, it has been observed as follows:

> *"It is clear that the definition of 'sale price' in Section 2(d) uses the words 'means' and 'includes'. The first part of the definition defines the meaning of the word 'sale price' and must, in our view, be given its ordinary, popular or natural meaning. The interpretation thereof is in no way controlled or affected by the second part which 'includes' certain other things in the definition. This is a well-settled principle of construction. Craies on Statute Law (7th Edn. 1.214) says:*
>
> *'An interpretation clause which extends the meaning of a word does not take away its ordinary meaning .... Lord Selborne said in Robinson Vs. Barton Eccles Local Board (1883)8 App.Case 798 (801):*
>
> *'An interpretation clause of this kind is not meant to prevent the word receiving its ordinary, popular, and natural sense whenever that would be properly applicable, but to enable the word as used in the Act ... to be applied to something to which it would not ordinarily be applicable.'*
>
> *Therefore, the inclusive part of the definition cannot prevent the main provision from receiving its natural meaning."*

7.5. In *Asian Paints India Ltd. Vrs. Commissioner of Sales Tax, (2002) 126 STC 239 (MP)* it has been stated as follows:

> *"It is practically impossible for the Legislature to include/add/specify each and every commodity manufactured and sold in the market by their common names, as they are running in thousand if not in lakhs. Here the craftsmanship of interpretation of statute for a particular word steps in which require interference by the Court in finding out the real meaning of the word specified in a particular notification or the Schedule as the case may be. The use of one word may include more than one commodity though not specified. It is with this approach, the Courts have to interpret the words used and specified in the Schedule and then find out its real meanings, and true scope in relation to those commodities which are not so specified."*

7.6. In the above perspective, when this Court attempts to classify the commodities, namely, *saree, patta, dhoti and gamuchha*, in wider sense it is understood that they all fall within the connotation of the term "textile product".

8. Therefore, this Court further has delved into the meaning of "textile product" for arriving at appropriate conclusion in the present case.

8.1. In *Porritts & Spencer (Asia) Ltd. Vrs. State of Haryana, (1978) 42 STC 433 (SC),* while deciding whether 'dryer felts' fell within the c ategory of 'all

varieties of cotton, woolen or silken textiles', the observation of the Hon'ble Supreme Court runs as follows:

> *"Now, the word 'textiles' is not defined in the Act, but it is well-settled as a result of several decisions of this Court, of which we may mention only a few, namely, Ramavatar Budhaiprasad Vrs. Assistant Sales Tax Officer, Akola, [1961] 12 STC 286 (SC) = AIR 1961 SC 1325; Motipur Zamindary Co. Ltd. Vrs. State of Bihar, [1962] 13 STC 1 (SC) = AIR 1962 SC 660 and State of West Bengal Vrs. Washi Ahmed, [1977] 39 STC 378 (SC) = [1977] 3 SCR 149, that in a taxing statute words of everyday use must be construed not in their scientific or technical sense but as understood in common parlance. *** There can, therefore, be no doubt that the word 'textile' in item 30 of Schedule B must be interpreted according to its popular sense, meaning 'that sense which people conversant with the subject-matter with which the statute is dealing would attribute to it'. ***"*

In the said case [*Porritts & Spencer (Asia) Ltd. Vrs. State of Haryana, (1978) 42 STC 433 (SC)]*, the Hon'ble Court has described the meaning of 'textiles' in the following manner:

> *"The word 'textiles' is derived from the Latin 'texere', which means 'to weave' and it means any woven fabric. When yarn, whether cotton, silk, woollen, rayon, nylon or of any other description or made out of any other material is woven into a fabric, what comes into being is a 'textile' and it is known as such. It may be cotton textile, silk textile, woollen textile, rayon textile, nylon textile or any other kind of textile. The method of weaving adopted may be the warp and woof pattern as is generally the case in most of the textiles, or it may be any other process or technique. There is such phenomenal advance in science and technology, so wondrous is the variety of fabrics manufactured from materials hitherto unknown or unthought of and so many are the new techniques invented for making fabric out of yarn that it would be most unwise to confine the weaving process to the warp and woof pattern. Whatever be the mode of weaving employed, woven fabric would be 'textiles'. What is necessary is no more than weaving of yarn and weaving would mean binding or putting together by some process so as to form a fabric. Moreover a textile need not be of any particular size or strength or weight. It may be in small pieces or in big rolls: it may be weak or strong, light or heavy, bleached or dyed, according to the requirement of the purchaser. The use to which it may be put is also immaterial and does not bear in its character as a textile. It may be used for making wearing apparel, or it may be used as a covering or bed-sheet or it may be used as tapestry or upholstery or as duster for cleaning or as towel for drying the body. A textile may have diverse uses and it is not the use which determines its character as textile. ***"*

8.2. In *Delhi Cloth & General Mills Co. Ltd. Vrs. State of Rajasthan, (1980) 46 STC 256 (SC) = (1980) 4 SCC 71*, the term "fabric" and "textile" have been discussed as under:

> *"9. What is a fabric? The "Mercury" Dictionary of Textile Terms defines "fabric" as a term which covers all textiles no matter how constructed, how manufactured, or the nature of the material from which made, and the expression "textile" is described as:*

*any product manufactured from fibres through twisting, interlacing, bonding, looping, or any other means, in such a manner that the flexibility, strength, and other characteristic properties of the individual fibres are not suppressed.*

*The Man-Made Textile Encyclopaedia (1959) defines fabric as:*

*a collective term applied to cloth no matter how constructed or manufactured and regardless of the kind of fibre from which made. In structure it is planar produced by interlacing yarns, fibres or filaments. Textile fabrics include the following varieties, bonded, felted, knitted, braided and woven.*

*The Fairchild's Dictionary of Textiles (1959) says that fabric is:*

*a cloth that is woven or knit, braided, petted, with any textile fibre*

*...and "textile" is said to refer to:*

*a broad classification of any material that can be worked into fabric, such as fibres and yarns including woven and knitted fabric, felt, netted fabric, laced and crouched goods.*

*In TEXTILE TERMS AND DEFINITIONS (1960) the word cloth is defined as:*

*a generic term embracing all textile fabrics and laminar felts and 'textile' is applied in its modern sense to:*

*any manufacture from fibres, filaments, or yarns, natural or artificial, obtained by interlacing.*

*The 1967 Annual Book of ASTM Standards defines cloth as:*

*any textile fabric but specially one designed for apparel, domestic or industrial use and textile fabric as a planar structure consisting of interlaced yarns or fibres.*

*The 1973 Annual Book of ASTM Standards reproduced those definitions."*

8.3. In Shree *Meenakshi Mills Ltd. Vrs. Union of India, (1974) 1 SCC 468* the term "textile" has been described thus:

*"18. The dictionary meanings of cotton textile are any material that is woven, a material, as a fibre or yarn, used in or suitable for weaving, woven or capable of being woven. The meaning of "textile" as a noun is a fabric which is or may be woven, a fabric made by weaving, a woven fabric, or a material suitable for weaving, textile material. The dictionary meanings show that cotton yarn is included in cotton textile."*

8.4. In State of *Haryana Vrs. Crown Agencies P. Ltd., (2010) 34 VST 84* (P&H), while considering whether "labels" are regarded as "textile", the view of the Hon'ble Punjab and Haryana High Court was expressed in the following words:

*"20. To the same effect is the judgment of this Court delivered by a Division Bench of this court in GSTR No. 65 to 67 of 1991 vide order dated 19.1.2009 [(2009) 23 VST 389], wherein it was held that handkerchiefs fall under Item 30 of Schedule A of the Punjab General Sales Tax Act, 1948 which is similar to Entry 14 of Schedule B of the Act. The same reads as under:*

*'But the question then is whether it would include handkerchiefs because handkerchiefs are not subjected to any knitting and embroidery. As already observed, handkerchiefs are hemmed and therefore, it may fall within the meaning of 'cotton, woolen or silken textiles on which knitting and embroidery work has been done.*

*However the question directly fell for consideration before the Division Bench of Kerala High Court in Deputy Commissioner of Sales Tax v. Mohammed Abdul Khader (1980) 46 STC 512. The facts in that case are akin to the facts of the case in hand. The assessee in both the cases have purchased excise duty paid handkerchief from the Mill and without subjecting those to any process sold it in the market. The handkerchiefs have been sold in the same condition in which it had been supplied to the assessee from Mills. The further fact and position has not been denied that the handkerchiefs have been produced wholly out of cotton. In the wake of the aforesaid fact and position, the Division Bench opined as under:*

*'*** It is not in dispute that the handkerchiefs have been manufactured wholly out of cotton. The mere fact that as part of the process of manufacture the edges of the cloth have been stitched will not in any way affect its character as a cotton fabric. In fact such process of stitching is essentially involved in the manufacture of several of the items enumerated in the inclusive portion of the definition of cotton fabrics contained in entry No. 19 of the First Schedule to the Central Excises and Salt Act, for example, bed sheets, bed spreads, counterpanes, tablecloths, etc. it is not therefore possible to accept the plea put forward by the learned Government Pleader that the fact that the edges of the G.S.T.R. Nos. 65 to 67 of 1991 kerchiefs have been stitched ill take the article out of the scope of the entry "cotton fabrics". We find that the same view has been taken by the Calcutta High Court in Delhi Cloth General Mills Co. Ltd. Vrs. Commercial Tax Officer, Central Section, West Bengal, with which ruling we are in respectful agreement.'*

*21. When the facts of the present case are examined in the light of the principles laid down in the aforesaid judicial pronouncements, we are left with no doubt that 'labels' have to be regarded as textiles. It has remained undisputed on facts that names of the companies for which the labels are prepared is woven, which is the process used for weaving any other textile. It does not involve any printing by any external aid. Therefore, in the facts and circumstances of the case 'labels' have to be regarded as textile and covered by Entry 14 of Schedule 'B' of the Act."*

8.5. In *Vrajlal Bhukhandas Vrs. State of Gujarat, (1964) 15 STC 437 (Guj)* after referring to meaning of "cloth" from different Dictionaries, the Hon'ble Court referring to *Kosuri Subba Raju, (1956) 7 STC 479*, stated thus:

*"… In that decision, the Andhra High Court laid down that the words 'cotton cloth' were used in the aforesaid provisions to denote every fabric used for any purpose including the use as a wearing apparel and that cloth did not cease to be cloth merely because it was used as a dhoti or a sari. …"*

8.6. Whether *kulfi* is "milk product", has been discussed in *Dayal Singh Kulfiwala Vrs. CST, (1979) 43 STC 374* (All) as follows:

*"Kulfi is prepared from milk. The milk is first heated till it becomes viscid. Then sugar, dry fruits and essence are mixed in this and the paste is filled in small containers. These*

*containers are then sealed and put in a freezer and after they solidify, the seals are broken and the kulfi is sold to customers.*

***

*Thus, the entry so far as milk product is concerned, excluding such items with which we are not concerned, has remained unchanged. The word 'milk product' has not been defined in the notification although illustrations of some milk products are given in the notification of 31st March, 1956. Before a particular commodity can be said to be milk product, it must be produced from it. Produce, according to the Webster's 3rd New International Dictionary, means something that is brought forth or yielded either naturally or as a result of effort or work. Kulfi is not yielded naturally from milk, but is produced as a result of evaporating the milk to a certain extent till it becomes viscid, and the addition of sugar, dry fruits and essence. Dry fruits, sugar and essence are added to give sweetness and flavor to the viscid milk and form a very small constituent of kulfi. The main constituent is milk. Thus, kulfi is nothing else but a milk product and is exempt from tax under both the notifications."*

8.7. The Hon'ble Supreme Court in *Alladi Venkateswarlu Vrs. State of Andhra Pradesh, (1978) 2 SCC 552* considered the question "whether 'Atukulu' (parched rice), and 'Muramaralu' (puffed rice) are 'rice' within the meaning of Entry 66(b) of Schedule I to the Andhra Pradesh General Sales Tax Act, 1957?" and held as follows:

> *"17. We think that, on a parity of reasoning the term "rice" as ordinarily understood in English language would include both parched and puffed rice."*

8.8. In the same analogy when "*saree, patta, dhoti, gamuchha*" are considered, they are the products of "textile". They do not lose essential characteristics of fabric. Thus, the expression "textile products including cotton fabrics and ready-made garments" is wide enough to take into its sweep the goods in question as mentioned above. The learned OSTT has appropriately held that the Appellate Authority has erred in giving restricted meaning to the expression contained in Entry 3 of Part-II of Schedule appended to the OET Act.

8.9. Conspectus of decisions referred to supra read juxtaposed to the entries in the schedule appended to the OET Act, there is no confusion in mind but to affirm the view expressed by the learned OSTT that items in question, viz., *"saree, patta, dhoti and gamuchha*", would fall within the ambit of Entry Serial No.3 of Part-II of the Schedule.

***Decision:***

9. For the discussions made in foregoing paragraphs and on the reasons stated above, the question whether the Division Bench of the Odisha Sales Tax Tribunal, Cuttack is right in law to hold that *saree, patta, dhoti and gamuchha* do fall under Entry No.3 of Part-II of Schedule appended to the OET Act, is answered in the affirmative in favour of the State of Odisha-Revenue and against the petitioner-dealer.

9.1. In the result, this Court confirms the Order dated 22.09.2017 of the OSTT and consequently, the sales tax revision petition filed at the behest of petitioner-dealer is dismissed. However, parties are left to bear their own costs.

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**2023 (I) ILR - CUT – 41**

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

W.P.(C) NO. 20499 OF 2022

**PADMA CHARAN PATRO** .....Petitioner

.V.

**M.D. & C.E.O. CENTRAL OFFICE**
**UNION BANK OF INDIA & ORS.** .....Opp. Parties

**CONSTITUTION OF INDIA,1950 – Article 226 – Exercise of extraordinary jurisdiction – The Petitioner conceded before this Hon'ble Court to file undertaking unconditionally to the effect that he would clear up balance outstanding in four months in equal monthly installments – The Petitioner filed undertaking with "condition"– Effect of – Held, which is not only unacceptable by this Court, but also held to be contemptuous – Therefore this Court ceases to have inclination to exercise its extraordinary jurisdiction invoking provisions of Article 226 of the Constitution of India in favour of unscrupulous loanee.**

(Paras 6.5-9)

**Case Laws Relied on and Referred to**:-

1. AIR 2003 SCW 1561: Canara Bank and Ors. Vs. Debasis Das & Ors.
2. 2021 SCC OnLine SC 564 : Suman Chadha & Anr. Vs. Central Bank of India.
3. AIR 2022 SC 56 = AIROnline 2021 SC 1210 = 2021 SCC OnLine SC 1255 : Bijnor Urban Cooperative Bank Limited, Bijnor & Ors. Vs. Meenal Agarwal & Ors.
4. (1997) 6 SCC 450 : Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works (P) Ltd. & Anr.

For Petitioner : Mr. Manoranjan Mishra.
For Opp. Parties :Mr. Bhaskar Chandra Panda

ORDER Date of Order: 12.10.2022

***BY THE BENCH***

1. The petitioner, proprietor of Maa Bhagabati Store and borrower, availed cash credit loan to the tune of Rs.3,00,000/- in the year 2013 from Union Bank of India, Goshani Nuagaon Branch, Berhampur in the district of Ganjam. Due to

indiscipline in repayment, notice dated 01.02.2022 was issued under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, "SARFAESI Act") recalling an amount of Rs.6,99,667/- outstanding as on 31.12.2021 together with interest thereon with contractual rate. Non-response of terms of such demand notice led to issue of notice dated 09.06.2022 under Section 13(4) read with Rule 8 of the Security Interest (Enforcement) Rules, 2002 indicating assumption of symbolic possession of the secured asset. Accordingly, the opposite parties-bank issued notice dated 20.07.2022 fixing date of auction sale of property on 30.08.2022. Challenging the said e-auction sale notice the petitioner came up before this Court in the present writ petition.

2. This Court while issuing notice, passed the following order on 24.08.2022:

> *"2. Counsel for the Bank appearing on advance notice submits that the e-Auction of the mortgaged residential house is fixed for 30th August, 2022 for recovery of an outstanding liability of around Rs.7.00 lakhs as on today.*
>
> *3. Counsel for the Petitioner submits that his client is prepared to deposit substantial amount as upfront money with the remaining balance within next four months.*
>
> *4. Issue notice for 29th September, 2022.*
>
> *5. Mr. Rajesh Ranjan Sahoo, proxy counsel appearing on behalf of Mr. Bhaskar Chandra Panda, learned counsel appears and waives notice on behalf of the Opposite Parties-Bank. Let requisite number of copies of the writ petition be served on him during the next three working days.*
>
> *6. As an interim measure, subject to the Petitioner depositing a sum of Rs.3.5 lakhs with the Bank on or before 30th August, 2022, the successful bid, if any, shall not be confirmed without leave of the Court.*
>
> *7. The Petitioner shall also file an undertaking to clear the remaining balance in equated instalments within next four months."*

3. Though it was conceded that aforesaid amount as directed has been deposited, the petitioner failed to furnish undertaking as required to do so in the above order dated 24.08.2022. Therefore, this Court passed further orders on 29.09.2022 which is to the following effect:

> *"1. Learned counsel for the Bank concedes that the amount in terms of the previous order stands deposited, however, his undertaking has not been furnished. He prays for last opportunity to seek instructions.*
>
> *2. List on 12.10.2022."*

4. On the resumed hearing today, Sri Bhaskar Chandra Panda, learned Advocate for the opposite parties submitted that the eauction sale of the secured

property has failed due to lack of intending bidder, however, no further orders protecting the petitioner be passed inasmuch as the "undertaking" furnished before the bank is not in consonance with the order passed by this Court.

5. Sri Manoranjan Mishra, learned Advocate for the petitioner has supplied a copy of "UNDERTAKING" as furnished to the bank for perusal of this Court. Said so-called "undertaking" runs as follows:

> *"To*
> *The Authorised Officer*
> *-cumChief Manager*
> *Union Bank of India*
> *Berhampur, Ganjam*
> *UNDERTAKING*
>
> *I, the undersigned do hereby undertake to clear the remaining balance in equated instalments within next four months as per the order of the Hon'ble Court in W.P.(C) No.20499 of 2022 subject to its final outcome w.e.f. my OTS proposal. A copy of Order dated 24.08.2022 is submitted herewith.*
>
> *Sd/-*
> *Padma Charan Patro*
> *30.08.2022"*

6. Neither Order dated 24.08.2022 nor Order dated 29.09.2022 passed by this Court in the instant case has whispered about One Time Settlement. Nonetheless, these orders specifically mentioned about filing of undertaking which is intended to bind the parties to the terms of payment schedule as conceded by the learned counsel for the respective parties. The interim orders are clear and loud that the petitioner, having deposited Rs.3,50,000/- as directed vide Order dated 24.08.2022, would clear up the balance outstanding amount "in equated instalments within four months", but the said order never directed to be "subject to" final outcome of OTS proposal. This Court does not approve of such a conduct on the part of the petitioner. The petitioner apparently has tried to tinker with the observations of this Court.

6.1. The tenor of UNDERTAKING as reproduced herein above shows that the petitioner has not come to this court with clean hands and clear heart. Therefore, this Court feels it appropriate not to show any indulgence noticing the inappropriate conduct of the petitioner.

6.2. It has been succinctly stated in *Canara Bank and Ors. Vrs. Debasis Das and Ors., AIR 2003 SCW 1561* as:

> *"A person who seeks equity must come with clean hands. He, who comes to the Court with false claims, cannot plead equity nor the Court would be justified to exercise equity jurisdiction in his favour. A person who seeks equity must act in a fair and equitable manner."*

6.3. The Hon'ble High Court of Delhi *C.B. Aggarwal Vrs. P. Krishna Kapoor, AIR 1995 Delhi 154*, observed:

> *"It is true that in a civilised society, legal process is the machinery for keeping order and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for vindication for men's right and enforcement of just claims. It is abused when it is diverted from its true course so as to serve extortion or oppression; or to exert pressure so as to achieve an improper end."*

6.4. It is apt to refer to *Suman Chadha & Another Vrs. Central Bank of India, 2021 SCC OnLine SC 564* wherein it has been said by the Hon'ble Supreme Court in no unambiguous words as:

> *"16. It is true that this Court has held in a series of decisions that the wilful breach of the undertaking given to the Court amounts to contempt of Court under Section 2(b) of the Act. But the Court has always seen (i) the nature of the undertaking made; (ii) the benefit if any, reaped by the party giving the undertaking; and (iii) whether the filing of the undertaking was with a view to play fraud upon the court or to hoodwink the opposite party."*

6.5. Taking serious view of the matter, suffice it to say that in the instant case, after conceding before this Court to file undertaking unconditionally to the effect that the petitioner would clear up balance outstanding in four months in equated monthly instalments, there was no scope for the petitioner to furnish the undertaking hedging with "CONDITION" which is not only unacceptable by this Court, but also held to be contemptuous.

7. In the present case, knowing fully well that no directions can be issued for setting the matter under OTS Scheme, the petitioner made prayer to this effect in the writ petition. It is well-established that this Court is powerless to invoke jurisdiction under Article 226 of the Constitution of India to direct the bank authorities to consider One Time Settlement proposal. It may be worthwhile to have reference to *Bijnor Urban Cooperative Bank Limited, Bijnor & others Vrs. Meenal Agarwal & others, AIR 2022 SC 56 = AIROnline 2021 SC 1210 = 2021 SCC OnLine SC 1255* wherein the Hon'ble Supreme Court has been pleased to lay down as follows:

> *"2.3 *** At this stage, it is required to be noted that in the said writ petition, the original writ petitioner also prayed for a writ of mandamus directing the Bank to give the benefit of OTS so that the original writ petitioner may deposit the entire amount at once so as to clear her dues for the loan which she had taken in the year 2013, which prayer was not granted by the High Court and the High Court only directed the Bank to consider her grievance and decide her representation dated 22.07.2019.*
>
> *2.4 Thereafter, the original writ petitioner again submitted an application dated 06.02.2021 to the Bank to grant the benefit under the OTS, which again was rejected by*

*the Bank vide communication dated 08.01.2021 and 25.02.2021. The original writ petitioner filed a fresh writ petition before the High Court being Writ Petition No. 15194 of 2021 with a prayer to quash the aforesaid impugned orders dated 08.01.2021 and 25.02.2021 rejecting her application for grant of benefit of OTS and also prayed for a writ of mandamus to direct the Bank to give the benefit of OTS issued vide Circular Nos. C-108 and C-121.*

*****

*5.2 Therefore, as per the guidelines issued, the grant of benefit of OTS Scheme cannot be prayed as a matter of right and the same is subject to fulfilling the eligibility criteria mentioned in the scheme. The defaulters who are ineligible under the OTS Scheme are mentioned in clause 2, reproduced hereinabove. A wilful defaulter in repayment of loan and a person who has not paid even a single installment after taking the loan and will not be able to pay the loan will be considered in the category of "defaulter" and shall not be eligible for grant of benefit under the OTS Scheme. Similarly, a person whose account is declared as "NPA" shall also not be eligible. As per the guidelines, the Bank is required to constitute a Settlement Advisory Committee for the purpose of examining the applications received and thereafter the said Committee has to take a decision after considering whether a defaulter is entitled to the benefit of OTS or not after considering the eligibility as per the OTS Scheme. While making recommendations, the Settlement Advisory Committee has to consider whether efforts have been made to recover the loan amount and the possibility of recovery has been minimized, meaning thereby if there is possibility of recovery of the amount, either by initiating appropriate proceedings or by auctioning the property mortgaged and/or the properties given as a security either by the borrower and/or by guarantor, the application submitted by the borrower for grant of benefit under the OTS Scheme can be rejected.*

*****

*8. *** What is required to be considered is a conscious decision by the Bank that the Bank will be able to recover the entire loan amount by auctioning the mortgaged property and a due application of mind by the Bank that there are all possibilities to recover the entire loan amount, instead of granting the benefit under the OTS Scheme and to recover a lesser amount. It is ultimately for the Bank to take a conscious decision in its own interest and to secure/recover the outstanding debt. No bank can be compelled to accept a lesser amount under the OTS Scheme despite the fact that the Bank is able to recover the entire loan amount by auctioning the secured property/mortgaged property. When the loan is disbursed by the bank and the outstanding amount is due and payable to the bank, it will always take a conscious decision in the interest of the bank and in its commercial wisdom.*

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

*the fact that the bank is able to recover the entire loan amount even by selling the mortgaged/secured properties, either from the borrower and/or guarantor. This is because under the OTS Scheme a debtor has to pay a lesser amount than the actual amount due and payable under the loan account. Such cannot be the intention of the bank while offering OTS Scheme and that cannot be purpose of the Scheme which may encourage such a dishonesty.*

*10. If a prayer is entertained on the part of the defaulting unit/person to compel or direct the financial corporation/bank to enter into a one-time settlement on the terms proposed by it/him, then every defaulting unit/person which/who is capable of paying its/his dues as per the terms of the agreement entered into by it/him would like to get one time settlement in its/his favour. Who would not like to get his liability reduced and pay lesser amount than the amount he/she is liable to pay under the loan account? ****

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

*12. In view of the aforesaid discussion and for the reasons stated above, we are of the firm opinion that* ***the High Court, in the present case, has materially erred and has exceeded in its jurisdiction in issuing a writ of mandamus in exercise of its powers under Article 226 of the Constitution of India by directing the appellant-Bank to positively consider/grant the benefit of OTS to the original writ petitioner****."*

*[Emphasis supplied]*

7.1. In *Dwarikesh Sugar Industries Ltd. Vrs. Prem Heavy Engineering Works (P) Ltd. and Another, (1997) 6 SCC 450*, it has been observed as follows:

*"32. When a position, in law, is well settled as a result of judicial pronouncement of this Court, it would amount to judicial impropriety to say the least, for the subordinate courts including the High Courts to ignore the settled decisions and then to pass a judicial order which is clearly contrary to the settled legal position. Such judicial adventurism cannot be permitted and we strongly deprecate the tendency of the subordinate courts in not applying the settled principles and in passing whimsical orders which necessarily has the effect of granting wrongful and unwarranted relief to one of the parties. It is .time that this tendency stops."*

8. It is noteworthy that the Hon'ble Supreme Court has strongly deprecated the tendency of the High Courts in entertaining the writ petitions filed under

Article 226 of the Constitution of India. The aforesaid being the position of law as enunciated by the Hon'ble Supreme Court laying down restrictions as to exercising power under Article 226 of the Constitution of India save and except exceptions carved out, this Court, while condemning the conduct of the petitioner, is of the considered view that the petitioner is not liable to be shown benevolence any further.

9. This Court, therefore, ceases to have inclination to exercise its extraordinary jurisdiction invoking provisions of Article 226 of the Constitution of India in favour of unscrupulous loanee. Accordingly, the writ petition is dismissed and consequently, the interim order(s) is vacated.

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**2023 (I) ILR - CUT – 47**

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

W.P.(C) NO. 7728 OF 2022

**M/s. DURGA RAMAN PATNAIK, BERHAMPUR** ……Petitioner

.V.

**ADDITIONAL COMMISSIONER OF GST (APPEALS) (FIRST APPELLATE AUTHORITY) BHUBANESWAR & ORS.** ……..Opp. Parties

**CENTRAL GOODS AND SERVICES TAX ACT, 2017 – Sections 29, 30 r/w Rule 23 of the Central Goods and Services Tax Rules, 2017 – Cancellation of registration – Appellate Authority rejected the appeal on the ground of limitation – Effect of – Held, the Appellate Authority should have borne in mind the predicament faced by tax payers on the introduction of new set of procedures by way of promulgation of the CGST Act and the OGST Act and rules framed thereunder – Time required to be taken to get acquainted – It is deemed necessary instead of directing the Appellate Authority to do the needful, this Court request the proper officer to grant opportunity to the petitioner taking all required step to revive registration – Writ petition allowed with certain direction.** (Paras 11-13)

**Case Laws Relied on and Referred to** :-

1. CWP No.19029 of 2021 :Aarcity Builders Private Limited Vs. Union of India & Ors.
2. (2022) 5 SCC 112 = (2022) 1 SCC (L&S) 771 = 2022 SCC OnLine SC 180 : Prakash Corporates Vs. Dee Vee Projects Ltd.
3. 2022 (61) GSTL 515 : Tvl. Suguna Cutpiece Center Vs. The Appellate Authority & Anr.

4. 2022 SCC OnLine SC 817 : Mohamed Ali Vs. V. Jaya & Ors.
5. W.P. No.10663 of 2022 : Tahura Enterprise Vs. Union of India.
6. Special Appeal No. 123 of 2022 : Vinod Kumar Vs. Commissioner of Uttarakhand State GST & Ors.
7. W.P.(C) No.15934 of 2021 :Nirmani Engineers and Constructions Pvt. Ltd. Vs. The Commissioner of CT&GST,Odisha & Ors.

For Petitioner : Mr. Ramesh Chandra Jena,
Mr. Rudra Prasad Kar(Amicus Curiae)
& Mr. Mark Wright.

For Opp. Parties : Mr. Subash Chandra Mohanty, Sr.S.C (CG & ST)
Central Excise & Customs).

JUDGMENT Date of Hearing :27.09.2022 & Date of Judgment: 13.10.2022

***M.S. RAMAN, J.***

1. The petitioner, proprietorship concern of Sri Durga Raman Patnaik with legal name and trade name "DURGA RAMAN PATNAIK" registered under the provisions of the Central Goods and Services Tax Act, 2017 (referred to as "CGST Act"), while assailing the Order dated 07.10.2021 passed in Appeal bearing No.228/BBSR-GST/APPEAL/2021 by the Additional Commissioner, GST (Appeals) (for brevity referred to as "Appellate Authority") vide Annexure-1, questioned the propriety of Order dated 21.08.2019 of Superintendent, Berhampur-I Range, Berhampur Division (for short, "Registering Authority"), who, in exercise of power under Section 29(2)(c) of the said Act, has cancelled the registration (Annexure-4).

2. Fact leading the petitioner to approach this Court to beseech invocation of extraordinary jurisdiction under the provisions of Article 226/227 of the Constitution of India, 1950, is that by referring to reply dated 31.08.2019 submitted by the petitioner in pursuance of terms of Show Cause Notice dated 21.08.2019, the Superintendent of Ganjam-I Circle in Berhampur-I Range without assigning any reason proceeded to cancel the registration, GSTIN: 21ALPPP8146E2ZY on 15.10.2019 invoking provisions of Section 29(2)(c) of the CGST Act with effect from 15.10.2019 inasmuch as there was non-filing of returns for consecutive period of six months.

2.1. Instead of seeking revocation of cancellation of registration under Section 30 of the CGST Act before the proper officer, assailing aforementioned order dated 15.10.2019, the petitioner preferred appeal under Section 107 of the CGST Act on 05.08.2021 with a delay of around 660 days which came to be rejected on 07.10.2021.

2.2. It is submitted by the counsel for the petitioner that while the Appellate Authority made an observation in his Appellate Order that application for revocation of cancellation of registration as envisaged in Section 30 of the CGST Act read with Rule 23 of the Central Goods and Services Tax Rules, 2017 (abbreviated as, "CGST Rules") being not filed within prescribed period, instead of rejecting the appeal on the ground of limitation by taking pedantic view, should have appreciated genuine difficulty faced by not only the petitioner but also other similarly placed suppliers and recipients and relegated him for availing the benefit of said remedial recourse of revocation of order of cancellation of registration under said provision as there is no outer limit provided under afore-mentioned provisions and the delay for sufficient reason being shown can be condoned.

2.3. Urging that the Appellate Authority ought to have shown pragmatic approach by taking a lenient view, referring to Notification No.19/2021— Central Tax, dated 01.06.2021, issued by Government of India, Ministry of Finance (Department of Revenue), Central Board of Indirect Taxes and Customs, it has been submitted that it has provided relief to the taxpayers by reducing/waiving late fee for non-furnishing Form GSTR-3B for the tax periods from July, 2017 to April, 2021, if the returns for these tax periods are furnished between 01.06.2021 to 31.08.2021. However, by virtue of Notification No. 33/2021— Central Tax, dated 29.08.2021, the last date to avail benefit of the amnesty scheme was extended from 31.08.2021 to 30.11.2021.

2.4. Based on the multiple representations received, Government by issue of Notification No. 34/2021— Central Tax [GSRNo.600(E)], dated 29.08.2021 have also extended the timelines for filing of application for revocation of cancellation of registration to 30.09.2021, where the due date of filing of application for revocation of cancellation of registration falls between 01.03.2020 to 31.08.2021. The extension was made applicable only in those cases where registrations were cancelled under clause (b) or clause (c) of sub-section (2) of Section 29 of the CGST Act.

2.5. Such an extension by way of amnesty scheme and extension of time limit for filing of application for revocation of cancellation of registration was promulgated as a benevolent gesture of the Government keeping in mind on the advent of GST regime with effect from 01.07.2017 adverse situations were faced by suppliers/recipients/taxpayers especially small taxpayers. Due to lack of awareness regarding nuances of "strict compliance" of new taxation policy, they could not file their returns in time. Such difficulties were multiplied by outbreak of Severe Acute Respiratory Syndrome-associated corona virus (SARS-CoV) leading to COVID-19 pandemic. Consequently, such situation was declared

*force majeure* which led to promulgation of Section 168A by way of the CGST (Amendment) Act, 2020 granting power to the Government to extend time limit in special circumstances.

2.6. It is, therefore, argued by the counsel for the petitioner that the Appellate Authority was not powerless to grant opportunity to the petitioner to deposit tax, interest coupled with penalty and late fee and relegate him to approach the Registering Authority under Section 30 of the CGST Act by condoning the delay as has been done by this Court in very many cases, namely in the case of *Nirmani Engineers and Constructions Pvt. Ltd. Vrs. The Commissioner of CT&GST, Odisha and Others, W.P.(C) No.15934 of 2021*, wherein vide Order dated 05.05.2021, this Court has observed as follows:

> *"2. Mr. Sunil Mishra, learned Additional Standing Counsel for Opposite Parties appearing on an advance notice states that as long as delay in filing the appeal is condoned, and provided the Petitioner complies with all the requirements of paying the taxes due, the 3B Return Form filed by the Petitioner will be accepted by the Opposite Parties.*
>
> *3. In that view of the matter, the delay in Petitioner's invoking the proviso to Rule 23 of the Odisha Goods and Services Tax Rules (OGST Rules) is condoned and it is directed that subject to the Petitioner depositing all the taxes due and complying with other formalities, the GST return filed by the Petitioner, provided it is filed on or before 5th July, 2021, will be accepted by the Opposite Parties."*

2.7. It is stated by the petitioner that in exercise of power under Section 128 of the CGST Act, the amount of late fee payable by registered person for failure to furnish return in Form GSTR-3B for the month of July, 2017 onwards by the due date under Section 47 has been waived by virtue of Notification No.76/2018— Central Tax, dated 31.12.2018 issued by the Government of India in Ministry of Finance (Department of Revenue), whereby ninth proviso has been inserted by way of amendment vide Notification No.19/2021— Central Tax, dated 01.06.2021, which is to the following effect:

> *"Provided also that for the registered persons who failed to furnish the return in Form GSTR-3B for the months /quarter of July, 2017 to April, 2021, by the due date but furnish the said return between the period from the 1st day of June, 2021 to the 31stday of August, 2021, the total amount of late fee under Section 47 of the said Act, shall stand waived which is in excess of five hundred rupees:"*

2.8. Relying on said proviso, it is, therefore, asserted that had the registration been live, the petitioner would have the occasion to furnish returns between the period from 01.06.2021 to 31.08.2021 in Form GSTR-3B for the months/quarter of July, 2017 to April, 2021.

2.9. Under such premise, the counsel for the petitioner praying for setting aside the Appellate Order (Annexure-1), would submit that given a chance, besides payment of tax, interest and penalty with late fee, all required returns can be furnished. Upon such compliance, the petitioner can be directed to make application under Section 30 for revocation of cancellation of registration.

3. It is stated at the Bar that many cases of this nature has been rejected by the Appellate Authority by passing a common order, as a consequence of which taxpayers even though are ready to deposit tax, interest and penalty with late fee and also furnish return(s), they are deprived of availing such advantage as is bestowed in the aforementioned notifications. Since the Bar sought to address the issue, this Court asked Sri Rudra Prasad Kar, Advocate to render assistance in this regard.

3.1. Mr. Rudra Prasad Kar, learned Advocate has placed the following suggestions by way of short note dated 25.08.2022:

> *"GST law being, a New Act, assessees are facing the difficulties in switching to procedural compliance electronically through internet on the GST Web-Portal. Considering the hardship faced by the assessees and more specifically due to COVID-19 pandemic, various amnesty schemes were introduced by the Government of India to ease the technical and procedural complicacies faced by the assessees. The provisions of the GST enactments and the rules made thereunder, read with various clarifications issued by the Central Government, pursuant to the decision of the GST Council and the Notification issued thereunder, also makes it clear that the intention is only to facilitate business and not to debar the assessees from coming back into GST fold. The purpose of GST registration is only to ensure that just taxes get collected on supplies of goods or services or both and is paid to the exchequer. Keeping these petitioners outside the bounds of the GST regime is a self-defeating move. It will be in the interest of the State to allow restoration of the Registration Certificate and facilitate business to grow.*
>
> *The provisions of the GST enactments cannot be interpreted so as to deny the right to carry on Trade and Commerce to a citizen. The constitutional guarantee is unconditional and unequivocal and must be enforced regardless of the defect in the scheme of the GST enactments. The right to carry on trade or profession also cannot be curtailed. Only reasonable restrictions, can be imposed.*
>
> *To deny such rights would militate against the rights under Article 14, read with Article 19(1)(g) and Article 21 of the Constitution of India.*
>
> *Recognizing the difficulties, the Central Board of Indirect Taxes and Customs (CBIC) extended the time limit for filing application for revocation of cancellation of registration for all the orders passed on or before 12.06.2020 was granted time till 31.08.2020 from which date the period of limitation for revocation of registration certificate would be counted. As the application filed by the writ-applicants for revocation of cancellation of registration was looked into by a quasi judicial authority, the order of the Hon'ble Supreme Court extending the period of limitation in view of the COVID-19 pandemic would apply and in such circumstances, the limitation in*

*accordance with the order passed by the Central Board of Indirect Taxes and Customs would also stand extended.*

*In view of the above and the various amnesty scheme notified by the Department, the Court may consider passing an order in consonance with the order of Hon'ble Supreme Court in Union of India & Another Vrs. FILCO Trade Centre Pvt. Ltd. & Another, SLP(C) No.31709-32710/2018, dated 22.07.2022.*

*The following are the humble suggestions:*

*1. The Hon'ble Court may consider allowing 'three' months time to assessees/the registered persons, whose registration have been cancelled under clause (b) or clause (c) of subsection (2) of Section 29 of the GST Act to apply for revocation of cancellation of registration from the date of passing of the order.*

*2. Accordingly, the GST Authorities/Concerned Officers may be directed to consider the application of revocation and allow the assessees to comply with the statutory requirements namely filing of returns, deposit of tax, interest, penalty and late fee within a further period of one month.*

*3. Authorities to take a pragmatic view and restore the R.Cs.*

*It is submitted that the Government will not be put to any pecuniary loss/revenue loss, rather the above suggestions and directions of this Hon'ble Court will be in the larger interest of trade, commerce and economic growth of the nation."*

4. Mr. Rudra Prasad Kar, learned Advocate, brought attention of this Court to the Judgment of Hon'ble Madras High Court rendered in the case of *Tvl. Suguna Cutpiece Center Vrs. The Appellate Authority and Another, W.P.(C) No.25048 of 2021*, etc. etc., vide Order dated 31.01.2022 reported at 2022 (61) GSTL 515 (Mad) to demonstrate that in the said Judgment a batch of matters qua certain taxpayers, having failed to furnish returns, registration certificates had been cancelled in the years 2018 and 2019 in terms of Section 29(2)(c), and their appeals have also been rejected by the Appellate Authority on the ground of limitation; nonetheless, the said Court protected them by issue of writ of *mandamus* with certain conditions. He also referred to decisions of other High Courts where similar views have been expressed and the statute under consideration being a Central statute, the views so expressed can be taken cognizance of for the purpose of extending akin privilege to the similarly circumstanced taxpayers of this State. In furtherance thereof, he urged that many taxpayers of this State being in unison to deposit tax, interest and penalty with late fee as is required under the CGST Act and rules framed thereunder, and non-grant of such opportunity cannot be said to enure to the larger interest of the State exchequer and disposing of writ petition with a direction to the Registering Authority to restore the registration by setting aside the Appellate Order would not only meet interest of justice, but also it would not cause prejudice to the Revenue. Therefore, he requested for extending one-time benefit.

5. Copy of suggestions with short note was served on Mr. Subash Chandra Mohanty, learned Standing Counsel for the opposite parties, who on instruction, submitted that in the event the petitioner deposits the required tax, interest, penalty and late fee, and furnishes all the returns, subject to verification by the authority concerned, the revocation of registration, upon duly constituted application under Section 30 of the CGST Act, could be considered by the Registering Authority.

6. The CGST Act, 2017 was promulgated and brought into force with effect from 01.07.2017, which is an Act to make provision for levy and collection of tax on intra-State supply of goods or services or both by the Central Government and the matters connected therewith or incidental thereto. Likewise, the Odisha Goods and Services Tax Act, 2017 (for brevity, "OGST Act") was enacted to make provision for levy and collection of tax on intraState supply of goods or services or both by the State of Odisha and the matters connected therewith or incidental thereto. Thus, the resultant effect upon introduction of the CGST Act and the OGST Act is that certain other statutes including Odisha Value Added Tax Act, 2004 and the Odisha Entry Tax Act, 1999 which were imposing indirect taxes stood repealed and in their place indirect taxes are levied under the CGST Act and the OGST Act. The levy of tax on goods and services is being made by the Central Government under the provisions of the CGST Act, 2017 and concurrent power has been conferred on the State Government to levy goods and services tax under the provisions under the OGST Act. Relevant provisions involved for facilitating adjudication of the issue raised in the present case do require to be mentioned.

> ***Section 29***
>
> *"Cancellation or suspension of registration.—*
>
> *(1) ****
>
> *(2) The proper officer may cancel the registration of a person from such date, including any retrospective date, as he may deem fit, where,—*
>
> *(a) a registered person has contravened such provisions of the Act or the rules made thereunder as may be prescribed; or*
>
> *(b) a person paying tax under Section 10 has not furnished returns for three consecutive tax periods; or*
>
> *(c) any registered person, other than a person specified in Clause (b), has not furnished returns for a continuous period of six months; or*
>
> *(d) any person who has taken voluntary registration under sub-section (3) of Section 25 has not commenced business within six months from the date of registration; or*
>
> *(e) registration has been obtained by means of fraud, wilful misstatement or suppression of facts:*

*Provided that the proper officer shall not cancel the registration without giving the person an opportunity of being heard.*

*Provided further that during pendency of the proceedings relating to cancellation of such period and in such manner as may be prescribed."*

***Section 30***

*"Revocation of cancellation of registration.—*

*(1) Subject to such conditions as may be prescribed, any registered person, whose registration is cancelled by the proper officer on his own motion, may apply to such officer for revocation of cancellation of the registration in the prescribed manner within thirty days from the date of service of the cancellation order.*

*Provided that such period may, on sufficient cause being shown, and for reasons to be recorded in writing, be extended,—*

*(a) by the Additional Commissioner or the Joint Commissioner, as the case may be, for a period not exceeding thirty days;*

*(b) by the Commissioner, for a further period not exceeding thirty days, beyond the period specified in clause (a).*

*(2) The proper officer may, in such manner and within such period as may be prescribed, by order, either revoke cancellation of the registration or reject the application: Provided that the application for revocation of cancellation of registration shall not be rejected unless the applicant has been given an opportunity of being heard.*

*(3) The revocation of cancellation of registration under the Central Goods and Services Tax Act shall be deemed to be a revocation of cancellation of registration under this Act."*

**Rule 22**

*"Cancellation of registration.—*

*(1) Where the proper officer has reasons to believe that the registration of a person is liable to be cancelled under Section 29, he shall issue a notice to such person in Form GST REG-17, requiring him to show cause, within a period of seven working days from the date of the service of such notice, as to why his registration shall not be cancelled.*

*(2) The reply to the show cause notice issued under sub-rule (1) shall be furnished in Form REG-18 within the periodspecified in the said sub-rule.*

*(3) Where a person who has submitted an application forcancellation of his registration is no longer liable to be registered or his registration is liable to be cancelled, the proper officer shall issue an order in Form GST REG-19, within a period of thirty days from the date of application submitted under Rule 20 or, as the case may be, the date of the reply to the show cause issued under sub-rule (1), cancel the registration, with effect from a date to be determined by him and notify the taxable person, directing him to pay arrears of any tax, interest or penalty including the amount liable to be paid under sub-section (5) of Section 29.*

*(4) Where the reply furnished under sub-rule (2) is found to be satisfactory, the proper officer shall drop the proceedings and pass an order in Form GST REG-20:*

*Provided that where the person instead of replying to the notice served under sub-rule (1) for contravention of the provisions contained in clause (b) or clause (c) of*

*subsection (2) of Section 29, furnishes all the pending returns and makes full payment of the tax dues along with applicable interest and late fee, the proper officer shall drop the proceedings and pass an order in Form GST-REG 20.*

*(5) The provisions of sub-rule (3) shall, mutatis mutandis, apply to the legal heirs of a deceased proprietor, as if the application had been submitted by the proprietor himself."*

**Rule 23**

*"Revocation of cancellation of registration.—*

*(1) A registered person, whose registration is cancelled by the proper officer on his own motion, may submit an application for revocation of cancellation of registration, in Form GST REG-21, to such proper officer, within a period of thirty days from the date of the service of the order of cancellation of registration at the common portal, either directly or through a Facilitation Centre notified by the Commissioner:*

*Provided that no application for revocation shall be filed, if the registration has been cancelled for the failure of the registered person to furnish returns, unless such returns are furnished and any amount due as tax, in terms of such returns, has been paid along with any amount payable towards interest, penalty and late fee in respect of the said returns.*

*Provided further that all returns due for the period from the date of the order of cancellation of registration till the date of the order of revocation of cancellation of registration shall be furnished by the said person within a period of thirty days from the date of order of revocation ofcancellation of registration:*

*Provided also that where the registration has been cancelled with retrospective effect, the registered person shall furnish all returns relating to period from the effective date of cancellation of registration till the date of order of revocation of cancellation of registration within a period of thirty days from the date of order of revocation ofcancellation of registration.]*

*(2) (a) Where the proper officer is satisfied, for reasons to be recorded in writing, that there are sufficient grounds for revocation of cancellation of registration, he shall revoke the cancellation of registration by an order in Form GST REG-22 within a period of thirty days from the date of the receipt of the application and communicate the same to the applicant.*

*(b) The proper officer may, for reasons to be recorded in writing, under circumstances other than those specified in clause (a), by an order in Form GST REG-05, reject the application for revocation of cancellation of registration and communicate the same to the applicant.*

*(3) The proper officer shall, before passing the order referred to in clause (b) of sub-rule (2), issue a notice in Form GST REG-23 requiring the applicant to show cause as to why the application submitted for revocation under sub-rule (1) should not be rejected and the applicant shall furnish the reply within a period of seven working days from the date of the service of the notice in Form GST REG-24.*

*(4) Upon receipt of the information or clarification in Form GST REG-24, the proper officer shall proceed to dispose of the application in the manner specified in sub-rule (2) within a period of thirty days from the date of the receipt of such information or clarification from the applicant."*

7. The Hon'ble Gujarat High Court in the case of *Aggarwal Dyeing and Printing Works Vrs. State of Gujarat & 2 Other(s), R/Special Civil Application No. 18860 of 2021*, vide Judgment dated 24.02.2022 discussed the provisions enshrined for registrationwith reference to the rules framed thereunder in the following manner:

> *"8.1 Scheme of the Act:*
>
> **** The related provisions for certificate of registration and its cancellation, under the said Act are as under:*
>
> *i. Section 2(107) defines the term "taxable person" means a person who is registered or liable to be registered under Section 22 or Section 24.*
>
> *ii. Chapter VI pertains to Registration. Section 22 provides for person liable for registration. Section 23 pertains to person who shall not be liable for registration whereas Section 24 provides for compulsory registration in certain cases specified therein. Section 25 provides application to be madewithin period of thirty days and prescribes procedure to be followed for registration. Section 26 provides deemed registration.*
>
> *iii. The Gujarat Goods and service Rules, 2017 has come into effect from 22nd June, 2017. Chapter III dealswith subject "Registration". Rule 8 provides for Application for registration. Rule 10 provides for Issue of registration certificate. Rule 16 provides for suomotu registration.*
>
> *iv. Section 29 confers power upon the proper officer for cancellation of Registration. Section 30 provides for revocation of cancellation of registration. Against the aforesaid substantive provisions prescribed under the Act, the corresponding rules framed thereunder are also required to be looked into.*
>
> *v. Rule 20 provides for filing of application for cancellation of registration by the dealer. Rule 21provides for Registration to be cancelled by the proper officer in certain cases. Rule 22 deals for procedure to be adhered to while proceeding for with cancellation of registration. Rule 23 deals with Revocation of cancellation of registration.*
>
> *9. In light of the aforesaid provisions, we notice that registration of any business entity under the GST Law implies obtaining a unique number from the concerned tax authorities for the purpose of collecting tax on behalf of the Government and to avail input tax credit for the taxes on his inward supplies. Without registration, a person can neither collect tax from his customers nor claim any input tax credit of tax paid by him. It appears that registration in GST is PAN based and State specific. Thus, supplier has to get himself registered in each of such State or Union Territory from where he effects supply. The Act empowers proper officer and registration granted under GST can be cancelled for specified reasons. The cancellation can either be initiated by the department on their own motion or the registered person can apply for cancellation of hisregistration.*
>
> *9.1 From the bare reading of the Rules, 2017 along with statutory provision, the reasons for cancellation can be culled out as under:*

*a) a person registered under any of the existing laws, but who is not liable to be registered under the GST Act;*

*b) the business has been discontinued, transferred fully for any reason including death of the proprietor, amalgamated with other legal entity, demerged or otherwise disposed of;*

*c) there is any change in the constitution of the business;*

*d) the taxable person (other than the person who has voluntarily taken registration under sub-section (3) of Section 25 of the CGST Act, 2017) is no longer liable to be registered;*

*e) a registered person has contravened such provisions of the Act or the rules made thereunder;*

*f) a person paying tax under composition levy has not furnished returns for three consecutive tax periods;*

*g) any registered person, other than a person paying tax under composition levy has not furnished returns for a continuous period of six months;*

*h) any person who has taken voluntary registrationunder sub-section (3) of Section 25 has not commenced business within six months from the date of registration;*

*i) registration has been obtained by means of fraud, willful misstatement or suppression of facts.*

*9.2 The procedure for cancellation of registration can be summarized as under:*

*i. A person already registered under any of the existing laws (Central excise, Service tax, VAT etc.), but who now is not liable to be registered under the GST Act has to submit an application electronically by 31stDecember 2017, in Form GST REG-29 at the common portal for the cancellation of registration granted to him. The Superintendent of Central Tax shall, after conducting such enquiry as deemed fit,cancel the said registration.*

*ii. The cancellation of registration under the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act, as the case may be, shall be deemed to be a cancellation of registration under Central Goods and Services Tax Act.*

*iii. In the event, the Superintendent of Central Tax has reasons to believe that the registration of a person is liable to be cancelled, a notice to such person in Form GST REG-17, requiring him to show cause, within a period of seven working days from the dateof the service of such notice, as to why his registration shall not be cancelled; will be issued.*

*iv. The reply to the show cause notice issued has to be furnished by the registered person in Form REG-18 within a period of seven working days. iv. In case the reply to the show cause notice is found to be satisfactory, the Superintendent of Central Tax will drop the proceedings and pass an order in Form GST REG-20.*

*v. However, when the person who has submitted an application for cancellation of his registration is no longer liable to be registered or his registration is liable to be cancelled, the Superintendent of Central Tax will issue an order in Form GST REG-19, within a period of thirty days from the date of application or, as the case may be, the date of the reply to the show cause issued, cancel the registration, with effect from a*

*date to be determined by him and notify the taxable person, directing him to pay arrears of anytax, interest or penalty.*

*vi. The registered person whose registration is cancelled shall pay an amount, by way of debit in the electronic credit ledger or electronic cash ledger, equivalent to the credit of input tax in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock or capital goods or plant and machinery on the day immediately preceding the date of such cancellation or the output tax payable on such goods, whichever is higher.*

*vii. In case of capital goods or plant and machinery, the taxable person shall pay an amount equal to the input tax credit taken on the said capital goods or plantand machinery, reduced by such percentage as may be prescribed or the tax on the transaction value of such capital goods or plant and machinery under Section 15, whichever is higher.*

*viii. The cancellation of registration shall not affect the liability of the person to pay tax and other dues for any period prior to the date of cancellation whether or not such tax and other dues are determined before or after the date of cancellation.*

*9.3 At the same time, the statute also provides for revocation of cancellation:*

*i. When the registration has been cancelled by theProper Officer (Superintendent of Central Tax) on his own motion and not on the basis of an application, then the registered person, whose registration has been cancelled, can submit an application for revocation of cancellation of registration, in Form GST REG-21, to the Proper Officer (Assistant or Deputy Commissioners of Central Tax), within a period of thirty days from the date of the service of the order of cancellation ofregistration at the common portal, either directly or through a Facilitation Centre notified by the Commissioner:*

*ii. However, if the registration has been cancelled for failure to furnish returns, application for revocation shall be filed, only after such returns are furnished and any amount due as tax, in terms of such returns, has been paid along with any amount payable towards interest, penalty and late fee in respect of the said returns.*

*iii. On examination of the application if the Proper Officer (Assistant or Deputy Commissioners of Central Tax) is satisfied, for reasons to be recorded in writing, that there are sufficient grounds for revocation of cancellation of registration, then heshall revoke the cancellation of registration by anorder in Form GST REG-22 within a period of thirty days from the date of the receipt of the application and communicate the same to the applicant.*

*iv. However, if on examination of the application for revocation, if the Proper Officer (Assistant or Deputy Commissioners of Central Tax) is not satisfied thenhe will issue a notice in Form GST REG–23 requiring the applicant to show cause as to why theapplication submitted for revocation should not be rejected and the applicant has to furnish the replywithin a period of seven working days from the dateof the service of the notice in Form GST REG-24.*

*v. Upon receipt of the information or clarification in Form GST REG-24, the Proper Officer (Assistant or Deputy Commissioners of Central Tax) shall dispose of the application within a period of thirty days from the date of the receipt of such information or clarification from the applicant. In case the information or clarification provided is satisfactory, the Proper Officer (Assistant or Deputy Commissioners of*

> *Central Tax) shall dispose the application as per para (iii) above. In case it is not satisfactory the applicant will be mandatorily given an opportunity of being heard, after which the Proper Officer (Assistant or Deputy Commissioners of Central Tax) after recording the reasons in writingmay by an order in Form GST REG-05, reject the application for revocation of cancellation of registration and communicate the same to the applicant.*
>
> *vi. The revocation of cancellation of registration under the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act, as the case may be, shall be deemed to be a revocation of cancellation of registration under Central Goods and Services Tax Act.*
>
> *10. Thus, upon appreciation of the scheme of Act, where specific forms have been prescribed at each stage right from registration, cancellation and revocation of cancellation of registration, the same are to be strictly adhered to. At the same time, it is equally important that the proper officer empowered under the said Act adheres to the principles of natural justice.*
>
> *11. At the outset, we notice that it is settled legal position of law that reasons are heart and soul of the order and noncommunication of same itself amounts to denial of reasonable opportunity of hearing, resulting in miscarriage of justice. ***"*

7.1. A conjoint reading of the provisions referred to above juxtaposed with provisions contained in Section 39 read with Rule 61 would clearly indicate that the petitioner is bound to file return for the month concerned on or before the 20th of the succeeding month concerned. Further a reading of Section 29(2)(c) of the CGST Act would also disclose that it is mandated by the Legislature that if there is continuous default of six months on the part of the assessee in filing returns, then the competent authority can invoke the power conferred under Section 29(2)(c) of the said Act to cancel the registration.

7.2. In the instant case, it is transpired from pleading in the writ petition that though the Superintendent, Berhampur-I Range passed order cancelling the registration with effect from 15.10.2019, the petitioner has been allowed to deposit an amount of Rs.3,09,360/- with late fee of Rs.5,000/- in respect of the tax liability for the period October, 2019 and the return in connection with cancelled GSTIN being 21ALPPP8146E2ZY was allowed to be furnished on 22.04.2021.

8. It appears, being confused on account of newly introduced taxation procedure, instead of taking recourse to the remedy available under Section 30 read with Rule 23 for revocation of cancellation of registration, appeal under Section 107 was preferred by the petitioner.

8.1. In the order of cancellation of registration dated 15.10.2019 (Annexure-4) it has been reflected as follows:

> *"This has reference to your reply dated 31.08.2019 in response to the notice to show cause dated 21.08.2019."*

However, without assigning any reason for considering said response, the proper officer, Superintendent, has cancelled the registration.

8.2. The appeal preferred by the petitioner has been rejected with the following observation:

> *"8. I find that the said appellant Nos.1 to 32 did not file the requisite returns as indicated in the respective show cause notice issued to them. Therefore, their registrations were cancelled. They also did not file application for revocation of cancellation of registration within the prescribed time. It is also noticed that the said appellants have not filed the present appeals within the stipulated time limit prescribed under Section 107(1) of CGST Act, 2017.*
>
> *9. As per the provisions of Section 107(1) of the CGST Act, a person is required to file appeal against an order passed by an adjudicating authority within the time limit of three months from the date on which order is communicated. It is noted that Hon'ble Supreme Court in its order dated 8thMarch, 2021 has extended the limitation period prescribed under general law of limitation or under any special (both Central and State) due to the onset of Covid-19 virus. Hon'ble Supreme Court in the said order has directed that in computing the period of limitation for any appeal, the period from 15.03.2020 to 14.03.0021 shall stand excluded. Further, it has been held in the said order that in cases where the limitation would have expired during the period between 15.03.2020 till 14.03.2021, notwithstanding the actual balance period of limitation remaining, all persons shall have limitation period of 90 days from 15.3.2021.*
>
> *10.1 It is also noted that the Hon'ble Supreme Court in its order dated 27.04.2021 has restored its earlier order dated 08.03.20 21 in view of the extraordinary situation caused by the second outburst of COVID-19 virus. Hon'ble Supreme Court has ruled that in continuation of the order dated 8thMarch, 2021 direct that the period(s) of limitation, as described under any general or special laws in respect of all judicial or quasi-judicial proceedings, whethercondonable or not shall stand extended till further orders. Hon'ble Supreme Court has further clarified that the period from 14th March, 2021 till further orders shall also stand excluded in computing the limitation period.*
>
> *10.2 In pursuance of the orders of the Hon'ble Supreme Court, Central Board of Indirect Taxes and Customs (CBIC) has issued a circular No. 157/13/2021-GST dated 20.07.2021. In the said circular, it is clarified that period of limitation extended by Supreme Court in its order dated 27.04.2021 shall be applicable in respect of any appeal before the appellate authority under the CGST Act. The relevant portion of the said Circular is reproduced as under:*
>
> *"5. In other words, the extension of timelines granted by the Hon'ble Supreme Court vide its order dated 27.04.2021 is applicable in respect of any appeal which is required to be filed before Joint/Additional Commissioner (Appeals), Commissioner (appeals), appellate authority for advance rulings, tribunal and various courts against any quasi-judicial order or where proceeding for revision or rectification of any order is required to be undertaken, and is not applicable to any other proceedings under GST laws."*
>
> *11. Thus, taking into account the extension of limitation period granted by the CBIC and Hon'ble Supreme Court, I find that the appeals by the above Appellant Nos. 1 to 32 are filed beyond the prescribed period of limitation. Therefore, I am constrained to reject the said appeals filed by the Appellant No. 1 to 32. Held accordingly."*

8.3. It is apparent from the above that while rejecting appeals of 32 taxpayers on 07.10.2021 by a common order, the Appellate Authority had no occasion to notice the further order being passed on 10.01.2022 by the Hon'ble Supreme Court taking into consideration third surge of COVID-19 virus. Said order dated 10.01.2022 having bearing on the case at hand, the appellate order deserves to be set aside.

8.4. Significant it is to have reference to Notification No.76/2018— Central Tax [GSR 1253(E)], dated 31st December, 2018 issued in exercise of power conferred under Section 128 along with pertinent amendments made thereof subsequently. For better appreciation relevant portions of said notification are extracted herein below to appreciate that the Government extended the benefit to taxpayers to furnish the returns between the period from 1st day of July, 2020 to 30th of September, 2020 who failed to furnish returns for the months of July, 2017 to January, 2020 by the due date:

"*Government of India Ministry of Finance*
*(Department of Revenue)*
*Central Board of Indirect Taxes and Customs*
*Notification No. 76/2018 – Central Tax*
*New Delhi, the 31st December, 2018*

*G.S.R.1253(E),– In exercise of the powers conferred by Section 128 of the Central Goods and Services Tax Act, 2017 (12 of 2017) (hereafter in this notification referred to as the said Act), the Central Government, on the recommendations of the Council , and in supersession of the notification of the Government of India in the Ministry of Finance, Department of Revenue No. 28/2017 – Central Tax, dated the 1st September, 2017 published in the Gazette of India, Extraordinary, Part II, Section 3, sub-section (i) vide number G.S.R. 1126 (E), dated the 1st September, 2017, notification of the Government of India in the Ministry of Finance, Department of Revenue No. 50/2017– Central Tax, dated the 24th October, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, sub-section (i) vide number G.S.R. 1326 (E), dated the 24th October, 2017 and notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 64/2017– Central Tax, dated the 15th November, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, subsection (i) vide number G.S.R.1420(E), dated the 15th November, 2017, except as respects things done or omitted to be done before such supersession, hereby waives the amount of late fee payable by any registered person for failure to furnish the return in Form GSTR-3B for the month of July, 2017 onwards by the due date under Section 47 of the said Act, which is in excess of an amount of twenty-five rupees for every day during which such failure continues:*

*Provided that where the total amount of central tax payable in the said return is nil, the amount of late fee payable by such registered person for failure to furnish the said return for the month of July, 2017 onwards by the due date under Section 47 of the said Act shall stand waived to the extent which is in excess of an amount of ten rupees for every day during which such failure continues:*

*Provided further that the amount of late fee payable under Section 47 of the said Act shall stand waived for the registered persons who failed to furnish the return in Form GSTR-3B for the months of July, 2017 to September, 2018 by the due date but furnishes the said return between the period from 22nd December, 2018 to 31st March, 2019.*
***

*1[Provided also that the total amount of late fee payable for a tax period, under Section 47 of the said Act shall stand waived which is in excess of an amount of two hundred and fifty rupees for the registered person who failed to furnish the return in Form GSTR3B for the months of July, 2017 to January, 2020, by the due date but furnishes the said return between the period from 1st day of July, 2020 to 30th day of September, 2020:*

*Provided also that where the total amount of Central tax payable in the said return is NIL, the total amount of late fee payable for a tax period, under Section 47 of the said Act shall stand waived for the registered person who failed to furnish the return in Form GSTR-3B for the months of July, 2017 to January, 2020, by the due date but furnishes the said return between the period from 1stday of July, 2020 to 30th day of September, 2020.]*
***
*2[Provided also that for the registered persons who failed to furnish the return in Form GSTR-3B for the months/quarter of July, 2017 to April, 2021, by the due date but furnish the said return between the period from the 1st day of June, 2021 to the 31stday of August, 2021, the total amount of late fee under Section 47 of the said Act, shall stand waived which is in excess of five hundred rupees:*

*Provided also that where the total amount of central tax payable in the said return is nil, the total amount of late fee under Section 47 of the said Act shall stand waived which is in excess of two hundred and fifty rupees for the registered persons who failed to furnish the return in Form GSTR-3B for the months/quarter of July, 2017 to April, 2021, by the due date but furnish the said return between the period from the 1st day of June, 2021 to the 31st day of August, 2021:*

*Provided also that the total amount of late fee payable under Section 47 of the said Act for the tax period June, 2021 onwards or quarter ending June, 2021 onwards, as the case may be, shall stand waived which is in excess of an amount as specified in column (3) of the Table given below, for the class of registered persons mentioned in the corresponding entry in column (2) of the said Table, who fail to furnish the returns in Form GSTR-3B by the due date, namely: —*

| *S.No.* *(1)* | *Class of registered persons* *(2)* | *Amount* *(3)* |
|---|---|---|
| *1.* | *Registered persons whose total amount of central tax payable in the said return is nil* | *Two hundred and fifty rupees* |
| *2.* | *Registered persons having an aggregate turnover of up to rupees 1.5 crores in the preceding financial year, other than those covered under S. No. 1* | *One thousand rupees* |
| *3.* | *Taxpayers having an aggregate turnover of more than rupees 1.5 crores and up to rupees 5 crores in the preceding financial year, other than those covered under S. No. 1* | *Two thousand and five hundred rupees]* |

*[F.No.20/06/16/2018-GST]*
*(Dr. Sreeparvathy S.L.)*
*Under Secretary*
*to the Government of India"*

*1. Inserted by Notification No.52/2020— Central Tax, dated 24.06.2020.*
*2. Inserted by Notification No.19/2021— Central Tax, dated 01.06.2021.*

8.5. Minute reading of above mentioned notification gives indication that the Government have been considerate in extending the benefit to the taxpayers who could not file returns for the months/quarter(s) of July, 2017 to April, 2021 within statutory period specified. As the registration certificate of the petitioner stood cancelled since 15.10.2019 by the time amendments to Notification No.76/2018— Central Tax [GSR 1253(E)], dated 31st December, 2018 came into force, there was no scope left for availing the advantage conferred thereunder.

8.6. Perusal of Common Order dated 31.01.2022 passed in the case of *Tvl. Suguna Cutpiece Center Vs. The Appellate Authority and Another, 2022 (61) GSTL 515 (Mad)* reveals that the Hon'ble Madras High Court considered inter alia the cases of taxpayers who have filed writ petition "AGAINST THE ORDER PASSED IN APPEAL FILED AGAINST THE ORDER OF CANCELLATION OF REGISTRATION OF GST CERTIFICATE ON ACCOUNT OF THE APPEAL BEING TIME BARRED". Relevant it is to quote the following from said common order:

*"171. One of the options available noticee whose registration is cancelled, is to approach the same authority for revocation of cancellation of the registration in the manner prescribed within 30 days from the date of service of cancellation of registration.*

*172. When Section 30 was incorporated in the respective GST enactments with effect from 1st July, 2017, there was no proviso to Section 30(1) of the Act. ****

*173. Only, a single window of opportunity was given to file application within thirty (30) days for revocation of cancellation order under Section 30(1). However, right from the beginning, GST Council recognised that the GST law was new and assessees encountered the difficulties in switching to procedural compliance electronically through Internet on the GST Web-Portal.*

*174. Considering the hardship faced by the assessees, the GST Council in its 33rd Meeting held on 24.02.2019 took a decision. Pursuant to aforesaid decision, the Central Government, on recommendations of the GST Council, in exercise of power conferred under Section 172 of the Central Goods and Services Tax Act, 2017, inserted a proviso to Section 30(1) of the respective GST enactments vide Order No.5/2019-GST, Central Board of Indirect Taxes and Customs, dated 23.04.2019. Thus, Proviso to Section 30(1) of the Act read as under:*

*"Provided that the registered person who was served notice under sub-section (2) of Section 29 in the manner as provided in clause (c) or clause (d) of sub-section (1) of Section 169 and who could not reply to the said notice, thereby resulting in cancellation of his registration certificate and is hence unable to file application for revocation of cancellation of registration under sub-section (1) of Section 30 of the Act, against such order passed up to 31.03.2019, shall be allowed to file application for revocation of cancellation of the registration not later than 22.07.2019."*

*175. This was a novel and an unconventional method adopted to amend the Act. It was contrary to the well-established procedure under the Constitution and Law for amending a statute. The above amendment was a stop gap arrangement. As per the aforesaid proviso which was inserted to Section 30(1) of the Act, wherever cancellation orders had been passed up to 31.03.2019 and application for revocation was not filed within thirty (30) days under sub-section (1) to Section 30, an option was given to file an application for revocation of cancellation of the registration not later than 22.07.2019.*

*176. Implementing requirement of Section 30 of the GST enactments, Rule 23 of the GST Rules, 2017 has been prescribed.*

***

*177. An alternate remedy is also available in the order of cancellation by way of appeal under Section 107 of the respective GST enactments which option has been exercised by some of the writ petitioners but beyond the period of limitation.*

*178. A reading of Section 29 of the Act respective GST enactments also makes it clear that cancellation of registration under the aforesaid section does not affect the liability of a person to pay tax and other dues under the Act or discharge any obligation under the said Act and the rules made under for any period prior to the date of cancellation, whether or not such tax and other dues are determined before or after the date of cancellation. They also make it clear that cancellation of registration under anyone of the other GST enactments shall be deemed to be cancellation of registration under the other GST enactments.*

***

*184. Nationwide, lockdown was imposed on 24.03.2020 due to the outbreak of SARS Covid-19 Pandemic. Under these circumstances, Government, rose to the occasion based on the recommendation of the GST Council and gave a fresh opportunity to those persons whose right to file an application under Section 30(1) of the Act and the remedy under proviso to the Section 30(1) of the Act had expired between 20.03.2020 to 29.06.2020 by extending the period upto 30.06.2020 vide Notification No.35/2020–Central Tax, Central Board of Indirect Taxes and Customs, dated 03.04.2020.*

*185. This Notification was issued in the exercise of power conferred under Section 168A of the Central Goods and Services Tax Act, 2017 read with Section 20 of the Integrated Goods and Services Tax Act, 2017 and Section 21 of the Union Territory Goods and Services Tax Act, 2017. This did not address the case of the above petitioners.*

*186. However, on 25.06.2020, the Central Government on the recommendations of the Council, in the exercise of power conferred under Section 172 of the Central Goods and Services Tax Act, 2017, issued the Central Goods and Services Tax (Removal of Difficulties) Order, 2020 vide Order No.01/2020-Central Tax, Central Board of Indirect Taxes and Customs, dated 25.06.2020. Relevant portion of the said Notification reads as under:*

*1. Short title.—*

*This Order may be called THE CENTRAL GOODS AND SERVICES TAX (REMOVAL OF DIFFICULTIES) ORDER,2020.*

*2. For the removal of difficulties, it is hereby clarified that for the purpose of calculating the period of thirty days for filing application for revocation of cancellation of registration under sub-section (1) of Section 30 of the Act for those registered persons who were served notice under clause (b) or clause (c) of sub-section (2) of Section 29 in the manner as provided in clause (c) or clause (d) of sub-section (1) of Section 169 and where cancellation order was passed up to 12th June, 2020, the later of the following dates shall be considered:*

*a) Date of service of the said cancellation order; or*

*b) 31st day of August, 2020.*

*187. The amnesty in the above Government Order pertains to cases where orders were passed up to 12.06.2020. ****

*188. The time for filing appropriate application for revoking the cancellation of registration was extended either from date of service of the said cancellation order or 31.08.2020 which was later.*

*189. Thus, all these petitioners whose registration had been cancelled prior to 12.06.2020 were given a fresh opportunity to file an application for revocation of cancellation of registration in terms of the Central Goods and Services Tax (Removal of Difficulties) Order, 2020 vide Order No.01/2020-Central Tax, Central Board of Indirect Taxes and Customs, dated 25.06.2020. However, none of the petitioners opted to exercise the privilege.*

*****

*191. Later, proviso was substituted by Section 122 of the Finance Act, 2020 which came into force from 01.01.2021 which reads as under:*

*"Provided that such period may, on sufficient cause being shown, and for reasons to be recorded in writing, be extended,—*

*(a) by the Additional Commissioner or the Joint Commissioner, as the case may be, for a period not exceeding thirty days;*

*(b) by the Commissioner, for a further period not exceeding thirty days, beyond the period specified in clause (a).".*

*192. By Notification No.92/2020— Central Tax, dated 22.12.2020, the Central Government appointed the 1st day of January, 2021 as the date on which the provisions of Section 119, 120, 121, 122, 123, 124, 126, 127 and 131 of the Act shall come into force. Thus, Section 30 of the GST Acts, came into force with effect from 1st day of January, 2021. The said Notification reads as under:*

*"Government of India*
*Ministry of Finance*
*(Department of Revenue)*
*Central Board of Indirect Taxes and Customs*
*Notification No 92/2020— Central Tax*
*New Delhi, the 22nd December, 2020*

*S.O. 4643(E).— In exercise of the powers conferred by subsection (2) of Section 1 of the Finance Act, 2020 (12 of 2020) (hereinafter referred to as the said Act), the Central Government hereby appoints the 1st day of January, 2021, as the date on which the provisions of Sections 119, 120, 121, 122, 123, 124, 126, 127 and 131 of the said Act shall come into force.*

*[F.No. CBEC-20/06/04/2020-GST]*

*193. Parallel amendments were made to Rule 23 of the respective GST Rules and Form GST REG-21 was amended vide Notification No.15/2021— Central Tax, Central Board of Indirect Taxes and Customs, dated 18.05.2021. ****

*194. The above amendment however did not address the case of the petitioners whose registrations were cancelled after 31.03.2019 and before the above amendment to the Act as Rules with effect from 01.01.2021.*

*****

*196. These petitioners had only one option to file an application within a period of 30 days from the date of service of the order of cancellation of registration under Section 30(1) of the Act which had expired long back.*

*197. Still later, in view of the prevailing situation, Notification No.34/2021– Central Tax, Central Board of Indirect Taxes and Customs, dated 29.08.2021 was issued by the Central Government once again on the recommendation of the GST Council. Notification No.34/2021– Central Tax, Central Board of Indirect Taxes and Customs, dated 29.08.2021 which reads as under:*

*Government of India Ministry of Finance*
*(Department of Revenue)*
*Central Board of Indirect Taxes and Customs*
*Notification No. 34/2021— Central Tax*
*New Delhi, the 29th August, 2021*

*G.S.R.600(E).– In partial modification of the notifications of the Government of India in the Ministry of Finance (Department of Revenue), No. 35/2020-Central Tax, dated the 3rd April, 2020, published in the Gazette of India, Extraordinary, Part II, Section 3, sub-section (i), vide number G.S.R. 235(E), dated the 3 rd April, 2020 and No. 14/2021— Central Tax, dated the 1st May, 2021, published in the Gazette of India, Extraordinary, Part II, Section 3, sub-section (i), vide number G.S.R. 310(E), dated the 1st May, 2021, in exercise of the powers conferred by Section 168A of the Central Goods and Services Tax Act, 2017 (12 of 2017) (hereafter in this notification referred to as the said Act), read with Section 20 of the Integrated Goods and Services Tax Act, 2017 (13 of 2017), and Section 21 of the Union Territory Goods and Services Tax Act, 2017 (14 of 2017), the Government, on the recommendations of the Council, hereby notifies that where a registration has been cancelled under clause (b) or (c) of sub-section (2) of Section 29 of the said Act and the time limit for making an application of revocation of cancellation of registration under sub-section (1) of Section 30 of the said Act falls during the period from the 1st day of March, 2020 to 31st day of August, 2021 the time limit for making such application shall be extended upto the 30th day of September, 2021.*

*[F. No. CBIC-20006/24/2021-GST]*

*198. The Central Government in the above Notification took a decision to extend the time limit up to 30.09.2021 for the persons like petitioners. However, this was applicable to those registrations which had been cancelled and time limit for filing*

*application for revocation of cancellation of registration had expired during the period commencing from the 1st day of March, 2020 to 31st day of August, 2021. Thus, the time limit for making such application stood extended up to the 30th day of September, 2021.*

*199. In the light of the above Notification, the Principal Commissioner has also issued clarification vide Circular No.158/14/2021—GST, Central Board of Indirect Taxes and Customs, dated 06.09.2021, while, tracing out the history, in paragraph Nos.3 and 4, it has been clarified as follows:*

*"3. Applications covered under the scope of the said notification*

*3.1. The said notification specifies that where the due date of filing of application for revocation of cancellation of registration falls between 1st March, 2020 to 31st August, 2021, the time limit for filing of application for revocation of cancellation of registration is extended to 30th September, 2021. Accordingly, it is clarified that the benefit of said notification is extended to all the cases where cancellation of registration has been done under clause (b) or clause (c) of sub-section (2) of Section 29 of the CGST Ac, 2017 and where the due date of filing of application for revocation of cancellation of registration falls between 1st March, 2020 to 31st August, 2021. It is further clarified that the benefit of notification would be applicable in those cases also where the application for revocation of cancellation of registration is either pending with the proper officer or has already been rejected by the proper officer. It is further clarified that the benefit of notification would also be available in those cases which are pending with the appellate authority or which have been rejected by the appellate authority. In other words, the date for filing application for revocation of cancellation of registration in all cases, where registration has been cancelled under clause (b) or clause (c) of sub-section (2) of Section 29 of CGST Act, 2017 and where the due date of filing of application for revocation of cancellation of registration falls between 1st March, 2020 to 31st August, 2021, is extended to 30th September, 2021, irrespective of the status of such applications. As explained in this para, the said notification would be applicable in the following manner:*

*(i) application for revocation of cancellation of registration has not been filed by the taxpayer—*

*In such cases, the applications for revocation can be filed up to the extended timelines as provided vide the said notification. Such cases also cover those instances where an appeal was filed against order of cancellation of registration and the appeal had been rejected.*

*(ii) application for revocation of cancellation of registration has already been filed and which are pending with the proper officer—*

*In such cases, the officer shall process the application for revocation considering the extended timelines as provided vide the said notification.*

*(iii) application for revocation of cancellation of registration was filed, but was rejected by the proper officer and taxpayer has not filed any appeal against the rejection—*

*In such cases, taxpayer may file a fresh application for revocation and the officer shall process the application for revocation considering the extended timelines as provided vide the said notification.*

*(iv) application for revocation of cancellation of registration was filed, the proper officer rejected the application and appeal against the rejection order is pending before appellate authority—*

*In such cases, appellate authorities shall take the cognizance of the said notification for extension of timelines while deciding the appeal.*

*(v) application for revocation of cancellation of registration was filed, the proper officer rejected the application and the appeal has been decided against the taxpayer—*

*In such cases, taxpayer may file a fresh application for revocation and the officer shall process the application for revocation considering the extended timelines as provided vide the said notification.*

4. *It may be recalled that, with effect from 01.01.2021, proviso to sub-section (1) of Section 30 of the CGST Act has been inserted which provides for extension of time for filing application for revocation of cancellation of registration by 30 days by Additional/ Joint Commissioner and by another 30 days by the Commissioner. Doubts have been raised whether the said notification has extended the due date in respect of initial period of 30 days for filing the application (in cases where registration has been cancelled under clause (b) or clause (c) of sub-section (2) of Section 29 of CGST Act, 2017) under sub-section (1) of Section 30 of the CGST Act or whether the due date of filing applications for revocation of registration can be extended further for the period of 60 days (30 + 30) by the Joint Commissioner/ Additional Commissioner/ Commissioner, as the case may be, beyond the extended date of 30.09.2021. It is clarified that:*

*(i) where the thirty days' time limit falls between 1st March, 2020 to 31st December, 2020, there is no provision available to extend the said time period of 30 days under Section 30 of the CGST Act. For such cases, pursuant to the said notification, the time limit to apply for revocation of cancellation of registration stands extended up to 30th September, 2021 only; and*

*(ii) where the time period of thirty days since cancellation of registration has not lapsed as on 1st January, 2021 or where the registration has been cancelled on or after 1st January, 2021, the time limit for applying for revocation of cancellation of registration shall stand extended as follows:*

*(a) Where the time period of 90 days (initial 30 days and extension of 30 + 30 days) since cancellation of registration has elapsed by 31.08.2021, the time limit to apply for revocation of cancellation of registration stands extended up to 30th September 2021, without any further extension of time by Joint Commissioner/ Additional Commissioner/ Commissioner.*

*(b) Where the time period of 60 days (and not 90 days) since cancellation of registration has elapsed by 31.08.2021, the time limit to apply for revocation of cancellation of registration stands extended up to 30th September 2021, with the extension of timelines by another 30 days beyond 30.09.2021 by the Commissioner, on being satisfied, as per proviso to sub-section (1) of Section 30 of the CGST Act.*

*(c) Where the time period of 30 days (and not 60 days or 90 days) since cancellation of registration has elapsed by 31.08.2021, the time limit to apply for revocation of cancellation of registration stands extended up to 30th September 2021, with the extension of timelines by another 30 days beyond 30.09.2021 by the Joint/ Additional*

*Commissioner and another 30 days by the Commissioner, on being satisfied, as per proviso to sub-section (1) of Section 30 of the CGST Act."*

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*201. By Circular No.157/13/2021-GST, the Central Board of Indirect Taxes and Customs, GST Policy Wing, dated 20.07.2021, it was classified as follows:*

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

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

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

*b) Quasi-Judicial proceedings by tax authorities:-*

*The tax authorities can continue to hear an dispose off proceedings where they are performing the functions as quasi-judicial authority. This may inter alia include disposal of application for refund, application for revocation of cancellation of registration, adjudication proceedings of demand notices, etc. Similarly, appeals which are filed and are pending, can continue to be heard and disposed off and the same will be governed by those extensions of time granted by the statues or notifications, if any.*

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

*Wherever any appeal is required to filed before Joint/ Additional Commissioner (Appeals), Commissioner (Appeals), Appellate Authority for Advance Ruling, Tribunal and various courts against any quasi-judicial order or where a proceeding for revision or rectification of any order is required to be undertaken, the time line for the same would stand extended as per the Hon'ble Supreme Court's order."*

*202. Meanwhile, the Hon'ble Supreme Court taking note of the hardship faced by the litigants had also extended the limitation by its orders dated 23.03.2020, 08.04.2021, 27.04.2021 & 23.09.2021 in Recognizance of Extension of Limitation, in Miscellaneous Application No.665/2021 in SMW(C) No.3/2020.*

*203. In its order dated 23.09.2021 in the above case, 2021 SCC OnLine SC 947, the Hon'ble Supreme Court held as under:-*

*Therefore, we dispose of the M.A. No. 665 of 2021 with the following directions:—*

*I. In computing the period of limitation for any suit,appeal, application or proceeding, the period from 15.03.2020 till 02.10.2021 shall stand excluded. Consequently, the balance period of limitation remaining as on 15.03.2021, if any, shall become available with effect from 03.10.2021.*

*II. In cases where the limitation would have expired during the period between 15.03.2020 till 02.10.2021, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 03.10.2021. In the*

*event the actual balance period of limitation remaining, with effect from 03.10.2021, is greater than 90 days, that longer period shall apply.*

*III. The period from 15.03.2020 till 02.10.2021 shall also stand excluded in computing the periods prescribed under Sections 23(4) and 29A of the Arbitration and Conciliation Act, 1996, Section 12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings.*

*IV. The Government of India shall amend the guidelines for containment zones, to state.*

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

8.7. In the case of *Aarcity Builders Private Limited Vrs. Union of India and Others, CWP No.19029 of 2021*, the Hon'ble Punjab and Haryana High Court at Chandigarh vide Judgment dated 09.12.2021 taking note of Notification No.34/2021— Central Tax, dated 29.08.2021 and the Central Goods and Services Tax (Fifth Removal of Difficulties) Order, 2019 observed as follows:

*"12. In our considered opinion, the interpretation sought to be placed by learned counsel appearing for respondents is unduly restricted. It cannot be lost site (sight) of that this notification was issued in view of the Covid pandemic, wherein even the Supreme Court had passed a blanket order of extending the period of limitation. Once the petitioners had already been granted benefit of the notifications dated 23.04.2019 (Annexure P-6), dated 25.06.2020 (Annexure P-7) and dated 29.08.2021 (Annexure P-10), the time limit for making such application should have extended up to the 30th day of September, 2021."*

8.8. In the context of limitation fixed for filing written statement under the Code of Civil Procedure, 1908, in the case of *Prakash Corporates Vrs. Dee Vee Projects Ltd., (2022) 5 SCC 112 = (2022) 1 SCC (L&S) 771 = 2022 SCC OnLine SC 180* it has been stated as follows:

*"21. While explaining the sweep and mandate of these provisions, this Court said : (SCG Contracts (India) (P) Ltd. Vrs. K.S. Chamankar Infrastructure (P) Ltd., (2019) 12 SCC 210 = (2020) 1 SCC (Civ) 237, SCC p. 214, para 8)*

*"8. … A perusal of these provisions would show that ordinarily a written statement is to be filed within a period of 30 days. However, grace period of a further 90 days is granted which the Court may employ for reasons to be recorded in writing and payment of such costs as it deems fit to allow such written statement to come on record. What is of great importance is the fact that beyond 120 days from the date of service of summons, the defendant shall forfeit the right to file the written statement and the court shall not allow the written statement to be taken on record. This is further buttressed by the proviso in Order 8 Rule 10 also adding that the court has no further power to extend the time beyond this period of 120 days.*

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*23. If the aforesaid provisions and explained principles are literally and plainly applied to the facts of the present case, the 120th day from the date of service of summons came to an end with 06.05.2021 and the defendant, who had earlier been granted time for filing its written statement on payment of costs, forfeited such right with the end of 120th day i.e. 06.05.2021. However, it is required to be kept in view that the provisions aforesaid and their interpretation in SCG Contracts (India) (P) Ltd. Vrs. K.S. Chamankar Infrastructure (P) Ltd., (2019) 12 SCC 210 = (2020) 1 SCC (Civ) 237 operate in normal and non-extraordinary circumstances with the usual functioning of courts. It is also noteworthy that the above referred provisions of CPC are not the only provisions of law which lay down mandatory timelines for particular proceedings. The relevant principles, in their normal and ordinary operation, are that such statutory timelines are of mandatory character with little, or rather no, discretion with the adjudicating authority for enlargement."*

Notwithstanding such dicta, taking into consideration irregular functioning of the Courts due to the COVID-19 pandemic situation, the Hon'ble Supreme Court in the said reported case [Prakash Corporates, (supra)] observed as follows:

*"25. It is not a matter of much debate that, starting from or around the month of December 2019, the entire humanity faced a situation which was unprecedentedly unfavorable and unpleasant to almost all the persons and the institutions. It was the outbreak of Covid-19 Pandemic that engulfed practically the entire globe; and the highly contagious virus called SARS-CoV-2 started playing havoc with its rapid transmission from one person to another. Covid-19 carried with it the scary possibilities of irretrievable damage to the respiratory systems, even leading to deaths. In fact, the number of fatalities due to this infection had been beyond imagination with survivors also living under a constant threat. The unprecedented health emergencies due to highly transmissible Covid-19 Virus led the administrations to take various containment measures, including those of travel restrictions and lockdowns as also of isolating the infected persons while putting their close contacts in quarantine.*

*26. We need not elaborate on the havoc created by Covid-19 but the relevant aspect for the present purpose is that with Covid-19, the movement of persons and working of almost all the institutions landed in such difficulties which were neither foreseen nor guarded against.*

*27. When the movements and gatherings of persons were fraught with dangers and when lockdowns became inevitable, the institutions related with the task of administration of justice were also required to respond to the challenges thrown by this pandemic. In this regard, this Court, apart from taking various measures of containment, also took note of the practical difficulties of the litigants and their lawyers; and this led to the suomotu order dated 23.03.2020 in Cognizance for Extension of Limitation, In re, (2020) 19 SCC 10 = (2021) 3 SCC (Cri) 801*

*27.1. In the consciously worded order dated 23.03.2020 [Cognizance for Extension of Limitation, In re, (2020) 19 SCC 10 = (2021) 3 SCC (Cri) 801], this Court, while taking note of the difficulties likely to be faced by the litigants in filing their petitions/applications/suits/appeals/ proceedings within the period of limitation, ordered that the period of limitation in all such proceedings, irrespective of the limitation*

*prescribed under general or special laws, whether condonable or not, shall stand extended w.e.f. 15.03.2020 until further orders. This order was passed in exercise of plenary powers of this Court under Article 142 of the Constitution of India, which are complementary to other powers specifically conferred by various statutes. Even if the above referred provisions of CPC had not been stated in specific terms, the general mandate of the order dated 23.03.2020 [Cognizance for Extension of Limitation, In re, (2020) 19 SCC 10 = (2021) 3 SCC (Cri) 801] was to extend the period of limitation provided in any law for the time being in force, irrespective of whether the same was condonable or not, w.e.f. 15.03.2020 and until further orders.*

*27.2. Noticeably, on 06.05.2020, when special periods of limitation under different enactments like the 1996 Act were referred to, this Court further ordered [Cognizance for Extension of Limitation, In re, (2020) 19 SCC 9 = (2021) 3 SCC (Cri) 799] that the limitation prescribed thereunder shall stand extended w.e.f. 15.03.2020 until further orders. It was a time when the country was under the grip of lockdown, and the Court provided that in case limitation had expired after 15.03.2020, the period between 15.03.2020 and lifting of lockdown in the jurisdictional area would be extended for a period of 15 days after lifting of lockdown.*

*27.3. Further, on 10.07.2020 [Cognizance for Extension of Limitation, In re, (2020) 9 SCC 468], this Court enlarged the scope of initial order in relation to the timelines fixed in Section 29-A and Section 23(4) of the 1996 Act. Significantly, Section 23(4) of the 1996 Act mandates that the statement of claim and defence shall be completed within a time period of six months. Yet further, it was also provided that the time for completing the process of compulsory pre-litigation mediation under Section 12-A of the Commercial Courts Act, 2015 shall stand extended for 45 days after lifting of lockdown.*

*27.4. On 08.03.2021 [Cognizance for Extension of Limitation, In re, (2021) 5 SCC 452 = (2021) 3 SCC (Civ) 40 = (2021) 2 SCC (Cri) 615 = (2021) 2 SCC (L&S) 50], suggestions were made before this Court about lifting of lockdowns and likely return of normalcy and, therefore, this Court considered it proper to dispose of the said suomotu petition with specific directions that while computing the period of limitation for any suit, appeal, application or proceeding, the period from 15.03.2020 to 14.03.2021 would stand excluded. Though the said order dated 08.03.2021 [Cognizance for Extension of Limitation, In re, (2021) 5 SCC 452 = (2021) 3 SCC (Civ) 40 = (2021) 2 SCC (Cri) 615 = (2021) 2 SCC (L&S) 50] was passed with a belief that the adverse effects of the pandemic were receding and normalcy was returning but, the spread of virus continued and this led to an exponential surge in Covid-19 cases; and to the second wave of pandemic in the country around the months of March-April 2021. In this turn of events, this Court again took up the matter in SMWP No. 3 of 2020 on MA No. 665 of 2021, as moved by the Supreme Court Advocates-on-Record Association and passed the necessary order on 27.04.2021 [Cognizance for Extension of Limitation, In re, (2021) 17 SCC 231 = 2021 SCC OnLine SC 373] in revival of the previous orders.*

*27.5. At this juncture, we are impelled to refer to the fact that much before passing of the order dated 27.04.2021 [Cognizance for Extension of Limitation, In re, (2021) 17 SCC 231 = 2021 SCC OnLine SC 373] by this Court, the alarming scenario due to the second wave of pandemic was indeed taken note of by the High Court of Chhattisgarh; and that the High Court issued the above-referred administrative order dated 05.04.2021 for curtailed/ truncated functioning of the High Court as also the subordinate courts. We shall elaborate on this aspect in the next segment of discussion but, have indicated the*

*same at this juncture to highlight the fact that even before passing of the order dated 27.04.2021 by this Court in Cognizance for Extension of Limitation, In re, (2021) 17 SCC 231 = 2021 SCC OnLine SC 373, the trial court dealing with the subject suit was already under containment measures; and could not have functioned normally.*

*27.6. Reverting to the orders passed by this Court, noticeable it is that on 27.04.2021 [Cognizance for Extension of Limitation, In re, (2021) 17 SCC 231 = 2021 SCC OnLine SC 373], this Court restored the order dated 23.03.2020 [Cognizance for Extension of Limitation, In re, (2020) 19 SCC 10 = (2021) 3 SCC (Cri) 801] and it was directed, in continuation of the order dated 08.03.2021 [Cognizance for Extension of Limitation, In re, (2021) 5 SCC 452 = (2021) 3 SCC (Civ) 40 = (2021) 2 SCC (Cri) 615 = (2021) 2 SCC (L&S) 50], that the periods of limitation as prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings, whether condonable or not, shall stand extended. Ultimately, the said MA No. 665 of 2021 was disposed of on 23.09.2021 [Cognizance for Extension of Limitation, In re, (2021) 18 SCC 250 = 2021 SCC OnLine SC 947] with this Court issuing directions similar to those contained in the order dated 08.03.2021 [Cognizance for Extension of Limitation, In re, (2021) 5 SCC 452 = (2021) 3 SCC (Civ) 40 = (2021) 2 SCC (Cri) 615 = (2021) 2 SCC (L&S) 50] but while providing that in computing the period of limitation for any suit, appeal, application or proceeding, the period from 15.03.2020 till 02.10.2021 shall stand excluded.*

*27.7. We are not elaborating on other directions issued by this Court but, when read as a whole, it is but clear that the anxiety of this Court had been to obviate the hardships likely to be suffered by the litigants during the onslaughts of this pandemic. Hence, the legal effect and coverage of the orders passed by this Court in SMWP No. 3 of 2020 cannot be unnecessarily narrowed and rather, having regard to their purpose and object, full effect is required to be given to such orders and directions. [To complete the scenario, we may indicate in the passing that even after we had heard this matter, there had been re-surge of Covid-19 cases with spread of a new variant of the virus. The drastic re-surge in the number of Covid cases has led this Court to again deal with the matter in SMWP No. 3 of 2020 on an application bearing No. 21 of 2022; and by the order dated 10.01.2022 [Cognizance for Extension of Limitation, In re, (2022) 3 SCC 117 = (2022) 2 SCC (Civ) 46 = (2022) 1 SCC (Cri) 580 = (2022) 1 SCC (L&S) 501], this Court again restored the principal order dated 23.03.2020 [Cognizance for Extension of Limitation, In re, (2020) 19 SCC 10 = (2021) 3 SCC (Cri) 801] and in continuation of the previous orders, has further directed that the period from 15.03.2020 till 28.02.2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings. Be that as it may, the fresh order in SMWP No. 3 of 2020 need not be elaborated for the present purpose.]*

*28. As regards the operation and effect of the orders passed by this Court in SMWP No. 3 of 2020, noticeable it is that even though in the initial order dated 23.03.2020 [Cognizance for Extension of Limitation, In re, (2020) 19 SCC 10 = (2021) 3 SCC (Cri) 801], this Court provided that the period of limitation in all the proceedings, irrespective of that prescribed under general or special laws, whether condonable or not, shall stand extended w.e.f. 15.03.2020 but, while concluding the matter on 23.09.2021 [Cognizance for Extension of Limitation, In re, (2021) 18 SCC 250 = 2021 SCC OnLine SC 947], this Court specifically provided for exclusion of the period from*

*15.03.2020 till 02.10.2021. A look at the scheme of the Limitation Act, 1963 makes it clear that while extension of prescribed period in relation to an appeal or certain applications has been envisaged under Section 5, the exclusion of time has been provided in the provisions like Sections 12 to 15 thereof. When a particular period is to be excluded in relation to any suit or proceeding, essentially the reason is that such a period is accepted by law to be the one not referable to any indolence on the part of the litigant, but being relatable to either the force of circumstances or other requirements of law (like that of mandatory two months' notice for a suit against the Government [Vide Section 15 of the Limitation Act, 1963]). The excluded period, as a necessary consequence, results in enlargement of time, over and above the period prescribed.*

*28.1. Having regard to the purpose for which this Court had exercised the plenary powers under Article 142 of the Constitution of India and issued necessary orders from time to time in SMWP No. 3 of 2020, we are clearly of the view that the period envisaged finally in the order dated 23-9-2021 [Cognizance for Extension of Limitation, In re, (2021) 18 SCC 250 = 2021 SCC OnLine SC 947] is required to be excluded in computing the period of limitation even for filing the written statement and even in cases where the delay is otherwise not condonable. It gets perforce reiterated that the orders in SMWP No. 3 of 2020 were of extraordinary measures in extraordinary circumstances and their operation cannot be curtailed with reference to the ordinary operation of law.*

*28.2. In other words, the orders passed by this Court on 23.03.2020 [Cognizance for Extension of Limitation, In re, (2020) 19 SCC 10 = (2021) 3 SCC (Cri) 801], 06.05.2020 [Cognizance for Extension of Limitation, In re, (2020) 19 SCC 9 = (2021) 3 SCC (Cri) 799], 10.07.2020 [Cognizance for Extension of Limitation, In re, (2020) 9 SCC 468] , 27.04.2021 [Cognizance for Extension of Limitation, In re, (2021) 17 SCC 231 = 2021 SCC OnLine SC 373] and 23.09.2021 [Cognizance for Extension of Limitation, In re, (2021) 18 SCC 250 = 2021 SCC OnLine SC 947] in SMWP No. 3 of 2020 leave nothing to doubt that special and extraordinary measures were provided by this Court for advancing the cause of justice in the wake of challenges thrown by the pandemic; and their applicability cannot be denied in relation to the period prescribed for filing the written statement. It would be unrealistic and illogical to assume that while this Court has provided for exclusion of period for institution of the suit and therefore, a suit otherwise filed beyond limitation (if the limitation had expired between 15.03.2020 to 02.10.2021) could still be filed within 90 days from 03.10.2021 but the period for filing written statement, if expired during that period, has to operate against the defendant.*

*28.3. Therefore, in view of the orders passed by this Court in SMWP No. 3 of 2020, we have no hesitation in holding that the time-limit for filing the written statement by the appellant in the subject suit did not come to an end on 06.05.2021.*

*29. It is also noteworthy that even before the scope of the orders passed in SMWP No. 3 of 2020 came to be further elaborated and specified in the orders dated 08.03.2021 [Cognizance for Extension of Limitation, In re, (2021) 5 SCC 452 = (2021) 3 SCC (Civ) 40 = (2021) 2 SCC (Cri) 615 = (2021) 2 SCC (L&S) 50] and 23.09.2021 [Cognizance for Extension of Limitation, In re, (2021) 18 SCC 250 = 2021 SCC OnLine SC 947], this Court dealt with an akin scenario in SS Group (P) Ltd. Vrs. Aaditiya J. Garg, (2022) 11 SCC 445 = 2020 SCC OnLine SC 1050, decided on 17.12.2020. In that case, in terms of Section 38(2)(a) of the Consumer Protection Act, 2019, 30 days' time provided for filing the written statement expired on 12.08.2020 and the extendable period of 15 days also expired on 27.08.2020. Admittedly, the written statement was filed on 31.08.2020, which*

*was beyond the permissible period of 45 days. The Constitution Bench of this Court has held in New India Assurance Co. Ltd. Vrs. Hilli Multipurpose Cold Storage (P) Ltd., (2020) 5 SCC 757 = (2020) 3 SCC (Civ) 338 that the Consumer Court has no power to extend the time for filing response to the complaint beyond 45 days. After taking note of the applicable provisions of law as also the mandate of the Constitution Bench, this Court referred to the orders until then passed in SMWP No. 3 of 2020 and held that the limitation for filing written statement would be deemed to have been extended.*

*30. This Court, inter alia, observed and held as follows: [SS Group (P) Ltd. Vrs. Aaditiya J. Garg, (2022) 11 SCC 445 = 2020 SCC OnLine SC 1050], SCC paras 10-11)*

*"10. In the present matter, it is an admitted fact that the period of limitation of 30 days to file the written statement had expired on 12.08.2020 and the extended period of 15 days expired on 27.08.2020. This period expired when the order dated 23.03.2020 passed by this Court in Cognizance for Extension of Limitation, In re, (2020) 19 SCC 10 = (2021) 3 SCC (Cri) 801 was continuing.*

*11. In view of the aforesaid, in our opinion, the limitation for filing the written statement in the present proceedings before the National Commission would be deemed to have been extended as it is clear from the order dated 23.03.2020 [Cognizance for Extension of Limitation, In re, (2020) 19 SCC 10 = (2021) 3 SCC (Cri) 801] that the extended period of limitation was applicable to all petitions/ applications/suits/appeals and all other proceedings. As such, the delay of four days in filing the written statements in the pending proceedings before the National Commission deserves to be allowed, and is accordingly allowed."*

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*32.2. In fact, in S. KasiVrs. State, (2021) 12 SCC 1 = 2020 SCC OnLine SC 529, this Court also noticed that a coordinate Bench of the same High Court had already held [SettuVrs. State, 2020 SCC OnLine Mad 1026] that the said order dated 23.03.2020 [Cognizance for Extension of Limitation, In re, (2020) 19 SCC 10 = (2021) 3 SCC (Cri) 801] did not cover the offences for which Section 167 CrPC was applicable but, in the order [S. KasiVrs. State, 2020 SCC OnLine Mad 1244] impugned, the other learned Single Judge of the same High Court took a view contrary to the earlier decision of the coordinate Bench; and that was found to be entirely impermissible. In any case, the said decision, concerning the matter of personal liberty referable to Article 21 of the Constitution of India and then, relating to the proceedings to be undertaken by an investigating officer, cannot be applied to the present case relating to the matter of filing written statement by the defendant in a civil suit.*

*33. So far as the decision of this Court in Sagufa Ahmed Vrs. Upper Assam Plywood Products (P) Ltd., (2021) 2 SCC 317 = (2021) 2 SCC (Civ) 178 is concerned, a few relevant factors related with the said case need to be noticed. In that case, the appellants had moved an application before the Guwahati Bench of the National Company Law Tribunal for winding up of the respondent company. The petition was dismissed on 25.10.2019 [Sagufa Ahmed Vrs. Upper Assam Plywood Products (P) Ltd., 2019 SCC OnLine NCLT 749]. The appellants applied for a certified copy of the order dated 25.10.2019 [Sagufa Ahmed Vrs. Upper Assam Plywood Products (P) Ltd., 2019 SCC OnLine NCLT 749] only on 21.11.2019 or 22.11.2019 and received the certified copy of the order through their counsel on 19.12.2019. However, the appellants filed the statutory appeal before the National Company Law Appellate Tribunal only on 20.07.2020 with an application for condonation of delay. The Appellate Tribunal*

*dismissed [Sagufa Ahmed Vrs. Upper Assam Plywood Products (P) Ltd., 2020 SCC OnLine NCLAT 609] the application for condonation of delay on the ground that it had no power to condone the delay beyond a period of 45 days. Consequently, the appeal was also dismissed. In that case, it was indisputable that even while counting from 19.12.2019, the period of 45 days expired on 02.02.2020 and another period of 45 days, for which the Appellate Tribunal could have condoned the delay, also expired on 18.03.2020. To overcome this difficulty, the appellants relied upon the aforesaid order dated 23.03.2020 [Cognizance for Extension of Limitation, In re, (2020) 19 SCC 10 = (2021) 3 SCC (Cri) 801].*

*33.1. This Court observed that the appellants were not entitled to take refuge under the above order in SMWP No. 3 of 2020 because what was extended was only the period of limitation and not the period up to which delay could be condoned in exercise of discretion conferred by the statute. This Court said thus: [Sagufa Ahmed Vrs. Upper Assam Plywood Products (P) Ltd., (2021) 2 SCC 317 = (2021) 2 SCC (Civ) 178], SCC p. 322, para 17)*

*"17. …What was extended by the above order [Cognizance for Extension of Limitation, In re, (2020) 19 SCC 10 = (2021) 3 SCC (Cri) 801] of this Court was only "the period of limitation" and not the period up to which delay can be condoned in exercise of discretion conferred by the statute. The above order [Cognizance for Extension of Limitation, In re, (2020) 19 SCC 10 = (2021) 3 SCC (Cri) 801] passed by this Court was intended to benefit vigilant litigants who were prevented due to the pandemic and the lockdown, from initiating proceedings within the period of limitation prescribed by general or special law. It is needless to point out that the law of limitation finds its root in two Latin maxims, one of which is vigilantibus et non dormientibus jura subveniunt which means that the law will assist only those who are vigilant about their rights and not those who sleep over them."*

*33.2. One of the significant facts to be noticed is that the said decision in Sagufa Ahmed Vrs. Upper Assam Plywood Products (P) Ltd., (2021) 2 SCC 317 = (2021) 2 SCC (Civ)178 was rendered by a three-Judge Bench of this Court much before the aforesaid final orders dated 08.03.2021 [Cognizance for Extension of Limitation, In re, (2021) 5 SCC 452 = (2021) 3 SCC (Civ) 40 = (2021) 2 SCC (Cri) 615 = (2021) 2 SCC (L&S) 50] and 27.09.2021 (sic 27.04.2021 [Cognizance for Extension of Limitation, In re, (2021) 17 SCC 231 = 2021 SCC OnLine SC 373]) in SMWP No. 3 of 2020 by another three-Judge Bench of this Court. In those final orders, this Court not only provided for the extension of period of limitation but also made it clear that in computing the period of limitation for any suit, appeal, application or proceeding, the period from 15.03.2020 to 02.10.2021 shall stand excluded. Such proposition of exclusion, which occurred in the later orders, was not before this Court in Sagufa Ahmed Vrs. Upper Assam Plywood Products (P) Ltd., (2021) 2 SCC 317 =(2021) 2 SCC (Civ) 178, which was decided much earlier i.e. on 18.09.2020.*

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*34. On behalf of the respondent, much emphasis has been laid on the submission that the appellant was regularly appearing in the Court and, therefore, cannot take advantage of the orders passed in SMWP No. 3 of 2020. It is true that the appellant had indeed caused appearance in the Court in response to the summons and sought time for filing its written statement but at the same time, it is also undeniable that at the relevant point of time, the second wave of pandemic was simmering and then, it engulfed the country*

*with rather unexpected intensity and ferocity. Then, on 27.04.2021 [Cognizance for Extension of Limitation, In re, (2021) 17 SCC 231 = 2021 SCC OnLine SC 373], this Court restored the operation of the order dated 23.03.2020 in Cognizance for Extension of Limitation, In re, (2020) 19 SCC 10 = (2021) 3 SCC (Cri) 801. Putting all these factors together, we are unable to accept the submissions made on behalf of the respondent that because of earlier appearance or prayer for adjournment, the appellant-defendant would not be entitled to the relaxation available under the extraordinary orders passed by this Court."*

8.9. Noteworthy here to take note of the Order dated 10.01.2022 passed in Cognizance for Extension of Limitation, In *re, (2022) 3 SCC 117 = (2022) 1 SCC (Cri) 580 = (2022) 2 SCC (Civ) 46 = (2022) 1 SCC (L&S) 501 = 2022 SCC OnLine SC 27*, which requires to be reproduced hereunder:

*"1. In March 2020, this Court took suomotu cognizance of the difficulties that might be faced by the litigants in filing petitions/applications/suits/appeals/all other quasi proceedings within the period of limitation prescribed under the general law of limitation or under any special laws (both Central and/or State) due to the outbreak of the Covid-19 Pandemic.*

*2. On 23.03.2020, this Court directed [Cognizance for Extension of Limitation, In re, (2020) 19 SCC 10 = (2021) 3 SCC (Cri) 801] extension of the period of limitation in all proceedings before courts/tribunals including this Court w.e.f. 15.03.2020 till further orders. On 8-3-2021 [Cognizance for Extension of Limitation, In re, (2021) 5 SCC 452 = (2021) 3 SCC (Civ) 40 = (2021) 2 SCC (Cri) 615 = (2021) 2 SCC (L&S) 50] , the order dated 23-3-2020 [Cognizance for Extension of Limitation, In re, (2020) 19 SCC 10 = (2021) 3 SCC (Cri) 801] was brought to an end, permitting the relaxation of period of limitation between 15.03.2020 and 14.03.2021. While doing so, it was made clear that the period of limitation would start from 15.03.2021.*

*3. Thereafter, due to a second surge in Covid-19 cases, the Supreme Court Advocates-on-Record Association (SCAORA) intervened in the suomotu proceedings by filing Miscellaneous Application No. 665 of 2021 seeking restoration of the order dated 23.03.2020 [Cognizance for Extension of Limitation, In re, (2020) 19 SCC 10 = (2021) 3 SCC (Cri) 801] relaxing limitation. The aforesaid Miscellaneous Application No. 665 of 2021 was disposed of by this Court vide order dated 23.09.2021 [Cognizance for Extension of Limitation, In re, 2021 SCC OnLine SC 947], wherein this Court extended the period of limitation in all proceedings before the courts/tribunals including this Court w.e.f. 15.03.2020 till 02.10.2021.*

*4. The present miscellaneous application has been filed by the Supreme Court Advocates-on-Record Association in the context of the spread of the new variant of the Covid-19 and the drastic surge in the number of Covid cases across the country. Considering the prevailing conditions, the applicants are seeking the following:*

*(i) Allow the present application by restoring the order dated 23.03.2020 passed by this Hon'ble Court in Cognizance for Extension of Limitation, In re, (2020) 19 SCC 10 = (2021) 3 SCC (Cri) 801; and*

*(ii) Allow the present application by restoring the order dated 27.04.2021 passed by this Hon'ble Court in Cognizance for Extension of Limitation, In re, (2021) 17 SCC 231 = 2021 SCC OnLine SC 373; and*

*(iii) Pass such other order or orders as this Hon'ble Court may deem fit and proper.*

*5. Taking into consideration the arguments advanced by the learned counsel and the impact of the surge of the virus on public health and adversities faced by litigants in the prevailing conditions, we deem it appropriate to dispose of MA No. 21 of 2022 with the following directions:*

*5.1. The order dated 23.03.2020 [Cognizance for Extension of Limitation, In re, (2020) 19 SCC 10 = (2021) 3 SCC (Cri) 801] is restored and in continuation of the subsequent orders dated 08.03.2021 [Cognizance for Extension of Limitation,In re, (2021) 5 SCC 452 = (2021) 3 SCC (Civ) 40 = (2021) 2 SCC (Cri) 615 = (2021) 2 SCC (L&S) 50], 27.04.2021 [Cognizance for Extension of Limitation, In re, (2021) 17 SCC 231 = 2021 SCC OnLine SC 373] and 23.09.2021 [Cognizance for Extension of Limitation, In re, 2021 SCC OnLine SC 947] , it is directed that the period from 15.03.2020 till 28.02.2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasijudicial proceedings.*

*5.2. Consequently, the balance period of limitation remaining as on 03.10.2021, if any, shall become available with effect from 01.03.2022.*

*5.3. In cases where the limitation would have expired during the period between 15.03.2020 till 28.02.2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 01.03.2022. In the event the actual balance period of limitation remaining, with effect from 01.03.2022 is greater than 90 days, that longer period shall apply.*

*5.4. It is further clarified that the period from 15.03.2020 till 28.02.2022 shall also stand excluded in computing the periods prescribed under Sections 23(4) and 29-A of the Arbitration and Conciliation Act, 1996, Section 12-A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings.*

*6. As prayed for by the learned Senior Counsel, MA No. 29 of 2022 is dismissed as withdrawn."*

8.10. It is observed that the order of cancellation of registration was passed with effect from 15.10.2019 and in terms of Section 107 the petitioner was required to file the appeal within three months from the date of communication of the order and further condonable period available was one month therefrom. In the present case total period lapsed on 14.02.2020. The Hon'ble Supreme Court of India in *Prakash Corporates Vrs. Dee Vee Projects Ltd., (2022) 5 SCC 112 = (2022) 1 SCC (L&S) 771 = 2022 SCC OnLine SC 180* took cognizance of "unprecedentedly unfavourable and unpleasant" situation faced by entire humanity from or around the month of December 2019. The Appellate Authority, while passing order on 07.10.2021, had no occasion to take into consideration the orders of the Hon'ble Court more particularly Cognizance for Extension of Limitation, In re, *(2022) 3 SCC 117 = (2022) 1 SCC (Cri) 580 = (2022) 2 SCC (Civ) 46 = (2022) 1 SCC (L&S) 501 = 2022 SCC OnLine SC 27*

*and Prakash Corporates Vrs. Dee Vee Projects Ltd., (2022) 5 SCC 112 = (2022) 1 SCC (L&S) 771 = 2022 SCC OnLine SC 180*. This Court finds that the Appellate Authority has not taken note of relevant notification(s) and amendments carried thereto as discussed in the foregoing paragraphs.

8.11. Close reading of orders passed by the Hon'ble Supreme Court extending period of limitation, the Judgment rendered in the case of *Tvl. Suguna Cutpiece Center Vrs. The Appellate Authority and Another, 2022 (61) GSTL 515* (Mad) unflinchingly discussing the purport of amendment(s) to the provisions of the statute, the Judgment dated 09.12.2021 of Punjab & Haryana *High Court in the case of Aarcity Builders Private Limited Vrs. Union of India and Others, CWP No.19029 of 2021* and the notifications with the clarifications issued by the Central Government persuades this Court to conclude that there has been pious intention to facilitate the business to be carried out so as to enable smooth payment of taxes and not to debar the taxpayers, but to bring them back to GST fold. Therefore, this Court, being not oblivious of fundamental rights conferred on every citizen under Article 19(1)(g) vis-à-vis Article 14, is one with the view expressed in Tvl. SugunaCutpiece Center and Aarcity Builders Private Limited (supra). While subscribing to the observation and interpretation, this Court feels it apposite to quote the following from the judgment in Tvl. SugunaCutpiece Center (supra):

> *"209. Thus, the intention of the Government has been to allow the persons like the petitioners to file a fresh application and to process the application for revocation of the cancellation of registration by the officers.*
>
> *210. In my view, no useful purpose will be served by keeping these petitioners out of the bounds of GST regime under the respective GST enactments other than to allow further leakage of the revenue and to isolate these petitioners from the main stream contrary to the objects of the respective GST enactments.*
>
> *211. The purpose of GST registration is only to ensure just tax gets collected on supplies of goods or service or both and is paid to the exchequer. Keeping these petitioners outside the bounds of the GST regime is a self-defeating move as no tax will get paid on the supplies of these petitioners.*
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> ***
>
> *221. While exercising jurisdiction, under Article 226 of the Constitution, the powers of the Court to do justice i.e., what is good for the society, can neither be restricted nor curtailed. This power under Article 226 can be exercised to effectuate the rule of law.*
>
> *222. Therefore, power of this Court under Article 226 of the Constitution of India is being exercised cautiously in favour of the petitioners as this power is conceived to serve the ends of law and not to transgress them.*
>
> *223. In Mafatlal Industries Ltd. Vrs. Union of India, (1997) 5 SCC 536, in Paragraph No.77, the Hon'ble Supreme Court observed that*

*"So far as the jurisdiction of the High Court under Article 226— or for that matter, the jurisdiction of this Court under Article 32— is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious that while exercising the power under Article 226/Article 32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment. Even while acting in exercise of the said constitutional power, the High Court cannot ignore the law nor can it override it."*

*224. Notwithstanding the fact that the petitioners have shown utter disregard to the provisions of the Acts and have failed to take advantage of the amnesty scheme given to revive their registration, this Court is inclined to quash the impugned orders with grant consequential reliefs subject to terms.*

*225. The provisions of the GST enactments cannot be interpreted so as to deny the right to carry on Trade and Commerce to a citizen and subjects. The constitutional guarantee is unconditional and unequivocal and must be enforced regardless of the defect in the scheme of the GST enactments. The right to carry on trade or profession also cannot be curtailed. Only reasonable restriction can be imposed. To deny such rights would militate against their rights under Article 14, read with Article 19(1)(g) and Article 21 of the Constitution of India."*

8.12. Vide Order dated 17.08.2022 Madras High Court in *M. Mallika Mahal Vrs.The Commissioner of Central GST & Central Excise, W.P. No.10663 of 2022,&c*. while ascertaining the position as to finality of Judgment in TvlSugunaCutpiece Center (supra) has observed as follows:

*"7. All other petitioners have approached this Court direct, by way of writ petition, seeking the relief of restoration. A learned Single Judge of this Court in a batch of writ petitions in WP.Nos.25048 of 2021 and batch has, by way of an order dated 31.01.2022, considered the cases of identically placed petitioners as before me. In the cases of those petitioners as well, orders of revocation had been passed and some of the petitioners had approached the assessing authority in terms of Section 30 seeking revocation, some had appealed the orders of cancellation under Section 107 and others had merely approached this Court under Article 226 of the Constitution of India.*

*8. The learned Judge has considered interim events including the position that Amnesty Schemes had not been availed by those petitioners. In fine, the learned Judge accepts the case of the petitioners, imposing certain conditions in para 229 of the order. A specific query was put to the State Counsel as to whether order dated 31.01.2022 has attained finality. He brings to my notice a communication that has been addressed by the Additional Chief Secretary/Commissioner of Commissioner of Commercial Tax to the GST Council on 31.03.2022 seeking the view of the Council and its guidance/directions in regard to the order of this Court dated 31.01.2022."*

8.13. An identical fact-situation arose before the Hon'ble Gujarat High Court, where the Appellate Authority did not entertain appeal on the ground of limitation qua cancellation of registration being made on 10.07.2019. In the case of *Tahura Enterprise Vrs. Union of India, R/Special Civil Application No.3442 of 2022,* by a Judgment dated 30.03.2022, said Court observed thus:

> *"8. Indisputably, the cancellation of registration was on the ground of non-filing of returns by the writ-applicants. The impugned order cancelling the registration came to be passed on 10.07.2019. The writ-applicants preferred an application before the appellate authority for revocation of cancellation of registration, but such application was not entertained on the ground that the same was time barred.*
>
> *9. We take notice of the fact that the Central Board of Indirect Taxes and Customs extended the time limit for filing application for revocation of cancellation of registration and the limitation for all the orders passed on or before 12.06.2020 was to effectively commence from 31.08.2020. As the application filed by the writ applicants for revocation of cancellation of registration was looked into by a quasi-judicial authority, the order of the Supreme Court extending the period of limitation in view of the Covid-19 Pandemic would apply and in such circumstances, the limitation in accordance with the order passed by the Central Board of Indirect Taxes and Customs could be said to have been extended.*
>
> *10. Indisputably, the application requesting for restoration of registration was filed in July 2021 i.e. during the period when the order of the Supreme Court extending the limitation was in operation. More importantly, the writapplicants have paid the requisite amount towards tax on the basis of self-assessed liability on 06.09.2021. Since the registration of certificate of the writ applicants came to be cancelled solely on the ground of non-filing of the returns, which was on account of non-payment of tax and the writapplicants now having paid such outstanding tax, the registration certificate of the writ-applicants should be ordered to be restored so that they are able to continue with their business."*

8.14. Refusing to decide the challenge against order of cancellation of registration on the ground of limitation would be counterproductive approach as the taxable person is deprived to carry on business in the sense that no tax invoice can be raised. This would ultimately impact the recovery of taxes and thereby, the action of the authority would work against the interest of revenue. Therefore, the opposite parties are required to take a pragmatic view in the matter. The introduction of GST regime presupposes hassle-free and citizen friendly taxation process and the taxpayer is not to be treated as a person hostile to the Department. It is but obvious that if the taxpayer adopts clandestine business and adopts dubious device to evade payment of tax, then he has to be dealt with sternly.

8.15. In such view of the matter, the writ petition is liable to be allowed with certain directions.

9. It is pertinent to say that writ petition is maintainable challenging the order in appeal, *albeit* the petitioner is entitled to carry the matter before the Appellate Tribunal under Section 112 of the CGST Act inasmuch as even after lapse of 5 years, the said Appellate Tribunal is not constituted under Section 109.

9.1. Pertinent here to refer to the ratio of Judgment laid down by the Hon'ble Supreme Court in the case of *Mohamed Ali Vrs. V. Jaya & Others, 2022 SCC OnLine SC 817*, in the context of maintainability of writ petition qua condonation of delay in preferring civil revision under Section 115 the Code of Civil Procedure, 1908 vis-a-vis availability of alternative remedy. The said Hon'ble Court has been pleased to lay down as follows:

> *20. Even otherwise and as observed hereinabove, against the ex-parte judgment and decree, the remedy by way of an appeal before the First Appellate Court was available. Therefore, the High Court ought not to have entertained the revision application under Section 115 of CPC and under Article 227 of the Constitution of India. The High Court ought not to have entertained such a revision application challenging the ex-parte judgment and decree. Once there was a statutory alternative remedy by way of an appeal available to the defendants, the High Court ought not to have entertained a writ petition or revision application under Article 227 of the Constitution of India.*
>
> *21. At this stage, the decision of this Court in the case of Virudhunagar Hindu Nadargal Dharma Paribalana Sabai Vrs. Tuticorin Educational Society, (2019) 9 SCC 538, is required to be referred to. In the said decision, it is observed and held by this Court that wherever the proceedings are under the Code of Civil Procedure and the forum is the civil court, the availability of a remedy under CPC, will deter the High Court and therefore, the High Court shall not entertain the revision under Article 227 of the Constitution of India especially in a case where a specific remedy of appeal is provided under the CPC itself. While holding so, it is observed and held in paragraphs 11 to 13 as under:—*
>
> *"11. Secondly, the High Court ought to have seen that when a remedy of appeal under Section 104(1)(i) read with Order 43, Rule 1(r) of the Civil Procedure Code, 1908, was directly available, Respondents 1 and 2 ought to have taken recourse to the same. It is true that the availability of a remedy of appeal may not always be a bar for the exercise of supervisory jurisdiction of the High Court. In A. Venkatasubbiah Naidu Vrs. S. Chellappan, (2000) 7 SCC 695, this Court held that "though no hurdle can be put against the exercise of the constitutional powers of the High Court, it is a well-recognised principle which gained judicial recognition that the High Court should direct the party to avail himself of such remedies before he resorts to a constitutional remedy".*
>
> *12. **But courts should always bear in mind a distinction between** (i) cases where such alternative remedy is available before civil courts in terms of the provisions of Code of Civil Procedure, and (ii) **cases where such alternative remedy is available under special enactments and/or statutory rules and the fora provided therein happen to be quasi-judicial authorities and tribunals**. In respect of cases falling under the first category, which may involve suits and other proceedings before civil courts, the availability of an appellate remedy in terms of the provisions of CPC, may have to be construed as a near total bar. Otherwise, there is a danger that someone may challenge in a revision under Article 227, even a decree passed in a suit, on the same grounds on which Respondents 1 and 2 invoked the jurisdiction of the High Court. This is why, a 3-member Bench of this Court, while overruling the decision in Surya DevRaiVrs. Ram ChanderRai, (2003) 6 SCC 675, pointed out in RadheyShyamVrs. ChhabiNath, (2015) 5*

*SCC 423 = (2015) 3 SCC (Civ) 67 that "**orders of civil court stand on different footing from the orders of authorities or tribunals or courts other than judicial/civil courts".***

*13. Therefore wherever the proceedings are under the Code of Civil Procedure and the forum is the civil court, the availability of a remedy under the CPC, will deter the High Court, not merely as a measure of self-imposed restriction, but as a matter of discipline and prudence, from exercising its power of superintendence under the Constitution. Hence, the High Court ought not to have entertained the revision under Article 227 especially in a case where a specific remedy of appeal is provided under the Code of Civil Procedure itself."*

*22. Applying the law laid down by this Court in the aforesaid decision to the facts of the case on hand, the High Court ought not to have entertained the revision petition under Article 227 of the Constitution of India against the ex-parte judgment and decree passed by the learned Trial Court in view of a specific remedy of appeal as provided under the Code of Civil Procedure itself. Therefore, the High Court has committed a grave error in entertaining the revision petition under Article 227 challenging the ex-parte judgment and decree passed by the learned Trial Court and in quashing and setting aside the same in exercise of powers under Article 227 of the Constitution of India."*

*[Emphasis supplied]*

9.2. In the case of *Vinod Kumar Vrs. Commissioner of Uttarakhand State GST and Others, Special Appeal No. 123 of 2022*, vide Judgment dated 20th June, 2022 the set of facts available before the Hon'bleUttarakhand High Court was that on account of failure to file returns for a continuous period of six months, which was mandatory under the Uttarakhand GST Act, the registration got cancelled on 21.09.2019 and the appeal before the First Appellate Authority was dismissed on the ground of delay; however, the writ petition filed by petitioner/appellant was also dismissed as not maintainable. In the Appeal against Order in Writ Petition passed by the Single Judge of said High Court while holding that writ petition was maintainable, the Court observed the following:

*"4) Thus it is apparent that the Statute does not provide any prohibition against exercise of the writ jurisdiction under Article 226 of the Constitution by the High Court. The practice of not entertaining the writ petition, except in the cases accepted above by the Hon'ble High Court, in a case where an alternative and efficacious remedy is available, is an internal mechanism, which the Court has imposed upon themselves.*

*5) Moreover, this issue whether a writ petition is maintainable when the limitation provided for filing an appeal is not extendable, as in this case, was considered by the Full Bench of the Gujarat High Court in the case of Panoli Intermediate (India) Pvt. Ltd. Vs Union of India and others, 2015 SCC OnLineGuj 570 = AIR 2015 Guj 97 = (2015) 56 (2) GLR 1395 (FB) = (2015) 3 KLT (SN 40) 30 (F.B.) = (2015) 326 ELT 532 = (2016) 2 GLH 337 (FB), where the case was referred to the larger Bench for determining three questions. The third question is important for this case, which is quoted below:*

*(3) When if the statutory remedy of appeal under Section 35 is barred by the law of limitation whether in a Writ Petition under Article 226 of the Constitution of India, the order passed by the original adjudicating authority could be challenged on merit?*

*6) The answer was given by the Hon'ble Full Bench of the Gujarat High Court in paragraph 31 of the said judgment, especially, in sub-paragraph (3). The Full Bench of the Hon'ble Gujarat High Court held that on the third question the answer is in affirmative, but with the clarification that*

*A) The petition under Article 226 of the Constitution can be preferred for challenging the order passed by the original adjudicating authority in following circumstances that:*

*A.1) The authority has passed the order without jurisdiction and by assuming jurisdiction which there exist none*

*A.2) Has acted in flagrant disregard to law or rules or procedure or acted in violation of principles of natural justice where no procedure is specified.*

*B) Resultantly, there is failure of justice or it has resulted into gross injustice. We may also sum up by saying that the power is there even in aforesaid circumstances, but the exercise is discretionary which will be governed solely by the dictates of the judicial conscience enriched by judicial experience and practical wisdom of the judge.*

*7) It is apparent from the record that a notice was given on the website, which in our considered opinion, is not sufficient, and a personal notice has to be given before cancellation of the registration. Therefore, the Court can invoke its jurisdiction under Article 226 of the Constitution and hold that the orders passed by the learned Commissioner can be interfered in a writ jurisdiction."*

9.3. The present writ petition is, therefore, entertained on the peculiar facts of the case and circumstances that prevailed at the relevant period.

9.4. As already stated, since the Appellate Tribunal has not yet been constituted as per Section 109 of the CGST Act, there being no alternative remedy available for the petitioner to question the veracity of the order passed in the first appeal, this Court prefers to exercise its writ jurisdiction to undo prejudice and injustice caused to the petitioner. Thus, this Court is of the considered view that grave injustice would ensue if extraordinary jurisdiction under Article 226 of the Constitution of India is not exercised. In the present case scales of justice weigh in favour of the petitioner.

9.5. In the event GST registration number is not restored, the petitioner would not be in a position to raise a bill as e-invoice system has been put in place in the GST regime. So, if the petitioner is denied of revival of GST registration number, it would affect his right to livelihood (Article 21 of the Constitution of India) as also right to carry on business [Article 19(1)(g)]. If he is denied of his right to livelihood because of the fact that his GST Registration has been cancelled, and that he has no remedy of appeal especially when Appellate Tribunal has not been constituted in terms of Section 109 read with Section 112,

then it would tantamount to violation of provision enshrined under Article 21 of the Constitution of India as the right to livelihood springs from the right to life avowed under Article 21.

10. This Court, in the case of one of the parties, namely in the case of *Suntony Signage Pvt. Ltd.,* whose registration under the CGST Act being cancelled and appeal being rejected on the ground of limitation by way of common order dated 07.10.2021, which order is subject-matter of challenge in the present writ, allowed the writ petition being W.P(C). No.41856 of 2021 [*Suntony Signage Pvt. Ltd. Vrs. Principal Commissioner of Central Goods and Services Tax & Others*] vide Order dated 12.07.2022 by setting aside said Appellate Order. In certain other cases, one of them being *Nirmani Engineers and Constructions Pvt. Ltd. Vrs. The Commissioner of CT&GST, Odisha and Others, W.P.(C) No.15934 of 2021*, vide Order dated 05.05.2021 condoning the delay in invoking proviso to Rule 23 of the Odisha Goods and Services Tax Rules, 2017, this Court allowed the petitioner therein to deposit tax, interest, penalty with late fee and furnish returns for the defaulted period.

11. Apart from the above, it may be worthwhile to say that the Appellate Authority should have borne in mind the predicament faced by taxpayers on the introduction of new set of procedures by way of promulgation of the CGST Act and the OGST Act and rules framed thereunder and time required to be taken to get acquainted. It is pertinent to refer to the following excerpts from Judgment dated 24.02.2022 delivered by the Hon'ble Gujarat High Court in the case of Aggarwal Dyeing and Printing Works Vrs. State of Gujarat & 2 Other(s), R/Special Civil Application No. 18860 of 2021:

> *"15.1 The Appellate authority ought to have appreciated that the writ applicants at relevant point of time i.e. in year 2017, applied for registration which request was favourably considered by the authorities under the Act with a specific registration number allotted to the writ applicant. It was a transitional phase, whereby the old CST Act was repealed and the new regime of CGST/ GGST has come into force. With the different forms and procedure envisaged thereunder, any layman is bound to take time to adhered to the norms. The Record reveals that subsequently the writ applicants have claimed to have filed their returns and have even deposited all dues. We further notice that such exercise has been undertaken through the writ applicant's Tax Consultant who were professionally engaged to undertake such task. Unfortunately, information of the returns for certain period not being uploaded, surfaced in the year 2019 and the cause explained suggest that circumstances were beyond the writ applicant's reach. In such peculiar circumstances, it was least expected of the Appellate Authority to condone the delay for filing appeal, more so, with the onset of Pandemic Covid-19, preventing further follow up action. In the peculiar facts and circumstances, the authority ought to have condoned the delay which unfortunately was not done, despite the writ*

*applicant having made a fervent request for condonation of delay in filing appeal seeking revocation of cancellation of registration."*

12. On the aforesaid analysis of factual and legal position, it is apt to set aside the Appellate Order dated 07.10.2021. As a consequence, this Court in the aforesaid circumstances thought of remitting the matter to the Appellate Authority for consideration of merits afresh. Nevertheless, this matter relates to registration of the petitioner which has been cancelled since 15.10.2019 and involves right to carry on business and sending the matter back to the Appellate Authority would further delay the process. It is taken into consideration that as the consequential effective step is required to be taken by the proper officer/Registering Authority/Superintendent, it is, therefore, deemed necessary instead of directing the Appellate Authority to do the needful, this Court requests the proper officer to grant opportunity to the petitioner for taking all required step to revive registration. Thus, writ of mandamus is liable to be issued keeping in mind the notifications and the suggestions put forth by Mr. Rudra Prasad Kar, learned Advocate. So does this Court in the present case to ensure ends of justice in the light of directions envisaged in *Tvl. Suguna Cutpiece Center Vrs. The Appellate Authority and Another, 2022 (61) GSTL 515 (Mad)* by the Madras High Court and Order dated 05.05.2021 of this Court in *Nirmani Engineers and Constructions Pvt. Ltd. Vrs. The Commissioner of CT&GST, Odisha and Others, W.P.(C) No.15934 of 2021*.

13. In the above premise, the following directions are, therefore, issued:

i. The petitioner is permitted to file returns for the period prior to the cancellation of registration, if such returns have not already been filed, together with tax defaulted which has not been paid prior to cancellation along with interest for such belated payment of tax and statutory payments and fee fixed for belated filing of returns for the defaulted period under the provisions of the Act, within a period of sixty days (60) days from the date of receipt of a copy of this Judgment, if it has not been already paid.

ii. It is made clear that such payment of tax/interest/penalty/ fine/fee etc. shall not be allowed to be made or adjusted from and out of any Input Tax Credit which may be lying unutilized or unclaimed in the hands of the petitioner.

iii. On payment of tax, interest, penalty and late fee, if any, and uploading of returns, as conceded by both the parties, the petitioner is at liberty to file the application for revocation of cancellation of registration within a period of 7 days therefrom along with petition for condonation of delay. In such eventuality, the proper officer/registering authority/ competent authority shall consider the same favourably by condoning the delay and revoke the cancellation of registration.

iv. The opposite parties shall take suitable steps by instructing GST Network, New Delhi or any other agency responsible for maintaining the Web Portal to make suitable changes in the architecture of the GST Web Portal to enable the petitioner to file his

returns and to pay the tax/interest/penalty/fine/fee and it is to be ensured by the department that there shall be no technical glitch during the period specified herein.

v. The above exercise shall be completed by the opposite parties within a period of ninety (90) days from the date of receipt of a copy of this Judgment.

vi. The Authority concerned is at liberty to verify the veracity of the claim(s) made in the returns so furnished and take appropriate steps in accordance with law after affording reasonable opportunity of hearing to the petitioner.

14. The writ petition is allowed in the above terms. Parties are to bear their respective costs. Since the main case has been decided, the pending Interlocutory Application, if any, also stands disposed off.

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**2023 (I) ILR – CUT - 87**

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

W.P.(C) NO. 611 OF 2012

**MAYURBHANJ CENTRAL CO-OPERATIVE BANK LTD.** ……..Petitioner

.V.

**GANESWAR SAHU** ……..Opp.Party

**INDUSTRIAL DISPUTES ACT, 1947 – Sections 10 (1)(c) & 12 (5) – Termination of the opposite party/workman on 31.08.1979 – Industrial dispute raised in the year 2003 through the union – The order of termination as well as gradation list prepared in the year 1985 challenged – The learned tribunal adjudicated the dispute and award was notified – Whether such endeavour of the learned Tribunal is sustainable? – Held, No – Such belated exercise made by the learned Labour Court is unsustainable in law and is liable to be set aside.**

For Petitioner : Mr. Narendra Kishore Mishra, Sr. Adv.
Mr. Nitish Kumar Mishra

For Opp.party : Mr. Aditya Narayan Das, Mr. Bamadev Baral.

JUDGMENT Date of Hearing: 14.09.2022 : Date of Judgment: 14.12.2022

***M.S. SAHOO,J.***

1. The petitioner-Mayurbhanj Central Co-operative Bank Ltd., Baripada, Dist-Mayurbhanj by filing the present writ petition under Articles 226 and 227 of the Constitution of India challenges the award dated 17.09.2011 passed by the

Presiding Officer, Labour Court, Bhubaneswar in I.D. Case No.9 of 2006 (Annexure-7 to the writ petition), the award being notified by the Government of Odisha, Labour and Employment Department Notification dated 24.11.2011 in terms of Section 17 of the Industrial Disputes Act, 1947 (herein after, 'I.D. Act, 1947' for short). Pursuant to the notice issued, the opposite party-workman appeared and filed his counter. The records of the learned Labour Court were called for and placed before this Court.

2. The award passed by the learned Labour Court, Bhubaneswar was pursuant to the reference dated 09.02.2006 by the Government of Orissa in exercise of powers conferred by subsection (5) of Section 12 read with clause (c) of sub-section (1) of Section 10 of the Industrial Disputes Act,1947. Terms of the reference made to the learned Industrial Tribunal is reproduced herein :

> *"Whether the denial of seniority and promotion of Sri Ganeswar Sahu with effect from 09.11.85 is legal and justified? If not, to what relief Sri Sahu is entitled for?"*

3. The facts of the case as have emerged from the pleadings of the parties and on the perusal of records produced before the learned Tribunal are that the opposite party herein was appointed on 02.11.1974 (Ext.8 before the learned Labour Court) by the Management of Mayurbhanj Central Co-operative Bank Ltd. (herein after, 'the Bank' for short) as Junior Administrative Inspector temporarily. Thereafter, on 06.03.1978 by the order issued by the Bank, the opposite party was appointed as supervisor (Ext.9 before the learned Labour Court). It was specified in the said order of appointment dated 06.03.1978 (Ext.9) that the appointment is purely temporary and is terminable on the afternoon of 30th June,1978 and the appointee (opposite party workman) shall be deemed as if relieved from service on the expiry of 30th June,1978 without assigning any reasons whatsoever.

3.1. Opposite party started Provident Fund Contribution with effect from May, 1979 as per the order dated 03.03.1979 [Ext.10]. He was then selected to undergo training in the Co-operative Training Institute, Baripada by the order dated 02.07.1979 (Ext.11). The Co-operative Training Institute by letter dated 09.12.1979 (Ext.12) relieved the opposite party on 09.12.1979 on completion of training from 16.07.1979 to 09.12.1979 directing to join their respective institution. The opposite party was terminated vide order of the Bank dated 31.08.1979 as pleaded before the Labour Court. Thereafter, by the order dated 26.09.1979 (Ext.3), the petitioner's service as temporary employee of the Bank was terminated with effect from the forenoon of 01.10.1979. Thereafter by the order dated 27.12.1979 (Ext.7) the opposite party was appointed as supervisor (temporary). In the said order dated 27.12.1979, the opposite party was directed

to join the Bank by furnishing the required certificates, medical fitness certificate and other testimonials latest by 01.01.1980. Thereafter, the petitioner's continuance in the Bank was uninterrupted till raising the Industrial Dispute on 28.09.1991 before the District Labour Officer, Baripada, Mayurbhanj. The subsequent industrial dispute was raised by the letter dated 09.01.2003 of an Union (Ext.19) on behalf of the opposite party-workman, which ended up in failure of conciliation as per the letter dated 06.10.2005 and ultimately the matter was referred by the State Government for adjudication as indicated above resulting in the award, i.e., impugned in the present writ petition.

4. By raising the Industrial Dispute on 09.01.2003 (through the Union), the opposite party-workman challenged his termination dated 31.08.1979. The opposite party-workman's appointment thereafter by the Co-operative bank as per his statement in the Ext.18 internal page-4 is that *"…… again M.C.C. Bank conducted interview on 26.12.1979 and got appointed on 27.12.1979 and I joined ……"* (Odiya having been translated into English). The Staff Service Rules of the Employer Co-operative Bank Limited was produced and marked (Ext.20 before the Labour Court.)

The essence of the grievance raised before the learned Labour Court is that the opposite party is not placed in the gradation list prepared pursuant to the letter dated 19.01.1985 (Ext.14). In particular, the petitioner has referred to the position of two of his colleagues in the gradation list, i.e., Sri Asit Kumar Paniand Sri Sarat Chandra Pani. In the gradation list dated 25.09.1985 (Ext.16), the opposite party was shown at sl. No.16. Further grievance raised was that as per the order dated 09.11.1985 (Ext.17) similarly situated employees were given promotion to the rank of Accountant on ad hoc basis and it is claimed by the petitioner that he being entitled to be placed at a position ahead of both Sri Asit Kumar Pani and Sri Sarat Chandra Pani should have been given promotion to the rank of Accountant being otherwise eligible. Before the Labour Court, the petitioner produced his representation dated 11.12.1985:(Diary No.4820/16.12.1985 of Bank (Ext.18), the contents of which are reproduced herein below :

> *"Respectfully,I beg to submit that I am working under your Bank as Supervisor and now as Managing Director of Podagarh LAMPS since one year.*
>
> *I, describe, my service period in enclosed papers since beginning and pray your authority to kindly consider my case for promotion and for which act of your kindness, I shall remain grateful."*

The petitioner's representation in vernacular was marked as part of Ext.18. In the Ext.18, internal page-3, the statement by the opposite party-workman in Oriya, translated to English is as follows:

*"… … during the course of training by the Secretary's order no.1426 dated 31.08.1979 and Memo No.1427 (7) dated 31.08.1979, it was informed that temporary posting is given for one month and on 30.09.1979 afternoon appointment was to be terminated and by order no.1423 dated 31.08.1979 termination with effect from afternoon of 31.08.1979 was intimated. … …"*

5. In response to the statement of claims filed by opposite party-workman on 01.12.2006, the first party-management,Cooperative Bank Limited filed written statement dated 01.05.2008. The copy of the statement gives a list of 11 documents relied upon by them. In response, the workman-second party before the learned Tribunal, filed his rejoinder and by the order dated 11.05.2010 the following issues were framed by the learned Industrial Tribunal:

*"1. Whether the denial of seniority and promotion of Sri Ganeswar Sahu, with effect from 09.11.1985 is legal and justified.?*

*2. If not, to what relief Sri Sahu is entitled for.?"*

6. This Court heard the learned Senior Counsel, Mr. N.K. Mishra on behalf of the petitioner [first party management before the learned Industrial Tribunal] and Mr. A. N. Das, learned counsel at length on behalf of the second party – workman.

7. The learned Senior Counsel for the petitioner-Co-operative Bank made a survey of the evidence on record before the learned Labour Court and submitted the following:

(i) The seniority of the opposite party-workman was settled in the year 1985 after which the persons senior to him in the gradation list dated 25.09.1985 (Ext.16) got their promotion. Therefore, the reference to the learned Labour Court is grossly barred by time having been made in the year 2006.

(ii) The opposite party-workman in his representation, copy of which was marked as Ext.18 before the learned Labour Court, admitted his engagement as Supervisor temporary made on 31.08.1979 was terminated by the order no.2034 dated 26.09.1979 and subsequent engagement was made on 27.12.1979, after interview on 26.12.1979.

7.1. It is thus submitted that the learned Labour Court committed error apparent on the face of record, inasmuch as the Court did not take into consideration the evidence on record that shows that cause of action, if any, arose on 31.08.1979. There is no dispute that the opposite party-workman continued after appointment as per the advertisement and interview held on 26.12.1979 and joined as Supervisor on 27.12.1979. It is further contended that the gradation list dated 25.09.1985 remained unchallenged by the opposite party-workman and the learned Tribunal entertaining the dispute in 2006 much after the gradation list was published in the year 1985 after about twenty one years acted in as contrast to the principle of serious laches as apparent on the face of the record.

7.2. As corollary to the aforesaid submission, it is submitted that the Tribunal has travelled well beyond the reference made,as quoted above, by granting promotion to the opposite party workman to the post of Accountant.

7.3. It is submitted by the learned Senior Counsel that the opposite party-workman has accepted the fresh appointment dated 27.12.1979 and has continued as such for 12 years till 1991 when he raised dispute before the D.L.O. whereas the gradation list was published on 25.09.1985 and, therefore, by no interpretation, the Industrial Dispute could have been entertained by the learned Labour Court.

8. Learned counsel for opposite party-workman, Mr. Das with all the emphasis and acumen at his command defended the award passed by the learned Labour Court referring to the written statement and rejoinder filed before the learned Labour Court as well as the counter affidavit filed before this Court.

9. When confronted with the exhibits referred to above as well as the fact that there is no dispute regarding the opposite partyworkman's engagement pursuant to the interview on 26.12.1979 and his joining as Supervisor on 27.09.1979 and publication of the gradation list on 25.09.1985, the learned counsel for the opposite party-workman has fairly submitted that at this stage, he cannot improve the pleadings and the facts as pleaded before the learned Tribunal as well as the material evidence on record.

10. Having heard the learned counsel for the parties, this Court is of the considered opinion that the learned Labour Court glossed over the evidence on record by not considering the fact that the opposite party-workman has accepted his letter of engagement, his joining as a fresh candidate on 27.12.1979 pursuant to the interview held on 26.12.1979. While dealing with the aspect of the gradation list dated 25.09.1985, the learned Tribunal fell into apparent error, inasmuch as, it has not given any reason for unsettling the gradation list of 1985, i.e., almost after twenty years of the publication of the gradation list. The conciliation was pursuant to the letter dated 09.01.2003 issued by the Secretary of Orissa co-operative Bank Employees Federation to the D.L.O., Mayurbhanj, Baripada (Ext.19), which ended up in the failure report dated 06.10.2005. From the records and the pleadings, it is not clear what happened to the earlier dispute dated 28.09.1991 raised before the D.L.O., Baripada.

This Court has to take into consideration of the fact that the learned Tribunal entered into the adjudication of the question whether the "termination" dated 30.09.1979 is valid in the dispute raised before it in the year 2003. Such endeavour of the learned Tribunal would have the effect of unsettling gradation

list published on 25.09.1985. Such belated exercise made by the learned Labour Court is unsustainable in law and is liable to be set aside.

11. Accordingly, the writ petition is allowed. The impugned order dated 17.09.2011 passed by the Presiding Officer; Labour Court, Bhubaneswar in I.D. Case No.9 of 2006 is set aside.

12. In the facts and circumstances of the case, there shall be no order as to costs. The records of the learned Labour Court, Bhubaneswar in I. D. Case No.9 of 2006 be sent back forthwith.

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**2023 (I) ILR – CUT- 92**

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

W.P.(C) NO.7252 OF 2014

**THE MANAGEMENT OF M/s. TATA REFRACTORIES LTD.** ……..Petitioner

.V.

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

**SERVICE LAW – Change of date of birth in the service Book – the workman did not produce any proof regarding date of birth at the time of entry into service – The workman obtained a medical report from company doctor – As per the medical report the management recorded the date of Birth of workman as 03.07.1952 – The workman subsequently submitted school leaving certificate where date of birth mentioned as 09.08.1954 & accordingly claimed that, his superannuation should be 28.02.2014 instead of 01.08.2012 – Whether a primary evidence like school leaving certificate has to be accepted or not? – Held, Yes – On the basis of school leaving/ transfer certificate which is conclusive in nature, the opp. Party/ workman has made out a case for correction of date of birth.** (Para 17)

**Case Laws Relied on and Referred to** :-

1. (2005) 6 SCC 49 : State of U.P. & Anr. Vs. Shiv Narain Upadhyaya.
2. Civil Appeal Nos.5720 and 5721 of 2021 : Karnataka Rural infrastructure Development Limited & Ors. Vs. T.P. Nataraja & Ors.
3. Writ Petition (Civil) No.20769 of 2005: Span India Pvt. Ltd.Vs.Ram Sunder & Ors.
4. 2004 (Supp.) OLR 838: State of Orissa & Ors. Vs. Sarada Prasanna Das.

5. 2016 (II) OLR 925 : The General Secretary (JRD), Bolanni Shramik, Barbil Vs. Presiding Officer, Industrial Tribunal, Rourkela.
6. 2007 (II) OLR 320 : Smt. Gelli Dei Vs. Orissa Lift Irrigation Corporation Ltd. and Ors.
7. (2014) 12 SCC 570 : Bharat Coking Coal Ltd. Vs. Chhota Birsa Uranw.

For Petitioner : Mr. B.P. Tripathy.

For Opp.parties : Mr. P.K. Muduli, AGA, Mr. P.K.Dash.

JUDGMENT Date of Hearing: 23.09.2022 : Date of Judgment: 14.12.2022

***M.S.SAHOO,J.***

1. The petitioner-company registered under the Companies Act, employer of opposite party no.3, by filing the writ petition has challenged the award dated 31.12.2013 (Annexure-1) of the learned Labour Court, Sambalpur passed in I.D. Case No. 31 of 2013.

2. The operative portion of the award made by the learned Labour Court is quoted herein:-

> *"The reference is answered on contest without any cost. The termination of services of Sri Haribola Dash, workman by way of retirement with effect from 01.08.2012 by the management of M/s. TRL Krosaki Refractories Limited, Belpahar, Dist-Jharsuguda is held to be illegal and unjustified. The secondparty is entitled to reinstatement in service with full back wages and other service benefits. The management is directed to reinstate the second-party in service immediately and refix his date of retirement as 28.02.2014. The first-party management is further directed to pay full back wages to the second party with effect from 01.08.2012 including his regular increment and all other service benefits within a period of two months hence."*

3. The I.D. Case No.31 of 2013 was pursuant to reference made by the Govt. of Odisha in the Labour and ESI Department under the power conferred by sub-section (5) of Section 12 read with Clause (c) of Sub-Section (1) of Section 10 of the Industrial Disputes Act, 1947 (14 of 1947) (for short the "Act 1947") vide Order under Memo No. 4447(4) dated 7.5.2013. The schedule of reference is quoted herein:-

> *"Whether the termination of services of Sri Haribola Dash, workman by way of retirement with effect from 01.08.2012 by the management of M/s. TRL Krosaki Refractories Limited, Belpahar, Dist-Jharsuguda is legal and/or justified? If not, what relief the workman is entitled to?"*

4. The opposite party no.3 (second party workman before the labour court) in his statement of claim submitted as follows:-

> *"(i) that the workman Shri Haribola Dash joined the first party erstwhile Tata Refractories Ltd (Previous name of the 1st party) on 06.07.1978 and continuously*

*worked sincerely and faithfully till he was retired w.e.f.01.08.2012 at the age of 58 years 5 months 24 days even though as per the standing order Clause No.48, he was to retire at the age of 60 years i.e., on 07.02.2014 (end of month 28.2.2014)*

*(ii) That at the time of his joining his school leaving certificate was not available with him for which Medical report was called for an the company Doctor Certified his age was 24 years on 03.07.1978 and later on he submitted his school leaving certificate to the management, which reflects his date of birth 07.02.1954. So his 60 years complete on 07.02.2014.*

*(iii) That the workman is a permanent/regular workman having P.F.A/c. No. OR/257/3664 and Pension Fund A/c. No.OR257/1791 at the time of retirement he was in the post of Master Technician in Basic Department bearing P.No.2240 and there was no adverse remark against him at any point of time.*

*(iv) That on 17.2.2012, the workman was informed by a letterno.HRM/P/489 dated 17.2.2012 by the General Manager (HRM & Admn.) that his retirement will take effect from 01.08.2012 and his last working day will be on 31.07.2012.*

*(v) That the workman replied to the said letter by his application dated 25.02.2012 stating his date of birth being 07.02.1954 he will retire on 28.2.2014 not on 01.08.2012 but the same was not considered by the 1st party and the workman's service was terminated w.e.f.01.08.2012 by retirement without affording any natural justice to him. He was issued a service certificate on 06.08.2012, which also reflects his date of birth on 07.02.1954.*

5. On being noticed by the learned Labour Court, the first party management filed their written statement. In the written statement, the petitioner herein (first party management) presented the facts as follows:-

*"The first party-management is a limited company having its Registered Office at Belpahar and Head Office at Jamshedpur. Prior to the formation of the TRL Krosaki Refractories Ltd., the management-Company was known as Tata Refractories Ltd., and there existed a Works Standing Order which is the certified standing order of the company and the same certified Standing Order of the Company and the same certified Standing order continues to be in force after formation of TRL Krosaki Refractories Ltd.*

*5.1 The workman was appointed as an unskilled labourer on temporary basis vides Order No.PH/1984, dated 06.07.1978. As per the requirement of the 1st party/management, the workman did not produce any proof regarding birth and accordingly had to obtain a medical report from the company doctor. In that medical report it has been mentioned that the 2nd party-workman was of 26 years as on the date, i.e., 03.07.1978.The employee was given employment with Employment sl.no.903, Personal No.2240 having recorded date of birth as 03.07.1952. In the period intervening he was promoted to the Grade of Master Technician and was posted in the Basic Department.*

*5.2 As the superannuation of the 2nd party-workman was approaching and due on 31.07.2012, the 1st partyManagement on 17.02.2012 issued a letter to the 2nd party-workman that he was due to retire on 31.07.2012 after completion of around 34 years of services. 2nd party workman had filed in the Declaration Nomination Form of*

*Provident Fund in Form-2 mentioning his date of birth as 03.07.1952 which was counter-signed by the Manager (Personnel) of the 1st party-Management on 30.11.1988.After attaining the superannuation he applied for monthly pension under the Employees' Pension Scheme, 1995, on 24.07.2012 mentioning his date of birth as 03.07.1952 under his signature.*

*5.3 During the period of employment of the 2nd partyworkman, the name of the company was changed from Belpahar Refractories Ltd., to Tata Refractories Ltd. to Tata Refractories Ltd. and he was issued with an identity-cumpunching card by the company wherein his date of birth was mentioned as 03.07.1952. All the records of the Company including the records available with the Government Authorities relating to his employment contain his date of birth as 03.07.1952. As per the requirement of the Regional Provident Fund Commissioner, Rourkela, the 2nd party-workman had submitted a clarification to the Regional Provident Fund Commissioner, Rourkela that his date of birth is 03.07.1952 according to the medical report available in the service record. On his application for Provident Fund dated 07.08.2012 he was paid Rs.2,21,101.49 on 23.08.2012 and it was received by the 2nd party-workman. The 2nd party-workman was also paid Rs.2,47,811.90 as full and final settlement which included his leave salary and gratuity and the same amount was transferred to the Bank Account No.10707928170 maintained the State Bank of India, Samda Branch on 24.08.2012. The Management acted as per the records that the date of birth of the workman is 03.07.1952 which was prepared as early as on 03.07.1978 as per the medical report submitted by the Doctor and accordingly the 2nd party-workman was allowed to retire on superannuation on 31.07.2012. There was never any illegal termination of the services of the 2nd party-workman, rather the superannuation of the 2nd party-workman was legal, justified and as per the provisions of the works Standing Order.*

*5.4 The 2nd party-workman was rightly superannuated on his completion of 60 years and the 2nd party-workman has come up with a false story at a much belated stage only to get the pecuniary advantage. 2nd party-workman was well aware on the date of his entry in service, i.e., on 06.07.1978, that his date of birth was 03.07.1952, but he did not make any protest by then or soon thereafter on the point of birth. It is submitted that in the medical report the Company Doctor certified the age of the 2nd party-workman as 26 years on 03.07.1978 and accordingly all his service records were prepared but on a later date the workman in association with some unscrupulous persons could manage to tamper the official record and he put his date of birth as 07.02.1954 and again it was duly corrected by the 1st party-management. As per the earliest recorded date of birth, the 2nd party-workman was allowed to superannuate on 31.07.2012 on his completion of 60 years during that month. The service certificate dated 06.08.2012 which was obtained by the 2nd party-workman was not based on official record and it was not procured from the competent authority by the 2nd party-workman and the person who has issued that certificate has not been authorized by the 1st party-management to issue such certificate."*

6. The learned Labour Court, Sambalpur on the basis of the pleadings culled out the issues for determination as recorded in para-5 of the award. The issues as framed by the learned Labour Court are quoted herein:-

*"(i) Whether the termination of services of Sri Haribola Dash, Workman by way of retirement with effect from 01.08.2012 by the management of M/s. TRL Krosaki Refractories Limited, Belpahar, Dist-Jharsuguda is legal and/or justified?*

*(ii) If not, what relief the workman is entitled to?*

7. The respective parties before the learned Labour Court filed their affidavits in evidence, i.e., deposition of workman himself as the witness. The workman has also examined as workman witness No.2 and workman witness No.3. The management examined witness nos. 1 and 2 on its behalf. The workman exhibited documents marked as Ext.1 to 18. The Management marked documents in evidence as Exts.A to AA/1. The service records introduced by the workman as well as documents on behalf of the workman are marked without objection. In fact, Ext.1 as well as Ext.A is the self-same document i.e. the copy of the 1st page of the service record. On perusal of the said exhibit, it is indicated that the Date of Birth: as indicated in the heading "Date of Birth" contains 3 entries;

*(i) 3.7.1952 (scored through)*
*(ii) 7-2-1954 (scored through)*
*(iii) 03.07.1952 (scored through noted and indicated by this Court)*

7.1 The medical examination report dated 03.07.1978 (Ext.B) shows that the opposite party no.3-workman Shri Haribola Dash was examined by the Doctor and the Entry No.2 shows at Sl.No.2. Age as assessed by the Doctor: About 26 Yrs (Twenty Six).

The horizontal line (3) indicates "3. Date of Birth (as per Certificate) : 24 Years as per his statement."

It can be seen that the workman/opposite party as early as on 03.07.1978 in his statement recorded by the doctor of the company had stated his age to be 24 years thereby indicating his year of birth to be 1954.

7.2 The workman has put his signature at the relevant horizontal line i.e. entry no.21. The signature of the Doctor is also present, the date being 3.7.78. The photocopy of the EPF Nomination Form is marked as Ext.E indicating the date of birth as "3-7-52". It contains the signature of the workman with date i.e. 30-11-88. The application for "Retirement gift" is marked as Ext.F dated 06/08/2012. The application for settlement of provident fund w.e.f.01.08.2012 made by the workman has been marked as Ext.K. The employee list dated 25.02.87 is marked as Ext.Q, in which the name of the opposite party no.3, workman contains at Sl. No.903 indicating his birth date 3rd July, 1952. The application made by the opposite party no.3-workman forwarded on 24.07.2012 written by the workman himself indicates his date of birth 03.07.1952. The petitioner's application for pension has been marked as Ext.S.

8. In the writ petition, notices were issued to the opposite party no.3-workman, who has appeared through the learned counsel. The records of the Labour Court, Sambalpur pertaining to I.D. Case No. 31 of 2013 which was called for is placed before this Court for reference.

Mr. B.P. Tripathy, learned counsel for the petitioner and Mr. P.K. Dash, learned counsel for the opposite party no.3-workman have been heard at length.

Chronological date charts as well as summary of citations relied upon by both the parties have been filed and have been considered by this Court.

9. The brief factual background of the case, those are necessary for adjudication are reiterated here in :

> After the issuance of superannuation letter dated 17.02.2012 intimating the workman that his retirement on 31.07.2012. The workman by representation dated 25.02.2012 (Ext.6) has stated that his date of birth as mentioned in documents like Driving License, School records is noted as 07.02.1954, therefore his retirement date should be 28.02.2014. The transfer certificate issued by the Headmaster where the workman prosecuted his studies i.e. Dalgaon M.E. School dated 25.07.1978 was admitted without objection from the Management. The said transfer certificate has been marked as Ext.3.

10. Learned counsel for the petitioner has taken us through the various exhibits marked by the employer to support their contention to treat the date of birth to be 03.07.1952 and submitted that as per the law laid down by the Hon'ble Supreme Court, date of birth as recorded in the service records at the earliest would not be subject to change at the instance of the employee. Learned counsel for the petitioner to buttress the submissions relies on the decision of the Hon'ble Supreme Court in the cases of ***State of U.P. and another v. Shiv Narain Upadhyaya : (2005) 6 SCC 49; Karnataka Rural Infrastructure Development Limited and others v. T. P. Nataraja and others; Civil Appeal Nos.5720 and 5721 of 2021 decided on 21.09.2021***. Learned counsel for the petitioner also relies on the decision rendered by the High Court of Delhi in the case of ***Span India Pvt. Ltd. v. Ram Sunder and others in Writ Petition (Civil) No.20769 of 2005 decided on 05.10.2006***.

11. On the other hand the learned counsel for the workmanopposite party no.3 relies on the decision of this Court reported in the cases of ***State of Orissa and two others v. Sarada Prasanna Das: 2004 (Supp.) OLR 838*** and the decision of the Division Bench of this Court in the case of the ***General Secretary (JRD), Bolanni Shramik, Barbil v. Presiding Officer, Industrial Tribunal, Rourkela: 2016 (II) OLR 925*** and in the case of ***Smt. Gelli Dei v. Orissa Lift Irrigation Corporation Ltd. and others : 2007 (II) OLR 320***.

12. A coordinate Bench of this Court while hearing the matter, by order dated 09.01.2017 had directed as follows:-

> *"A photocopy of the transfer certificate purported to have been issued in favour of the petitioner by the Headmaster of Dalgaon M.E. School, Sambalpur (now in Jharsuguda) is handed over to the learned counsel for the State, who is directed to take instruction with regard to genuineness of the same."*

On such direction of this Court, the Block Education Officer, Lakhanpur, At/PO-Lakhanpur, Dist-Jharsuguda has provided instructions by letter No.2235 dated 5.9.2022 addressed to the Sr. Standing Counsel, School and Mass Education Cell, O/o of the Advocate General, Odisha stating the following:-

> *"… … In this regard it is submitted that on verification of the admission register of Dalagaon M.E. School, it is found that Sri Haribola Dash, Son of Baladeb Dash, VIII-Bageinala had taken admission on 22.07.1965 in Class-VI on the basis of the T.C. No.29 dated 07.07.1965 issued from Gudiali Upper Primary School wherein the date of birth of Haribola Dash has entered as 07.02.1954 in the admission register of the Dalagaon M.E. School.*
>
> *Further as per the admission register and 1st copy of the original Transfer Certificate Book of Dalagaon M.E. School, it is revealed that while he was reading in Class-VI and being not passed the Middle School Certificate Examination, he was issued with T.C. No.2 on 09.08.1967 by the Headmaster of Dalagaon M.E. School, wherein the purpose of leaving school has been marked as to read elsewhere. Furthermore as per the school records, Sri Haribola Dash has been issued with a duplicate T.C. on 25.07.1978 by the Headmaster, Dalagaon M.E. School with the same information as has been mentioned in the Original T.C. issued on 09.08.1954, as recorded in the admission register. The extract of the relevant page of the admission register of Dalagaon M.E. School and copy of the T.C. issued on 09.08.1967 and 25.07.1978 are enclosed herewith for favour of kind reference of the Hon'ble High Court of Orissa."* *(Underlined to supply emphasis)*

13. The said letter dated 05.09.2022 issued by the Block Education Officer, Lakhanpur has been taken on record by order dated 12.09.2022 passed by this Court without any objection from the petitioner management, who have taken a very fair stand considering the letter dated 05.09.2022 having been issued by responsible Govt. authority who does not per se has any interest in the litigation. Accordingly, it has to be concluded that the School Transfer Certificate/Ext.3 as produced before the learned Labour Court is correct and authenticated and also is a primary evidence/document that is to be accepted as evidence for the date of birth having been issued by the Headmaster of the concerned school originally on 09.08.1967 and also a copy on 25.07.1978 indicating the date of birth as recorded in the admission Register to be 07.02.1954.

14. In considered opinion of this Court the entries made in the 1st page of the service book/record of the opposite party no.3-workman has to be treated in its perspective. The said record was admittedly in the custody of the employer, the three entries regarding date of birth, out of which two have been scored out, have to be considered to be entered/subsequently written by someone, the person scoring through the entry, has not put his signature.

Since the entries in the first page of the service book indicating the date of birth and the subsequent corrections have resulted in three entries, out of which two have been scored through neither the learned Labour Court could have gone nor this Court can go into the question, who had made the entries and who had made the corrections in absence of any signature/initial either certifying the entry or certifying the correction.

15. The case at hand, is somewhat unique in its facts as presented before the learned Labour Court to the extent that an evidence which can be treated to be the proof of the date of birth was initially not with the employer/management at the time, when the workman got employment and employment was given to workman after he being examined by the doctor and the date of birth being noted as per the doctor's report without any other primary evidence and the said "date of birth" has been entered in various documents during service of the employee. But existence of the document, i.e., the school leaving certificate and the entries made there in have not been disputed. Rather the contents of the School Leaving Certificate have been proved to be true as indicated above, by the officer under whom the headmaster of the concerned school is working.

16. Considering the rival submissions on the question of law, there cannot be two opinions that date of birth as recorded in the service record at the earliest could not be subject to change at the instance of the employee later, particularly close to the date of Superannuation.

However in considered opinion of this Court, the said sound proposition of law would be of no avail to the management petitioner in the facts and circumstances of the present case where the question is whether a primary evidence, that is laid to make a claim of the date of birth to be 09.08.1954 instead of 03.07.1952 as recorded in the service book when the workman entered into service, has to be accepted or not. On acceptance of primary evidence indicating the date of birth to be 07.02.1954 (Ext.3), the entry made in the Service Book has to be treated as not indicating the correct date of birth.

In fact it would be evident from the evidence laid before the learned Labour Court and the written statement of the management that they did not

challenge Ext.3 straight away, apart from taking a plea that the school leaving certificate was not available with the workman when he joined his service and that the workman has come up with a false story.

17. In ***Bharat Coking Coal Ltd. v. Chhota Birsa Uranw :(2014) 12 SCC 570*** the Hon'ble Supreme Court dealing with a matter where two dates of birth of the respondent employee was recorded in service record, i.e., date of birth recorded as 15.02.1947 in Form-B, a statutory form stipulated under the Rules which was signed twice by the respondent employee whereas certificate issued on passing "Mining Sardarship", the date of birth was recorded as 06.02.1950 corresponding to date recorded in School Leaving Certificate, have held the following (at paragraphs 8, 9, 10, 15 and 16 of SCC)

> *"8. In the corpus of service law over a period of time, a certain approach towards date of birth disputes has emerged in wake of the decisions of this Court as an impact created by the change in date of birth of an employee is akin to the farreaching ripples created when a single piece of stone is dropped into the water. This Court has succinctly laid down the same in Home Deptt. v. R. Kirubakaran [Home Deptt. v. R. Kirubakaran, 1994 Supp (1) SCC 155 : 1994 SCC (L&S) 449 : (1994) 26 ATC 828] , which is as under: (SCC pp. 158-59, para7)*
>
> *"7. An application for correction of the date of birth should not be dealt with by the tribunal or the High Court keeping in view only the public servant concerned. It need not be pointed out that any such direction for correction of the date of birth of the public servant concerned has a chain reaction, inasmuch as others waiting for years, below him for their respective promotions are affected in this process. Some irreparable injury, inasmuch as, because of the correction of the date of birth, the officer concerned, continues in office, in some cases for years, within which time many officers who are below him in seniority waiting for their promotion, may lose their promotions for ever. Cases are not unknown when a person accepts appointment keeping in view the date of retirement of his immediate senior. According to us, this is an important aspect, which cannot be lost sight of by the court or the tribunal while examining the grievance of a public servant in respect of correction of his date of birth. As such, unless a clear case, on the basis of materials which can be held to be conclusive in nature, is made out by the respondent, the court or the tribunal should not issue a direction, on the basis of materials which make such claim only plausible. Before any such direction is issued, the court or the tribunal must be fully satisfied that there has been real injustice to the person concerned and his claim for correction of date of birth has been made in accordance with the procedure prescribed, and within the time fixed by any rule or order. If no rule or order has been framed or made, prescribing the period within which such application has to be filed, then such application must be filed within the time, which can be held to be reasonable. The applicant has to produce the evidence in support of such claim, which may amount to irrefutable proof relating to his date of birth. Whenever any such question arises, the onus is on the applicant, to prove the wrong recording of his date of birth, in his service book. In many cases it is a part of the strategy on the part of such public servants to approach the court or the tribunal on the eve of their retirement, questioning the correctness of the entries in respect of their dates*

*of birth in the service books. By this process, it has come to the notice of this Court that in many cases, even if ultimately their applications are dismissed, by virtue of interim orders, they continue for months, after the date of superannuation. The court or the tribunal must, therefore, be slow in granting an interim relief for continuation in service, unless prima facie evidence of unimpeachable character is produced because if the public servant succeeds, he can always be compensated, but if he fails, he would have enjoyed undeserved benefit of extended service and merely caused injustice to his immediate junior." (underlined to supply emphasis)*

*The same approach had been followed by this Court while deciding on date of birth disputes irrespective of the relief being in favour of the workman or the employer. (See State of Punjab v. S.C. Chadha [(2004) 3 SCC 394 : 2004 SCC (L&S) 469] , State of U.P. v. Shiv Narain Upadhyaya [(2005) 6 SCC 49 : 2005 SCC (L&S) 794] , State of Gujarat v. ValiMohd. Dosabhai Sindhi [(2006) 6 SCC 537 : 2006 SCC (L&S) 1445] and State of Maharashtra v. Gorakhnath Sitaram Kamble [(2010) 14 SCC 423 : (2011) 2 SCC (L&S) 582] .)*

*9. Another practice followed by the courts regarding such disputes is that date of birth of an employee is determined as per the prescribed applicable rules or framework existing in the organization. Even this Court in spite of the extraordinary powers conferred under Article 136 has decided date of birth disputes in accordance with the applicable rules and seldom has the Court determined the date of birth as it is a question of fact fit to be determined by the appropriate forum. (See State of Maharashtra v. Gorakhnath Sitaram Kamble [(2010) 14 SCC 423 : (2011) 2 SCC (L&S) 582] , High Court of Madras v. M. Manickam [(2011) 9 SCC 245 : (2011) 4 SCC (Civ) 588 : (2011) 2 SCC (L&S) 464] and High Court of A.P. v. N. Sanyasi Rao [(2012) 1 SCC 674 : (2012) 1 SCC (L&S) 310] .)*

*10. As stated earlier, this Court needs to decide the manner in which date of birth has to be determined. It is the case of the appellant that as the respondent raised the dispute at the fag end of his career and as there exists a set of records being the Form B register which is a statutory document in which the date of birth has been verified by the respondent himself twice, other non-statutory documents should not be given precedence and the orders of the High Court must be set aside. This claim of the appellant does not stand in the present matter. As determined, the dispute was not raised at the fag end of the career; on the contrary, it was raised in 1987 almost two decades prior to his superannuation when he first came to know of the discrepancy. It has been held in Mohd.Yunus Khan v. U.P. Power Corpn. Ltd. [(2009) 1 SCC 80 : (2009) 1 SCC (L&S) 83] , that: (SCC p. 84, para 14) (underlined to supply emphasis)*

*"14. … An employee may take action as is permissible in law only after coming to know that a mistake has been committed by the employer."*

*Thus, the case of the respondent should not be barred on account of unreasonable delay.*

*15. As noted by us, the respondent in 1987 on coming to know of the wrong recording of his date of birth in his service records from the nomination form sought rectification. Therefore, such rectification was not sought at the fag end of his service. We have further noticed that the High Court duly verified the genuineness of the school leaving certificate on the basis of a supplementary affidavit filed by Shri Dilip Kumar Mishra, Legal Inspector of the appellant Company on 6-9-2010 before the High Court. It has*

*been admitted in the said supplementary affidavit that the school leaving certificate has been verified and has been found to be genuine. We have further noticed that Implementation Instruction 76 Clause (i)(a) permits rectification of the date of birth by treating the date of birth mentioned in the school leaving certificate to be correct provided such certificates were issued by the educational institution prior to the date of employment. The question of interpreting the words "were issued" was correctly interpreted, in our opinion, by the High Court which interpreted the said words for the purpose of safeguarding against misuse of the certificates for the purpose of increasing the period of employment. The High Court correctly interpreted and meant that these words will not apply where the school records containing the date of birth were available long before the starting of the employment. The date of issue of certificate actually intends to refer to the date with the relevant record in the school on the basis of which the certificate has been issued. A school leaving certificate is usually issued at the time of leaving the school by the student, subsequently a copy thereof also can be obtained where a student misplaces his said school leaving certificate and applies for a fresh copy thereof. The issuance of fresh copy cannot change the relevant record which is prevailing in the records of the school from the date of the admission and birth date of the student, duly entered in the records of the school.*

*16. Therefore, the order of the High Court does not call for any interference. We endorse the reasoning given by the High Court and affirm the same. In these circumstances, we do not find any merit in the appeal. Accordingly, this appeal is dismissed." (underlined to supply emphasis)*

Applying the principles laid down in ***Bharat Coking Coal v. Chhota Birsa Uranw*** (supra), it has to be held on the basis of the School Leaving/Transfer Certificate (Ext.3) which is conclusive in nature, the opposite party-workman has made out a case for correction of date of birth. Further not correcting date of birth has resulted in real injustice to the workman. The evidence so produced by the workman has been further certified by the superior authority: Block Education Officer of the issuing authority: of the school wherefrom School Leaving/Transfer Certificate was issued. The date of issuance of the School Leaving/Transfer Certificate is 09.08.1967, the duplicate being issued on 25.07.1978. The period of study of the petitioner in the school as referred to in the School Leaving/Transfer Certificate is from 22.07.1965 in Class-VI when he took admission and did not pass the Middle School Certificate Examination. It can be seen that the workman/opposite party as early as on 03.07.1978 in his statement recorded by the doctor of the company had stated his age to be 24 years thereby indicating his year of birth to be 1954. The fact of recording of date of birth of the O.P. NO.3-employee to be 03.07.1952 in the school admission register when he took admission on 22.07.1965 is much prior to he seeking employment with the petitioner-employer in 1978 when he was medically examined on 03.07.1978.

18. In view of the above discussions, the writ petition is dismissed upholding the award dated 31.12.2013 passed by the learned Labour Court, Sambalpur in I. D. Case No.31 of 2013 with the following further orders:

> since the workman concerned has already superannuated on attaining the age of superannuation and received his retiral dues, his wages from 01.08.2012 till the date of retirement, i.e., 28.02.2014 are to be calculated taking in view then prevailing schedule of wages and other entitlements like increments etc, the differential amount deducting the amount received by the workman, if any shall be paid to the workman within a period of eight weeks from the date of pronouncement of this judgment. The last pay drawn by the workman as would be fixed on 28.02.2014 which would be his date of superannuation by taking the date of birth to be 07.02.1954 shall be fixed and accordingly the retiral dues are to be recalculated within the said period of eight weeks. The differential amount of recalculated retiral dues and the amount that has been actually received by the workman shall also be paid within eight weeks.

Ordered accordingly.

**—— o ——**

**2023 (I) ILR – CUT - 103**

**BISWAJIT MOHANTY, J & MISS. SAVITRI RATHO,J.**

W.P.(C) NO.12446 OF 2022

**M/s. PANCHASAKHA CARRIER** .....Petitioner

.V.

**INDIAN OIL CORPORATION LTD., NEW DELHI & ORS.** .....Opp. Parties

**TENDER – Scope of judicial review – Held, the Constitutional Courts should apply a lot of restraint while exercising their power of judicial review in contractual and commercial matters and Courts must give "fair play in the joint" to the Government and public sector undertaking in such matters and unless a case of mala fide, arbitrariness, irrationality and perversity is made out, the Constitutional Courts ought not to interfere in such matters while exercising their power of judicial review.** (Para 9)

**Case Laws Relied on and Referred to** :-

1. (2016) 17 SCC 818 : Afcons Infrastructure Limited Vs. Nagpur Metro Rail Corporation Limited & Anr.
2. (2020) 16 SCC 489 : Silppi Constructions Contractors Vs. Union of India & Anr.

For Petitioner : M/s. Devashis Panda,S. Panda, A. Mehta & D.K. Panda

For Opp. Parties : M/s. P.K. Rath, S.K. Pattanayak,A. Behera, S.K. Behera,P. Nayak, S. Das,S.B. Rath & S. Mohapatra

JUDGMENT Date of Hearing: 11.10.2022 : Date of Judgment: 19.10.2022

***BISWAJIT MOHANTY,J.***

1. This writ application has been filed by the petitioner praying for quashing of the orders under Annexures-1 & 4/1 reflecting rejections of the petitioner's bid in connection with the tender for road transportation of bulk petroleum products by bottom loading tank trucks. Further prayer is to direct the opposite party No.2 to consider the petitioner's tender on merits as per the Tender Call Notice and award it the work of transportation of I.O.C.L's. bulk petroleum products ex-I.O.C.Ls Paradeep Terminal.

2. The present case relates to the Tender Call Notice issued by the opposite party No.1 under Annexure-2 inviting tender for road transportation of bulk petroleum products by bottom loading tank trucks vis-à-vis Paradeep Terminal for the year 2021-2022. Vide Annexure-A/1, it was made clear that clarification end date vis-à-vis the Tender Call Notice under Annexure-2 was 27.07.2021 and the document download/sale end date/bid submission end date was 14.08.2021 and bid opening date was 16.08.2021. Clause 1.1 of the Tender Call Notice made it clear that all the tank trucks would be subject to third party inspection and fabrication has to be carried out on a new tank from a PESO approved fabricator. Serial No.3 of Clause 1.3 made it clear that legible copies to be submitted with regard to valid R.T.O. registration and PESO license for the tank trucks (for short 'TTs') offered and TTs offered without these documents, would not be considered for evaluation. As per Clause 1.4.7 of the Tender Call Notice, a tenderer will have to offer TTs in the ratio of number of TTs required capacity wise i.e. 12-16 KL : 18-40 KL. It also made it clear that one tenderer can offer maximum 6 TTs in the ratio of 2 numbers TTs of 12-16 Kilo Litres (for short 'KL') capacity and 4 numbers TTs of 18-40 KL capacity. Like this minimum TTs which can be offered by a tenderer shall be in the ratio of one number of TT in 12-16 KL capacity and two numbers of TTs in 18-40 KL capacity. It also made it clear that that the TTs which would fall under the ratio specified shall be considered under LOT-1. In case a tenderer has offered TTs not in the desired ratio, then the TTs falling in desired ratio shall be considered as LOT-1 and other TTs offered beyond the ratio shall be considered in LOT-2. While allocation of TTs within L-1 rate is finalized, the offers from LOT-1 will be allocated and if the requirement is still not met, then allocation will be made from LOT-2. It also laid down the ranking procedure. At clause 1.4.9 it was made clear that all ready

built TTs offered should have valid R.T.O. registration and PESO license as indicated earlier and as per Clause 1.4.12, the tenderer shall fill the details of ownership of TTs, R.T.O registration, PESO license etc. as applicable in the particulars of TTs offered. It also provided for reservation criteria which included reservation in favour of the S.C., S.T and MSEs. At Clause 1.11, it laid down the process of evaluation of tenders. At clause 1.12 (c) it was made clear that the tenderer's offer complete in all respect must be submitted on or before the due date of closing of the tender in line with the instructions given. As per Clause 1.12(d), claims and objections due to ignorance of existing conditions or inadequacy of information would not be considered after submission of the bid and during the implementation. Further as per Clause 1.12 (e) it was made clear that the tenderer shall give an undertaking on their letter head that the content of the bidding document has not been altered or modified and any change in the bid documents or conditional bid is liable to be summarily rejected.

In the "Instructions to Tenderers for participation in E-Tendering" under Annexure-2, it was made clear that no bids should be submitted after the last date and time of submission has reached and if the tenderer intended to revise the bid already submitted, they may change or revise the same on or before the last date and time of submission of bid. It also made it clear that no bid can be modified after the dead line of submission of bids. The said instructions also stipulated that the relevant documents as mentioned in the tender are to be submitted online only and the opposite party No.1 will not be responsible in any way for failure on the part of the tenderer to follow the instructions and the tenderers were advised in their own interest to ensure that the bids are uploaded in e-Procurement system well before the closing date and time of bid.

The document under Annexure-2 also includes the application form to be filed by the tenderers. For our purpose Sl. No.20 under the heading of "List of Documents required for Technical Evaluation" forming part of the said form is relevant and the same is quoted hereunder.

| **Sr.** | **Description of Document** | **Requirement** | **Submitted/Not Submitted** |
|---|---|---|---|
| XXXX | XXXX | XXXX | XXXX |
| 20. | All the Tank Trucks are subject to Third Party Inspection | 3rd Party Inspection report for Ready Built Tank Trucks.<br>Third party Inspection report confirming that the Ready Built Tank Trucks are fitted with equipment to facilitate bottom loading and vapor recovery system conforming to OISD RP167 & API RP 1004 Standard.<br>The 3rd Party Inspection report can be obtained from any PESO approved fabricator (Garage) confirming the above.<br>Certificate from PESO that the Fabricator is a PESO Approved Fabricator, also to be submitted along with the Certificate. | |

It appears that the petitioner offered his tender by e-mail dated 13.08.2021 offering six fully built TTs, two with capacity in between 12-16 KL, four with the capacity in between 18-40 KL. It appears from the application form filed by the petitioner that the petitioner has given a tick mark against Sl. No.20 which gives an impression that it had uploaded third party inspection reports of all the six TTs confirming that the TTs were fitted with equipment to facilitate bottom loading and vapor recovery system conforming to OISD RP 167 & API RP 1004 Standard. But the factual position of this case reveals that though the petitioner had offered six TTs, however with regard to two TTs bearing Registration Nos.OD04P5643 & OD04P5743 in 18-40 KL capacity, no such inspection reports were submitted while uploading the tender documents. In such background, vide Annexure-B/1 filed by the opposite parties; the petitioner was given an opportunity to submit such reports by 24.09.2021 which should be valid on the closing date of tender i.e. 14.08.2021. Accordingly, the petitioner submitted a document dated 23.09.2021 under Annexure-C/1 on 24.09.2021. From the tender summary report under Annexure-1 uploaded on 02.12.2021, the petitioner came to know that its bid has been rejected. When the petitioner made queries, it came to know that the work orders have been issued in favour of the successful bidders on 18.03.2022 and on finding out the real reasons of rejection i.e. on account of absence of Third Party Inspection Reports/Fabrication Certificates with regard two TTs bearing Registration Nos.OD04P5643 & OD04P5743, it submitted a representation on 21.03.2022 vide Annexure-4 to include its two TTs as it has already submitted the required Certificate on 24.09.2021. It also prayed to consider its case as the above noted two TTs are already running outside the State on existing contract at Paradeep Terminal from 04.11.2020 for I.O.C.L. However, on 05.04.2022 vide Annexure-4/1, the prayer of the petitioner was rejected referring to Sl. No.20 of the list of documents quoted earlier and Clause No.21 of the tender document as indicated at page-31 of the said documents, both of which require that the TTs quoted in these tender should have valid PESO license and R.T.O. registration certificate at the time of submission of the bids. There it was made clear that though the petitioner offered six number of TTs however, during scrutiny it was observed that in two numbers of TTs namely Nos.OD04P5643 & OD04P5743, the petitioner had not submitted third party inspection reports confirming that the said ready built tank trucks were fitted with equipment to facilitate bottom loading and vapor recovery system confirming to OISD RP167 & API RP 1004 standard. It was also indicated in Annexure4/1 that though the petitioner was given an opportunity vide Annexure-B/1 to submit the same with the clear-cut requirement that the reports should be valid as on the closing date of the tender i.e. 14.08.2021 and though the petitioner submitted the third party inspection report vide Annexure-

C/1 but from that document it was clear that on the date of closing of the tender i.e. 14.08.2021, the petitioner did not have the third party inspection reports in respect of the above noted two TTs confirming to the above mentioned requirements. Hence, the above two number of TTs out of six TTs offered by the petitioner were rejected. It also drew attention of the petitioner to the representation under Annexure-4 where it has admitted committing the mistake vis-à-vis the above two TTs. Therefore, in such background, the petitioner did not get any allocation of TTs and challenging such rejection, the present writ application has been filed.

3. Mr. D. Panda, learned counsel for the petitioner at the outset fairly submitted that the third party inspection reports confirming that the ready built tank trucks are fitted with equipment to facilitate bottom loading and vapor recovery system confirming to OISD RP167 & API RP 1004 standard were not submitted by the petitioner in respect of the TT Nos.OD04P5643 & OD04P5743. However, he contended that as both the trucks have already been engaged by the opposite party No.1 for bulk transportation of petroleum products since 2020 pursuant to the work order under Annexure-3, the opposite party should not have rejected those two TTs. Secondly, he submitted that even as per their direction under Annexure-B/1, the petitioner has submitted the required third party inspection reports on 23.09.2021 under Annexure-C/1 on 24.09.2021. In such background, also those two TTs should not have been rejected and its case should have been considered under the desired ratio of 2:4 as it had offered six TTs. Thirdly, he contended that such rejection violates Clauses 1.3 & 1.4.7 to 1.4.12 of the Tender Call Notice. Lastly, he submitted that such rejection has been done with a mala fide intention to favour some other transporters.

4. Mr. P.K. Rath, learned counsel for the opposite parties submitted that as per the conditions enumerated in the Tender Call Notice under Annexure-2, Clause 1.1 made it clear that all the TTs were subject to third party inspection and as per Sl. No.3 under Clause 1.3, all the TTs were required to submit valid R.T.O. registration and PESO license and if these documents are not submitted then such TTs will not be considered for evaluation. He also submitted that Sl. No.20 under the heading "List of Documents Required for Technical Evaluation" which forms part of the application form, required each tenderer to submit third party inspection reports confirming that its TTs were fitted with equipment to facilitate bottom loading and vapor recovery system conforming to OISD RP 167 & API RP 1004 Standard, which was also indicated in Clause 1.1 and by putting a tick mark against such column, the petitioner has acted in a mischievous manner as it had not submitted such third party inspection reports in respect of two out of six TTs. Relying upon sub-clauses (c)(d)(e) of Clause 1.12

of the Tender Call Notice and the "Instructions to Tenderers for participating in E-Tendering" at internal pages 20 & 21 of the Tender Call Notice, he reiterated that third party inspection reports in respect of each of the TTs should have been submitted before the last date which was never done in this case so far as two TTs are concerned. Moreover though the petitioner was given an opportunity to submit the third party inspection reports in respect of those two vehicles by 24.09.2021 showing them to be valid as on the last date i.e. 14.08.2021, however the same were never supplied by the petitioner. Document at Annexure-C/1 dated 23.09.2021 submitted by the petitioner nowhere showed that those two vehicles had valid third party inspection report as on 14.08.2021. He also submitted that the petitioner having admitted its mistake in its representation under Annexure-4 and in view of the detailed reasoning given in the impugned order under Annexure-4/1, this Court should not interfere with the decision making process of the opposite parties, which cannot be described as arbitrary, irrational, perverse or mala fide in the facts and circumstances of the case. In this context, he relied upon the decisions of the Supreme Court as rendered in the case of **Afcons Infrastructure Limited Vrs. Nagpur Metro Rail Corporation Limited and Another,** (2016) 17 SCC 818 and **Silppi Constructions Contractors Vrs. Union of India and another,** (2020) 16 SCC 489. With regard to mala fide, he contended that no specific allegation on this issue pointing fingers at specific persons have been made in the writ petition and since the allegation relating to mala fide is vague, the same should not be accepted. Lastly, drawing our attention to the affidavit dated 12.09.2022 filed on behalf of opposite parties which gives the details relating to reservation and ranking system given at page-10 under AnnexureF/1, he submitted that the petitioner fell under general category. For such category, in 12-16 KL capacity, 10 TTs were required as per Table Nos.1, 2 & 5 and for 18-40 KL capacity, 19 TTs were earmarked via-vis the Table Nos.1, 3 & 5. In this context, he took us through the tables and Notes attached to such tables clearly explaining the above noted figures of 10 & 19 earmarked for two categories of TTs. As per Table No.6, taking into account the desired ratio in LOT-1 to be 2:4, the merit list got exhausted at Sl. No.5 as up to that stage the TTs offered in the desired ratio of 2:4 were accommodated. With reference to Table No.7, he submitted that conceding for a moment that even if two more TTs are allotted, then the allocation can move up to Sl. No.6 in the ranking list and since the petitioner occupied Sl. No.8, there was no question of issue of any work order in its favour as by that time after rejection of two of its TTs, all the slots of general category have been exhausted. In this context, he submitted that though AnnexureF/1 contains 7 Tables, as only 3 have been numbered, he prayed that rest of the Tables be treated as Tables No.4, 5, 6 & 7 serially. He also submitted that the

allegations made by the petitioner against successful bidders are to be rejected as those bidders have not been impleaded as parties to this case.

5. Heard Mr. D. Panda, learned counsel for the petitioner and Mr. P.K. Rath, learned counsel for the opposite parties.

6. From a perusal of records which includes the counter and various affidavits filed by the opposite parties and the rejoinder and various affidavit filed by the petitioner, it is clear that the petitioner never submitted the third party inspection reports in respect of two TTs Viz. OD04P5643 & OD04P5743 though the application form required that all the TTs were subject to third party inspection. Further, the petitioner put a tick mark against Sl. No.20 of the Application Form without submitting the reports in respect of two vehicles. However, since Mr. Panda has fairly submitted that no such third party inspection reports were submitted vis-à-vis the above noted two vehicles, we are not taking a serious view of the matter. But non-filing of those reports clearly made the offer of the petitioner in respect of these two vehicles, incomplete. The plea of Mr. Panda that since those two TTs have already been engaged by the opposite party No.1, those two TTS should not have been rejected, cannot be accepted because as per Clause 1.1, Serial No.3 of Clause 1.3 so also as per Sl. No.20 under the "List of Documents Required for Technical Evaluation" etc. submission of third party inspection reports in respect of all the TTs was mandatorily required. Sub-Clause (c) of Clause 1.12 of the tender documents under Annexure-2 required that the tenderer's offer should be complete in all respects. Since such reports were not supplied with regard to two TTs, clearly the offer of petitioner remained incomplete. Assuming that the above noted two TTs had the required reports by the last date i.e. 14.08.2021 however, there is nothing to show that this was brought to the notice of the decision making authority at any point of time vis-à-vis the Tender Call Notice under Annexure-2 either by the last date i.e. 14.08.2021 or in response to Annexure-B/1 by 24.09.2021. Though the petitioner could have sought clarification on this aspect by 27.07.2021, which was the last date for clarification but there is nothing to show that the petitioner sought for the same prior to filing its tender documents. Further, it may be noted that when the petitioner got an opportunity, though it submitted the report on 24.09.2021 under Annexure-C/1 but a perusal of the same does not show that those third party inspection reports were valid on the last date of submission of the bid i.e. 14.08.2021. It only shows those report to be valid till 20.08.2023 and since the certificate under Annexure-C/1 was issued on 23.09.2021, an ordinary interpretation of the said document would be that the report is valid from 23.09.2021 till 20.08.2023. Therefore, the document at Annexure-C/1 cannot be of much help to the petitioner. Accordingly, we are not

willing to accept the second contention of Mr. Panda. All the above noted shortcomings have been highlighted by the well reasoned rejection order under Annexure-4/1.

7. With regard to allegation of Mr. Panda that there has been violation of Clauses 1.3, 1.4.7 to 1.4.12 7 of the Tender Call Notice, a perusal of the same do not reflect any violation in the facts and circumstances as already discussed. Clause 1.3 at Sl.No.3 rather makes it clear that legible copies of valid R.T.O. registration of PESO license for TTs offered be submitted and without these documents, the offer will not be considered. A reading of Clauses 1.4.7 to 1.4.12 also does not offer much help to the petitioner as these deal with stipulations relating to the ratio system, the desired ratio and the ranking procedure etc. Rather the Ratio and LOT system as explained at Clause 1.4.7 makes it clear that tenderer is required to offer TTs in desired ratio and those TTs falling in the desired ratio shall be considered in LOT-1 and in case the tenderer has offered TTs, not in desired ratio then such TTs would be considered in LOT-2 and when offers from LOT-1 do not meet the requirement then allocation will be made from LOT-2. Since two TTs of the petitioner were rightly rejected, the authorities took the total TTs offered for LOT-1 in 1:2 ratio i.e. one under 12-16 KL capacity category and two others under 18-40 KL capacity for the purpose of LOT-1 as reflected in Table No.6 at page 10 of Annexure-F/1 attached to affidavit dated 12.09.2022 filed by the opposite parties. However, since the Table-6 of Annexure-F/1 clearly show that vis-à-vis the available slots of 10 in 12-16 KL capacity category and 19 in 18-40 KL capacity category, TTs with the desired ratio of 2:4 were available till merit list No.5 and further since the desired slots got exhausted at Sl. No.5 and since the petitioner stood at Sl. No.8 the petitioner did not have a chance of getting its TTs allotted.

8. With regard to the allegation of mala fide as made by the petitioner, since as per the settled position of law specific and detailed allegations have not been made with supporting materials and since against those whom allegations have been made, they have not been made parties in person, we refuse to take cognizance of such allegation.

9. All these discussions would clearly show that despite requirement for submitting third party inspection reports in respect of all the vehicles, the petitioner did not submit such reports in respect of two vehicles by the last date and even though it was given an opportunity thereafter, it did not submit the document showing that by the last date, the two vehicles had such inspections reports. Further, though vide Annexure-A/1, 27.7.2021 was indicated as the last date for clarification, there is nothing on record to show that the petitioner made

an effort to get any clarification with regard to supply of third party inspection reports in respect of two vehicles which according to it were already working for opposite party No.1 pursuant the order under Annexure-3.

For the above noted reasons, we do not find any wrong has been committed by the opposite party No.1 in not issuing any work order in favour of the petitioner particularly in the background of its ranking as indicated at Table No.6 of Annexure-F/1 enclosed with the affidavit dated 12.09.2022 filed by the opposite party. Since the decision making process has not been affected by arbitrariness, irrationality, perversity and mala fide, we find no reasons to interfere in the matter. As per the decisions of the Supreme Court rendered in the case of **Afcons Infrastructure Limited** (supra) and **Silppi Constructions Contractors** (supra) it has been made clear that Constitutional Courts should exercise a lot of restraint while exercising their power of judicial review in contractual and commercial matters and Courts must give "fair play in the joint" to the Government and public sector undertaking in such matters and unless a case of mala fide, arbitrariness, irrationality and perversity is made out, the Constitutional Courts ought not to interfere in such matters while exercising their power of judicial review. Further it is settled in both the decisions that the authority who floats the tender and had authored the tender documents is the best judge as to how such documents are to be interpreted and the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. Therefore, in the background of non-furnishing of third party inspection reports when submission of such reports was a mandatory requirement as per the Tender Call Notice under Annexure-2 as discussed above, it cannot be said that the authority has committed any illegality in rejecting the bid of the petitioner and in not awarding the work to it.

10. For all these reasons, this writ petition is without any merit and is dismissed hereby. No costs.

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**2023 (I) ILR - CUT-112**

**Dr. B.R. SARANGI, J & B.P. SATAPATHY,J.**

W.P(C) NO. 22402 OF 2017

**SHREE SHREE JAGANNATH MAHAPRABHU BIJE SRIKHETRA MARFAT UTTARPARSWA MATH ENDOWMENT TRUSTEE BOARD** ……Petitioner

.V.

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

**(A) THE RIGHT TO FAIR COMPENSATION AND TRANSPARENCY IN LAND ACQUISITION, REHABILITATION AND RESETTLEMENT ACT,2013 – The compensation was determined following the provisions of Sections 26, 27, 28 29 & 30(3) of Act – Whether refund of the amount of solatium already paid is well justified only on the basis of audit objection? – Held, No – Merely because an audit objection was raised, the authorities have directed not to operate the bank account and that itself cannot sustain in absence of compliance of due procedure of law and principles of natural justice.** (Para 14)

**(B) WORD –"Solatium" explained with case laws.** (Para 8 and 9)

**(C) INTERPRETATION OF STATUTE – Statutory rules and administrative instructions – Which should be prevail? – Held, statutory rules should prevails over the administrative instructions.** (Para 15)

**Case Laws Relied on and Referred to** :-

1. AIR 2019 SC 3447: RB Dealers Private Limited Vs. Metro Railway, Koltaka.
2. (1969) VR 350 : March Vs. City of Frankston.
3. (1991) 4 SCC 212 : Narain Das Jain Vs. Agra Nagar Mahapalika.
4. (2004) 1 SCC 467 : Panna Lal Ghosh Vs. Land Acquisition Collector.
5. (1876) 1 Ch D 426: Taylor Vs. Taylor.
6. AIR 1936 PC 253 : Nazir Ahmed Vs. King Emperor.
7. AIR 1952 SC 16 : Commissioner of Police, Bombay Vs. Gordhandas Bhanji.
8. (2011) 10 SCC 714: J&K Housing Board Vs. Kanwar Sanjay Krishan Kaul.
9. (2009) 12 SCC 49 : State of Rajasthan Vs. Jagdish Narain Chaturvedi.
10. (2011) 5 SCC 435 : Joint Action Committee of Airlines Pilots Associations of India Vs. Director General of Civil Aviation.
11. (2006) 6 SCC 395: K. H. Siraj Vs. High Court of Keral.
12. (1994) 4 SCC 460: AIR 1995 SC 519 : Narendra Kumar Vs. State of Haryana.
13. AIR 1981 SC 746 : (1981) 1 SCC 608 : Francis Carlie Mullian Vs. Administrator, Union Territory of Delhi.
14. (1978) 1 SCC 248 : AIR 1978 SC 597 : Menaka Gandhi Vs. Union of India.
15. (1983) 1 SCC 124 : AIR 1983 SC 109 : Port of Bombay Vs. Dilipkumar Raghavendranath Nadkarni.
16. (1996) 2 SCC 549 : AIR 1996 SC 1051 : Chameli Singh Vs. State of Uttar Pradesh.

For Petitioner : M/s. U.C. Mohanty, T. Sahoo and B.K. Swain

For Opp. Parties : Mr. S.N. Nayak,ASC.

JUDGMENT Decided On: 08.12.2022

***Dr. B.R. SARANGI, J.***

1. The petitioner, by means of this writ petition, seeks to quash the decision of the Government communicated vide letter dated28.04.2017 under Annexure-7 in disallowing the award of solatium, and the consequential notice dated 10.05.2017 in Annexure-8 issued by opposite party no.3, by order of opposite party no.2, for refund of an amount of Rs.51,40, 838/-, as well as the letter no.123/LA dated 02.03.2016 under Annexure-5 of opposite party no.2 issued to the opposite party no.4 and the consequential order dated 02.03.2016 under Annexure-4, and further seeks to issue direction to opposite party no. 4 for operation of its Axis Bank Account No.915010019215714 through its authorized representative.

2. Briefly stated the facts of the case are that the Govt. of Odisha in Revenue and Disaster Management Department, vide its letter dated 06.07.2013, issued instructions to all the District Collectors regarding direct purchase of private lands for social development projects through bilateral negotiation and subsequent thereto further instructions were also issued vide letter dated 31.3.2014. As a consequence thereof, the competent revenue authorities were authorized to file requisition under the Right to Fair Compensation and Transparency in Land Acquisition and Rehabilitation and Resettlement Act, 2013 (for short the "Act, 2013") to purchase the lands under the guidelines and also while doing so to give compensation, as admissible in accordance with the provisions of the Act 2013, including the assessment of the market value of the land as admissible in respect of building and structure etc. Accordingly, the officers were also instructed to obtain non-encumbrance certificate from the concerned revenue authorities and establishment of the pure title of the seller over the land should be arrived before purchase of the land.

2.1 The Government of Odisha in Revenue & Disaster Management Department issued preliminary notification in prescribed Form-H under Section 11(1) of the Act, 2013, vide notification dated 08.01.2015. As per the said notification, plot nos.276 and 283 under Khata No.303 measuring area Ac. 0.127 dec. Kissam-Gharabari-1, Mouza-Chudanga Sahi had been notified. The same had also been published in two Odia newspapers "Dharitri" and "Tirthakhetra" dated 13.01.2015. Thereby, there was compliance of Section 11(1)(c) of the Act 2013. In addition to the same, the notification was duly published in the notice boards of the offices of the Sub-Collector and the Tahasildar. A copy of the same

was also sent to the Executive Officer, Puri Municipality for discussion and for publishing the same in the notice board. Relating to the aforesaid suit plots for the purpose of acquisition of land, L.A. Case No.5/2015 was registered by opposite party no 3.

2.2 On the basis of aforesaid L.A. Case No.05 /2015 the follow up actions were taken by issuing notices to the RTs (petitioners) regarding the nature of claim and persons interested on subsequent date, i.e. on 10.03.2015 and also published declaration vide no.13743/R&DM dated 07.05.2015 under Section 19 of the Act, 2013. Notices were also issued under Sections 20 and 21 fixing to 11.06.2015 for hearing. Pursuant to such notice, the petitioner appeared on 11.06.2015 and filed its objection. The District Collector, Puri, being the Land Acquisition Collector in the proceeding held on 11.06.2015, considered the measurement made under Section 20 of the Act, 2013 and the field report conducted thereon and clarified regarding acquisition of Ac.0.127 in respect of plot nos.276 and 283 along with structure standing thereon and also accepted the proposal for revaluation of the structure since it is a new building. The petitioner, being the owner in possession in respect of the abovementioned suit plots of the Kisam of Gharabari, the award was passed by the Collector, while the same was acquired, and the awarded amount was transferred to the bank account of the petitioner maintained with opposite party no. 4, i.e., Bank Manager, Axis Bank, Puri, vide Account No. 915010019215714.

2.3 In adherence to the guidelines issued on 06.07.2013 and in terms of the Act 2013, the District Collector, Puri, in consideration of the above mentioned notification dated 08.01.2015, took steps for acquisition of land for widening of road keeping in view the Nabakalebar of Lord Shree Shree Jagannath Mahaprabhu in the Puri Town.Even though the petitioner, pursuant to such notice, raised objection, the same was not considered, but its lands were acquired as per Act, 2013 which came into force with effect from 01.01.2014. The widening of the road around the Shree Shree Jagannath Temple was also given post facto approval by the Govt. of Odisha, vide notification dated 04.02.2016, with reference to letter dated 09.01.2016 of the District Magistrate & Collector, Puri, as due to shortage of time and in view of first approaching of Nabakalebar, it was decided in principle to go for direct purchase of land on negotiation basis wherein the land owners were not inclined to execute the agreement with the Executive Engineer (R&B) Department rather preferred to enter the agreement with the Collector, Puri for sale of land to have better surety.

2.4 When the land acquisition process reached its finality with the passing of the award by the District Collector/ Land Acquisition Collector, Puri, vide award

dated 26.05.2015, the District Collector, Puri issued instructions to the Branch Manager, Axis Bank, opposite party no.4, vide letter no.123 LA dated 02.03.2016 directing him for stoppage/withholding of the money mentioned against each beneficiary kept either in the account mentioned or in any other account or kept in the form of fixed deposit or any other instrument, till further instructions issued from him and the confirmation of withholding of money submitted to him accordingly. But the same was done without providing any kind of information or opportunity to the petitioner. The Branch Manager, Axis bank, Grand Road, Puri issued letter dated 02.03.2016 to the petitioner from which the petitioner came to know that as per instructions of the District Collector, Puri the amount lying in the account of the petitioner in the bank has been withheld.

2.5 The petitioner came to learn from reliable sources that the Revenue and Disaster Management Department raised a plea of irregular payment as per the audit objection and for compliance of the audit objection issued instructions to the District Collector/Land Acquisition Collector, Puri, who in its turn also gave reply to the same vide letters dated 09.01.2016, 21.03.2016 and 02.04.2016. The reasons for withholding amount having not been communicated, the petitioner to find out the reasons applied for information under the Right to Information Act, 2005 from the District Collector/Land Acquisition Collector, Puri, from which it was revealed that clarifications in compliance to the audit objection were given by providing letters dated 09.01.2016, 21.03.2016, 02.04.2016 along with the expert opinion dated 27.2.2016 given by the Executive Engineer (R&B) Division, Puri.

2.6 The Government in the Revenue and Disaster Management Department vide its letter dated 28.04.2017 took a view that the solatium is only to be added to the compensation payable to any person whose land has been acquired, i.e., payment of solatium would arise only if the land of such affected person has been taken over for the purpose of the project and solatium can be given only to the land losers and not to otherwise affected persons. Basing upon such report of the Government, the District Collector/ Land Acquisition Collector, Puri vide notice dated 10.05.2017 directed that the amount of Rs.51,40,838/- paid towards solatium on the collateral damages of the property of the petitioner is not payable, as the audit has raised to that effect objection and, accordingly, the petitioner has to refund the aforesaid amount. Hence, this writ petition.

3. Mr. U.C. Mohanty, learned counsel appearing for the petitioner vehemently contended that without adhering to the provisions contained under Sections 26 to 37 of the Act, 2013, instructions issued by the Government in Revenue and Disaster Management Department, vide letter dated 28.04.2017,

cannot be sustained in the eye of law. More so, the direction for recovery of solatium, having been given without affording an opportunity of hearing to the petitioner, also cannot be sustained in the eye of law. Thereby, the Certificate Officer, without following the provisions of law as provided under the Odisha Public Demands Recovery Act, 1961 (for short "OPDR Act, 1961") and even without providing any opportunity of hearing to the petitioner, has passed an order in issuing the certificate directing the petitioner for deposit of the amount indicating therein that for non-payment of the same the property shall be attached and he will be arrested.

3.1 It is further contended that the Collector, while passing the award including determination of amount of compensation, has resorted to the provisions contained under Sections 26 and 27 of the Act, 2013, and parameters for the same clearly establish that the damage if any sustained by the person at the time of the Collector's taking possession of the land, by reason of the acquisition injuriously affecting his other property, movable or immovable, in any other manner, or his earnings etc. and the Collector shall determine the value of the things attached to the land or building by taking the services of the competent engineer or any other specialist in the relevant field, as may be considered necessary by him. Section-30 provides that the Collector, having determined the total compensation to be paid, shall to arrive at the final award impose a solatium amount equivalent to one hundred percent of the compensation amount, which itself establishes that whatever the compensation amount finally awarded shall be included equivalent amount to one hundred percent of the compensation amount.

3.2 It is further contended that by misinterpreting the explanation to Section-30, the letter dated 28.04.2017 followed by the notice dated 10.5.2017 were issued, which cannot be sustained in the eye of law. It is also contended that the direction of this Court contained in order dated 05.05.2016 passed in W.P.(C) No. 7690 of 2016 has not been complied with. Thereby, direction given for refund/recovery of Rs.51,40,838/- being arbitrary, illegal and contrary to the provisions of law, cannot sustain in the eye of law.

3.3 To substantiate his contention, learned counsel for the petitioner has placed reliance on the judgment of the ***apex Court in the case of RB*** Dealers Private Limited v. Metro Railway, Koltaka, AIR 2019 SC 3447.

4. Mr. S.N. Nayak, learned Additional Standing Counsel appearing for the State-opposite parties vehemently contended that decision of the Government dated 28.04.2017 disallowing the award of solatium and consequential notice dated 10.05.2017 calling upon the petitioner to refund Rs.51,40,838/- are well

justified. It is further contended that the schedule land had been acquired through bilateral negotiation and direct purchase process following the instructions communicated by the Govt. in Revenue and Disaster Management Department, vide letters dated 06.07.2013, 31.03.2014 and 07.02.2014, for the project "Widening of road around Shree Jagannath Temple, Puri", in view of Nabakalebar-2015. As per the provisions contained in the Act, 2013, the preliminary notification was issued under Section-11(1) and public objections under Section-15(1) were heard and thereafter final declaration under Section-19 of the Act, 2013 was made by the Government. Then, notices were issued to the petitioner and similarly placed land losers to ascertain the nature of their claim. Accordingly, hearing under Section-21 was conducted on 11.6.2015, on which date the petitioner along with other persons also submitted the required information/ documents relating to the nature of their claim, which were duly considered and disposed of. Then, compensation was determined following the provisions of Sections-26, 27, 28 &29 of Act, 2013. While determining total compensation amount, to arrive at final award, solatium was assessed at Rs.93,54,959/- which was equivalent to 100% of the compensation amount. The consideration amount, as determined by the Collector and communicated to the petitioner, was released to the account of the petitioner, which was opened in opposite party no.4's bank. But A. G. Audit, on verification of the payment position, raised objection to the payment of compensation in respect of the structures situated beyond acquired area with equivalent solatium amount. Taking into consideration the said objection, it was held that excess expenditure of Rs.2.26 crore has been made by way payment of compensation towards cost of buildings situated beyond the area of land acquired. It was also observed by checking 28 L.A. Case Records (19 direct purchase, and 9 through L.A. process), out of 53 case records, that transparency has not been maintained. Land had been acquired for public necessity due to Nabakalebar Festival, 2015. The process of land acquisition was completed just before the Nabakalebar, 2015 amidst non-cooperation, resistance and hefty demands for compensation by persons interested. As regards the discrepancy in the area of the structure, for which compensation has been paid, it was further explained to audit that the valuation of the structure can never be limited to the plinth area of the building, as the building standing on the area acquired had extended structures which were actually assets attached to the building and were injuriously affected by way of taking possession. It was further explained that once the building is dismantled, particularly in case of archaic buildings involved in the land acquisition process, it has to affect the very basic structure of the building where collateral damage was inevitable necessitating payment of compensation for such damaged area, consisting assets attached to the building. In support of such explanation, documentary evidence, such as, photographs, C.Ds. were also submitted to

audit. But such explanation was not accepted by the audit and steps were taken for refund of the solatium amount. Consequentially, no illegality or irregularity has been committed. Thereby, the writ petition has to be dismissed.

5. This Court heard Mr. U.C. Mohanty, learned counsel appearing for the petitioner and Mr. S.N. Nayak, learned Additional Standing Counsel appearing for the State opposite parties in hybrid mode and perused the records. Pleadings have been exchanged between the parties, with the consent of learned Counsel for the parties the writ petition is being disposed of finally at the stage of admission.

6. The sole question that arises for consideration before this Court, on the basis of the pleadings available on record, is that whether determination for payment of compensation including the solatium can be made in terms of the provisions contained in the Act, 2013 or not, and if so, whether the instructions issued by the Revenue and Disaster Management Department dated 28.04.2017 for refund of the amount of solatium already paid is well justified or not.

7. It is the admitted fact that the land and the building standing thereon were acquired under the Act, 2013 in the greater public interest of widening the road around Shree Jagannath Temple, Puri in view of Nabakalebar-2015. Thus, acquisition having been made by following the due procedure prescribed under the Act, 2013, the amount of compensation was paid to the petitioner by depositing the same with the opposite party no.4-bank, which maintains the account of the petitioner. But due to audit objection, now direction has been given for refund of such amount which had been deposited towards solatium. Several clarifications have been made, as mentioned above, that the petitioner is not entitled to get solatium and, therefore, liable to refund the amount paid to him, in view of the audit report. It is not in dispute that without giving any opportunity to the petitioner and without complying with the principles of natural justice, all of a sudden the District Magistrate-cum-Collector, Puri issued direction on 10.05.2017 to opposite party no.4, i.e., the Axis Bank not to disburse the amount to the petitioner. Consequentially, the account of the petitioner has been ceased/freezed and not made operational depriving the petitioner to avail the benefit granted to him. If the audit has made some objection for payment of solatium, there is no valid and justifiable reason not to give opportunity of hearing to the petitioner before issuance of any instruction to opposite party no.4 to cease/freeze the account. Furthermore, if it is the admitted fact that the land and building standing thereon had been acquired and due compensation was paid to the petitioner including solatium, in that case, merely because an objection was raised by the audit, instructions cannot be issued by the

Government for refund of the solatium already paid to the petitioner, contrary to the provisions of law as envisaged under the Act, 2013.

8. Before delving into the question posed, it is necessary to examine the meaning of 'solatium' as defined in various English dictionaries.

In ***Chambers Dictionary***, the word 'solatium' has been defined to mean compensation for disappointment, inconvenience wounded feelings.

According to ***Cambridge Dictionary***, 'solatium' means something, for example money, that is given to someone to make them feel better when they have suffered in some way.

In ***Collins English Dictionary***, the word 'solatium' means compensation awarded to a party for injury to the feelings as distinct from physical suffering and pecuniary loss.

8.1 In ***March v. City of Frankston***, (1969) VR 350, while considering Section 26 of Valuation of Land Act, 1960, as amended by the Valuation of Land (Appeals) Act, 1965, it was held as follows:-

> *"'Solatium' is an expression apt to describe an award of some amount to cover inconvenience and, in a proper case, distress caused by compulsory taking. It is quite inapt to describe an amount awarded for provable loss to which the claimant is entitled."*

8.2 In ***Narain Das Jain v. Agra Nagar Mahapalika***, (1991) 4 SCC 212, the apex Court held has follows:-

> *"Solatium' is a 'money comfort' qualified by the statute and given as a conciliatory measure for the compulsory acquisition of land of the citizen, by a welfare state such as India."*
>
> It was further clarified as follows:-
>
> *"Solatium' is a 'money comfort' qualified by the statute and given as a conciliatory measure for the compulsory acquisition of land of the citizen, by a welfare state such as ours."*

The above view has also been taken by the apex Court in ***Panna Lal Ghosh v. Land Acquisition Collector***, (2004) 1 SCC 467.

9. Taking into account the above meaning attached to the word 'solatium', the inevitable conclusion is that it is in the nature of compensation especially damages for sorrow mental agony or wounded feeling. In other words, it is consolation, compensation and sentimental damages paid to a party whose land

has been acquired. It can also be explained that sum paid to an injured party over and above actual damages by way of solace to his wounded feeling.

10. Therefore, there is no iota of doubt that the petitioner's land and the building standing thereon, which was situated adjacent to Shree Shree Jagannath Temple, having been acquired, there must be injuries to the feelings and sentiments of the petitioner. As a consequence thereof, solatium was paid, along with the compensation amount, by depositing the same in the account of the petitioner with opposite party no.4. After having deposited the amount, the opposite parties no. 2 and 3 should not have issued instructions to opposite party no.4-bank with regard to cessation of the bank account causing undue hardship to the petitioner.

11. It is of relevance to note that the authorities have determined the compensation as per the provisions contained under Sections-26, 27, 28 and 29 of the Act 2013 and solatium at the rate of 100% over the total compensation amount determined and payable under Section-30(3) of the Act, 2013. The determination of the final award shall be different than that of the determination of amount of compensation. The amount of compensation is one part of the final award. But there are three components, namely, the compensation amount plus additional amount calculated @ 12% per annum as per Section-30(3) of the Act, 2013 and solatium as per Section-30(3) of the Act, 2013. Therefore, if the amount has been determined and solatium has been paid, as contemplated under Sub-section (1) of Section-30 of the Act, 2013 and the same has been calculated only on the market value of the land, i.e., total compensation amount as determined under Sections-26, 27 and 28 of the Act, 2013. Therefore, the question of refund of such amount by issuing administrative instructions by the Department of Revenue and Disaster Management cannot sustain in the eye of law.

12. In ***R.B. Dealers*** (supra), the apex Court, referring to the provisions of law as provided under Sections-26 to 30 and Section-69(3) of the Act, 2013, held that before the final award is passed by the Collector, the Collector has to determine the market value of the land as provided under Section-26 of the Act and as per Section-27 read with the parameters of Section-28 and the determination of the value of the things attached to the land or building shall be as per Section-29 of the Act, 2013. The Collector, while passing the final award as per Sections-26, 27 and 28, has to award a solatium amount equivalent to 100% of the compensation amount as per Sections-29 and 30 of the Act, 2013. The land owners, whose lands have been acquired, are also entitled to, in addition to the market value of the land, an additional amount @ 12% as per Section-30(3) of the Act, 2013.

13. In view of the aforesaid law laid down by the apex Court, the determination of the amount of compensation made by the Collector and the Land Acquisition Officer towards acquisition of the land and building standing thereon and payment made to the petitioner, is well justified and, as such, the same has attained its finality as per Section-37 of the Act, 2013. Merely because an audit objection was raised, the authorities have directed not to operate the bank account and that itself cannot sustain in absence of compliance of due procedure of law and principles of natural justice. It is well settled law, as laid down by the apex Court time and again, that mere objection raised by audit cannot form foundation for recovery or stoppage of money in absence of any proper inquiry as per law.

14. The basic principle behind the audit report cannot be used as a substantive evidence of the genuineness of the bona fide nature of the transaction referred to in the accounts. Audit is official examination of the accounts in order to make sure that the accounts have been properly maintained according to the prescribed mode. Audit report is a statement of facts pertaining to the maintenance of accounts coupled with the opening of the auditor in respect thereto based on those facts. Therefore, that cannot be a ground for issuance of instructions to the bank not to allow the petitioner to operate its account. If the petitioner is otherwise entitled to get the solatium as per the provisions contained under Section-30(3) of the Act, 2013 and the same has been paid in due adherence to the provisions of law, that cannot be recovered or refunded on the basis of the instructions issued by the Revenue and Disaster Management Department, vide letter dated 28.04.2017, that too on the basis of the audit conducted by the authorities.

15. It is well settled principle of law laid down by the Privy Council and the apex Court that if the statute prescribes a thing to be done in a particular manner the same should be done in that manner or not at all.

In ***Taylor v. Taylor***, (1876) 1 Ch D 426, it was laid down that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden. This doctrine has often been applied to Courts.

In ***Nazir Ahmed v. King Emperor***, AIR 1936 PC 253, law is well settled "where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden."

In ***Commissioner of Police, Bombay v. GordhandasBhanji***, AIR 1952 SC 16, the apex Court held as follows:-

> *"Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.*

Similar view has also been taken by the apex Court in ***J&K Housing Board v. Kanwar Sanjay KrishanKaul***, (2011) 10 SCC 714.

In ***State of Rajasthan v. JagdishNarain Chaturvedi***, (2009) 12 SCC 49, the apex Court held that in case of conflict between the statutory rules and administrative instructions, the former shall prevail. No administrative instructions can override statutory rules.

In ***Joint Action Committee of Airlines Pilots Associations of India v. Director General of Civil Aviation***, (2011) 5 SCC 435, the apex Court held that the executive instructions are issued for guidance and to implement the scheme of the Act and do not have the force of law, can be issued by the competent authority and altered, replaced and substituted at any time.

In ***K.H. Siraj v. High Court of Keral***, (2006) 6 SCC 395, the apex Court held that executive instructions can always supplement the rules which may not deal every aspect of a matter.

In view of the above, the administrative instructions/executive instructions issued by the Revenue and Disaster Management Department dated 28.04.2017 are contrary to the statutory provisions contained under Sections 26, 27, 28, 29 and 30 of the Act, 2013 and thus cannot sustain in the eye of law.

16. Considering from other angle, due to restrictions imposed for operation of the account of the petitioner, undue hardship has been caused. On the one hand, the land and building, where the petitioner was residing, was acquired and demolished which made him homeless, and on the other hand, instructions have been issued to the bank not to allow the petitioner to operate the bank account on flimsy ground, which gravely affects the petitioner's right to live, as enshrined under Article 21 of the Constitution of India.

17. In ***Narendra Kumar v State of Haryana***, (1994) 4 SCC 460: AIR 1995 SC 519, the apex Court held that right to livelihood is an integral facet of the right to life.

18. In ***Francis CarlieMullian v. Administrator, Union Territory of Delhi***, AIR 1981 SC 746 : (1981) 1 SCC 608, the apex Court held that every citizen has a right to live with human dignity.

19. In ***Menaka Gandhi v. Union of India***, (1978) 1 SCC 248 : AIR 1978 SC 597, the apex Court held that Article 21, if read literally, is a colourless article and would be satisfied, the moment it is established by the State that there is a law which provides a procedure which has been followed by the impugned action. But the expression 'procedure established by law' in Article 21 has been judicially construed as meaning a procedure which is reasonable, fair and just.

20. The term 'life' used in Article 21 of the Constitution of India has a wide and far reaching concept. In Board of Trustees of the ***Port of Bombay v. Dilipkumar Raghavendranath Nadkarni***, (1983) 1 SCC 124: AIR 1983 SC 109, the apex Court held that life means something more than mere animal existence and the inhibition against the deprivation of life extends to all those limits and faculties by which life is enjoyed.

21. In ***Chameli Singh v. State of Uttar Pradesh***, (1996) 2 SCC 549 : AIR 1996 SC 1051, the apex Court held that right to life means to live like a human being and it is not ensured by meeting only the animal needs of man. It includes right to live in any civilized society implies the right to food, water, decent environment, education, medical care and shelter. It is further held that right to shelter when used as an essential requisite to the right to live should be deemed to have been guaranteed as a fundamental right. As it enjoined in the directive principles, the State should be deemed to be under an obligation to secure it for its citizens.

22. In P***.G. Gupta v. State of Gujarat***, 1995 Supp (2) SCC 182, the right to shelter has also been defined by the apex Court.

23. Therefore, taking into consideration the very purpose behind Article 21 and applying the same to the present context, it is amply clear that once the compensation amount has been determined and awarded to the petitioner in accordance with the Act, 2013, subsequent thereto, on the basis of audit objection, so far as solatium part is concerned, the opposite parties cannot ask for refund of the same. That by itself forms part of the award amount as per provisions contained in Section-30(3) of Act, 2013. More so, the meaning attached to the word 'solatium', as discussed above, is crystal clear. For generation to generation the petitioner had been residing adjacent to Shree Shree Jagannath Temple. The land and building standing thereon was acquired for the greater public interest. Thereby, while parting with the land as well as the building, the emotion, the sensitiveness, the thoughts of the petitioner attached to that place has been injured. The same was assessed in terms of money and paid to the petitioner towards solatium. Therefore, under no circumstance, the State has got any right to recover such solatium awarded in favour of the petitioner

and, as such, the consequential direction so given not to operate the bank account cannot also sustain. Thereby, the impugned decision dated 28.04.2017 taken by the Government under Anenxure7 disallowing the award of solatium, being violative of Section- 30(3) of the Act, 2013, and the consequential notice issued on 10.05.2017 vide Anenxure-8 by opposite party no.3, by order of opposite party no.2, to refund the solatium amount, cannot sustain, as the same are contrary to the provisions contained under Sections-26 to 30 of the Act, 2013. As a consequence thereof, the said orders are hereby quashed and the opposite parties are hereby directed to allow the petitioner forthwith to operate its Axis Bank Account No. 915010019215714 through its authorized representative.

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

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**2023 (I) ILR - CUT-124**

**Dr. B.R. SARANGI, J & B.P. SATAPATHY, J.**

W.P(C) NO. 22291 OF 2022

**AF ENTERPRISES LTD.,NEW DELHI** .....Petitioner

.V.

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

**TENDER – Tender call notice specifically stipulated that bids cannot be submitted after due date and time – Opposite party no.4 had not submitted the bid within stipulated time – Effect of – Held, "time is essence of a contract" and if the same is not adhered to, then the contract cannot be sustained in the eye of law, an essential condition of a tender has to be strictly complied with – The bid has to be finalized amongst the remaining bidders, without taking into consideration of the bid of opposite party no.4.** (Para 10-14)

**Case Laws Relied on and Referred to** :-

1. (2016) 8 SCC 446 : Bakshi Security and Personnel Services Private Limited Vs. Devkishan Computed Private Limited & Ors.
2. Special Leave to Appeal (C) No.37479 of 2016: Durgawati Devi Vs. Union of India through its Secretary.
3. AIR 1992 Orissa 221 : Radhamohan Patra Vs. State of Orissa & Ors.
4. (2009) 11 SCC 9 : Sorath Builders Vs. Shreejikrupa Buildcon Limited & Anr.
5. (1917) 1 KB 486 : R. Vs. Kensington, Income Tax Commissioner.
6. AIR 1977 SC 781 : State of Haryana Vs. Karnal Distillery.

7. AIR 1994 SC 579 : Chancellor Vs. Bijayananda Kar.
8. 2018 (II) OLR 436 : Netrananda Mishra Vs. State of Orissa.

For Petitioner : M/s. Pami Rath, J. Mohanty, S. Gumansingh, B. Thakur and S. Mohanty

For Opp. Parties : Mr. P.P. Mohanty, AGA.
M/s. B.P. Tripathy, R. Achary and N. Barik [O.P.No.2]
Mr. J. Sahoo, Sr. Adv., M/s. K. Sahoo, R. Ghosh and C. Das [O.Ps.4 & 5]

JUDGMENT Decided On : 12.12.2022

***Dr. B.R. SARANGI, J.***

AF Enterprises Limited, New Delhi, a company registered under the Companies Act, 1956, has filed this writ petition seeking to quash the order dated 25.08.2022 under Annexure-8, by which the Director, Horticulture-cum-Ex-Officio Additional Secretary to Govt., Agriculture & F.E. Department has directed the tender committee to entertain opposite party no.4 as regards consideration of its bid, which was otherwise denied on the strength of clause-2(h) of the tender bid identification no.MD/OAIC-5(A&I)/2022-23, in compliance of the order dated 15.07.2022 passed by this Court in W.P.(C) No.17557 of 2022, and further to issue direction the opposite party-authorities not to consider the bid of opposite party no.4 in pursuance of the tender call notice dated 20.06.2022 under Annexure-1.

2. Briefly stated, the facts of the case are as follows:-

2.1. Opposite party no.2-Odisha Agro Industries Corporation (OAIC) issued a tender call notice on 20.06.2022 inviting bids from the eligible and approved manufacturers for "Supply of Plastic Crates (Fruits and Vegetables Crates)" of approximate 5 lakhs quantity, vide Bid Identification No.MD/OAIC-3(E&I)/2020-21, on the basis of e-tender procurement in two cover system. As per the tender call notice, the bidder should have the necessary portal enrolment with his own digital signature certificate of Class-II or Class-III from any authorized certifying authorities. The bid documents were to be available in the latest active tender section of the website from 10 AM of 21.06.2022 to 5 PM of 11.07.2022 for online bidding only. For information regarding operation of e-tendering procedure mode was prescribed therein.

2.2. Under clause-9 of the Instruction to Bidder, it was specifically stipulated that bids cannot be submitted after due date and time. The materials to be supplied had specific criteria to be met as regards to capacity, size density and toleration requirement. Thus sample submission becomes the most important

determining factor in the technical evaluation of the bidders. Under the Notes to the tender call notice, clause (f) provides that certain tests are to be conducted for quality assurance before delivering the stock to farmers. Keeping that in view, sample of the product proposed to be supplied by each of bidders was to be scrutinized in the technical bid process. Clause-2(h) of the bid documents requires that each bidder has to submit 2 crates as sample. The sample was to reach the office of opposite party no.2 on or before 12.07.2022 by 2 PM, as because the technical bid opening process was scheduled to 3 PM of 12.07.2022. The manner of submission of sample was through Indian Postal Service, courier and special messenger. In compliance of the tender call notice, the petitioner submitted its technical bid and financial bid, so also its sample as per clause2 (h) of the bid documents, along with a covering letter, which were received on 11.07.2022.

2.3. Pursuant to the tender call notice under Annexure-1, six bidders, including the petitioner, submitted their technical and financial bids. The last date and time of sample submission was 12.07.2022 by 2 PM. However, opposite party no.4 could not submit its sample in due time, which was objected to by the petitioner by making a complaint through e-mail, wherein it was clearly stated that opposite party no.4 had not submitted the sample within due time and thus its sample should not be accepted. The said complaint was received at 2.36 PM of 12.07.2022. At 3 PM when technical committee sat for opening of technical bid, it took a decision that the bid of opposite party no.4 cannot be considered due to non-submission of sample in time as per clause-2(h). The said proceeding is also accompanied with an attendance sheet containing the name of the bidders from which it is evident that no representative of opposite party was present.

2.4. Challenging the above decision of the technical committee, opposite party no.4 approached this Court by filing W.P.(C) No.17557 of 2022 with a prayer to quash the decision of the technical committee in rejecting its bid and allow it to participate in the tender process and this Court, on 15.07.2022, disposed of the said writ petition by passing order to the following effect:-

> *"After advancing some arguments, it is contended that Clause-14 of the tender document provides for redressal of this type of dispute through Dispute Redressal Forum and, therefore, the Petitioner may be permitted to approach the Director, Horticulture in accordance with law. As such, it is contended that the Petitioner has already approached the said Authority on 12.07.2022 by filing representation, which is at page-38 of the Writ Petition. Therefore, direction may be given to consider the same and pass appropriate Order in accordance with law.*
>
> *5. Having heard learned Counsel for the Petitioner and after going through the records, this Writ Petition stands disposed of directing Director, Horticulture, to dispose of the*

> *representation filed by the Petitioner adhering to the condition stipulated in the tender document and pass appropriate Order, as expeditiously as possible, preferably within a period of six weeks from the date of production of certified copy of this Order".*

In compliance of the said order, opposite party no.3 considered the representation of the petitioner and passed impugned order dated 25.08.2022 directing the tender committee to consider the bid of opposite party no.4. Hence, this writ petition.

3. Mrs. Pami Rath, learned counsel appearing for the petitioner vehemently contended that opposite party no.4, having not adhered to the conditions stipulated in the tender documents, by not submitting the sample within the time specified, i.e. before 2 PM of 12.07.2022, its bid was rightly rejected by the technical evaluation committee. But, without bringing this fact to the notice of this Court, opposite party no.4 filed W.P.(C) No.17557 of 2022 and made an innocuous prayer for disposal of its representation, which was allowed. Since opposite party no.4 had not approached this Court with clean hands and had suppressed the material facts, it was not entitled to get the relief, as granted by this Court. It is further contended that the impugned order dated 25.08.2022 passed by opposite party no.3, in pursuance of order dated 15.07.2022 passed in W.P.(C) No.17557 of 2022, suffers from gross material irregularities, in view of the fact that though opposite party no.3 has recorded the deposition of the officers of opposite party no.2, namely, Manas Moharana (Junior Accountant-cum DEO), Aradhana Mohanty (JEE) and Satyabrata Sahoo (Project Manager), but none of the materials and depositions have been discussed in the said order, which amounts to non-application of mind. It is further contended that there is no evidence on record to show that opposite party no.4 had actually made any representation on 12.07.2022, as averred in earlier W.P.(C) No. 17557 of 2022. It is further contended that time being the essence of the contract, if clause-2(h) of the bid documents clearly indicates that 2 crates as samples should be placed before the authority by 2 PM of 12.07.2022 and if the same was not adhered to by opposite party no.4, the authority was well justified in rejecting the technical bid of opposite party no.4 and, therefore, no fault can be found with authority. Thereby, the order impugned dated 25.08.2022 suffers from gross material irregularities which requires interference of this Court at this stage.

3.1 To substantiate her contentions, learned counsel for the petitioner has relied upon ***Bakshi Security and Personnel Services Private Limited v. Devkishan Computed Private Limited and others***, (2016) 8 SCC 446; ***Durgawati Devi v. Union of India through its Secretary, Ministry &Ors***., Special Leave to Appeal (C) No.37479 of 2016 disposed of on 04.10.2019; ***Radhamohan Patra v. State of Orissa & Ors***, AIR 1992 Orissa 221 and ***Sorath Builders v. Shreejikrupa Buildcon Limited and another***, (2009) 11 SCC 9.

4. Mr. P.P. Mohanty, learned Additional Government Advocate appearing for the State-opposite parties no.1 & 3 contended that the representative officer of OAIC, namely, Miss Aradhana Mohanty, JE, who was looking after collection of sample, vide her deposition dated 22.08.2022, had specifically stated that opposite party no.4-LM Plastic Pvt. Ltd. had provided the sample at 2.40 PM of 12.07.2022. Since opposite party No.4 had submitted the sample beyond the time stipulated in the tender documents, the same was not accepted. It is further contended that the order dated 25.08.2022 has been passed by opposite party no.3 in compliance of the order dated 15.07.2022 passed in W.P.(C) No. 17557 of 2022. Thereby, no illegality or irregularity has been committed by the authority.

5. Mr. B.P. Tripathy, learned counsel appearing for opposite party no.2 admitted the fact that the OAIC had floated e-tender on behalf of the Government of Odisha on 21.06.2022 for supply of five lakh numbers of plastic crates for fruits and vegetables in two cover system from eligible manufacturers. The last date of submission of online bid was 11.07.2022 at 5.00 PM and the technical bid of the tender was opened on 12.07.2022 at 3.00 PM. It is further contended that clause-2(h) of the tender documents clearly states that each bidder has to submit 2 crates as samples (as per the specifications given in Detailed Tender Call Notice (DTCN) by post of Indian Postal Service or courier or through special messenger in the office of the OAIC on or before 12.07.2022 at 2.00 PM. It is also contended that OAIC is not to be responsible for any postal or through special messenger delay whatsoever for receipt of plastic crates. The tender evaluation committee met on 12.07.2022 at 3.00 PM for opening of technical bid for procurement of plastic crates. It was found that 6 nos. of manufacturers had submitted their bids by online mode, out of which 5 bidders were qualified after opening of their technical bid. Amongst 6 bidders, opposite party no.4-L.M. Plastics had not submitted 2 nos. of sample crate within the stipulated time period as per clause-2(h) of bid documents, for which its bid was not considered by the tender evaluation committee. Therefore, opposite party no.4 approached this Court by filing W.P.(C) No.17557 of 2022 challenging the rejection of its bid and this Court, vide order dated 15.07.2022, disposed of the said writ petition directing opposite party no.3 to dispose of the representation. In compliance of the same, opposite party no.3, vide letter/order dated 25.08.2022, directed the tender committee to entertain opposite party no.4 as regards consideration of its bid, which was otherwise denied on the strength of clause2(h) of the tender Bid Identification No.MD/OAIC5(A&I)/2022-23, and communicated to opposite party no.4. Challenging the said order, the petitioner has approached this Court by filing this writ petition.

6. Mr. J. Sahoo, learned Senior Counsel appearing along with Ms. Kajal Sahoo, learned counsel for opposite parties no.4 & 5, while reiterating the contentions raised by other opposite parties, admitted that opposite party no.4 had not submitted sample crates, as required under clause-2(h) of the tender documents. Therefore, it made representation to the authority and the same having not been considered, it approached this Court by filing W.P.(C) No.17557 of 2022. This Court considered its grievance and directed opposite party no.3 to consider the representation of opposite party no.4. As a consequence thereof, opposite party no.3 passed the impugned order dated 25.08.2022. Thereby, no illegality or irregularity has been committed by the authority so as to cause interference of this Court.

7. This Court heard Mrs. Pami Rath, learned counsel appearing for the petitioner; Mr. P.P. Mohanty, learned Additional Government Advocate appearing for the State-opposite parties no.1 & 3; Mr. B.P. Tripathy, learned counsel appearing for opposite party no.2 and Mr. J. Sahoo, learned Senior Counsel appearing along with Ms. Kajal Sahoo, learned counsel for opposite parties no.4 & 5 in hybrid mode. Pleadings have been exchanged between the parties, with the consent of learned counsel for the parties the writ petition is being disposed of finally at the stage of admission.

8. For just and proper adjudication of the case, the relevant clauses of tender documents are quoted below:-

> *"8. Bidders are to submit only the original BoQ (in .XIS format) uploaded by Officer Inviting Tender after entering the relevant fields without any alteration/deletion/ modification. Multiple BoQ submission by bidder shall lead to cancellation of bid. In case of item rate tender, bidders shall fill in their rates other than zero value in the specified cells without keeping it blank.*
>
> *9. Bids cannot be submitted after due date and time. The Bidder should ensure correctness of the bid prior to uploading and take print out of the system generated summary of submission to confirm successful uploading of bid. -The bids cannot be opened even by the OIT or the Procurement Officer Publisher/ opener before the due date and time of opening."*

8.1 Sub-clause (h) of Clause-2 of the Instructions to Bidders, which provides the eligibility criteria to qualify for award of the contract, reads as follows:-

> *"2(h) Each bidder has to be submit 2 crates as samples (as per the specifications given in detailed Tender Call Notice (DTCN by post of Indian Postal Service or courier or through special Manager in the office of the Odisha agro Industries Corporation Ltd., 95- Satyanagar, Bhubaneswar, 751007 on or beforedt.12.07.2022 at 2.00 Pm. The OAIC office shall not be responsible for any postal or through special messenger delay whatsoever for receipt of plastic crates".*

8.2 The e-mail dated 12.07.2022 sent by the petitioner, being relevant for the purpose of the case, is extracted hereunder:-

> *"Dear Sir/Madam,*
>
> *Refer to Corrigendum vide No. M.D./OAIC5(A&1)/2022-23, as perTender conditions OEM as bidder must have to furnish BIS certified sample before 2 pm on 12th of July 2022.*
>
> *However as we observed till 2.10.P.M no sample was being furnished by one of the Bidder by name M/S L.M Plastics."*

8.3 The proceedings of opening of technical bids for procurement of plastic crates dated 12.07.2022, being relevant for an effective adjudication of the case, are extracted here-in-below:-

> *"As per the schedule, the meeting of internal purchase committee is held on dated 12.07.2022 at 3.P.M. in Conference Hall of the Head Office for opening of technical bid for procurement of plastic crates. The members present in the meeting is at Annexure-A.*
>
> *It is found that 6 manufacturers (Annexure-B) have submitted bidding documents in online, out of which 5 bids are qualified to be opened. The bid of M/S LM plastic is not considered due to non-submission of samples in time n per clause 2(h) of the tender bid identification No- M.D/OAIC-5(A&I)/2022-23."*

9. In view of the rival contentions raised by learned counsel for the parties, this Court is not inclined to enter into the controversy as to whether or not opposite party no.4 had filed representation before opposite party no.3, as because the same has become academic, in view of the fact that if opposite party no.4 has not adhered to the terms and conditions of the bid documents, then question of allowing opposite party no.4 to participate in the bid on the strength of representation does not arise.

10. Learned counsel appearing for the parties unequivocally contended that opposite party no.4 had not submitted the sample crates as per clause-2(h) of the tender documents by 2.00 PM of 12.07.2022. On the basis of admission of all the parties, that opposite party no.4 had not adhered to the conditions stipulated in the tender documents, the subsequent direction given by the Director, Horticulture, vide order dated 25.08.2022, to frustrate the conditions of the bid documents, cannot sustain. It is well settled by the apex Court time and again that "time is essence of a contract" and if the same is not adhered to, then the contract cannot be sustained in the eye of law. When clause-2(h) of the Instructions to Bidders specifically requires that to qualify for award of the contract a bidder has to submit 2 crates as samples, as per the specifications given in the Detailed Tender Call Notice (DTCN), by post of Indian Postal Service or courier or through special messenger in the office of the OAIC on or before 12.07.2022 at 2.00 PM, the opposite party no.4, having failed to do so,

has violated such condition and, as such, it was not technically qualified. As a consequence thereof, in the proceedings of theopening of the technical bid for procurement of plastic creates dated 12.07.2022, the tender committee recorded that six manufacturers had submitted their bids through online basis, out of which five bidders were qualified for opening of their technical bids, but the technical bid of opposite party no.4 was rejected due to non-submission of sample in time. Thereby, the reasons assigned for rejection of technical bid of opposite party no.4 is well justified, which cannot be interfered with, as conditions stipulated in the bid documents are sacrosanct and non-compliance thereof cannot entitle opposite party no.4 to participate in the bid process. Therefore, the impugned order dated 25.08.2022 under Annexure-8 passed by opposite party no.3-Director of Horticulture cannot be sustained in the eye of law, as the same is arbitrary, unreasonable and contrary to the provisions of law and also suffers from complete non-application of mind.

11. In ***Bakshi Security and Personnel Services Private Limited*** (supra), the apex Court in paragraphs14 & 15 of the judgment held as follow:-

> "*14.The law is settled that an essential condition of a tender has to be strictly complied with. In* ***Poddar Steel Corpn, v. Ganesh Engg. Works****,(1991) 3 SCC 273, this Court held as under: (SCC p. 276, para 6)*
>
> *"6. ... The requirements in a tender notice can be classified into two categories—those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases."*
>
> *15. Similarly in* ***B.S.N. Joshi & Sons Ltd v. Nair Coal Services Ltd****., (2006) 11 SCC 548 this Court held as under: (SCC pp. 571-72, para 66)*
>
> *"(i)if there are essential conditions, the same must be adhered to.*
>
> *xxx xxx xxx"*

12. In ***Durgawati Devi*** (supra), the apex Court vide order dated 04.10.2019 passed in Special Leave Petition (C) No. 37479 of 2016 observed as follows:-

> *"Admittedly, as on the last date for submission of applications in terms of the advertisement referred to above, the petitioner did not own land as required. The petitioner only had an agreement for sale in her favour. It is well-settled that execution of a sale agreement does not transfer ownership/title. Ownership can only be acquired by a registered deed of conveyance. The petitioner was not eligible as on the last date for submission of applications.*
>
> *Counsel appearing on behalf of the petitioner strenuously contended that a deed of conveyance has since been executed and the petitioner is now the owner of the land. However, it is not disputed that as on the relevant date, that is the last date for submission of applications, the petitioner was not the owner of the land.*

*The High Court cannot, and rightly did not, in exercise of power under Article 226 of the Constitution of India, relax the terms and conditions of a tender notice".*

13. In ***Radhamohan Patra*** (supra), this Court in paragraph-7 of the judgment held as follows:

*"7. xxxxx The object of calling for tender is giving an opportunity to the rival competitors in the trade to give their offer in respect of the work in question, one not knowing the offer of the other so that the competent authority will take a final decision with regard to the acceptance of any one of them. In this view of the matter, to consider the offer of a tenderer who did not give the offer of a tenderer who did not give the offer of a tenderer who did not give the offer within the time on the ground that the said offer is lower than the rate accepted by the competent authority would obviously frustrate the sanctity and object of the tender call system".*

14. In ***Sorath Builders*** (supra), the apex Court in paragraph-27 of the judgment held as follows:

*"27. Following the aforesaid legal Principles laid down by this Court, we are of the considered opinion that Respondent 1 was negligent and was not sincere in submitting his pre-qualification documents within the time schedule laid down despite the fact that he had information that there is a time schedule attached to the notice inviting tenders. Despite being aware of the said stipulation he did not submit the required documents within the stipulated date. Prequalification documents were received by Respondent 2 University only after the time schedule was over. The terms and conditions of the tender as held by the Supreme Court are required to be adhered to strictly, and therefore, Respondent 2 University was justified in not opening the tender submitted by Respondent 1 on 1-12-2008, which was late by three days. According to us no grievance could also be made by Respondent 1 as lapse was due to his own fault".*

15. Therefore, submission of sample crates as per clause-2(h) of the tender documents by 2 PM of 12.07.2022, being an essential condition, the same must be adhered to. Consequentially, the authority issuing tender is required to enforce it rigidly. The terms and conditions of tender are required to be adhered to strictly, resultantly the bid of opposite party no.4 cannot be opened.

16. It is of relevance to note that opposite party no.4, by filing W.P.(C) No.17557 of 2022, had not approached this Court with clean hands. In the said writ petition, though opposite party no.4 sought for quashing of the order of rejection of its bid and permission to participate in the tender process, but did not disclose the fact that it had not submitted the sample crates within the time stipulated and, on the contrary, in paragraph-9 of the said writ petition it had pleaded that even though its representative was sitting in the office of opposite party no.1 since 12.30 PM on 12.07.2022, as per the tender conditions, but opposite party no.3, who is not an authority as per the bid documents, denied to collect opposite party no.4's samples, whereas the samples of various other bidders were collected in front of the representative of opposite party no.4. Such

a stand is hardly believable and cannot be accepted by any prudent person, as because in terms of the tender notice the sample was to be submitted by 2 PM and, as such, it is not understood why representative of opposite party no.4 was sitting with samples in the office of opposite party no.1 from 12.30 PM without producing the same before the authority concerned.

17. Be that as it may, in pursuance of order dated 15.07.2022 passed by this Court in W.P.(C) No.17557 of 2022, opposite party no.3 considered the representation of opposite party no.4 and passed the impugned order dated 25.08.2022. While passing the order impugned, the materials which were produced before the Director of Horticulture-opposite party no.3, as is revealed from the order impugned, were to the following effect:-

> *"And whereas, MD, OAIC has provided the photo copies of tender call notice and tender document, photo copies of sample receipts of 5 manufacturers except the receipt of the - petitioner's sample and the proceeding of the tender committee dated 12.8.2022 against the array of document / information asked for as mentioned herein above."*

Though the Director of Horticulture-opposite party no.3 recorded, as above, but assigned the reasons that the substance of material evidences procured during deposition is not just enough to stand with the principle of fair play, and the procedure and process practiced for receipt and verification of sample does provide sufficient trigger for sprouting of doubt. This clearly indicates that the Director of Horticulture-opposite party no.3 has not applied his mind properly and, more so, has not examined the grievance of opposite party no.4 with reference to the tender conditions and passed such order arbitrarily and unreasonably. Since opposite party no.4 had not approached this Court with clean hands and suppressed the material facts, it is not entitled to get any relief.

18. In ***R. v. Kensington, Income Tax Commissioner,*** *(1917) 1 KB 486* at page 506, it was held as follows:-

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

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

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

21. In the judgment rendered in ***Netrananda Mishra v. State of Orissa,*** *2018 (II) OLR 436*, in which one of us (Dr. Justice B.R. Sarangi) was a Member, this Court, at paragraph-26 of the said judgment, held as under:-

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

In view of the above, as opposite party no.4 had not approached this Court with clean hands, the writ petition at its behest ought not to have been entertained.

22. In view of the facts and law, as discussed above, it is made clear that since essential conditions of the tender documents are to be complied with and opposite party no.4 has not adhered to clause-2(h) of the bid documents, subsequently, on consideration of its representation, in pursuance of the orders of this Court, by virtue of the impugned order dated 25.08.2022, cannot take the advantage of inclusion of its bid to participate in the tender process and, as such, the order impugned so passed on 25.08.2022 by the Director of Horticulture-opposite party no.3, being in gross violation of the conditions stipulated in the tender conditions, cannot sustain in the eye of law. As such, the Director of Horticulture-opposite party no.3 has acted in excess of his jurisdiction in order to show favour to opposite party no.4.

23. In view of the aforesaid facts and circumstances, this Court is of the considered view that the order dated 25.08.2022 passed by the Director of Horticulture-opposite party no.3 in allowing opposite party no.4 to participate in the tender process cannot be sustained in the eye of law, as in terms of the tender conditions, which are sacrosanct, opposite party no.4 was the defaulter, due to non-compliance of clause-2(h) of the DTCN, in not submitting the samples by 2 PM of 12.07.2022. Thereby, without considering the same, the direction so given by the Director of Horticulture opposite party no.3 in the impugned order dated 25.08.2022 under Annexure-8 is liable to be quashed and is hereby quashed. Consequentially, the bid has to be finalized amongst the remaining bidders, without taking into consideration the bid of opposite party no.4.

24. While parting with the case, this Court deem sit proper to observe that henceforth while dealing with the tender matter, the Director of Horticulture-opposite party no.3 shall see that any of the tender conditions is not lost sight of.

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

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**2023 (I) ILR - CUT-135**

**ARINDAM SINHA, J & SANJAY KUMAR MISHRA, J.**

W.P.(C) NO. 32377 OF 2020

**PROJECT OFFR. BHARATPUR OPEN CAST PROJECT OF MAHANADI COALFIELDS LTD.** .....Petitioner

.V.

**DARSANI KUMAR SAHOO & ANR.** .....Opp. Parties

**CONSTITUTION OF INDIA, 1950 – Articles 226, 227 – Writ of Certiorari – Whether finding of facts recorded by the Tribunal can be challenged in proceeding under Writ of Certiorari on the ground that the relevant material adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding? – Held, No – Such contention cannot be agitated before the writ Court, the finding are within the exclusive jurisdiction of the Tribunal.**

**Case Law Relied on and Referred to** :-

1. AIR 1964 SC 477: Syed Yakoob Vs. Radhakrishnan

For Petitioner : Mr. S.D. Das,Sr. Adv.

For Opp. Parties : Mr. P.K. Parhi, Deputy Solicitor General
Mr. J. Nayak, CGC, Mr. A. Mishra.

JUDGMENT Date of Judgment: 02.12.2022

***ARINDAM SINHA, J.***

1. Mr. Das, learned senior advocate appears on behalf of petitioner-management. He submits, impugned is award dated 9th June, 2017 carrying direction to advance promotion of opposite party no.2 (workman) as shall be effective on the date, in which his junior Sri Pothal was given promotion in different cadre of Dumper Operators. Further direction was entitlement to all consequential financial benefits in the higher cadre from that date.

2. He draws attention to his client's written statement, in particular paragraph-5, where there is mention that the workman was informed by letter dated 8th September, 2004, with reference to his representation dated 24th April, 2003, his case was considered along with others by the Department Promotion Committee (DPC) but was not recommended. Said letter was annexed to the written statement.

> *"In reference to your application in regards to review of promotion, the details of promotion has been sent to area office. In this regards, this is to inform you that the dely*

*in promotion from Dumper operator Gr. D to Gr. C due to your poor performance and you have not obtained qualifying marks in trade test. So your above case can not be considered at present.*

*This is for your kind information."*

He then draws attention to note sheet of the DPC, appearing to have been signed on 25th April, 1993. He points out, at sl. no.5 is name of the workman, being one of those employees having obtained less than qualifying marks having attendance less than 240 days, including authorized leave, as were not considered for promotion to the posts indicated against the name(s). He submits, this was good evidence but his client was prevented from adducing the same before the labour Court. On query from Court he is unable to demonstrate compliance with rule 10-B(2) in Industrial Disputes (Central) Rules, 1957 on part of his client.

3. He also draws attention to order sheet from the Lower Court Record (LCR), in particular to order nos.53 to 57. He submits, absence of his client on one day brought closure of evidence against it. The next day parties were not present because Presiding Officer (PO) was on leave. His client was thereafter not represented on the next date and on following date, impugned award was made. In the circumstances he seeks interference in judicial review to enable his client to adduce evidence that was introduced by pleadings but could not be brought on record by aforesaid omission. He submits, there is demonstration that the presumption could not have been made in the facts and circumstances.

4. Mr. Mishra, learned advocate appears on behalf of the workman. He submits, the order sheet will reveal that more than reasonable opportunity was given to the parties. On two occasions costs were imposed on the management for not having appeared. The costs were nominal yet the management did not pay same to his client.

5. He draws attention to his client's rejoinder paragraph-3. The paragraph is reproduced below.

*"3.That, we do not agree fully with the contentions of the Management as per his para no.5 of his written statement. His promotion is a time bound promotion as per the scheme framed by the Management as in vogue then as agreed in the note sheet of 1993 of the Management submitted by him in his statement.* ***Promotion to the post of Dumper Operator Gr.C was held in 1993 not as per the scheme, but instead of 1991 and thereafter****. The cause of not promoting to post was never intimated to the workman. When he raised complaints in the year 2/2004 about his promotion of not being held, he was then in the year 9/2004 informed by the Management that "due to poor performances and not obtaining qualifying marks in trade test, his case could not be considered from Gr.D to Gr.C"* ***Actually no such trade test had ever taken place nor any DPC was held in between 1990 to 1997 except the year of 1993 as told earlier****.*

> *Hence the promotion was delaying and also thereby the promotion as delayed amounts to be denied illegally."* *(emphasis supplied)*

6. He submits, presumption is possible in law and no illegality nor material irregularity appears on face of the award, for interference.

7. We have perused impugned award and, inter alia, the order sheet. We are satisfied every opportunity was given to the management.

8. The labour Court had before it pleading by paragraph-5 in the written statement and denial by paragraph-3 in the rejoinder. It appears that the workman's case was, there was no DPC held in year 1993. The management did not adduce evidence to show that in fact, there was DPC. Text of letter dated 8thSeptember, 2004, introduced by paragraph-5 in the written statement of the management, is reproduced below.

> *"In reference to your application in regards to review of promotion, the details of promotion has been sent to Area Office. In this regards, this is to inform you that the delay in promotion from Dumper Operator Gr.D to Gr.C due to your poor performance and you have not obtained qualifying marks in trade test. So your above case cannot be consider at present.*
>
> *This is for your kind information."*

It will appear from above extract, there was no mention in it of DPC having been held. The management then omitted to adduce its evidence before the Court below. Thus there was, inter alia, assertion of no DPC having been held and nothing in the materials on record to show otherwise. In such circumstances, law allows for presumption of the fact that no DPC was held and we cannot fault the labour Court for having so presumed against the management and in favour of the workman.

9. The Supreme Court in ***Syed Yakoob v. Radhakrishnan reported*** *in* ***AIR 1964 SC 477*** said in regard to a finding of fact recorded by the Tribunal, a writ of Certiorari can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence, which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law, which can be corrected by a writ of Certiorari. The Court went on to say further that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of Certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The management in contending that the presumption could not have been drawn since, relevant

evidence was there though not adduced by omission, is seeking to draw the writ Court within the exclusive jurisdiction of the Tribunal. Such contention cannot be agitated before the writ Court. Here, we extract a passage from paragraph-7 in ***Syed Yakoob*** (supra), reproduced below.

> *"xxx xxx xxx The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ court. xxx xxx xxx"*

10. In view of aforesaid, we do not find merit in the writ petition. It is dismissed.

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**2023 (I ) ILR - CUT - 138**

**ARINDAM SINHA, J & SANJAY KUMAR MISHRA, J.**

I.A. NO.16541 OF 2022

[Arising out of WP (C) No. 32412 of 2021]

**M/s. PARADEEP PHOSPHATES LTD.** .....Petitioner

**.V.**

**PRESIDING OFFICER, LABOUR COURT, BHUBANESWAR & ANR.** .....Opp. Parties

**REVIEW – Interim application filed by the management who is the petitioner with a prayer to recall the judgment and heard the matter afresh by another bench where one of the Hon'ble judge is not a party – Whether such an application is tenable when the petitioner has not made out a case on principles of "real danger" or "reasonable apprehension" of bias – Held, as the plea of mistake or error on face of the record not been urged as required to review an order, we don't find sufficient reason to review own judgment.** (Para 8,9)

**Case Law Relied on and Referred to** :-

1.(2016) 5 SCC 808 :Supreme Court Advocates-on-record Assn. Vs. Union of India (Recusal Matter).

For Petitioner : Mr. Narendra Kishore Mishra,Sr. Adv.
Mr. N. K. Mishra, Mr. A. K. Roy, Mr. A. Mishra.

For Opp. Parties : Mr. Shankar Das (O.P. no.2 in person)

JUDGMENT Date of Judgment : 15.12.2022

***ARINDAM SINHA, J.***

1. Mr. Mishra, learned senior advocate appears on behalf of applicant-management, who was writ petitioner. He submits, the writ petition was disposed

of by judgment dated 17th November, 2022. The application carries prayer for recalling the judgment and for the matter to be heard afresh by another Division Bench, where one of us (Mr. S. K. Mishra, J.), is not a party.

2. He draws attention to disclosure in the application, being an affidavit. He points out, the deponent is none other than opposite party no.2 in the writ petition. The deponent was identified in the affidavit by Mishra, J. In the circumstances, the prayer.

3. The workman appears in person. We have not required him to answer.

4. It has been said in the application, inter alia, Mishra, J. while at the Bar had conducted I.D. Case no.16 of 2003 on behalf of Paradeep Phosphates Employees' Union and had identified said opposite party as workman witness no.3 (WW3), deponent of the affidavit. It has also been said that at the hearing of the writ petition, particularly on 17th November, 2022, the workman appeared in person. When the matter was taken up for the first time by this Bench, Mishra, J. should have recused himself from hearing the writ petition being otherwise concerned with opposite party no.2, appearing in person. However, the Bench not only heard the case as the only matter on that day but also perhaps inadvertently, passed judgment.

5. Perused the affidavit in context of aforesaid. It appears, Mishra, J., while at the Bar was representing Paradeep Phosphates Employees' Union. The evidence on affidavit says that the deponent was working as Junior Accountant in the Finance and Accounts Department of the company. There is no mention that he was an office bearer of the Union. It also appears from the affidavit, identification made of the deponent was on 23rd October, 2009. Applicant has brought this to our notice after we heard and dealt with the writ petition on 17th November, 2022.

6. We have looked at the order-sheet in the writ petition and find, this Bench heard it on two days. First was on 27th October, 2022. We reproduce text of our order made that day.

> *"1. Mr. Mishra, learned senior advocate appears on behalf of petitioner and submits, the writ petition be listed on 15th November, 2022. Opposite party no.2 appears in person and submits, several adjournments were obtained earlier. On query from Court he submits, the matter be taken up on any date fixed.*
>
> *2. List on 15th November, 2022, marked at 10.30 A.M.*
>
> *3. Interim order to continue till next date."*

Though there was direction for listing on 15th November, 2022, marked at 10:30 A.M. but the writ petition could only be taken up on 17th November, 2022. It is

obvious that applicant did not think fit to make inquiry, in that period, regarding whether one of us was acquainted with opposite party no.2.

7. We are sure in our minds that there was no recollection of this obscure act of one of us, while carrying on the profession and in the usual course of things, more than thirteen years ago, in having identified said opposite party as a witness of the Union, when we heard and disposed of the writ petition. Priority was given because a litigant was appearing in person and had submitted on 27th October, 2022 that several adjournments had been obtained earlier.

8. Notwithstanding above, we looked for and found guidance regarding recusal from judgment of the Supreme Court in **Supreme Court Advocates-on-record Assn. v. Union of India (Recusal Matter)**, reported in **(2016) 5 SCC 808**. One of the learned Judge's view was unanimous, the other learned Judges in the Bench having agreed therewith. We extract and reproduce paragraph 25 from the view.

> *"25. From the above decisions, in our opinion, the following principles emerge:*
>
> *25.1. If a Judge has a financial interest in the outcome of a case, he is automatically disqualified from hearing the case.*
>
> *25.2. In cases where the interest of the Judge in the case is other than financial, then the disqualification is not automatic but an enquiry is required whether the existence of such an interest disqualifies the Judge tested in the light of either on the principle of "real danger" or "reasonable apprehension" of bias.*
>
> *25.3. The Pinochet case added a new category i.e. that the Judge is automatically disqualified from hearing a case where the Judge is interested in a cause which is being promoted by one of the parties to the case."*

No question has been raised or arises of Mishra, J. having financial interest in the outcome of the case, for his automatic disqualification. We have scrupulously enquired, pursuant to the application having been moved, on whether applicant has made out a case on principles of "real danger" or "reasonable apprehension" of bias. There could not be real danger of bias in perception of applicant simply because had it been so, same would have kept applicant alert and upon noticing constitution of the Bench, caused immediate awareness to orally mention for release. The application is dated 1st December, 2022 seeking recall, on the ground urged, of judgment dated 17th November, 2022. Reasonable apprehension cannot also be said to have been there since, apprehension cannot be an afterthought. Lastly, it cannot be said, opposite party, in contesting the writ petition, was promoting a cause, in which Mishra, J. was or is interested. In the circumstances, the application having been made to the Court and to be dealt with by the Bench, we find the contention for recusal, without merit.

9. Review is possible in law on discovery of new and important matter or evidence, which after exercise of due diligence, was not within knowledge of applicant or could not be produced by him, at the time when the order was made. It is also possible on account of some mistake or error apparent on face of the record or for any other sufficient reason. Here, the affidavit dated 23rd October, 2009 has been produced, as discovered to be new and important matter or evidence, obviously in context of hearing and adjudication of the writ petition. As aforesaid, deponent of the affidavit was not an office bearer of the Union, the latter who was client of one of us when at the Bar. Contents of the affidavit are in no way related to or connected with the writ petition of applicant. Mistake or error on face of the record has not been urged and in view of preceding paragraphs 5 to 8, we do not find sufficient reason to review our judgment dated 17th November, 2022.

10. There is no link for us to take cognizance of contention in the application and feel that we ought not to have heard or decided challenge in the writ petition.

11. The application is dismissed.

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**2023 (I) ILR – CUT- 141**

**D. DASH, J *&* Dr. S.K. PANIGRAHI, J.**

JCRLA NO. 40 OF 2011

**PURANDAR MAHALING & ORS.** …….Appellants

.V.

**STATE OF ODISHA** ……..Respondent

**CRIMINAL TRIAL – Offence under section 302/34 of the Indian Penal Code – Conviction – Prosecution case based on dying declaration – Duty of the Court – Held, the Court must be satisfied that the declaration is truthful, direct, voluntary and free from any suspicious feature to give rise to any doubt in the mind – Case Law discussed.**

(Para 12-15)

For Appellants : M/s. M.K. Pati

For Respondent : Mr. S.S. Kanungo,AGA.

JUDGMENT Date of Hearing : 25.11.2022: Date of Judgment: 08.12.2022

***D.DASH, J.***

The Appellants, by filing this Appeal, from inside the jail, has called in question the judgment of conviction and order of sentence dated 26.02.2011 passed by the learned Additional Sessions Judge, Bolangir in Sessions Case No.154/42 of 2009 arising out of G.R. Case No.265 of 2009 corresponding to Bolangir Sadar P.S. Case No.100 of 2009 of the Court of learned S.D.J.M., Bolangir.

The Appellant No.2-(accused) namely, Suna Mahaling is the father of accused-Appellant No.1- Purandar Mahaling and accused Appellant No.3-Banalata Mahaling is the mother of the Appellant No.1. All have been convicted for commission of offence under section-302/34 of the Indian Penal Code, 1860 (for short hereinafter called as "the IPC") and sentenced to undergo imprisonment for life and pay fine of Rs.1,000/- each with the default stipulation to undergo rigorous imprisonment for six (6) months each.

2. The prosecution case is that accused-Purandar had married the deceased namely, Dhanamati, the daughter of Amar Singh Majhi (P.W.2), 6 to 7 years prior her death. The accused-Appellant No.1-Purandar being the husband, accused-Appellant No.2-Suna being the father-in-law and accused-Appellant No. 3-Banalata being the motherin-law of the deceased, as alleged, were torturing the deceased and subjecting her to cruelty. One year before the death of the deceased, once these accused persons had driven out the deceased from their house for being not provided with a Television as demanded by them. The deceased then had gone to live with her father (Informant-P.W.2). The accused persons thereafter took back the deceased with them. A meeting had been convened for the purpose and in that meeting a document (Ext.1) had been prepared. It is stated that on 22.09.2009 around 9 pm, the accused persons set the deceased ablaze by dowsing her with kerosene and she was then taken to Bolangir Government Hospital for treatment. The accused persons sent the information that the deceased committed suicide in that way.

The father of the deceased (Informant, P.W.2) having received such information went to Bolangir Hospital and saw the deceased lying with burn injuries on her neck and her treatment to be going on. The deceased remained hospitalized as an indoor patient for treatment of such burn wounds for a long period of five (5) months. However, ultimately all the attempts to save her failed and she succumbed to those injuries.

The father of the deceased (Informant, P.W.2) when saw the deceased in the hospital, in that condition on his arrival from village getting the information;

he went to Bolangir Sadar Police Station on 23.04.2009 and lodged the written report at 7 pm.

The Inspector-in-Charge of Police(IIC), Bolangir Sadar P.S. having received the report, treated the same as F.I.R., and immediately registered as Bolangir P.S. Case No.100 of 2009. The IIC then took up investigation. In course of investigation, he examined the Complainant and issued requisition to the Medical Officer, District Headquarter Hospital, Bolangir for recording the dying declaration of the deceased who was then under treatment in that hospital. The IIC (P.W.14) then visited the spot, prepared the spot map. On 28.04.2009, he arrested the accused-Appellant No.1-Purandar Mahaling, forwarded him in custody to the Court. On transfer of this P.W.14, P.W.12 another Sub-Inspector attached to the Sadar Police Station, Balangir took charge of investigation. On 16.08.2009, he received the report from the treating Doctor about the factum of death of the deceased. He after holding the inquest through the Executive Magistrate on requisition sent the requisition for postmortem examination over the dead body. He also seized some incriminating materials by preparing seizure list and finally on completion of investigation submitted the final form placing the accused persons to face the trial for commission of offence under section-498-A/302/34 of the IPC.

3. Learned Sub-Divisional Judicial Magistrate (S.D.J.M.), Bolangir on receipt of the police report having taken cognizance of the said offences, after observing the formalities committed the case to the Court of Sessions for trial. That is how the trial commenced by framing charges against the accused persons for offence under section-498-A/302/34/of the IPC.

4. Accused persons took the plea of complete denial and false implication.

5. In the trial, the prosecution in total has examined fourteen (14) witnesses. Out of them, P.W. 2 is the Informant and he is the father of the deceased, who has lodged the F.I.R., Ext.2, which has led to the registration of the case against accused persons. As already stated, P.Ws. 12 and 14 are the two Investigating Officers. P.W.4 is the mother of the deceased and P.W.13 is the Doctor who had the occasion treat the deceased and had recorded the dying declaration of the deceased on receiving the requisition from P.W.14 which has been proved through him as Ext.8/2. P.W.1 is a witness who has stated about the earlier dissension in the family of the accused persons concerning the deceased and regarding the convening of the meeting to settle the matter. P.Ws.6 and 7 are two formal witnesses to the seizure of the bed sheet and command certificate; whereas P.W.8 is another witness to seizure. The Doctor who conducted postmortem examination over the dead body of the deceased is P.W.10 and

P.W.9 is the Doctor who had admitted the deceased in the hospital as an indoor patient. Besides leading the oral evidence through the above witness, the prosecution has also proved several document which have been admitted in evidence and marked Ext.1 to 10; important of those are the proceeding of the village meeting, Ext.1; F.I.R., Ext.2; inquest report, Ext.3, medical examination report, Ext.6, postmortem report, Ext.7 and the dying declaration said to have been recorded by P.W.11 as Ext.8/2.

6. The Trial Court having examined the evidence let in by the prosecution and upon their evaluations has found the prosecution to have failed to prove the charge under Section-498-A of the IPC against the accused persons beyond reasonable doubt. Proceeding to find out the establishment of the charge under section-304-B of the IPC, the evidence being discussed, the Trial Court's answer has again gone against the prosecution. Lastly, coming to find out the establishment of the charge under section-302 of the IPC against the accused persons holding the death of the deceased to be homicidal; on going through the evidence of the Doctor holding the postmortem examination and the other treating Doctor as well as other evidence on record, the death of the deceased has been found to be on account of the burn injuries sustained by him. This finding was not under challenge before the Trial Court and it is also not questioned before us.

Admittedly, the death having taken place on account of severe burn injuries sustained by the deceased after prolonged treatment in the hospital being shifted from the house of the accused persons, we are where wholly in agreement with the said conclusion of the Trial Court.

7. Learned Counsel for the Appellants submitted that the finding of the Trial Court fastening the guilt upon the accused persons to be the author of the crime in committing the murder of the deceased by dowsing her with kerosene and setting her ablaze is untenable. According to him, the evidence on record; more importantly the dying declaration (Ext.8/2) ought not to have been relied upon to record a finding of guilt against the accused persons that it is they who are responsible for the death of the deceased by setting her ablaze. In this connection, he has taken us through the evidence of the prosecution witnesses as well as the relevant documents especially, Ext.8/2 the so called dying declaration. He submitted that the suspicious circumstances surrounding that dying declaration as those emerge in the evidence are enough to eschew the said dying declaration from the arena of consideration. According to him, the Trial Court has erred in accepting the said dying declaration as the basis for recording the conviction.

8. Learned Counsel for the State giving emphasis on the evidence of the Doctor, P.W.13 and the dying declaration which has been admitted in evidence and marked Ext.8/2 submits that the same have been rightly upon accepted by the Trial Court. According to him, there is no such circumstance available on record to entertain any doubt with regard to the dying declaration recorded by P.W.13 on police requisition. He further submitted that even that dying declaration receives corroboration from the other evidence and when the dissension in the family of the accused persons with the accused persons in the one hand and deceased on the other has been proved the accused persons have been rightly convicted for commission of offence under section-302/34 of the IPC for the role played by them as it reveals from the very dying declaration, Ext.8/2.

9. Keeping in view the submissions made; We have carefully gone through the judgment passed by the Trial Court. We have read the depositions of the witnesses (P.W.1 to 14) and have perused the documents admitted in evidence and marked Exts. 1 to 10.

10. In the present case, the sole point for determination stands as to whether these accused persons have caused the death of the deceased by dowsing her with kerosene and setting her ablaze. Indisputably, on 22.04.2009 around 9 pm, the deceased received the burn injuries when she was in her matrimonial home. The F.I.R. has been lodged by P.W.2 on 23.04.2009 around 7 pm and the Informant is none other than the father of the deceased. In the F.I.R., Ext.2, it is stated that P.W. 2 had received the information that his daughter was taken to Bolangir Government Hospital for treatment. His evidence is that, he having received the information around 11 am from a distant relation of accused Purandar that the deceased had been taken to Bolangir Hospital; rushed to the Bolangir Hospital and saw his daughter with burn injuries on her neck. She was then alive and under treatment. He states that his daughter remained under treatment for about five months in the hospital and thereafter died. This witness is not stating anything as to if when he saw, his daughter, she was unconscious and unable to talk. He does not say to have even asked anything to his daughter which is the normal and most ordinary response from a father, seeing the daughter in that condition. He is also silent as to if his daughter seeing him, volunteered and told anything as to how she got burnt. Thus, his evidence is wholly on the score that he was told by a related brother of accused-Purandar that the accused persons had set her daughter ablaze. The name of that person is not stated by this P.W.2 nor it has been so mentioned in the F.I.R., Ext.2 and the prosecution has also examined that person by disclosing his identity as such.

The mother of the deceased (P.W.4) however has stated that having received information, she with P.W.2 had gone to village Kharlikani where the house of the accused persons situates and from there to the Bolangir Government Hospital. She has stated to have seen her daughter lying with burn injuries on her neck up to waist and she was then conscious and able to talk. This witness is stating that on being asked, the deceased told that accused Purandar poured kerosene over her body and ignited fire which caused the injuries and the reason was for non-fulfillment of his demand for being provided with a Television. This is not told by P.W.2 who too is said to have gone with P.W.4. When We go through the F.I.R., Ext.2, it is not ascertainable there from that P.W. 4 had accompanied P.W.2. When that P.W.2 says that having gone to the hospital, he had been to Police Station and lodged the F.I.R. P.W.4 is not stating in her evidence that when the deceased told her about the incident on being asked implicating accused-Purandar to be the person to have set her ablaze; whether P.W.2 was present with her or it was after he left for P.S. As noted, P.W.2 in his evidence does not say that P.W.4 had accompanied him to the hospital. It is his positive evidence that he came to the hospital and saw the deceased with burn injuries. He does not say to have either he or anyone else had asked the deceased anything about the incident. Nowhere else in his deposition, he states to have asked the deceased as to how she sustained the burn injuries. When it is said by this P.W.4 that her daughter was conscious and able to talk and as such told her about the incident implicating accused-Purandar; P.W.9, being the Doctor attached to the hospital who had examined the deceased on 23.04.2009 on police requisition while on duty is stating that the patient had not disclosed before him about the cause of the burn injuries. The Investigating Officer, P.W.14 says that on receiving the F.I.R., he issued the requisition for recording the dying declaration. Furthermore, this P.W.4 when was examined by police on 23.04.2009 after P.W.14 arrived at the hospital, she has not at all stated about the declaration of her daughter on her asking about accused-Purandar (husband's) role in sprinkling kerosene on her and setting her ablaze in her statement before Police as recorded under section-161 Cr.P.C. which has been proved by the defence through P.W.14. So, this P.W.4 for the first time has stated in Court on 06.07.2010 and the omission in her previous statement being material one, she has improved it later which cannot for that reason as well as for the above analysis of evidence is not believable.

11. The Doctor, P.W.13, says to have recorded the statement of deceased on 30.04.2009. The dying declaration Ext.8/2 has been recorded on 23.04.2009 at 8.20 pm as indicated therein. But that is not said so by P.W.13 in his evidence. P.W.14 says to have visited the hospital after receiving the F.I.R. around 8 pm and at that time, the deceased was unconscious. This on perusal of the case diary

which We had to do to clarify the ambiguity and confusion is seen to have been duly noted with a further note that the condition was precarious and it further reveals that he issued requisition to the M.O., DHQ Hospital, Bolangir to record the dying declaration at 8.10 pm while in the hospital whereafter, she examined the mother of the deceased (P.W.4) in the hospital. The dying declaration as finds mention in Ext.2 being recorded at 8.20 pm, the same has not been seized by P.W.14 immediately thereafter and even till 15.08.2009 when he handed over the charge of investigation to P.W.12 and P.W.13 gave it to P.W.12 on 20.08.2009. Till that date where was that dying declaration and in whose custody is no said either by P.W.12 or P.W.14 and most nterestingly, the doctor (P.W.13) even is not saying that he had kept it with him and gave it to P.W.12 who also does not say to have received from P.W.13. This P.W.14 says that when he saw deceased on the solitary occasion, she was not only unconscious but also his condition was serious. He, therefore, states to have examined the victim in course of treatment on 30.04.2009 and had recorded her statement. However that statement has not been proved during trial. Moreover, when P.W.14 says that her daughter simply implicated her son-in-law accused-Purandar, the evidence of P.W.13 is that the deceased stated before him that her husband, father-in-law and mother-in-law sprinkled kerosene over her body and her husband lighted the match stick and set her ablaze. Thus clearly there appears the tendency to rope in two more i.e. parent-in-laws in addition to the husband. This P.W.13 further states that the deceased also told which he recorded hearing her shout, neighbours came to her rescue and sent her to the hospital. Thus, there surfaces the exaggeration in the dying declaration before P.W.13 as to the role of the father-in-law and mother-in-law of the deceased when before P.W.4, the declaration is silent as to the role of the father-in-law and mother-in-law and that declaration before P.W.4 was only describing the role of accused –Purandar, the husband of the deceased. The bed head ticket of the deceased has not been proved from the side of the prosecution to show as to when she gained her sense and could be able to talk on 23.04.2009 after 11.20 am when P.W.9, the Doctor examining the deceased on police requisition has deposed that she did not disclose anything about the cause of burn injury and when P.W.14, the Investigating Officer says that around 8 pm he found the deceased to be unconscious and lying in a serious condition. P.W.13 is also not saying as to at what time he received the police requisition for recording the dying declaration. Moreover, the statement recorded by P.W.14 after few days when he examined her i.e. on 30.04.2009 has not seen the light of the day which leads for drawal of adverse inference that had that been produced that would have gone against the prosecution as to involvement of the accused persons.

12. At this juncture, We must take note of the settled position of holding the field.

A dying declaration is relevant and material evidence and a truthful and reliable dying declaration may form the sole basis of conviction, even though it is not corroborated. But the Court must be satisfied that the declaration is truthful. The reliability of the declaration must be subjected to a close scrutiny considering that it was made in the absence of the accused who had no opportunity to test its veracity by cross-examination. If the Court finds that the declaration is not wholly reliable and a material and integral portion of the deceased's version of the entire occurrence is untrue, the Court may, in all the circumstances of the case, consider it unsafe to convict the accused on the basis of the declaration alone without further corroboration. (*Thurukanni Pompiah And Anr. vs State Of Mysore*: AIR 1965 SC 939)

13. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of either torturing, or prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base the conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. (*Smt. Shakuntala Vrs. State of Haryana:* 2008(3) Crimes 265 (SC) 2007 Cri.L.J. 3747: AIR 2007 SC 2709, 2009(59)).

14. It is now well settled that conviction can be recorded on the basis of a dying declaration alone, if the same is wholly reliable, but in the event there exists any suspicion as regards correctness or otherwise of the said dying declaration, the Courts in arriving at the judgment of conviction shall look for some corroborating evidence. It is also well known that in a case where in consistencies in the dying declarations, in relation to the active role played by one or the other accuse persons, exist, the Court shall lean more towards the first dying declaration than the second one. (*Ranjit Singh Vrs. State of Punjab;* 2007(1) Crimes 175 (179) SC).

15. It is thus necessary for the prosecution to prove that the dying declaration is direct, voluntary and free from any such suspicious feature to give rise to any doubt in the mind. The evidence as to the dying declaration has to be just appreciation in the light of the surrounding circumstances and its weight is required to be determined with reference to the principle governing of weighing the evidence. The dying declaration must be closely scrutinized as to its truthfulness like any other important piece of evidence in the light of surrounding facts and circumstances of the case bearing in mind on the other hand that the statement is by a person who has not been examined in Court and on the other hand that a dying man is not likely to implicate the innocent persons. Conviction can be founded even on the sole dying declaration of the deceased, if it is successfully noticed to be voluntary true, unprompted and natural version of the deceased with regard to the incident which resulted into his death.

16. Viewed in the light of the above legal principles, on a conspectus analysis of the evidence made hereinbefore, We find ourselves to be not in a situation to say that the two dying declarations; one before P.W.4 and the other one before P.W.13 as recorded under Ext.8/2 successfully pass through the tests of voluntariness, truthfulness and reliability even with regard to the consistent part as to implication of accused-Purandar only. Therefore, We feel it unsafe to convict the accused persons solely on the dying declaration as deposed to by P.W.4 and later on recorded by P.W.13 by merely saying that the same receives corroboration from the fact that there was prior dissention and bitter relationship of the deceased with the accused persons. The impugned judgment of conviction and order of sentence are vulnerable.

17. In the wake of aforesaid, the Appeal stands allowed. The judgment of conviction and order of sentence dated 26.02.2011 passed by the learned Additional Sessions Judge, Bolangir in Sessions Case No.154/42 of 2009 arising out of G.R. Case No.265 of 2009 corresponding to Bolangir Sadar P.S. Case No.100 of 2009 of the Court of learned S.D.J.M., Bolangir are hereby set aside. The Appellants (accused persons) be set at liberty forthwith in case their detention is not so wanted in any other case.

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**2023 (I) ILR – CUT - 150**

**D. DASH, J.**

R.S.A. NO.123 OF 2021

**PRADEEP KUMAR AGARWALLA & ANR.** .....Appellants.

**.V.**

**THE GENERAL SECRETARY,**
**VIVEKANANDA KENDRA & ANR.** .....Respondents.

**(A) TRANSFER OF PROPERTY ACT, 1882 – Section 105 – Lease – The essential ingredients of lease – Indicated.** (Para 13)

**(B) EASEMENT ACT,1882 – Section 52 r/w Section 108 of Transfer of Property Act – Whether a particular transaction is lease or licence? – Determination of – Discussed with Case Laws.** (Para 14-17)

**Case Laws Relied on and Referred to** :-

1.96 (2003) CLT 700 (SC) : Chandy Varghese & Ors. Vs. K. Abdul Khader & Ors.
2.1976 (3) SCC 512 : Board of Revenue Vs. A.M. Ansari.
3.AIR 1988 SC 184 (190) : Khalil Vs. Tufel Hussein.
4.(1971) 1 SCC 276 : Sohan Lal Naraindas Vs. Laxmidas Raghunath Gadit.
5.(1989) 1 SCC 19 : Rajbir Kaur Vs. S. Chokesiri.

For Appellants : M/s. P.K. Rath, A. Behera, P. Nayak, S. Das, S. Rath, S. Panda.

For Respondents: M/s. T. Panigrahi, R.R. Dash, D. Nayak, S.P.Rath, B.D. Dash, R.C. Mishra.

JUDGMENT Date of Hearing: 06.12.2022: Date of Judgment: 23.12.2022

***D.DASH, J.***

1. The Appellants by filing this Appeal under Section-100 of the Code of Civil Procedure 1908 (for short, 'the Code') have assailed the judgment and decree passed by the learned District Judge, Baripada in RFA No.21 of 2018.

By the same, the Appeal filed these present Appellants being the aggrieved Defendant Nos.3 and 4 in the Civil Suit No.100/524 of 2011-2005 of the Court of learned Senior Civil Judge, Baripada under Section-96 of the has been dismissed.

The Respondent No. 1-Society as the Plaintiff have filed the suit for declaration of its right of ownership and possession of the property in question with further prayer to declare the cancellation deed executed on 03.12.2003 by the deceased-Defendant No.1 in the Trial Court as fraudulent, illegal, inoperative

and void with further prayer for mandatory and permanent injunction in directing the Appellants (Defendant Nos.3 and 4) to give vacant possession of the land in Schedule-A as also the building standing thereon and restrain to so disturb in future.

The suit having been decreed, these Appellants (Defendant Nos.3 and 4) being aggrieved by the same had carried the First Appeal which too had been dismissed. Hence, the present Appeal is at the instance of those Defendant Nos.3 and 4 as the Appellants herein.

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

3. The Plaintiff's case is that the Defendant No.1 who died during the suit is the owner of the land as described with the building in Schedule-A of the plaint standing thereon. The Defendant No.1 was a patron of the Plaintiff-Society. She proposed the Plaintiff-Society to take the suit property on lease for functioning of its Baripada branch. So, the matter being approved by the Committee of the Plaintiff-Society. The Defendant No.1 executed a deed of lease for 99 years, which stood registered on 23.03.1998. The Plaintiff-Society thereafter occupied the building along with vacant space as the lessee. The Plaintiff-Society also spent money for repair and altercation of the building. They made it heritable and suitable for carrying out the activity of the PlaintiffSociety. It is stated that after five years of lease, the Plaintiff all of a sudden issued a notice dated 14.12.2003 under Section-106 of the Transfer of Property Act, 1882 (for short, 'the T.P. Act') after executing the deed of cancellation on 03.12.2003 indicating the violations of the conditions of the lease by the Plaintiff-Society. It is the further case of the Plaintiff that on 09.05.2005, the Defendant No.2 broke open the lock and got it replaced by another and placed some miscreants inside the said house. Due to prolong illness of the Defendant No.1, her nephew Dipan Kumar Ray and Ratna Bose are stated to have managed to get that deed of cancellation on 03.12.2003. As per the terms and conditions of the said registered lease-deed executed on 23.03.1998, the Defendant No.1 was taking Rs.1000/- per year towards annual rent for the suit premises. It is stated that the Plaintiff-Society had never carried out any nefarious activities in the suit premises as alleged in the said deed of cancellation, which has been registered on 03.12.2003. The allegations made in the said cancellation deed are stated to have been false. The Plaintiff-Society further states that after 11 days of cancellation, a notice was sent by an Advocate to the General Secretary of the PlaintiffSociety indicating the cancellation of the lease-deed and directing them to vacate the suit premises in favour of the Defendant No.1. The notice sent is stated to be based

on falsehood and planned for the purpose. The cancellation deed is alleged to be fraudulent and one obtained at the instance of the nephew of the Defendant No.1 and others by taking advantage of the old age of Defendant No.1. It is also stated that such cancellation deed is not in accordance with the provisions of law and the same is having no value in the eye of law. The Plaintiff-Society further stated that the Defendants had no manner of right, title and interest over the Schedule-A land and as such, they have no right to possess the same land described in Schedule-A of the plaint with the house standing thereon.

However, on 08.05.2005, the Defendant No.1 through Defendant No.2 forcibly dispossessed the devotees of the Plaintiff-Society and since then the occupation of the land and house had been taken over by them by force. Defendant No.1 who was unmarried died on 07.03.2007 leaving behind no heir. It is said that after death, nobody is there to claim the suit land and building. Then after some time the PlaintiffSociety could know that during pendency of the suit, the Defendant No.1 through the Defendant No.2 as her power of attorney holder has sold the suit land and building to Defendant Nos. 3 and 4 vide registered sale-deed dated 17.01.2006 for a consideration of Rs.17,80,100/-. The Defendant Nos. 3 and 4 in the facts and circumstances are thus said to have derived no right, title and interest over the suit land and building standing thereon. The sale-deed is said to be not a genuine one and void. The Defendant No.2 as the power of attorney holder of the Defendant No.1 is stated to be having no saleable right over the suit land and the building standing over it and the sale made in favour of Defendant Nos. 3 and 4 therefore is said to be of no value in the eye of law.

The Plaintiff-Society has made the following prays:-

> (1) It be declared that the Plaintiff is the rightful owner in possession of leasehold property mentioned in Schedule-'A';
>
> (2) the deed of cancellation executed on dated 03.12.2003 be declared as fraudulent, illegal, inoperative and void;
>
> (3) mandatory permanent injunction be passed over Schedule-'A' land and building directing the Defendants to give vacant possession of the leasehold property described in Schedule-'A';
>
> (4) that the Defendants may be permanently restrained to enter into the said land and building situated therein as subject to occupation of the 1st floor of the building by the Defendant No.1 alone as per Agreement.

4. The Defendant Nos. 1 & 2 did not file any written statement. The Defendant Nos. 3 and 4 jointly filed their written statement. While it traversing the plaint averments, they have stated to have no knowledge about the lease deed, if any, executed by the Defendant No.1 in favour of the Plaintiff-Society. They state to have learnt about the cancellation of the same by the Defendant No.2 on the ground of violations of the terms and conditions mentioned in the lease deed. It is further stated

that the suit land with the building belong to Defendant No.1 and she had executed a power of attorney in favour of the Defendant No.2, who has sold the suit land and building to them by registered sale-deed dated 17.01.2006 on receipt of valuable consideration. They thus assert to be the bonafide purchasers for value.

5. With the above rival pleadings, the Trial Court has framed the following issues:-

(i) Whether the suit is maintainable in its present form?

(ii) Whether the suit is barred by the law of limitation?

(iii) Whether the suit is bad for non-joinder of necessary parties?

(iv) Whether the cancellation of the lease deed by defendant no.1 late Anima Bose was legal?

(v) Whether the defendant no.3 and 4 have any right over the suit building by virtue of their sale deed?

(vi) Whether the plaintiff is entitled to the relief as claimed?

(vii) Whether the plaintiff is entitled to any other reliefs?

6. Deciding the issue No.4 with regard to the cancellation of leasedeed by Defendant No.1, upon examination of evidence and their evaluation, the answer has been given in favour of the Plaintiff-Society that such deed of cancellation is illegal and void. Practically, answer to the above issue has led the Trial Court to decree the suit granting the reliefs as under:-

> "Defendant Nos. 3 and 4 having suffered from the said judgment and decree passed by the Trial Court having carried the First Appeal have been unsuccessful, the present Appeal therefore is at the instance of the Defendant Nos. 3 and 4."

7. The present Appeal has been admitted to answer the following substantial question of law:-

> Whether during subsistence of the leasehold right in favour of the Plaintiff under Ext.1, the sale under Ext.A in favour of Defendant Nos. 3 and 4 including possessory right be effected?

8. Learned Counsel for the Appellants submitted that the Courts below in the present case have proceeded in taking an erroneous view that the document which is projected from the side of the Plaintiff Society i.e. Ext.1, being simply a registered one and nomenclatured as lease for a period of 99 years is actually as such when upon proper construction it is not that what so titled. According to him, the deed, Ext.1 which is projected by the Plaintiff-Society to be the basis of their claim in seeking the relief is not a deed of lease for a period of 99 years in the eye of law. He submitted that merely because, it has been registered, the Courts below should not have accepted it as so titled. He submitted that upon proper construction of the details of the terms and conditions as also the

evidence on record especially as to the user of the property, the finding ought to be that it was not at all a lease for 99 years but merely a permission to occupy a part for the specific purpose and thus in reality a licence. He therefore, submitted that the very foundation of the case of the Plaintiff-Society that they have the leasehold right over the property in question on the basis of that Ext.1 is not tenable. He, therefore, submitted that the suit ought to have been simply dismissed. In order to buttress the said contention, learned Counsel for the Appellants has invited the attention of the Court to the contents of the deed, Ext.1 in pointing out as to how those being read together, run in total conflict with the nomenclature of the said document.

He further submitted that the Courts below are not correct in decreeing the Plaintiffs suit for the declaration accepting that they are the lessees. He submitted that the prayer made by the Plaintiff-Society that they are the rightful owner in possession of the leasehold property is the ground to negate their claim and that thereby determines the lease in terms of the provisions contained under Section-111(g) of the T.P. Act. He further submitted that on proper construction of the document, Ext.1 on which the claim of the Plaintiff-Society in the suit is based, the same can at best said to be a mere permission granted by the Defendant No.1 to the Plaintiff-Society to use the part of the house and premises for carrying out the activities of this Kendra and thereby, the PlaintiffSociety cannot be said to have been clothed with any right over the property as the lessee much less as having the ownership right as claimed. He, therefore, submitted that when the very basis of the claim of the Plaintiffs, Ext.1 as projected falls, the purchase made by the Defendant Nos.3 and 4 from the admitted owner of the property by registered sale-deed can never be declared to be void and it cannot be so held in this suit at the instance of the Plaintiff-Society. He submitted that in the exercise to search out the answer to the substantial question of law, it has to be ascertained as to it the deed was actually a lease as claimed by the Plaintiff or not so as to say that the Plaintiff-Society has the right over the property as the lessee for which the Defendant No.1 was not having the right to transfer the property. He submitted that this being a pure question of law and relating to construction of the document concerned whose execution is not in dispute and thus can be raised in this Second Appeal for the first time for being so ruled upon.

9. Learned Counsel for the Respondent-Society on the other hand submitted that it being admitted by the parties that the property had been leased out to the Plaintiff-Society by the Defendant No.1 for a period of 99 years, it is not permissible to construe the same as to if it is not so. He for the purpose of providing support to the submission that Ext.1 is a lease has relied upon the

decision of the Apex Court in case of ***Chandy Varghese and others Vrs. K. Abdul Khader and Others; 96 (2003) CLT 700 (SC)***. He submitted that the execution of a deed of cancellation of that original lease by the Defendant No.1 is of no value in the eye of law and the original lease could have only been cancelled by Defendant No.1 by moving the Court and obtaining a decree to that effect. He, therefore, submitted that when recourse has not been taken by the Defendant No.1 to get the said lease standing in favour of the PlaintiffSociety set aside through Court but has been done by way of execution of cancellation deed; the legal effect and force of the original lease is not taken away in the eye of law. Therefore, the Courts below according to him are right in decreeing the suit.

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 and have perused the evidence on record both oral and documentary.

11. Before proceeding to directly take up the exercise of answering the substantial question of law by addressing the rival submissions, the important legal feature of the case as to construction of the document, Ext.1 on which the entire claim of the Plaintiff-Society as advanced is based needs examination. In the facts and circumstances of the case, it is seen that the Plaintiff-Society has based its whole claim upon the registered deed, Ext.1, which it claims to be a deed of lease of the property in question for a period of 99 years. Therefore, it would be necessary to find out as to whether said foundation for the PlaintiffSociety's claim stands in the eye of law or not. This being a pure question of law depending upon the construction of that document Ext.1 whose subsistence is required to be found out so as to hold its impact upon the registered sale deed, Ext.A executed by the original owner who is also the lessor for the Plaintiff; this Court finds it just and appropriate at first to ascertain the nature of the transaction under Ext.1 and its legal import.

It is the settled position of law that the Plaintiffs in order to be entitled to the reliefs claimed is to stand on his own by establishing the foundational facts upon which his case is based and for the purpose it cannot take advantage of the weakness of the case of the Defendants or even on the failure to prove their case. The point thus arises as to if the Ext.1 is a deed of lease for a period of 99 years and the Plaintiff-Society has been conferred with the right thereunder as the lessee in respect of the suit land and building standing thereon.

12. The Plaintiff-Society has nomenclatured the suit as "Suit for Declaration of Leasehold Right, Recovery of Possession and Mandatory Permanent

Injunction". The subject matter of the suit has been described in Schedule-'A' of the plaint, which runs as under:-

**SCHEDULE-'A'**

The land situated in Mouza-Baripada town Ward No.4 (Golapbag) under Baripada town Police situation recorded in the name of Anima Bose under Khata No.6.

| Plot No. | Kisam | Area |
|---|---|---|
| 203 | Gharabari-I | Ac.0.070 decimals. |

It has been stated in the plaint that Defendant No.1 (since dead) had executed one 99 years lease deed in favour of the Plaintiff which has been admitted in evidence and marked Ext.1. As would be seen from the terms and conditions enumerated in the aforesaid deed, the Defendant No.1 had allowed the Plaintiff-Society to occupy the building along with the vacant space. In Schedule-A of the plaint as it appears nothing has been indicated about existence of the building which is however not denied by the parties. As against the title of the suit as aforementioned, the prayer in the plaint is however to declare that the Plaintiff-Society is the rightful owner in possession of the leasehold property as mentioned in Schedule-A. At the cost of repeatation, it be stated that Schedule-A is the land and over that, the building stands and then the subsequent prayer is to the effect to restrain the Defendants permanently to enter into the suit land and the standing building, subject to the occupation of the first floor of the building by the Defendant No.1 alone as per the agreement.

13. The essential ingredients of lease are :-

(1) that by the document immovable property should be transferred with a right to enjoy the property in lieu of rent;
(2) there must be a lessor and lessee;
(3) the term of period of lease;
(4) the consideration or rent or in cash or kind.

The lease is not a mere contract, but is a transfer of an interest of immovable property in lieu of consideration may be cash or kind and the ownership remains with the lessor, though right to enjoy of the property is transferred to the lessee. Until and unless the aforesaid ingredients are found place in the documents and evidence, on record, only then the document can be termed as lease.

14. In case of ***Chandy Varghese*** (supra) cited by the learned Counsel for the Plaintiff's-Society (Respondent No.1); the question before the Court was to whether the original owner Kuahumni had intended to transfer any interest in favour of one Shankara Narayan Iyyer so as to say that subsequent holders have said right based on transfer or not.

In that case, reference has been made to the decision, it has been held therein:-

> "22. Section 105 of the Transfer of Property Act defines a lease of immovable property as 'transfer of a right to enjoy such property made for a certain time in consideration for price paid or promised. Under Section 108 of this Act, the lessee is entitled to be put in possession of the property.A 'lease' is, therefore, 'a transfer of interest in land'. Whereas Section 52 of the Easement Act defines a 'licence' to mean a right granted to another person over immovable property to do or continue to do some act which would in the absence of such right be unlawful'.When such right does not amount to an easement or creates any interest in the property, the right is called a 'licence'. In all cases where the dispute is about the nature of the document to be a lease or licence, the question that has to be addressed by the Court to itself is what is the intention disclosed by the parties from the terms of the document or the transaction. Where the conclusion is that circumstance or conduct of the parties shows that all that was intended was that the occupier should have a personal privilege with no interest in the land, the transaction would be licence and not a lease."

In case of ***Board of Revenue Vrs. A.M. Ansari***; 1976 (3) SCC 512 it has been held therein:-

> "It is the creation of an interest in immovable property or a right to possess it that distinguishes a lease from a licence. A licence does not create an interest in the property to which it relates while a lease does. There is, in other words, transfer of a right to enjoy the property in case of a lease. As to whether a particular transaction creates a lease or a licence is always a question of intention of the parties which is to be inferred from the circumstances of each case. For the purpose of deciding whether a particular grant amounts to a lease or a licence, it is essential therefore, to look to the substance and essence of the agreement and not to its form.
>
> In order that an agreement can be said to partake of the character of lease, it is necessary that the grantee should have obtained an interest in and possession of land. If the contract does not create an interest in land then the land would be considered as a mere warehouse of the thing sold and the contract would be a contract for goods."

15. Whether it is a lease or not the crucial issue for determination is to find out the real intention of the parties as decipherable from a complete reading of the document, if any, executed between the parties and the surrounding circumstances. Only a right to use a property in a particular way or under certain the terms given to the occupant while the owner retains control or possession over the premises results in licence being created; for the owner retains legal position while all that the licencee gets is a permission to use the premises in a particular purpose or in a particular manner and but for the permission so given, the occupation would have to be unlawful. (***C.M. Beena And Anr Vrs. P.N. Ramachandra Rao***; (2004) 3 SCC 595).

16. An effort should be made to find out whether the deed confers a right to possess exclusively coupled with the transfer of right to enjoy the property or

what has been parted with is merely a right to use the property while the possession is retained by the owner. The conduct of the parties before and after the creation of relationship is of relevance for finding out their intention.

If the effect of the instrument is to give the holder an exclusive right of occupation of the subject matter, it is in law a demise of the same.

If an interest in immovable property entitling the transferee to enjoyment is created, it is a lease; if permission to use the land without exclusive possession is alone gathered, a licence is the legal result Khalil Vrs. Tufel Hussein; AIR 1988 SC 184 (190). Where the tenor of the agreement showed a clear intention to deprive the Defendant of an interest, it was leave and licence. The instrument where shows the parties intent that the one is to divest himself of the possession and other is to come into possession for a determinate time, either immediately or in future, it operates as a lease.

17. The test of exclusive possession is though not decisive, is of quite significance to decide whether a particular transaction is lease or licence. It is a most significant indicator to hold that the document creates a lease but that does not preclude the Court from holding that the document is in fact a licence (***Sohan Lal Naraindas Vrs. Laxmidas Raghunath Gadit***; (1971) 1 SCC 276 and ***Rajbir Kaur Vrs. S. Chokesiri;*** (1989) 1 SCC 19. In that case of Sohan Lal Narindas (supra) an attempt was deliberately made to camouflage the true nature of the agreement. Under the circumstance the apex court observed: *"Intention of the parties to an instrument must be gathered from the terms of the agreement examined in the light of the surrounding circumstances. The description given by the parties may be evidence of the intention but it is not decisive. Mere use of the words appropriate to the creation of a lease will not preclude the agreement operating as a licence*. A recital that the agreement does not create a tenancy is also not decisive. The crucial test in each case is whether the instrument is intended to create or not to create an interest in the property the subject matter of the agreement. If it is in fact intended to create an interest in the property it is a lease. If it does not, it is a licence. In determining whether the agreement creates a lease or licence the test of exclusive possession, though not decisive, is of significance."

18. It is again the well settled position of law that the substance of the document and not the nomenclature will determine the true legal character of the grant. The construction of a document would depend upon its pith and substance and not upon the labels that the parties may put upon it. The crucial test is whether the instrument is intended to create or not to create an interest in the property, which is the subject matter of the agreement. If it is in fact intended to create an interest in the property; it is a lease.

19. Now, therefore, bearing the above settled principles of law in mind, the document, Ext.1 which is the base upon which of the claim of the Plaintiff-Society in filing the suit and seeking the relief as already stated stands, needs examination. The document in the given case is Ext.1, dated 23.03.1998 is a registered one. The document has been labeled as "Lease of Land and Building For a Term of 99 years". The condition no.1 is as under:-

> (a) the lessor is hereby demise to the lessee for the purpose of having the office of Vivekananda Kendra and carrying out the above from aims and objectives of the said Kendra as per the Memorandum of Rules and Guidelines and for no other purpose.

20. It is further stated therein that during the said term yearly rent of Rs.1000/- would be paid by the Plaintiff-Society to the Defendant No.1, when the Defendant No.1 shall pay the ground rent. It has also been stated that the lessee will keep the said premises in a good condition and complete repair and fit in all respect to be used for. The other condition that lessee (Plaintiff-Society) was to pay the water tax, electric charges as would be consumed for the said premises which also has the reference to the user. There absolute ban as per the condition for the Plaintiff-Society to transfer mortgage or sublet the said premises has been put and while stating that the Plaintiff-Society can make necessary alteration, construction on the existing building or on the open space; it has been further indicated that such would be only for carrying out its activities properly. Most importantly, the next condition stands that the Defendant No.1 is to occupy the first floor of the building as usual.

21. The first witness examined by the Plaintiff-Society who is an official of Kendra is P.W.1. He in his examination-in-chief has stated that Defendant No.1 had executed one 99 years lease-deed to carry out the activities of the Kendra. This P.W.1 during his cross-examination has stated that prior to the year 2006; the suit property was under occupation of Defendant No.1, although he states that such occupation was illegal. He states to have no knowledge about possession of Defendant No.1 after cancellation of the lease-deed.

The other witness P.W.2 has stated that the Defendant No.1 was then residing in the building; the same is also the evidence of P.W.3 who was then working in that Kendra at the particular place that Defendant No.1 was residing in the suit land where the centre was also functioning.

Thus, when from the deed, Ext.1, it is seen that the intention of the parties were to see that the aims and objectives of the said Kendra are carried out by user of the property in question belonging to the Defendant No.1 in her occupation, that is only in respect of which they were given to occupy the portion of the building, the portion i.e. the first floor of the building where she was residing has not been allowed to be used at all nor even to have the entry to

the said floor which then too closes the entry to the terrace. The evidence of the Plaintiff's witnesses also stand to the effect that such arrangement was made for carrying out the activities of the Kendra and the Defendant No.1 did not part with the possession of the entire property in favour of the Plaintiff-Society except allowing them to use the same for the purpose. She was very much residing in the first floor of the building and even it is said by one of the witness of the Plaintiffs that she was in possession of the entire one after some time being taken over. It has however been pleaded in the plaint that the Defendant No.1 has forcibly and illegally occupied the leasehold property which is not the fact as is evident from the evidence of the Plaintiffs witnesses. From all these aforesaid, this Court is of the view that by Ext.1, the property in question had not been leased out in favour of the Plaintiff-Society for a period of 99 years, but it was an arrangement between the Plaintiff-Society and Defendant No.1 for the user of the part of the building and the land lying nearby with the sole purpose of running of that Kendra when (the entire suit property even as per the deed had not been given on the hands of the Plaintiff-Society).

For all these aforesaid, when this Court finds that Ext.1 was not a deed of lease of the property in question for a period of 99 years as claimed by the Plaintiff-Society; the substantial question of law is thus answered against the Plaintiffs. Accordingly, it is held that the suit filed by the Plaintiffs seeking the reliefs is liable to be dismissed and the Courts below have erred in decreeing the same even though the foundation as laid for the suit in claiming the reliefs is not made out.

In that view of the matter when the sale transaction in favour of the Defendant Nos. 3 and 4 are not under challenge in this suit on any other ground either by that Defendant No.1 or by any one claiming through her, the Plaintiff-Society cannot impeach the same when their claim over the property as the lessee falls flat.

22. In the result, the Appeal stands allowed. The judgments and decrees passed by the Courts below are set aside and the Respondent No.1-Plaintiff is hereby non-suited. There shall however be no order as to cost.

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**2023 (I) ILR - CUT- 161**

**BISWANATH RATH, J.**

W.P.(C) NO. 2463 OF 2007

**SODA BHOTRA & ORS.** .....Petitioners

.V.

**ADDL. DIST. MAGISTRATE,KORAPUT & ORS.** .....Opp. Parties

**ODISHA SCHEDULED AREAS TRANSFER OF IMMOVABLE PROPERTY (BY SCHEDULE TRIBES) REGULATIONS, 1956 – Regulation 2,3(1),3(2) – Whether the proceeding under regulation 2 is maintainable where both the parties are belonging to schedule tribes? – Held, Not maintainable – Institution of proceeding under such regulation arises only when there is occupation of a tribe property by a non-tribe and also include any transaction at the instance of the tribe against non-tribe.** (Para 5)

For Petitioners : Mrs.P.P.Mohanty

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

JUDGMENT Date of Hearing &Judgment: 31.10.2022

***BISWANATH RATH, J.***

1. In spite of notice on the private Opposite Parties, nobody is appearing. Heard learned counsel for the Petitioners as well as learned counsel for the State.

2. The Writ Petition involves confirming orders vide Annexures- 1 & 2 passed by the competent authority under the provision of Regulation 2 of 1956 Act. Through the pleading in the Writ Petition Mrs. Mohanty, learned counsel for the Petitioners raises a point of law reading through the provisions at Regulation 3 of the 1956 attacking the institution of the proceeding involved herein itself for both the parties involved herein belonging to Schedule Tribe and submitted the institution of proceeding itself bad in law.

Reading through the provision at Regulation 3 of 1956, both the provisions at Sub-Section(1) & (2) of the Regulation 1956, an attempt is made by Mrs. Mohanty, learned counsel for the Petitioners that once the parties involved belong to Schedule Tribe, there is no question of initiation of such proceeding particularly under the Regulation involved.

3. In the circumstance and for a question of law involved herein further submission is advanced by Mrs. Mohanty, learned counsel for the Petitioners saying even though such a plea was not taken in the forum below however a point of law even raised at this stage can be adjudicated and in the above

background Mrs. Mohanty, learned counsel for the Petitioners request for interference in both the impugned orders Annexures-1 & 2 and setting aside the both.

4. Mr.Sahoo, learned Additional Standing Counsel however reading through both the orders contested on the entertainability of the Writ Petition on the premises that none of the forums involved the question raised by the Petitioners herein, therefore there should be restriction in challenging the impugned orders on absolutely surprising ground in a Writ Petition and thus requests for dismissal of the Writ Petition. There is however no dispute that both the private parties involve herein belong to Tribe.

5. Considering the rival contentions of the Parties, this Court finds the moot question required to be decided herein looking to the provisions made in Regulation 3 of the 1956 and since both the parties belonging to schedule tribes, if the proceeding vide OSATIP Case No.12 of 1995 was maintainable ? Keeping in view contest of the Parties through a common provision of law, this Court here takes into account the provision at Regulation 3(1) and 3(2) read as follows:-

> 3. **Transfer of immovable property by a member of the Scheduled Tribe**-(1) Notwithstanding anything contained in any law for the time being in force any transfer of immovable property by a member of Scheduled Tribe, except by way of mortgage executed in favour of any public financial institution for securing a loan granted by such institution for any agricultural purpose, shall be absolutely null and void and of no force or effect whatsoever, unless such transfer is made in favour of another member of a Scheduled Tribe:
>
> Provided that-
>
> (i) Nothing in this sub-section shall be construed as to permit any member of a Scheduled Tribe or his successors-in-interest to transfer any immovable property which was settled with such member of Scheduled Tribe by or under any authority of the State or the Central Government or under any law for the time being in force;
>
> (ii) In execution of any decree for realization of the mortgage money, no property mortgaged as aforesaid shall be sold in favour of any person not being a member of a Scheduled Tribe and
>
> (iii) A member of a Scheduled Tribe shall not transfer any land if the total extent of his land remaining after the transfer will be reduced to less than two acres in case of irrigated land or five acres in case of unirrigated land.
>
> (2) Where a transfer of immovable property is made in contravention of Sub-section (10 the competent authority may, either on application by anyone interested therein or on information received from the Grama Panchayat or on his own motion and after giving the parties, an opportunity of being heard, order ejectment against any person in possession of the property claiming under the transfer and shall cause restoration of possession of such property the transferor or his heirs. In causing such restoration of

possession the competent authority may take such steps as may be necessary for securing compliance with the said order or preventing any breach of peace.

Provided that if the competent authority is of the opinion that the restoration of possession of immovable property to the transferor or his heirs is not reasonably practicable, he shall record his reasons thereof land shall, subject to the control of the State Government settle the said property with another member of Scheduled Tribe in the absence of any such member with any other person in accordance with the provisions contained in the Odisha Government Land Settlement Act, 33 of 1962."

Reading through the aforesaid provisions there remain no doubt that occasion for instituting proceeding under such regulation arises only when there is occupation of a tribe property by a non-tribe and even involving any transaction at the instance of the tribe against non-tribe. There is clear material disclosing both private parties belong to tribe community and thus Petitioners get support to their case through Regulation 3 herein.

6. In the circumstance this Court finds there is force in the submission of learned counsel for the Petitioners that the original proceeding involved herein was not entertainable in the eye of law. This Court accordingly interferes in the order at Annexure-1 & 2 and sets aside the same.

7. The Writ Petition succeeds. No order as to cost.

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**2023 (I) ILR - CUT- 163**

**BISWANATH RATH, J.**

W.P.(C) NO.1633 OF 2009

**GULF OIL CORPORATION LTD.** .....Petitioner

.V.

**SUNDARGARH MAZDOOR SANGHA** .....Opp. Party

**CODE OF CIVIL PROCEDURE, 1908 – Order 11 Rule 14 – The petitioner filed an application for production of certain document which are in possession of the Opp. Party – The learned lower Court rejected the application – Effect of – Held, When there is specific plea of the petitioner/plaintiff that the relevant documents are within the custody of the defendant and there is no written objection filed by the defendant, it appears that there is mechanical consideration of the case – There is loss of prospect in the effective adjudication of the suit in absence of relevant materials – Hence the impugned order of the Trial Court sets aside.** (Para 9)

For Petitioner : M/s Shibashis Mishra,P.K Mohapatra
For Opp. Party : None

JUDGMENT Date of Hearing & Judgment:12.12.2022

***BISWANATH RATH, J.***

1. Heard the submission of Mr. Mishra, learned counsel for Petitioner. In spite of service of notice nobody appears on behalf of the contesting Opposite Party.

2. This writ petition involves a challenge to the order of rejection of the application U/o.11 Rule 14 of C.P.C. by the trial court at Annexure-6.

3. Taking this Court to the pleadings available at paragraph nos.6 & 7 and reading through the pleadings stated in the application U/o.11 Rule 14 of C.P.C. and the grounds therein specifically through paragraph no.5 therein, Mr. Mishra, learned counsel for Petitioner submitted that once the plaintiff has specific plea through the application involved herein specifically pleading that defendant is in possession of the document sought for, there appears, there is no proper consideration of this aspect in disposal of the application U/o.11 Rule 14 of C.P.C. by the trial court and therefore, there is illegal rejection of such application.

4. Mr. Mishra, learned counsel for Petitioner further also contended that unless these documents are called for and placed in the evidence process, there will be no effective adjudication of the proceeding involved and the plaintiff will ultimately suffer for no fault of him.

5. There is nobody to oppose such contentions. Records disclose that there is no written objection to the above plea of the Plaintiff in the Court below.

6. This Court from the application finds, the plaintiff has made the following pleadings in paragraph nos.6 & 7:-

> "6. That, the Defendant is governed under Trade Union Act-1926 and rules provided under the Regulation made there under. The Defendant has a Certified Constitution, approvedbyDy.LabourCommissioner-cum-AdditionalRegistrar. Trade Unions,Rourkela. According to Clause-2 of the Constitution, the Registered Office of the Defendant is located at E/260, Fertilizer Township, Rourkela-7. The said Bye Law at Clause-4, specifies that it can operate in Orissa ReRollers, Ambica Cement and Utkal Moulders.
>
> 7. That, as provided under Trade Unions Regulations, the Defendant is required to submit its Annual Returns. In its Annual Returns for the year-2006, the Defendant has disclosed its registered office as MM 31 Chhend. Rourkela, which is different than as Certified by the Registrar of Trade Union. It further discloses that it is operating only in Adhunik Metalic Limited and not in any other industries.

7. Further looking to the application at Annexure-5 this Court finds, the specific pleadings of the plaintiff through paragraph no.5 reads as follows:-

> "5. That, the original Bye-law, the annual returns and the minute books are under custody and possession of the Defendant Union which are essential to be produced in the Hon'ble court to elucidate the truth and the entire case of the plaintiff rests on those documents."

8. Reading the aforesaid paragraphs through plaint as well as application involved herein, this Court finds, there remains no doubt that there has been specific pleadings on the document called for through paragraph nos.6 & 7 and there is even specific pleading by the plaintiff that the documents called for are in the custody of the defendant and the same are relevant for the purpose of effective adjudication of the proceeding.

9. In the circumstance, this Court finds, the application ought to have been allowed at least considering the requirement of the same for effective adjudication of the dispute involved therein. Further for the nature of documents, which is not public documents, there was no possibility on the part of the Plaintiff to procure such documents otherwise. It is, at this stage of the matter, looking to the reason of rejection of the application by the trial court as find at page 41 in the impugned order, this Court finds, there has been rejection of such application on the premises that the plaintiff has to prove his own case by filing documents relied by itself. This Court here observes, for the specific plea of the plaintiff that such documents are within the custody of the defendant and there is no written objection filed by the defendant, there appears, there is mechanical consideration of the case at hand. There is loss of prospect in the effective adjudication of the suit in absence of relevant materials. In the process this Court interfering in the order dated 20.12.2008 involving application U/o.11 Rule 14 of C.P.C., sets aside the same. As no purpose will be served in remitting the matter to the trial court for re-consideration for the reason it will land unnecessary wastage of time and for the observation made hereinabove and as there is relevancy of the document sought for involving Annexure-5 in the ultimate trial of the suit, this Court while allowing the application at Annexure-5, directs the defendant to produce the original Bye-law, the annual return for the year ending 31.12.2007, the minute book of the year 2007-08, at least within a period of ten days from the date of production of a certified copy of the order in the trial court and a copy of this order be also supplied to the counsel for the defendant in the trial Court also within a period of seven days hence.

10. The Writ Petition succeeds. However, there is no order as to costs.

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**2023 (I) ILR – CUT -166**

**S.K. SAHOO,J.**

CRLA NO. 58 OF 2017

**ANIL BENIA** .....Appellant

.V.

**STATE OF ODISHA** .....Respondent

**NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 – Offence punishable under section 20(b)(ii)(C) of the Act – The appellant's plea that the informant (P.W.9) is the Investigating Officer of the case, who on completion of investigation submitted charge sheet, so serious prejudiced has been caused – Whether Solely on the basis of apprehension or the doubts, the entire prosecution version can be discarded – Held, No – Nothing has been brought out from the evidence to show that the I.O was not impartial or unfair and he was biased and therefore, on the basis of some apprehension or the doubts, it cannot be said that the investigation by I.O has caused serious prejudice to the appellant – The appeal stand dismissed.**

(Para 9)

**Case Laws Relied on and Referred to** :-

1. (2020) 79 OCR (SC) 924 :Mukesh Singh Vs. State (Narcotic Branch of Delhi)
2. (2018) 72 OCR (SC) 196 :Mohan Lal Vs.The State of Punjab.

For Appellant : Mr. J.R. Dash
For Respondent : Mr. Arupananda Das,AGA.

JUDGMENT Date of Hearing: 15.09.2022 :Date of Judgment: 01.11.2022

***S.K. SAHOO,J.***

The appellant Anil Benia faced trial in the Court of learned Special Judge, Rayagada in C.T. Case No.119 of 2013 for offence punishable under section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereafter 'N.D.P.S. Act') on the accusation that on 21.08.2013 at about 2.00 p.m. at Muniguda Railway station, he along with two others were found in possession of five airbags containing flowering and fruiting tops of cannabis plant (ganja) of commercial quantity weighing 91 kgs.350 grams in an auto rickshaw bearing registration no.OR-07J-6591 in the process of transporting the same to Titilagarh without having any authority or licence to possess it.

The learned trial Court vide impugned judgment and order dated 12.12.2016 found the appellant guilty under section 20(b)(ii)(C) of the N.D.P.S. Act and sentenced him to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.1,00,000/- (rupees one lakh), in default, to undergo further rigorous imprisonment for a period of one year.

2. The prosecution case, in short, is that on 21.08.2013 P.W.9 Ganapati Behera, S.I. of Police, Rayagada G.R.P.S., in absence of the IIC, was in charge of the said police station. On that day at about 5.00 a.m., he along with other G.R.P.S. personnel were performing patrolling duty near Muniguda Railway station area and at about 2.00 p.m., they found one auto rickshaw bearing registration No.OR-07J-6591 was coming in a high speed in the side of Muniguda Railway station. When they stopped the auto rickshaw, the driver of the auto rickshaw fled away, leaving the auto rickshaw. P.W.9 and other police staff found acute smell of ganja was coming out of the vehicle loaded with airbags and they noticed two other persons were sitting inside the auto rickshaw and five airbags were loaded therein. Thereafter, P.W.9 called two independent witnesses, namely, Rasmikanta Behera (P.W.2) and Sansar Luhar (P.W.3) who came near the auto rickshaw and also found smell of ganja emitting from it. P.W.9 interrogated the two persons found present in the auto rickshaw who confessed that the airbags contained contraband ganja which they were taking to Titilagarh for disposal. P.W.9 asked both the accused persons about their names, who disclosed their names as Anil Benia (appellant) and Prafulla Lima. He further asked them whether they wanted to be searched in presence of a Magistrate or by him (P.W.9), to which both the accused persons gave their written option that they wanted to be searched in presence of a Magistrate. From the spot itself, P.W.9 intimated to Sub-divisional Magistrate, Gunupur over phone for deputation of one Executive Magistrate for the purpose of remaining present at the time of search and seizure. P.W.9 took steps to guard the auto rickshaw as well as two culprits till arrival of the Executive Magistrate. The Tahasildar, Muniguda, namely, Tapan Kumar Satapathy (P.W.7) was deputed by the Sub-divisional Magistrate, Gunupur and he arrived at the spot at 4.00 p.m. P.W.7 gave his identity to the accused persons and after giving written option to the accused persons, in his presence, the airbags were brought down and when those were opened, flowering and fruiting tops of the cannabis plant packed in polythene packets were found inside the airbags. The auto rickshaw so also the airbags were seized under seizure list Ext.3/2. On weighment, the five airbags seized were found containing 19 kgs. 660 grams, 20 kgs. 020 grams, 17 kgs.980 grams, 18 kgs.080 grams and 15 kgs. 610 grams of ganja and as such, the total became 91 kgs. 350 grams. P.W.5 collected samples of 25 grams in duplicate from each of the five packets and those were marked as A-1, A-2, B-1, B-2, C-1, C-2, D-1, D-2, E-1 and E-2. P.W.9 prepared paper slips containing the signatures of the independent witnesses, i.e. P.Ws.2 and 3, weighman Mohammad Nazar (P.W.4), P.W.7, the accused persons and of himself. One paper slip was kept in each of the sample packets and it was sealed and another paper slip was put over it. The bulk ganja packets were also sealed by using paper slips as per seizure list Ext.6. The sample packets were seized under seizure list Ext.14/1 in presence of

the witnesses. While sealing the sample packets and bulk ganja packets, one rupee coin and wax were used. On personal search of the accused persons, one wrist watch and one silver ring were seized from accused Prafulla Lima under seizure list Ext.15/1 in presence of the witnesses so also one mobile hand set and Rs.20/- were seized from appellant Anil Benia under seizure list Ext.16/1. The weighing machine and coin used for sealing were seized under seizure list Ext.17/1 and those were left in the zima of P.W.4. The appellant and the co-accused Prafulla Lima were arrested. P.W.9 brought the accused persons so also the seized articles to G.R.P.S., Rayagada and drew up the first information report (Ext.20) at Rayagada G.R.P.S. and in the absence of the IIC, he registered the case as G.R.P.S. Rayagada P.S. Case No.41 dated 21.08.2013 under section 21(b) of the N.D.P.S. Act.

P.W.9 himself took up investigation and preserved the seized articles in P.S. malkhana. On 22.08.2013 he sent a detailed report to the Superintendent of Police, Railway Police, Rourkela and forwarded the accused persons to Court. On the same day, P.W.9 seized the malkhana register under seizure list Ext.21 and kept the same in his own zima as per zimanamaExt.22. On 23.08.2013 P.W.9 sent the sample packets containing ganja marked as A-1, B-1, C-1, D-1 and E-1 to the R.F.S.L., Berhampur through S.D.J.M., Rayagada as per the orders of the learned Special Judge, Rayagada under forwarding report Ext.23. Constable No.255 PrafullaNayak produced the sample packets before R.F.S.L. and obtained acknowledgment. P.W.9 verified the ownership of the seized auto rickshaw and ascertained that it belonged to one Hari Saran Das of village-Nalabanta, P.S.-Aska, District-Ganjam. On 30.09.2013 P.W.9 seized the detailed report submitted to the office of the Superintendent of Police, Railway Police, Rourkela under seizure list Ext.25 and left the same in the zima of SangitaToppo, Inspector, D.C.R.B. He received the chemical examination report vide Ext.27 and submitted charge sheet on 17.12.2013 against the appellant, co-accused Prafulla Lima and auto driver Kuna Panda showing him as absconder under section 21(b) of the N.D.P.S. Act.

3. The appellant along with co-accused Prafulla Lima were charged under section 20(b)(ii)(C) of the N.D.P.S. Act for illegal transportation of 91 kgs. 350 grams of contraband ganja in an auto rickshaw to which both of them refuted, pleaded not guilty and claimed to be tried.

During course of trial, the co-accused Prafulla Lima, who was granted interim bail for one month, did not surrender for which non-bailable warrant of arrest was issed against him and the case against him was splitted up and only the appellant Anil Benia faced the trial.

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

P.W.1 Prabin Kumar Kuanr who was the A.S.I. of G.R.P.S. was one of the members of the patrolling party and he stated about the detention of the vehicle, presence of the appellant and co-accused in the said vehicle and seizure of contraband ganja from the vehicle. He further stated about the seizure of station diary by P.W.9 as per seizure list Ext.1 and leaving the same in his (P.W.1) zima as per zimanama Ext.2.

P.W.2 RashmikantaBehera who was the Station Master of Muniguda Railway station, did not support the prosecution case. He proved his signatures on some papers.

P.W.3 SansarLuhar who was the licensed Railway porter of Muniguda Railway station, did not support the prosecution case. He proved his signatures on some papers.

P.W.4 Mohammed Nazar, who was a dealer of lubricants also did not support the prosecution case. He proved his signatures on some papers.

P.W.5 Purna Chandra Sahoo who was the labourer in Muniguda Railway station, also did not support the prosecution case for which he was declared hostile.

P.W.6 Durga Prasad Dandasana was the constable No.54 attached to G.R.P.S. and he is also a witness to the seizure of ganja and stated about the preparation of seizure list.

P.W.7 Tapan Kumar Satpathy was the Tahasildar, Muniguda, who on receipt of a message from Sub-Collector -cum- S.D.M., Gunupur proceeded to the spot and he stated about the search and seizure of contraband ganja found in five airbags from the possession of the appellant and co-accused Prafulla Lima, collection of sample packets of ganja, sealing of the air bags and sample packets and preparation of the seizure lists in which he put his signatures.

P.W.8 Sadananda Pradhan was the A.S.I. of Police attached to Rayagada G.R.P.S. and one of the members of the patrolling party. He stated about the detaining of auto rickshaw and further stated about the presence of the appellant and the co-accused Prafulla Lima inside the vehicle. He further stated that the driver of the auto rickshaw fled away and the appellant so also co-accused Prafulla Lima confessed carrying ganja in the vehicle and disclosed their names. He also stated about the seizure of five airbags filled with ganja from the auto rickshaw. He further stated about the weighment of ganja, collection of samples

of 25 grams of ganja in duplicate from each of the packets and sealing of samples. He is a witness to the seizure list.

P.W.9 Ganapati Behera was the S.I. of Police attached to the Rayagada G.R.P.S. and in absence of the Inspector-in-charge, he was in charge of the police station. He stated about detaining of the auto rickshaw and presence of the appellant so also the co-accused Prafulla Lima inside the vehicle and running away of the driver, confession of the appellant and the co-accused to be carrying ganja in the vehicle, disclosure of their names, seizure of five numbers of airbags filled with ganja, weighment of ganja and collection of samples of 25 grams of ganja in duplicate from each of the packets and sealing of the packets, arrest of the appellant and the co-accused on 21.08.2013. He is the informant in the case so also the Investigating Officer, who on completion of investigation, submitted charge sheet against the appellant so also the co-accused persons.

P.W.10 Suresh Chandra Naik was the Inspector incharge attached to Rayagada G.R.P.S., who produced the detailed report in connection with Rayagada G.R.P.S. Case No.41 of 2013 as per the direction of the Superintendent of Police, Railway, Rourkela.

The prosecution exhibited twenty eight documents. Ext.1 is the seizure list of station diary of Muniguda G.R. Beat House, Ext.2 is the zimanama of the said station diary, Ext.3/2 is the seizure list of auto rickshaw and five air bags containing ganja, Ext.4 is the written option given by co-accused Prafulla Lima, Ext.5 is the written option given by the appellant, Ext.6 is the seizure list of five air bags after weighment, Exts.7/4, 8/4, 9/4, 10/4 and 11/4 are the paper slips containing signatures of witnesses, Ext.12/1 is the seizure list of written option of the appellant, Ext.13/1 is the seizure list of written option of coaccused Prafulla Lima, Ext.14/1 is the seizure list of ten sealed exhibit packets, Ext.15/1 is the seizure list of personal belonging of co-accused Prafulla Lima, Ext.16/1 is the seizure list of personal belonging of the appellant, Ext.17/1 is the seizure of weighing machine and one coin used for sealing purpose seized from P.W.4, Ext.18/1 is the zimanama of the articles seized under Ext.17/1 given to P.W.4, Ext.19 is the spot map, Ext.20 is the first information report, Ext.21 is the seizure list of Malkhana register, Ext.22 is the zimanama of Malkhana Register, Ext.23 is the forwarding letter of exhibits to R.F.S.L., Berhampur, Ext.24 is the seizure list of acknowledgement of exhibits at R.F.S.L., Ext.25 is the seizure list of detailed report, Ext.26 is the zimanama of detailed report, Ext. 27 is the chemical examination report and Ext.28 is the detailed report dated 22.08.2013.

The prosecution also proved ten material objects. M.O.I to M.O.V are the sealed bulk ganja and M.O.VI to M.O.X are the sample packets.

5. The defence plea of the appellant is that he was waiting at the railway station and the police brought him and foisted the case against him.

No witness was examined on behalf of the defence.

6. The learned trial Court after assessing the oral as well as documentary evidence on record has been pleased to hold that the presence of the accused persons and the seizure of ganja has remained unimpeached and the possession of the same by the accused persons cannot be doubted in view of the fact that one of the co-accused of the case being the driver of the auto rickshaw fled away from the spot leaving the auto rickshaw in a suspicious circumstance. It was further held that the presumption under sections 35 and 54 of the N. D. P. S. Act regarding the culpable mental state of the appellant so also regarding commission of an offence under the N.D.P.S. Act are succinctly established. It was further held that the seizure of contraband materials regarding quantity of contraband and presence of the accused persons cannot be doubted and no fault can be found with the I.O. in ensuring the compliance of section 50 of the N.D.P.S. Act for which the veracity of the prosecution case cannot be suspected. Accordingly, the appellant was held guilty under section 20(b)(ii)(C) of the N.D.P.S. Act.

7. Mr. J.R. Dash, learned counsel appearing for the appellant contended that the independent witnesses, i.e. P.Ws.2, 3, 4 and 5 have not supported the prosecution case and basing on the evidence of the official witnesses, which are discrepant in nature, the order of conviction has been passed. He also highlighted that since the informant (P.W.9) is also the Investigating Officer of the case, who on completion of investigation submitted charge sheet, the appellant has been seriously prejudiced. Though it is the specific prosecution case that a one rupee coin was used for sealing the sample packets so also the bulk ganja packets, but neither the said coin was produced in Court with the seized articles at the first instance nor during trial. The malkhana register was also not produced. It is argued by Mr. Dash that the safe custody of the seized articles after its seizure and before its production in Court is a doubtful feature and therefore, the impugned judgment and order of conviction should be set aside.

Mr. Arupananda Das, learned Addl. Government Advocate, on the other hand, supported the prosecution case and contended that even though independent witnesses have not supported the prosecution case but in view of the settled position of law that the conviction can be based upon the evidence of the official witnesses and in a case of this nature where there are no such material contradictions or improbability features noticed in their evidence, no fault can be found with the impugned judgment. It is further argued that the seized articles

along with the sample packets were kept in P.S. malkhana and malkhana register was also seized as per seizure list Ext.21 and nonproduction of malkhana register or copy thereof before the learned trial Court cannot be a ground to disbelieve the prosecution case as there is nothing on record that during the retention of the seized articles in the malkhana or prior to that, there was any chance of tampering with the same. Learned counsel further submitted that when the seized articles were produced and a prayer was made to send the sample packets for chemical examination, the learned Special Judge, Rayagada noticed that not only the five bulk ganja airbags marked as Exts.A to E but also ten sample packets were properly sealed and intact and accordingly, direction was issued to the learned S.D.J.M., Rayagada to receive the same and keep the seized five bulk ganja airbags and five nos. of sample packets i.e. A-2, B-2, C-2, D-2, E-2 in safe custody and to send the other five sealed sample packets, i.e. A-1, B-1, C-1, D-1 and E-1 to the Deputy Director, R.F.S.L., Berhampur for chemical examination and opinion. It was further argued that on the basis of such direction issued, the learned S.D.J.M., Rayagada forwarded the sample packets A-1 to E-1 to the Chemical Examiner and the forwarding report also indicates the sample packets were properly sealed. The Chemical Examiner in its report Ext.27 also indicated that the impression of the seal which was found on the parcel corresponded to the seal impression forwarded and the exhibits were found to be fruiting and flowering tops of cannabis plant known as ganja and therefore, it cannot be doubted that the articles which were seized at the spot from the possession of the appellant and the co-accused were the very articles which reached the Chemical Examiner and there was no tampering with the same. Learned counsel for the State further argued that since the appellant was found in the auto rickshaw along with the co-accused persons and one of them fled away from the spot, who was the driver of the auto rickshaw and the other coaccused jumped bail during trial and absconded and the appellant failed to satisfactorily discharge the burden of possession of such contraband articles, the learned trial Court has rightly utilized the provisions under sections 35 and 54 of the N.D.P.S. Act against the appellant in holding him guilty and since there is no illegality or infirmity in the impugned judgment, the appeal should be dismissed.

**Conviction basing on the evidence of the official witnesses**:

8. All the independent witnesses i.e. P.Ws.2, 3, 4 and 5 have not supported the prosecution case and they have stated that they did not know the appellant. They have been declared hostile by the prosecution under section 154 of the Evidence Act and cross-examined by the learned Special Public Prosecutor. Even if a witness is characterized as a hostile witness, his evidence is not completely effaced. The said evidence remains admissible in the trial and there is

no legal bar to base a conviction upon his testimony, if corroborated by other reliable evidence. The part of evidence of a witness as contained in examination-in-chief, which remains unshaken even after crossexamination, is fully reliable even though the witness has been declared hostile. The learned Special Public Prosecutor has failed to bring out anything from the cross-examination he made to the witnesses to lend corroboration to the evidence of the official witnesses. The witnesses have stated that their signatures were taken in blank papers and they did not know as to why their signatures were taken. Therefore, the evidence of these witnesses is no way helpful to the prosecution and cannot be acted upon in any way.

Even though the independent witnesses examined in the case have not supported the prosecution case, but the same cannot be a ground to discard the prosecution case in toto. If the statements of the official witnesses relating to the search and seizure are found to be cogent, reliable and trustworthy, the same can be acted upon to adjudicate the guilt of the appellant. This Court will have to appreciate the relevant evidence and determine whether the evidence of the official witnesses is believable after taking due care and caution in evaluating their evidence.

**Whether the appellant is prejudiced as the informant (P.W.9) is also the Investigating Officer:**

9. In the case of **Mukesh Singh -Vrs.- State (Narcotic Branch of Delhi) reported in (2020) 79 Orissa Criminal Reports (SC) 924**, which is a five-Judge Constitution Bench decision constituted to decide the correctness of the ratio laid down in the case of **Mohan Lal -Vrs.- The State of Punjab reported in (2018) 72 Orissa Criminal Reports (SC) 196**, it was held that whether the investigation conducted by the concerned informant was fair investigation or not is always to be decided at the time of trial. The concerned informant/investigator will be cited as a witness and he is always subject to cross-examination. There may be cases in which even the case of the prosecution is not solely based upon the deposition of the informant/informant -cum- investigator but there may be some independent witnesses and/or even the other police witnesses. The testimony of police personnel will be treated in the same manner as testimony of any other witness and there is no principle of law that without corroboration by independent witnesses, his testimony cannot be relied upon. It has also been held that there is no reason to doubt the credibility of the informant and doubt the entire case of the prosecution solely on the ground that the informant has investigated the case. Solely on the basis of some apprehension or the doubts, the entire prosecution version cannot be discarded and the accused is not to be

straightway acquitted unless and until the accused is able to establish and prove the bias and the prejudice. While concluding, it was observed that in a case where the informant himself is the investigator, by that itself cannot be said that the investigation is vitiated on the ground of bias or the like factor. The question of bias or prejudice would depend upon the facts and circumstances of each case. It was held that merely because the informant is the investigator, by that itself the investigation would not suffer the vice of unfairness or bias and therefore, on the sole ground that informant is the investigator, the accused is not entitled to acquittal. The matter has to be decided on a case to case basis. It was held that a contrary decision in the case of **Mohan Lal** (supra) and any other decision taking a contrary view that the informant cannot be the investigator and in such a case the accused is entitled to acquittal are not good law and they are specifically overruled.

Ordinarily if a police officer is the informant in a case, in the fairness of things, the investigation should be conducted by some other empowered police officer or at least the investigation should be supervised by some other Senior police officer as the informant police officer is likely to be interested in the result of the case projected by him. However, if the informant police officer in the exigencies of the situation conducts investigation and submits final form, it cannot be per se illegal. Investigation into criminal offences should be fair, unobjectionable and should not percolate the apprehension in the minds of the accused that it is carried out unfairly and with designed motive. An onerous and responsible duty is cast on the investigating officer to conduct the investigation avoiding any kind of fabrication of evidence and his impartiality must dispel any suspicion. His prime duty is to bring out the real truth to instill confidence of the public and rule out the sense of being partitioned or to suppress. Any extraneous force and/or influence in the investigation process may result into tainted and unfair investigation. Thus the investigating agency should not be influenced by any extraneous influence and investigation must be done judiciously, fairly, transparently and expeditiously to secure the rule of law. The defence has to prove in what way such investigation is not impartial or it was unfair, biased or has caused prejudice to the accused.

P.W.9 has stated that he was the Sub-Inspector of Police at Rayagada G.R.P.S. and in the absence of I.I.C., he was in-charge of the police station. P.W.9 detected the case while he was performing patrolling duty with other G.R.P.S. personnel, conducted search and seizure and investigated the case and submitted charge sheet. Nothing has been brought out from his evidence to show that he was not impartial or his investigation was unfair and he was biased and

therefore, on the basis of some apprehension or the doubts, it cannot be said that the investigation made by P.W.9 has caused serious prejudice to the appellant.

**One rupee coin, malkhana register used for sealing not produced in Court:**

10. P.W.9 specifically stated that he sealed the packets and bags by means of one rupee coin and wax. He further stated that the coin used for sealing purpose belonged to him and it was a one rupee coin and such coins are normally available with everybody.

The prosecution is required to prove the proper sealing of seized articles and complete elimination of tampering with such articles during its retention by the investigating agency. Burden of proof of entire path of journey of the articles from the point of seizure till its arrival before chemical examiner has to be proved by adducing cogent, reliable and unimpeachable evidence. The brass seal used in sealing the contraband articles should be kept in the zima of a respectable person and it is required to be produced before the Court at the time of production of the seized articles and sample packets for verification by the Court. In the case in hand, no brass seal was used for sealing purpose, but it was just a one rupee coin which was available with anyone. The evidence of P.W.9 regarding use of one rupee coin for sealing purpose is corroborated by the other official witnesses like P.W.7 and P.W.8. No question has been put to P.W.9 by the learned defence counsel as to why he did not use any brass seal, but one rupee coin for sealing purpose. Unless I.O. is asked a pertinent question in that respect, no adverse inference can be drawn against his conduct on surmise.

P.W.9 specifically stated that he was in charge of P.S. Malkhana and seized articles were kept in the Malkhana. He further stated that he seized P.S. Malkhana register at the P.S. under seizure list Ext.21. No question was put to the I.O. challenging that the seized articles were not kept in sealed condition in the P.S. Malkhana. P.W.9 has specifically stated that the entire operation of seizure was completed by 10 p.m. and therefore, there was no time left to produce the appellant and the seized articles on that very day in Court. The seized articles were produced on the next day before the learned Special Judge, Rayagada and a prayer was made by P.W.9 to send the sample packets for chemical examination. The learned Special Judge, Rayagada noticed and reflected in the order sheet that not only the five bulk ganja airbags marked as Exts.A to E but also ten sample packets were properly sealed and intact and accordingly, direction was issued to the learned S.D.J.M., Rayagada to receive the same and keep the seized five bulk ganja airbags and five nos. of sample packets i.e. A-2, B-2, C-2, D-2, E-2 in safe custody and to send the other five sealed sample packets, i.e. A-1, B-1, C-1, D-1 and E-1 to the Deputy Director,

R.F.S.L., Berhampur for chemical examination and opinion. The learned S.D.J.M., Rayagada forwarded the sample packets A-1 to E-1 to the Chemical Examiner and the forwarding report also indicates the sample packets were properly sealed. The Chemical Examiner in its report Ext.27 also indicated that the impression of the seal which was found on the parcel corresponded to the seal impression forwarded. In such a situation, mere nonproduction of malkhana register during trial cannot be a ground to discard the prosecution case or to doubt that the seized articles were not kept in safe custody prior to its production in Court and that there was possibility of tampering with the same particularly when paper slips containing signatures of independent witnesses, accused persons including the Executive Magistrate (P.W.7) were used for sealing the airbags and sample packets.

**Section 35 and 54 of N.D.P.S. Act:**

11. The defence plea of the appellant is that he was waiting at the railway station and the police brought him and foisted the case against him. In view of the evidence of official witnesses, such plea is not acceptable. The appellant and co-accused Prafulla Lima were found in the offending auto rickshaw and five airbags containing flowering and fruiting tops of cannabis plants (ganja) were found from it. The auto rickshaw driver ran away when the official witnesses on suspicion detained it.

Section 35 of the N.D.P.S. Act speaks about culpable mental state and section 54 of the N.D.P.S. Act states about presumption to be drawn from the possession of illicit articles. Section 35 of the N.D.P.S. Act requires the defence to prove that the accused had no such mental state with respect to the act charged as an offence by the prosecution. The accused is to prove that he was not in conscious possession of the contraband articles, if it is proved by the prosecution that he was in possession thereof. Section 35(2) of the N.D.P.S. Act requires the accused to prove beyond reasonable doubt that he had no culpable mental state which can be discharged only by adducing cogent and reliable evidence which must appear to be believable or showing circumstances which might lead the Court to draw a different inference. An initial burden exists upon the prosecution and only when it stands satisfied, the legal burden would shift. The prosecution has to prove the fundamental facts so as to attract the rigors of section 35 of the N.D.P.S. Act. In view of section 54 of the N.D.P.S. Act, the accused is to account satisfactorily about the possession of the contraband articles. If the prosecution proves the search and seizure of the contraband articles from the accused to have been conducted in strict compliance of all the mandatory provisions and other directions provisions as far as possible, the burden shifts to the accused to account it satisfactory otherwise presumption shall be raised against him that he has committed an offence under the Act. When the evidence of the official witnesses has remained unshaken that the appellant was found in the auto rickshaw from which contraband ganja was found in five airbags

and the appellant has not rebutted such presumption under sections 35 and 54 of the N.D.P.S. Act by bringing into evidence, therefore, the learned trial Court is justified in holding that presumption is to be drawn against him for his illegal possession and transportation of ganja in the seized auto rickshaw.

**Conclusion:**

12. In view of the foregoing discussions, when the evidence of the official witnesses relating to search and seizure of contraband ganja from the exclusive and conscious possession of the appellant while transporting the same in a auto rickshaw is found to be clinching and trustworthy and that the seized bulk contraband ganja and sample packets were sealed properly and produced in Court on the next day of seizure with the appellant and the co-accused and there is absence of any materials to show tampering with the seized articles during its retention in the police station and after the production of seized articles, the packets were verified by the Courts and the seals were found to be intact and in view of the finding of the chemical examination report (Ext.27), I am of the humble view that the prosecution has successfully established its case beyond all reasonable doubt against the appellant and I find no illegality or infirmity in the impugned judgment and order of conviction. The sentence that has been imposed on the appellant for the conviction under section 20(b)(ii)(C) of the N.D.P.S. Act is the minimum sentence. Therefore, there cannot be any interference with the same. However, in view of the financial condition of the appellant as appears from the case records, the default sentence for nonpayment of fine is reduced from rigorous imprisonment for a period of one year to rigorous imprisonment for three months.

Accordingly, the criminal appeal being devoid of merits, stands dismissed.

Lower Court records with a copy of this judgment be sent down to the learned trial Court forthwith for information.

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**2023 (I) ILR - CUT-177**

**S.K. SAHOO, J.**

CRLLP NO. 26 OF 2015

**STATE OF ODISHA (VIG.)** .....Petitioner

.V.

**DEBASIS DIXIT** .....Opp.Party

**CODE OF CRIMINAL PROCEDURE, 1973 – Section 378 – Appeal against acquittal – Scope of interference by the Appellate Court – Indicated with case laws.** (Para 8-10)

**Case Laws Relied on and Referred to** :-

1. A.I.R. 1983 SC 308 : Babu Vs. State of Uttar Pradesh
2. (2008) 10 SCC 450 : Ghurey Lal Vs. State of Uttar Pradesh.
3. (2018) 5 SCC 790 : Bannareddy Vs. State of Karnataka.
4 A.I.R. 2013 S.C. 3368 : State of Punjab Vs. Madan Mohan Lal Verma.
5. (2009) 44 OCR 425 : State of Maharashtra Vs. Dnyaneshwar
6. A.I.R. 2002 S.C. 486 : Punjabrao Vs. State of Maharashtra.
7. A.I.R. 2016 S.C. 2045 : V. Sejappa Vs. State.
8. A.I.R. 1979 S.C. 1191 : Panalal Damodar Rathi Vs. State of Maharashtra.
9. (2016) 64 OCR (S.C.) 1016) : Mukhitar Singh Vs. State of Punjab

For Petitioner : Mr. Sangram Das, Standing Counsel (Vig.)

For Opp. Party : Mr.J. K. Panda

ORDER Date of Order:13.01.2023

***S.K. SAHOO, J.***

Heard Mr. Sangram Das, learned Standing Counsel for the Vigilance Department for the petitioner. Mr. J.K. Panda, learned counsel for the Opp. Party is present.

2. This leave petition under section 378 of Cr.P.C. has been filed by the State of Odisha (Vigilance) seeking for leave to prefer an appeal against the impugned judgment and order dated 30.10.2014 passed by the learned Special Judge (Vigilance), Bhubaneswar in T.R. Case No.11 of 2011 in acquitting the Opp. Party of the charges under section 7 and section 13(2) read with section 13(1)(d) of the Prevention of Corruption Act (hereafter 'P.C. Act') for demanding and accepting Rs.10,000/- (rupees ten thousand) from the complainant as bribe for passing the bill relating to execution of work.

3. The prosecution case, in short, is that the complainant (P.W.2) had undertaken a work from OUAT, Bhubaneswar for construction of staff quarters at Krushi Vigyan Kendra, Angul and he had completed the work and he had received about Rs.8,00,000/- (rupees eight lakhs), but he was to get further amount of Rs.3,90,000/- (rupees three lakhs ninety thousand) for which he was repeatedly approaching the Opp. Party who was the Asst. Engineer, but he did not pay any heed to it. On 03.05.2010, when the complainant met the Opp. Party and requested him to pass his bill, the Opp. Party demanded an amount of Rs.15,000/- (rupees fifteen thousand) and on the request of the complainant, he asked the complainant to pay at least Rs.10,000/- (rupees ten thousand) to pass the bill.

The complainant lodged an F.I.R. before the Superintendent of Police, Vigilance basing on which Bhubaneswar Vigilance P.S. Case No.22 of 2011 was registered. A trap party was formed and during preparation at Vigilance Office, the complainant narrated the above facts, produced ten numbers of 1000 rupee G.C.

notes which were treated with phenolphthalein powder and given to him to hand over the same to the Opp. Party on demand. The trap party went to the office of the Opp. Party where the complainant paid the tainted money to the respondent on demand and immediately the trap party rushed to the office of the Opp. Party, recovered the tainted money from his table, seized the same along with the connected work file. After obtaining the chemical examination report and sanction from the competent authority and on completion of investigation, charge sheet under the aforesaid offences was submitted against the Opp. Party.

4. The defence plea of the Opp. Party is that he had never demanded any money from the complainant for passing the bill nor received any bribe from him. On 05.05.2010 the complainant approached him and he asked the complainant to complete the PHD and electrical work and to deliver the possession of the house whereafter the final bill would be prepared. His further plea is that his higher authority in connivance with the complainant had filed a false case.

5. During course of trial, the prosecution examined eleven witnesses.

P.W.1 Prasant Kumar Pradhan was the Director, Physical Plant, P.W.2 Sushanta Sundaray is the complainant in the case, P.W.3 Debendranath Rout, P.W.4 Surendra Pradhan was the Section Officer of S.F.S.L., P.W.5 Rama Chandra Nayak, the then Junior Engineer in-charge of the construction work, P.W.6 Debi Prasad Ray, the then V.C. of O.U.A.T., Bhubaneswar, P.W.7 Pradip Kumar Mohanty, the then Labour Officer acted as overhearing witness, P.W.8 Rabindra Kumar Panda is the Trap Laying Officer, P.W.9 Siba Sankar Patra was the then C.T.O., P.W.10 Trinath Patel was the then Deputy Superintendent of Police, Vigilance and P.W.11 Harapriya Nayak is the Investigating Officer of the case.

The prosecution exhibited twenty six numbers of documents. Ext.1 is the report of P.W.2, Ext.2 is the preparation report, Ext.3 is the detection report, Ext.4 is the 164 Cr.P.C. statement of P.W.2, Exts.5 and 8 are the seizure lists, Ext.6 is the four fold paper, Ext.7 is one file K.U.K. Angul, office of D.P.P., OUAT, Exts.9 and 22 are the zimanama, Ext.10 is the C.E. report of P.W.4, Ext.11 is the M.B. book, Ext.12 is the sanction order, Exts.13, 14 and 15 are the seized glass bottles, Ext.16 is the seizure list of one sealed glass bottle, Ext.17 is the seizure list relating to seizure of tainted money, Ext.18 is the seizure list relating to seizure of one sealed glass bottle, Ext.19 is the seizure list relating to the file cover, Ext.20 is the statement recorded under section 164 of Cr.P.C., Ext.21 is the spot map, Ext.23 is the specimen brass seal on a paper, Ext.24 is the copy of the preparation report seized by P.W.8 on production by P.W.9, Ext.25 is the file containing drawing, work order, F-2 agreement etc. (containing twenty eight sheets) and Ext.26 is the copy of the forwarding report.

No witness was examined on behalf of the defence.

6. The learned trial Court after analyzing the evidence on record has observed as follows:-

> "32. As discussed hereinbefore the complainant (P.W.2) and the accompanying witness (P.W.7) have not supported the prosecution case about the demand and acceptance of the bribe money by the accused at the spot. So, the defence plea that the accused had never demanded and accepted the bribe money from the complainant cannot be said to be wholly unfounded. The evidence regarding prior demand is shaky and not acceptable. Want of signature of the accused in the detection report without any explanation and suppression of report dt.04.05.2010 lodged by the complainant before the S.P., Vigilance without any explanation are other circumstances which go against the prosecution. The evidence on record relating to recovery of the tainted money i.e. who brought out the same from the table is inconsistent. Likewise, the evidence of the witnesses is contradictory as to whether the bill pending with the accused was a final bill and if all the work of civil, electric, PHD in respect of the building was completed or not, so also whether the possession of the building was handed over or not prior to 05.05.2010. Cumulative effect all these infirmities create some doubt about the bonafide of prosecution case. On a conjoint reading of the evidence on record as discussed above and particularly in the light of statements of the hostile witnesses (P.Ws.2 and 7) who have not supported the prosecution case as regards the vital ingredients of demand and acceptance, so also keeping in view the position of law as cited above, I am of the view that prosecution has not been able to prove its case as regards the demand and acceptance of bribe of Rs.10,000/- by the accused for passing the bill of the complainant beyond all reasonable doubt and the benefit of such doubt should be extended in favour of the accused."

7. Mr. Sangram Das, learned Standing Counsel for the Vigilance Department contended that even though the complainant (P.W.2) and the accompanying witness (P.W.7) have not supported the prosecution case about the demand and acceptance of the bribe money by the Opp. Party at the spot, but when the Trap Laying Officer (P.W.8) has stated that when he challenged the Opp. Party about the receipt of tainted money, he fumbled and though he thereafter denied to have received any money from P.W.2, but his both hand wash was taken separately and its colour changed to pink and on being asked, the Opp. Party brought out the tainted money of Rs.10,000/- which was kept under a file and P.W.9 compared the numbers of the tainted noted with the numbers earlier noted which tallied and all these evidence substantiates about the acceptance of the tainted money and its recovery. He argued that the Opp. Party has not offered any satisfactory explanation in his 313 Cr.P.C. statement as to how the tainted money came under the official file and in view of such acceptance and recovery, presumption under section 20 of the P.C. Act would be attracted and therefore, it is a fit case where leave should be granted to prefer an appeal against the judgment and order of acquittal.

8. The right of appeal against acquittal vested in the State Government should be used sparingly and with circumspection and it is to be made only in case of public importance or where there has been a miscarriage of justice of a very grave nature.

Law is well settled as held in case of ***Babu -Vrs.- State of Uttar Pradesh reported in A.I.R. 1983 Supreme Court 308*** that in appeal against acquittal, if two views are possible, the appellate Court should not interfere with the conclusions

arrived at by the trial Court unless the conclusions are not possible. If the finding reached by the trial Judge cannot be said to be unreasonable, the appellate Court should not disturb it even if it were possible to reach a different conclusion on the basis of the material on the record because the trial Judge has the advantage of seeing and hearing the witnesses and the initial presumption of innocence in favour of the accused is not weakened by his acquittal. The appellate Court, therefore, should be slow in disturbing the finding of fact of the trial Court and if two views are reasonably possible on the evidence on the record, it is not expected to interfere simply because it feels that it would have taken a different view if the case had been tried by it.

In case of ***Ghurey Lal -Vrs.- State of Uttar Pradesh reported in (2008) 10 Supreme Court Cases 450***, it is held as follows:-

> "75….The trial court has the advantage of watching the demeanour of the witnesses who have given evidence, therefore, the appellate court should be slow to interfere with the decisions of the trial court. An acquittal by the trial court should not be interfered with unless it is totally perverse or wholly unsustainable."

In case of ***Bannareddy -Vrs.- State of Karnataka reported in (2018) 5 Supreme Court Cases 790***, it is held as follows:-

> "10….It is well settled principle of law that the High Court should not interfere in the well reasoned order of the trial court which has been arrived at after proper appreciation of the evidence. The High Court should give due regard to the findings and the conclusions reached by the trial court unless strong and compelling reasons exist in the evidence itself which can dislodge the findings itself."

Thus, an order of acquittal should not be disturbed in appeal under section 378 of Cr.P.C. unless it is perverse or unreasonable. There must exist very strong and compelling reasons in order to interfere with the same. Findings of fact recorded by a Court can be held to be perverse, if the same have been arrived at by ignoring or excluding relevant materials on record or by taking into consideration irrelevant/inadmissible materials or if they are against the weight of evidence or if they suffer from the vice of irrationality.

9. Law is well settled that mere receipt of the amount by the accused is not sufficient to fasten his guilt in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification. The prosecution has to successfully prove the foundational facts i.e. the demand, acceptance of bribe money and recovery of the same from the accused and then only the statutory presumption under section 20 of the P.C. Act against the guilt of the accused would arise and the accused has to adduce evidence relating to the rebuttal of such presumption. The burden rests on the accused to displace the statutory presumption raised under section 20 of the P.C. Act by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in section 7 of the P.C. Act. In a case where the accused offers an explanation for receipt of the alleged amount, while

invoking the provisions of section 20 of 1988 Act, the Court is required to consider such explanation on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt. Therefore, whether all the ingredients of the offences i.e. demand, acceptance and recovery of illegal gratification have been satisfied or not, the Court must take into consideration the facts and circumstances brought on the record in its entirety and the standard of burden of proof on the accused vis-à-vis the standard of burden of proof on the prosecution would differ. It is only when this initial burden regarding demand and acceptance of illegal gratification is successfully discharged by the prosecution, then burden of proving the defence shifts upon the accused. The proof of demand of illegal gratification is the gravamen of the offences under sections 7 and 13(1)(d) of the P.C. Act and in absence thereof, the charge would fail. Mere acceptance of any amount allegedly by way of illegal gratification or recovery thereof, de hors the proof of demand, ipso facto, would not be sufficient to bring home the charge under these two sections of the P.C. Act. ***(Ref:- State of Punjab -Vrs.- Madan Mohan Lal Verma reported in A.I.R. 2013 S.C. 3368, State of Maharashtra -Vrs.- Dnyaneshwar reported in (2009) 44 Orissa Criminal Reports 425, Punjabrao -Vrs.- State of Maharashtra reported in A.I.R. 2002 S.C. 486, V. Sejappa -Vrs.- State reported in A.I.R. 2016 S.C. 2045, Panalal Damodar Rathi -Vrs.- State of Maharashtra reported in A.I.R. 1979 S.C. 1191, Mukhitar Singh -Vrs.- State of Punjab reported in (2016) 64 Orissa Criminal Reports (S.C.) 1016).***

10. In view of the evidence available on record and in absence of any material produced by the prosecution to prove and demand and acceptance of the tainted money by the Opp. Party and since the decoy (P.W.2) and overhearing witness (P.W.7) have not supported the prosecution case and as rightly observed by the learned trial Court that there is significant discrepancy relating to recovery of tainted money from the Opp. Party, I find no illegality or impropriety in the impugned judgment. In my humble view, the learned trial Court has come to a just conclusion and acquitted the respondent of all the charges.

Therefore, I am not inclined to grant leave to the State of Odisha (Vigilance) to prefer any appeal against the impugned judgment and order of acquittal. Accordingly, the CRLLP petition stands dismissed.

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**2023 (I) ILR - CUT- 182**

**B.P. ROUTRAY, J.**

MACA NO. 670 OF 2007

**GANDE MINZ & ORS.** .....Appellants

.V.

**PANKAJ KUMAR PATEL (SINCE DEAD) THROUGH HIS LRS & ANR.** .....Respondents

GENERAL MANAGER, NATIONAL
INSURANCE COMPANY LTD.
(IN MACA NO.1071/2007) …….Appellants

.V.

GANDA MINZ & ORS.
(IN MACA NO.1071/2007) ……..Respondents

**COMPENSATION – Whether the insurer is liable to indemnify the compensation in favour of a gratuitous passenger – Held, Yes and can recover the same from the owner of the vehicle after taking recourse of the law.** (Para 11-14)

**Case Laws Relied on and Referred to** :-

1. 2004 (2) SCC 1 :M/s. National Insurance Co. Ltd. Vs. Baljit Kaur & Ors.
2. 2013 (2) SCC 41 :Manager, National Insurance Co. Ltd. Vs. Saju P. Paul & Anr.
3. 2016 SCC OnLine Ori 1008:Charulata Mallik Vs.Prakash Ku Mohanty.
4. (2004) 3 SCC 297 :National Insurance Co. Ltd. Vs. Swaran Singh.
5. (2020) 4 SCC 49 :Nirmala Kothari Vs.United India Insurance Company Ltd.
6. (2006) 7 SCC 318 :Lal Chand Vs. Oriental Insurance Co. Ltd.

For Appellants : Ms. S. Mohanty, (in MACA No.670/2007)
Mr. A. Das, (in MACA No.1071/2007)

For Respondents : Mr. A. Das, Counsel for Respondent No.2 (in MACA No.670/2007)
Ms. S. Mohanty, Counsel for Respondents 1 to 3
(in MACA No.1071 of 2007)

ORDER Date of Order: 19.12.2022

***B. P. ROUTRAY,J.***

1. The matters are taken up through hybrid mode.

2. Heard Ms. S. Mohanty, learned counsel for the claimants and Mr. A. Das, learned counsel for insurance company.

3. Though the matters are listed for orders, but on the request of both parties the same are taken up for final hearing.

4. Ms. Mohanty seeks and permitted to correct the consolidated cause title in the court.

5. Both the appeals being arise out of same common impugned judgment, are heard together and disposed of by this common order.

6. Both the appeals are directed against the impugned judgment dated 20th April, 2007 of learned 2nd MACT, Northern Division, Sambalpur passed in Misc. (A) Case No.379 of 1997 (SN) and batch. Present appeals are in respect of Misc.(A) Case No.379 of 1997 (SN), wherein compensation to the tune of Rs.1,00,000/- has been granted in favour of the claimants with adjustment of Rs.50,000/- already paid under Section 140 of the MV Act on account of death of the deceased in the motor vehicular accident dated 21st May, 1995.

7. MACA No.1071 of 2007 has been filed by the insurer challenging the award and MACA No.670 of 2007 has been filed by the claimants praying for enhancement of the compensation amount.

8. Learned tribunal while granting the award has further granted liberty in favour of the insurer to recover the amount from the owner.

9. While challenging the impugned award, Mr. Das submits that first of all the deceased was a gratuitous passenger in the offending vehicle, i.e. Tipper bearing registration number OR 16 4346, which was a goods carriage vehicle and secondly, the driver of the offending vehicle did not have a valid licence on the date of accident.

10. The claimants prays for enhancement of the amount mainly on the ground that notional income of the minor deceased should be fixed at Rs.15,000/- per annum as per 2nd Schedule of the MV Act.

11. First dealing with the challenge advanced by the insurer that the deceased being a gratuitous passenger the insurer is not liable to indemnify the compensation amount, it needs to be mentioned that in the case of ***M/S. National Insurance Co. Ltd v. Baljit Kaur And Ors., 2004 (2) SCC 1***, Hon'ble Supreme Court has held as follows:-

> "21. The upshot of the aforementioned discussions is that instead and in place of the insurer the owner of the vehicle shall be liable to satisfy the decree. The question, however, would be as to whether keeping in view the fact that the law was not clear so long such a direction would be fair and equitable. We do not think so. We, therefore, clarify the legal position which shall have prospective effect. The Tribunal as also the High Court had proceeded in terms of the decision of this Court in ***Satpal Singh (2000) 1 SCC 237***. The said decision has been overruled only in ***Asha Rani (2003) 2 SCC 223***. We, therefore, are of the opinion that the interest of justice will be subserved if the appellant herein is directed to satisfy the awarded amount in favour of the claimant, if not already satisfied, and recover the same from the owner of the vehicle. xxxxx"

12. In the case of ***Manager, National Insurance Co. Ltd. v. Saju P. Paul & Anr., 2013 (2) SCC 41***, it is observed that:-

> "26. The pendency of consideration of the above questions by a larger Bench does not mean that the course that was followed in ***Baljit Kaur (2004) 2 SCC 1*** and ***Challa Upendra Rao (2004) 8 SCC 517*** should not be followed, more so in a peculiar fact situation of this case. In the present case, the accident occurred in 1993. At that time, the claimant was 28 years old. He is now about 48 years. The claimant was a driver on heavy vehicle and due to the accident he has been rendered permanently disabled. He has not been able to get compensation so far due to the stay order passed by this Court. He cannot be compelled to struggle further for recovery of the amount. The Insurance Company has already deposited the entire awarded amount pursuant to the order of this Court passed on 1-8-2011 in ***National Insurance Co. Ltd. v. Saju P. Paul, SLP (C) No.***

> ***20127 of 2011***, and the said amount has been invested in a fixed deposit account. Having regard to these peculiar facts of the case in hand, we are satisfied that the claimant (Respondent 1) may be allowed to withdraw the amount deposited by the Insurance Company before this Court along with accrued interest. The Insurance Company (the appellant) thereafter may recover the amount so paid from the owner (Respondent 2 herein). The recovery of the amount by the Insurance Company from the owner shall be made by following the procedure as laid down by this Court in ***Challa Upendra Rao (2004) 8 SCC 517."***

13. Further, our High Court in the case of ***Charulata Mallik vsPrakash Ku Mohanty, 2016 SCC OnLine Ori 1008***, have held that:-

> "12. It is not only the duly of the Tribunal to see that just and adequate compensation is awarded to the claimants for the loss suffered by the deceased due to the accident, but also to see that there is hassle free payment of compensation with promptitude in order to save the claimants from distress. In that view of the matter, I am persuaded to rely upon the decision of Hon'ble Apex Court in the case of ***Baljit Kaur*** (supra) and ***Saju P. Paul*** (supra) and followed in the decision report in 2016 (II) OLR 448 as well as unreported decision in M.A.C.A. No.485 of 2007 (supra)."
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> xxxxxx xxxxx xxxxxx
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> 14. In that view of the matter, the appeal is allowed in part to the extent stated above and the insurance company-respondent no.2 is directed to deposit the compensation awarded along with interest accrued thereon before learned Tribunal within a period of six weeks hence. On such deposit being made, the same shall be disbursed/released in favour of the claimants proportionately in terms of the impugned award on proper identification. The Insurance Company is at liberty to prosecute the owner of the offending vehicle (respondent no.1) to recover the compensation amount taking recourse to law."

14. In the instant case the deceased is admittedly a minor child and the accident took place in 1995. Therefore, the challenge advanced by the insurer is not found appealing since the tribunal has granted the right of recovery in favour of the insurer, which is in accordance with the principles enumerated in the aforesaid decisions.

15. Coming to the second point raised by the insurer that the driver did not have a valid driving licence on the date of accident, it is the specific finding of the tribunal that the driver of the offending truck was possessing a fake licence based on Ext.8 and Ext.C. However no evidence was led from the side of the insurer to bring anything that it was within the knowledge of the owner. The insurer has further failed to bring anything on record that the accused driver was not competent to drive the vehicle.

16. In the case of ***National Insurance Co. Ltd. v. Swaran Singh, (2004) 3 SCC 297*** the Hon'ble Supreme Court has held as follows:-

> "110. (iii) The breach of policy condition e.g. disqualification of the driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of Section 149, has to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving

> at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards the insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by a duly licensed driver or one who was not disqualified to drive at the relevant time."

17. Again in the case of ***Nirmala Kothari vs. United India Insurance Company Limited, (2020) 4 SCC 49*** it is held by Supreme Court that the owner while hiring a driver is though expected to verify that the driver has a driving licence, if the driver produces a licence which on the face of it looks genuine, the employer is not expected to further investigate into the authenticity of the licence unless there is cause to believe otherwise and if the employer finds the driver to be competent to drive the vehicle and has satisfied himself that the driver has a driving licence, then there would be no breach of Section 149(2)(a)(ii) of the MV Act and the insurance company is liable under the policy to indemnify the compensation.

18. Relying on the decision rendered in the case of ***Swaran Singh*** (supra), the Supreme Court further in the case of ***Lal Chand v. Oriental Insurance Co. Ltd., (2006) 7 SCC 318***, held that the insurer has the onus to prove that the owner of the vehicle was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicle by a duly licensed driver or one who was not disqualified to drive at the relevant point of time.

19. Accordingly the insurer cannot take any benefit for the same to disown its liability.

20. So far the challenge of the claimants is concerned, Ms. Mohanty contends that the deceased being a minor should be treated as a non-earning person and according to the amount prescribed in Schedule-II of the MV Act, his notional income should be fixed at Rs.15,000/- per annum.

21. Upon perusal of the impugned judgment of the tribunal it is seen that there are altogether 23 children died in the accident as they were in the offending vehicle which was loaded with cow dung manure at the time of accident. The learned tribunal without going through a detailed process of computation, keeping in view the age of the minor children died in the accident, has directed for payment of compensation of Rs.1,00,000/- in every case considering the age group of those deceased children.

22. It is true that as per the 2nd schedule in the MV Act, notional income of a non-earning person is prescribed to be Rs.15,000/- per annum. However, in absence of details of each child brought on record through evidence like age, their educational qualification and other aspects including socio-economic background of the parents, who are present claimants, in the opinion of this court the amount so granted by the Tribunal to the tune of Rs.1,00,000/- uniformly in each case does not require any interference.

23. In the result, both the appeals are disposed of and the award amount granted by the tribunal along with interest is confirmed.

24. At this stage it is submitted by Ms. Mohanty, learned counsel that the claimants have not received the amount of Rs.50,000/- in terms of direction of the tribunal passed under Section 140 of the MV Act and therefore, the entire amount of Rs.1,00,000/- be paid to them.

The learned tribunal is directed to verify the same on record and if found that the claimants have not received the amount granted under Section 140 of the MV Act, then pay the entire amount of Rs.1,00,000/- (one lakh) along with interest to the claimants.

25. Accordingly, the insurance company is directed to deposit the balance amount of Rs.50,000/- (fifty thousand) before the tribunal along with interest @ 6% as directed by it, within a period of two months from today; where-after the same shall be disbursed in favour of claimants on the same terms and proportion as contained in the impugned judgment.

26. The statutory deposit made by the insurer before this court in MACA No.1071 of 2007 along with accrued interest be refunded on proper application and on production of proof of deposit before the tribunal.

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

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**2023 (I) ILR - CUT- 187**

**B.P. ROUTRAY, J.**

SA NO. 97 OF 1988

**RAJA DEI** .....Appellant

.V.

**ALTA BEWA & ORS.** .....Respondents

**LIMITATION ACT, 1963 – Sections 6,7 and 8 – Whether application of law of limitation prohibit plaintiff to maintain the suit after 12 years of denial by the predecessor of the Defendants – Held, Yes – It is explained by the Supreme Court in the case of Darshan Singh and others vs. Gurdev Singh, (1994) 6 SCC 585 that, in each case the litigant is entitled to a fresh starting period of limitation from the date of cessation of disability subject to the condition that in no case the period extended by this process under Section 6 or 7 (of the Limitation Act) shall exceed three years from the date of cessation of disability.**

(Para 11)

**Case Law Relied on and Referred to** :-

1. (1994) 6 SCC 585: Darshan Singh and Ors. Vs. Gurdev Singh.

For Appellant : Mr. S.N. Mishra

For Respondents : Mr. Somya Dev Ray

JUDGMENT Date of Judgment: 22.12.2022

***B.P. ROUTRAY,J.***

1. The Plaintiff, namely, Raja Dei is the present Appellant. She challenges the judgment and decree dated 6.2.1988 of the learned District Judge-cum-First Appellate Court, Mayurbhanj passed in Title Appeal No.20 of 1985, wherein the judgment and decree of the learned Sub-Judge, Karanjia passed in T.S. No.19/4 of 1984/1981-I was reversed only on the ground of limitation.

2. The substantial question involved in the present appeal is, whether application of law of limitation against the Plaintiff to prohibit her to maintain the suit after 12 years of denial by the predecessor of the Defendants is sustainable?

3. The facts need to be described in a nut shell are that one Surumali Mohanta had four sons, namely, Suar, Laxman, Lachhu and Jayanath. Suar and Lachhu died unmarried without leaving any issue. Plaintiff is the daughter of Laxman through Nilamani (wife). The Defendants are the wife and children of Jayanath. The properties in dispute have been described in schedule 'A' of the suit, i.e. to the extent of 9 Mana 4 Guntha 1 Biswa and 12 Gandas under Khata No.101 of mouza-Sannai, Pragana Jashipur, Dist.-Mayurbhanj. In the settlement record, the suit schedule 'A' land have been recorded jointly in the names of Laxman and Jayanath earlier and subsequently the names of Defendant Nos.2 to 7 have been recorded.

4. The case of the Plaintiff is that, she is posthumous daughter of Laxman, who died in the year 1957. Her mother Nilamani (P.W.3) gave birth to her after 2/3 months of death of Laxman and Nilamali married to Laxman around 2 years before her birth. Subsequently Nilamani married to one Gangadhar. Though the Plaintiff in her early days resided at her maternal grand-father's house, but after 4/5 years she came and stayed with Jayanath. Jayanath, her paternal uncle, gave married to her in 1965. In the year 1966, the Plaintiff filed Mutation Case No.645/1966 before the Tahasildar praying for recording of half share of suit schedule 'A' properties in her name, which was rejected on 3.10.1966 by the Tahasildar on the ground that the Plaintiff was never in possession of the suit land.

5. Subsequently, present suit was filed in the year 1981 by the Plaintiff. The Defendants contested the same and their stand is that the Plaintiff is not the daughter of Laxman and Laxman died much prior to coming into force of the Hindu Succession Act, 1956. Besides, they also took the ground of non-joinder of necessary party as Nilamani was not arrayed as a party, and also the ground of limitation.

6. Learned Sub-Judge, Karanjia framed as many as ten issues and all the issues were answered in favour of the Plaintiff to decree the suit in her favour granting half share to her. The findings of the learned Sub-Judge, Karanjia given in favour of the Plaintiff and confirmed by the learned District Judge are that, the Plaintiff is the daughter of Laxman and Laxman died in the year 1957, i.e. after coming into force of the Hindu Succession Act, 1956 and that, Laxman died in jointness with Jayanath.

7. There is no dispute with regard to the status of the parties that they are Hindus and governed by Hindu Mitakshara School of Law.

8. In the opinion of the learned District Judge, there is a clear denial to the title and possession of the plaintiff over the suit schedule 'A' properties by Jayanath in the written objection filed by him before the Tahasildar in Mutation Case No.645/1966. In the objection petition of Jayanath, which was filed on 3.10.1966, he has specifically denied so stating that the Plaintiff had neither any title under law nor was she in possession of the properties and after death of Laxman, he (Jayanath) became the sole heir and successor of all properties of Surumali. Learned District Judge further opined that on the date of filing of the suit, the Plaintiff was more than 21 years old and by operation of Section 6 and 8 of the Limitation Act, the right of the Plaintiff is deemed to have been barred being more than 12 years had passed from the date of filing of such objection in the mutation case by Jayanath. In other words, as per learned District Judge, the suit having been filed after 12 years counted from 3.10.1966 when the Plaintiff had the knowledge of express denial of her title and possession over the suit land by Jayanath, and more than three years of her attaining majority she cannot maintain the suit to enforce her right of preemption.

9. With regard to non-joinder of Nilamani in the suit, no serious objection was raised and according to the opinion of both the trial courts and first appellate court, she (Nilamani) having been married to another person after death of Laxman and after giving birth to the Plaintiff, her right does not survive in the joint family properties of Laxman and secondly, she never prayed for such right before the court despite being examined as P.W.3.

10. The admitted case of the parties is that they are Hindus and governed by Mitakshara School of Law and the unchallenged finding is that the Plaintiff is the daughter of Laxman. Laxman is the elder brother of Jayanath. The Plaintiff was in her mother's womb on the date of death of Laxman and Jayanath married 4/5 years after the death of Laxman. It is admitted that Defendant No.1-Alata Bewa is the wife of Jayanath and Jayanath died in the year 1980. Therefore, the status of the Plaintiff and Jayanath as well as all the Defendants after Jayanath, as co-sharers of the Hindu Joint Family Property is not denied. So the question arises here for determination is that, can plaintiff's right as a co-sharer of Jayanath and his successors is barred by limitation?

11. It is true that possession in Hindu Joint Family Property by one co-sharer is in the eye of law, possession of all and passage of time does not extinguish the right of co-owner who is out of possession of the joint property except in the event of ouster or abandonment. In the context of a co-sharer in a joint property, his right and possession would not amount to ouster unless there is a clear declaration that his title and possession as a co-sharer is denied and disputed. The court in a given situation based on the pleadings and evidences may come to the conclusion that such a plea of ouster in respect of the other party is existing or not. In the instant case as discussed by the learned District Judge in paragraph 8 of his judgment regarding the pleading of denial taken by the Defendants ousting the title and possession of the Plaintiff remains undisputed. Looking to the LCR, it is seen that the Defendants have not only claimed exclusive possession, which is one of the necessary ingredients to satisfy the right of prescription against the Plaintiff, by making statements in their depositions which is found supporting from the Plaintiff's evidence, but also they have clearly pleaded in their objection-petition filed in the mutation case to expressly deny the title and possession of the Plaintiff. It is also not disputed that though at the time of filing of the mutation case in 1966 the deceased was a minor, but at the time of filing of the suit in the year 1981, the Plaintiff was more than 21 years. Section 8 of the Limitation Act is generally treated as an exception to Section 6 and 7 of the said Act. It is explained by the Supreme Court in the case of ***Darshan Singh and others vs. Gurdev Singh, (1994) 6 SCC 585*** that, in each case the litigant is entitled to a fresh starting period of limitation from the date of cessation of disability subject to the condition that in no case the period extended by this process under Section 6 or 7 (of the Limitation Act) shall exceed three years from the date of cessation of the disability. Here in the case at hand, the extended period of three years excepted under Section 8 of the Limitation Act has undoubtedly lapsed in view of her declaration on age in the plaint. Therefore, as held by the learned District Judge to conclude that the Plaintiff's right is barred by limitation is confirmed.

12. In view of the discussions made above, no reason is found to interfere with the impugned judgment and decree. The appeal is accordingly dismissed.

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**2023 (I) ILR - CUT-191**

**Dr. S.K. PANIGRAHI, J.**

RVWPET (RPC) NO.25 OF 2019

**STATE OF ODISHA & ORS.** .....Petitioners

.V.

**SAMPADARANI ACHARYA** .....Opp. Party

**SERVICE LAW – Regularisation of Resource Teacher – Resource Teachers were initially engaged for imparting integrated education to disabled children under a central sponsored scheme – They have been absorbed in different cadres on different dates in the year 2010 by the Government – As per the policy previous service cannot be included in the present service – Whether judicial review in policy issue is permissible? – Held, No – Judicial review in policy issue is very limited – It was not wise on the part of the learned Tribunal to interfere with the policy issue of the Government – The common order dated 28.09.2015 passed in O.A. 3682(C) of 2011 and batch of cases by the Tribunal is set aside – All the above Review Petitions are allowed.** (Para 14-16)

**Case Laws Relied on and Referred to** :-

1. Civil Appeal No.1499 of 1998 : State of Orissa Vs.Dipti Paul.
2. AIR 2006 SC 1806 : State of Karnataka Vs.Umadevi.
3. 2014(I) OLR (SC) 364 : N. Ashalata Reddy Vs.Anshu Kathuria and Ors.
4. 2022(I)ILR-CUT-219 : Smrutirekha Mishra Vs.State of Odisha and Ors.
5. (2020) 13 SCC 581: Dr. Ashwani Kumar Vs.Union of India and Anr.
6. (2004) 4 SCC 684 : State of Karnataka Vs.Dr. Praveen Bhai Togadia.
7. (2020) SCC Online SC 150: Natural Gas Corporation Vs.Krishan Gopal & Ors.
8. 2005 (6) SCC 751 : State of Maharashtra Vs.R.S. Bhonde.

For Petitioners : Mr. D.R. Mohapatra, SC (for S & ME Deptt.)

For Opp. Party : Mr. Laxmikanta Mohanty

ORDER Date of Order: 13.09.2022

***Dr. S.K. PANIGRAHI, J.***

1. All these matters are taken up through hybrid mode.

2. All the aforesaid RVWPETs (RPC) have been filed at the instance of the State to review the common order dated 28.09.2015 passed in O.A. 3682(C) of 2011 and batch of cases by the Odisha Administrative Tribunal, Cuttack Bench, Cuttack (hereinafter referred to as "the Tribunal" for brevity) in the light of order dated 12.12.2018 passed by this Court in W.P.(C) No.23239 of 2017 and batch of cases.

3. Grievance of the Petitioners/ State is that the Tribunal heard the matter in the absence of their counter. Though the said fact was brought to the notice of

the learned Tribunal, but it did not incline to grant further time and heard the matter and disposed of the said Original Applications (hereinafter referred to as "the O.As. for brevity) in the following manner. The operative part of the order of the learned Tribunal is quoted as follows:

> *"3. We have heard the counsel for both the sides and have also gone through the averments of the original application (O.A.) and so also the order of the Division Bench of this Tribunal passed in OA No.2025/1996 and 3514(C)/1999.*
>
> *4. It is not at all disputed that these applicants were serving as Resource Teacher for imparting integrated education to disabled children under a scheme and after the abolition of the scheme they were deployed in different primary schools and were inducted into General Teacher cadre. For such redeployment and induction to General Teacher cadre, the Director of Elementary Education, Orissa, Bhubaneswar vide office order No.14857, dtd.06.11.1995 (Annexure-4) had fixed the service condition in which the Resource Teacher having B.Ed./C.T. qualification were allowed to draw the minimum in the pay scale of Rs.1080-1800/- per month along with D.A. as admissible under the Rules whereas Non-Trained Teachers were given scale of pay of Rs.950-1500/-. The Division Bench of the Tribunal in O.A. No.2025/1996 had passed the order as follows:*
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> *"However, the last pay he was getting as Resource Teacher may be protected in the scale of Rs.950-1500/- taking recourse to Rule 74(d) of the Orissa Service Code provided his last pay was not higher than Rs. 1500/- which is the maximum in that scale and in that case, he shall be entitled to get only Rs. 1500/-. Orders in this regard be passed within three months from the date of receipt of a copy of this order."*
>
> *In this case the applicant Rama Krushna Purohit was an Un-Trained Teacher. It is stated That this order has already been complied with by the State Govt. vide order dtd.28.08.2001 in O.A.Nos.3514(C)/99, 3515(C)/99, 1817(C)/1999 and 17(C)/2001 following the ratio of O.A.No.2025/1996, similar order was passed giving pay protection of the last pay drawn as Resource Teacher while switching over to the General Teacher cadre. It is stated that the said order had been complied with by the State Govt. Thus, the present applicants, who stand in the same footing with the applicants of the above mentioned O.As. are also entitled for same pay protection. In other words, pay protection was granted on the condition that it was even the scale applicable for the posts in which the applicants' scale was adjusted. The Tribunal passed the aforesaid order taking into consideration the provisions of Rule-74(d) of Orissa Service Code. The order passed in the case of Mr.Purohit had not been challenged before any forum. Referring to the ratio one Ratnakar Das approached the Tribunal even without waiting for a counter.*
>
> *5. In view of the position stated above, all the O.As, are allowed. The last pay drawn by these applicants as Resource Teacher while inducted into General Teacher cadre be protected in their respective scale of pay i.e. in the scale of Trained Teacher and Untrained Teacher taking into consideration the qualification of the applicants and this exercise should be completed within a period of one month from the date of receipt of a copy of this order. It is further directed that service benefits, if any, given to the applicants of O.A.No.2025/1996 and O.A.No.3514/1999 be extended to the present applicants.*
>
> *Accordingly, all the O.As. are disposed of"*

4. Being aggrieved by the said order dated 28.09.2015 passed by the Tribunal, The State of Odisha filed W.P.(C) No.23239 of 2017 and batch of cases before this Court. This Court disposed of the said Writ Petitions vide order dated 19.12.2018 by granting liberty to the State to file Review Petition before the Tribunal. In such view of the matter, the State has preferred these Review Petitions on the grounds that:-

(i) The State was not given sufficient opportunity to file counter affidavit which leads to disposal of the O.As. being allowed. Despite the fact was brought to the notice of the Tribunal, the same was not given heed to.

(ii) The present Opposite Parties/ Original Applicants (hereinafter referred to as "the Original Applicants" for brevity) who were initially engaged as Resource Teachers for disabled children unit under integrated education which is a central sponsored scheme sans any service condition.

(iii) It was also stipulated that soon after abolition of the scheme, the engagement of the Resource Teachers like the Original Applicants shall also be abolished and they will have no claim for further engagement or regularisation of their posts. The service conditions of the Original Applicants were that no Resource Teacher shall claim any regular assignment and their services may be terminated without giving any reason thereof. Accordingly, after abolition of the said scheme, the services of the Original Applicants were terminated. Hence, no illegality is committed by the State. Further, the Original Applicants cannot claim regularisation of their services during the period of Resource Teacher.

(iv) In the meantime, after the Resource Teachers were disengaged by following the abolition of the scheme on 31.03.2009, the State took conscious policy decision to give appointment to disengaged Resource Teachers by bringing them to general cadre. With the introduction of the said policy, the Odisha Government was generous enough to consider the plight of the Original Applicants and thereby the Government regularized them under a new service governed under the new policy and service condition.

(v) Since the Original Applicants were engaged under a scheme which was purely temporary in nature, they cannot claim for their future service or regularisation of their past services. Hence, the past services of the Original Applicants cannot be counted. Therefore the Original Applicants cannot be considered under the Orissa Civil Services (Pension) Rules, 1992. Hence, the claim of the Original Applicants for grant of pension and pensionary benefits under the old Rules is not tenable.

(vi) Hon'ble Supreme Court has decided in several cases and the law is well settled in the case of ***State of Orissa –vrs.- Dipti Paul***[1] and in the case of State of ***Karnataka –vrs.- Umadevi***[2]. The Orissa Elementary Education (Method of Recruitment and Condition of Service of Teachers and Officers) Rules, 1997 postulates that the appointment of an Elementary Teacher shall be started

**1**. Civil Appeal No.1499 of 1998, **2**. AIR 2006 SC 1806

with effect from Level-V to Level-I after entering into a cadre. Hence, any service benefit claimed by the teacher entered into the service shall be governed under the Orissa Elementary Education (Method of Recruitment and Condition of Service of Teachers and Officers) Rules, 1997. In the present cases, the Original Applicants were never governed under the Orissa Elementary Education (Method of Recruitment and Condition of Service of Teachers and Officers) Rules, 1997 during the period of serving as Resource Teacher which was purely under a scheme. Hence, they cannot claim any kind of regular benefit for the said period. The Original Applicants in O.A. No.3682(C) of 2011, entered into the cadre with effect from 28.08.2010 and his service period shall be reckoned from that date. The Tribunal has wrongly held that the Original Applicants were eligible to get regular scale of pay as they were protected the scale of pay while they were under the scheme. It is to be borne in mind that the Original Applicants were allowed to receive Rs.1500/- under the same scheme and with the abolition of the scheme, the said scale ceased to operate.Since the Original Applicants were re-engaged on sympathetic consideration and were brought to the Elementary Cadre, their scale of pay is totally different from that of the schematic scale of pay. In such view of the matter, the claim of the Original Applicants for pay protection and service surety cannot be accepted.

5. In so far as the reliance of the Original Applicants on the judgments of the Supreme Court in the case of **N. Ashalata Reddy –vrs.- Anshu Kathuria and Ors.**[3] wherein the Apex Court has held that the review jurisdiction is extremely limited, unless there is mistake apparent on the face of the record. In the present cases, mistake is clearly visible as the stand of the Petitioners/ State has not been given due care.

6. It is also stated that some of the similarly placed candidates have been allowed to receive the benefits as prayed for by the present Original Applicants. If the said fact is true, the present Original Applicants cannot be deprived to take advantage because of certain wrong orders passed by the Government. But this Court is oif the believe that mistake should not be perpetuated.

7. Learned counsel for the Opposite Parties/Original Applicants submitted that the scope of review in the present cases is very limited, as the Petitioners/ State has failed to show the mistake of fact apparent on the face of the record. Non-filing of counter cannot be construed as a matter of mistake of fact.

8. In a similar matter, this Court vide common judgment dated 22.04.2022 passed in WPC (OAC) No.696 of 2018 and batch of cases directed the Opposite Parties, the present review Petitioners/ State to extend the service benefits to ex-Resource Teachers by counting the entire period of service from the date of appointment as Resource Teacher and to enroll their names under O.C.S. Pension Rules, 1992. Hence, the present Original Applicants cannot be discriminated.

**3.** 2014(I) OLR (SC) 364

9. He further submitted that reliance placed by the Petitioners/ State on the case of **Dipti Paul** (supra) relates to the case of Sikshya Karmees who were appointed with consolidated pay of Rs.400/- per month, whereas the present Original Applicants were appointed as Resource Teachers and were receiving the regular scale of pay as Primary School Teachers.

10. It is also submitted that the Tribunal relied on Rule74(d) of the Orissa Service Code and had allowed the case of the Original Applicants and directed to grant pay protection to Resource Teachers as they were appointed with the scale of pay of regular Primary School prior to their termination from service. It is also submitted that the Tribunal relied upon its earlier decisions in similar matters which were confirmed by this Court and the Supreme Court and passed the said order. The similarly situated persons namely Sarojini Kar and Swarnalata Beberta Pattnaik whose cases were confirmed by both this Court and the Supreme Court have already been granted all the service and financial benefits by counting their entire period of service from the date of their initial appointment as Resource Teachers.

11. He further submitted that if a similar benefit has been given to an employee, such benefit should be extended to all similarly placed employees without any discrimination. To that effect, he placed reliance on the decision of this Court in the case of **Smrutirekha Mishra –vrs.- State of Odisha and Ors.**[4]

12. Heard learned counsel for the Parties.

13. The Original Applicants have since been the employees under a scheme and receiving fixed remuneration for the work they were performing, they have been absorbed in different cadres. Hence, they are born into cadre on different dates of the year 2010. Their previous service cannot be included for the present service. Further, the policy of the Government to absorb them as benevolent employer which itself is a laudable and hence, the said policy cannot be reviewed under judicial review in view of the judgments of the Supreme Court in the cases of **Dr. Ashwani Kumar vrs.Union of India and Anr.**[5]**,State of Karnataka vrs. Dr. Praveen Bhai Togadia**[6]**, Oil and Natural Gas Corporation vs.Krishan Gopal & Ors.**[7] **and State of Maharashtra vrs. R.S. Bhonde**[8] wherein the Apex Court has held that judicial review in policy issue is very limited. The prayer of the Original Applicants in the aforesaid O.As. was nothing but interfering with the Government policy issue and it was not wise on the part of the learned Tribunal to interfere with the policy issue of the Government.

14. This Court is also not inclined to interfere with the policy issue of the Government. As per the law laid down by the Apex Court as well as by this Court,

**4.** 2022(I)ILR-CUT-219 **5**. (2020) 13 SCC 581, **6**. (2004) 4 SCC 684, **8**. 2005 (6) SCC 751,
**7**. (2020)SCC Online SC 150

the Original Applicants are not entitled to get pay protection for the period when they were engaged under the scheme.

15. Applying the law laid down by the Apex Court and by this Court in the aforementioned decisions, direction issued by the Tribunal vide common order dated 28.09.2015 passed in O.A. 3682(C) of 2011 and batch of cases more particularly the directions that last pay drawn by these applicants as Resource Teacher while inducted into General Teacher cadre be protected in their respective scale of pay i.e. in the scale of Trained Teacher and Untrained Teacher taking into consideration the qualification of the applicants and this exercise should be completed within a period of one month from the date of receipt of a copy of this order are unsustainable and beyond the pale of judicial review. Accordingly, this Court is of the view that the Original Applicants are not entitled to the benefit of regularization of their past service when they were working under the schematic employment.

16. For the reason stated above, all the above Review Petitions are allowed. The common order dated 28.09.2015 passed in O.A. 3682(C) of 2011 and batch of cases by the Tribunal is set aside. There shall be no order as to costs.

17. Accordingly, all the above Review Petitions are disposed of.

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**2023 (I) ILR - CUT - 196**

**Dr. S.K. PANIGRAHI, J.**

WPC(OAC) NO.1106 OF 2008

**BHAKTA CHARAN MISHRA** …….Petitioner

.V.

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

**ODISHA REVISED SCALE OF PAY RULE, 1981 – Erroneous revision of scale – Recovery of excess amount after 27 years – Whether such recovery in a belated stage is permissible? – Held, No – A belated recovery after 27 years is not only arbitrary, iniquitous but also violation of Article 14 of the Constitution of India.** (Para 34)

**Case Laws Relied on and Referred to** :-

1. (2009) 3 SCC 475 : Syed Abdul Qadir Vs. State of Bihar.
2. (1994) 2 SCC 521 : Shyam Babu Verma Vs. Union of India.
3. (2015) 4 SCC 334 : State of Punjab Vs. Rafiq Masih.

For Petitioner : Mr. J. Rath, Sr. Adv., Mr. D.N. Rath.
For Opp. Parties : Mr. Debasis Mohapatra, SC(for S & ME Deptt.)

ORDER Date of Order: 21.12.2022

***Dr. S. K. PANIGRAHI, J.***

1. This matter is taken up through hybrid arrangement.

2. In this Writ Petition, the Petitioner has made a prayer to quash the order dated 31.03.2008 passed by the Opposite Party No.2/Director, Secondary Education, Orissa, Bhubaneswar. The petition calls into question the action of Opposite Party No.2 in directing for recovery of excess amount from the salary of the Petitioner as his pay scale was revised erroneously for the second time under 1981 ORSP Rules. The Petitioner has further prayed for a direction from this Court to the Opposite Parties to fix his pay in the senior S.E.S. cadre (Headmaster) with effect from 01.01.2008 as per the exercise of option suitably in the scale of pay of Rs.5700- 9900/- and taking into account the last pay drawn by him in Junior SES cadre at Rs.8000/- as on 01.01.2008.

I. **Facts of the case**:

3. The Petitioner being a Science Graduate, was appointed as a Science Teacher by the erstwhile Managing Committee of Menda High School, in the Sub- Division of Sonepur, which was earlier in Bolangir District and now in the district of Sonepur. The school in question was an aided educational institution within the meaning of Section 3 (b) of the Orissa Education Act, 1969 (hereinafter referred to as "the Act" for brevity) and was under the Direct Payment Scheme of the State Government when the Petitioner was appointed.

4. In the staffing pattern prescribed by the State Government, the post held by the Petitioner was a Trained Graduate Post. But, as the Petitioner was an untrained candidate at the time of appointment, he was given untrained scale of pay, which was equivalent to trained intermediate scale of pay. The Petitioner acquired his B.Ed. qualification in August, 1979 and thereby he was eligible to draw the Trained Graduate Scale of Pay, since the Petitioner was appointed against a Trained Graduate Post.

5. The Petitioner was also extended the Trained Graduate Scale of pay by the Government with effect from 14.08.1980, though the Petitioner was entitled the same on the date when he acquired the training qualification. Therefore, the Petitioner requested the authority to extend such scale of pay in his favour with effect from the date he acquired the training qualification. However, since the request made by the Petitioner for release of trained graduate scale of pay with effect from August, 1979 was not approved by the Competent Authority.

Aggrieved thereby, the Petitioner approached this Court by way of Writ Petition vide O.J.C. No. 2070 of 1991, which was decided by this Court in favour of the Petitioner vide order dated 29.07.1991, giving a direction to the Opposite Parties to release the Trained Graduate Scale of pay in favour of the Petitioner w.e.f. 18.08.1979 when the Petitioner acquired such qualification.

6. Accordingly, the Petitioner's pay had been fixed. But, surprisingly, the Petitioner vide letter No.17747 dated 31.03.2008 was communicated by the Opposite Party No.2 that the pay of the Petitioner in the Trained Graduate Scale (Junior SES) has been wrongly fixed and the Petitioner was paid higher salary than he was entitled to and thereby a direction was issued to refix the pay of the Petitioner in a lesser scale of pay directing to recover the excess payment made to the Petitioner from his salary.

**II. Submissions on behalf of the Petitioner:**

7. Learned counsel for the Petitioner submitted that prior to the aforesaid order passed by this Court, since the Petitioner was continuing as a valid and lawfully appointed Science Teacher of the school in question and the appointment of the Petitioner was duly approved by the Competent Authority, the Petitioner was paid his salary component under the Direct Payment Scheme, in accordance with Rule-9 of the Orissa Education (Recruitment and Conditions of Service of Teachers and Members of the Staff of Aided Educational Institutions) Rules, 1974 made under Section 27 of the Act. The Petitioner was also receiving his salary directly from the State Government at par with the scale of pay received by his counter parts in the other Government establishments. It is pertinent to mention here that when the Petitioner was so appointed, Pay Revision Scale of Pay, 1974 was in force. Accordingly, the Petitioner was paid his salary in the untrained graduate scale of pay, i.e. @ Rs.320/- per month in the scale of pay of Rs.320-500/-. The Petitioner's pay was fixed by the Opposite Party Nos.2 and 3 in the trained graduate scale of pay, i.e. Rs.400-620 with effect from 14.08.1980.

8. While the Petitioner was so continuing, the scale of pay extended in favour of the employees of the aided educational institutions of the Government were revised from time to time by the State Government in accordance with different Pay Revision Rules, such as 1981 Pay Revision Rules, 1985 Pay Revision Rules, 1989 Pay Revision Rules and 1998 Pay Revision Rules and was given with effect from 01.01.1996. The 1981 Pay Revision Rules, 1985 Pay Revision Rules and 1989 Pay Revision Rules and the fixations of the pay of the Petitioner therefore were made prior to the order dated 29.07.1991 passed by this Court in O.J.C. No.2070 of 1991. The pay of the Petitioner was, however, fixed in accordance with 1981 Pay Revision Rules, which carried the pay of the Trained Graduate Assistant Teacher, in the scale of pay of Rs.410-840/-. The Petitioner gave his option for such pay fixation with

effect from 14.08.1981, although 1981 Pay Revision Rules came into force with effect from 01.01.1981. Accordingly, the pay of the Petitioner was fixed in accordance with the option exercised by the Petitioner at Rs.425/- in the scale of pay of Rs.410-840/- with effect from 14.08.1981. In other words, the Petitioner continued to receive in the old scale of pay as per his own option, i.e. in the scale of pay of Rs.400-620/- till 13.08.1981 and in the scale of pay of Rs.410-840/- with effect from 14.08.1981. In so far as the Pay Revision Rules 1985 and 1989 are concerned, the Petitioner opted to come over to such time scale of pay with effect from 18.08.1990 vide option dated 14.09.1986 so far as 1985 Pay Revision is concerned and 23.08.1991 so far as 1989 Pay Revision is concerned.

9. It was submitted that such options exercised by the Petitioner were duly communicated by the Headmaster of the school to the Competent Authority and, accordingly, the Inspector of Schools fixed up the pay of the Petitioner at Rs.425/- in accordance with 1981 Pay Revision Rules with effect from 14.08.1981, at Rs.1560/- with effect from 18.08.1990 in accordance with 1985 Pay Revision Rules and Rs.1750/- with effect from 18.08.1990 in accordance with 1989 Pay Revision Rules and the Petitioner was, accordingly, receiving his salary. It was further submitted that such fixation of pay of the Petitioner were made taking into the fact that the Petitioner was a Trained Graduate with effect from 14.08.1980.

10. It was also submitted that since this Court had made a declaration vide the order 29.07.1991 passed in O.J.C. No.2070 of 1991 that the Petitioner was entitled to get trained graduate scale of pay with effect from the date he acquired the training qualification, i.e. 18.08.1979 and the Opposite Parties had to extend such benefit to the Petitioner with effect from 18.08.1979. Accordingly, the pay of the Petitioner should have been fixed suitably in accordance with the subsequent Pay Revision Rules, in which the pay of the Petitioner has been fixed taking the Petitioner as a Trained Graduate Teacher with effect from 14.08.1980 instead of 18.08.1979. The Petitioner had opted to come over to the Revised Scale of pay of 1981 Pay Revision Rules with effect from 14.08.1981 taking into consideration the fact that the Petitioner was granted Trained Graduate Scale of Pay by the Government with effect from 14.08.1980. The Petitioner's pay in accordance with the Trained Graduate Scale of Pay as fixed in 1981 Pay Revision is Rs.410-15-425-20-465-25-540-EB-25-590-30-680-EB-30-770-35 -840/- and to be fixed with effect from 14.08.1981. The next increment of the Petitioner was Rs.15/- and the Petitioner ought to have been given the benefit of the increment in the month of August 1981 by raising his pay from Rs.410/- to Rs.425/-. Therefore, on coming to 1981 Pay Revision Rules, the Petitioner ought to have been put on Rs.445/- on 18.08.1981, considering the fact that the Petitioner acquired the B.Ed. qualification on 18.08.1979 in accordance with the order of this Court vide Annexure-1.

11. In fact, the Opposite Party No.3 has rightly fixed up the pay of the Petitioner at Rs.445/ on 18.08.1981. However, a mention has been made in the service book of

the Petitioner that the pay of the Petitioner has been fixed in the revised pay Rules of 1981 at Rs.425/- on 01.01.1981. It was contended that taking the fixation of the pay of the Petitioner from any angle by fixing the pay as on 01.01.1981 or on 18.08.1981, in normal fixation, the pay of the Petitioner had to be fixed on 18.08.1981 at Rs.445/-. Therefore, merely because a mention made in the service book that the pay of the Petitioner has been fixed on 01.01.1981 in accordance with the Pay Revision Rules 1981, the pay of the Petitioner could not have been altered in any manner on 18.08.1981 other than fixing the same at Rs.445/-per month. Accordingly, the Petitioner has been drawing his salary in such scale of pay at Rs.445/- on 18.08.1981 fixing his next increment on 18.08.1982 at Rs.465/-. The pay of the Petitioner was also suitably fixed at Rs.1560/ under the 1985 Pay Revision Rules with effect from 18.08.1990 and at Rs.1750/- under the 1989 Pay Revision Rules with effect from 18.08.1990 and the pay of the Petitioner was fixed at Rs.5900/- with effect from 01.01.1996 in the scale of pay of Rs.5000-150-8000/- in accordance with 1998 Pay Revision Rules, which came into force with effect from 01.01.1996. The pay of the Petitioner was further fixed in accordance with 1998 Pay Revision Rules pursuant to the advancement scale of pay at Rs.6200/- with effect from 01.01.1996 by fixing the next increment of the Petitioner with effect from 01.01.1997.

12. It was further submitted that while the Petitioner was so continuing as an Assistant Trained Graduate Teacher under the Junior Subordinate Education Service (SES) Cadre, the school was taken over by the State Government as a Government institution with effect from 07.06.1994 and the Petitioner was also promoted to the Senior SES Cadre vide office order No.37935 dated 06.08.2007 by the Opposite Party No.2. The scale of pay prescribed for the post of Senior SES Cadre (Headmaster) was Rs.5700-9900. Therefore, the Petitioner was entitled to have his fixation of pay in the Senior SES Cadre, to which the Petitioner has been promoted considering the scale of pay last drawn by him in the Junior SES Cadre. The Petitioner, therefore, gave his option on 11.09.2007, on being promoted to the Senior SES Cadre to come over to the promotional scale of pay with effect from 01.01.2008, on the date of accrual of his next increment in the lower post. It was further submitted that the Petitioner was granted increment by the Opposite Party No.3 on 01.01.2008 by raising his scale of pay from Rs.7850/- to Rs.8000/- on 01.01.2008. While the matter stood thus, the pay of the Petitioner was to be fixed in the post of Senior SES Cadre (Headmaster) with effect from 01.09.2007, since the Petitioner joined as the Headmaster on 30.08.2007. But, surprisingly the Petitioner was communicated a letter by the Opposite Party No.2 bearing No.17747 dated 31.03.2008 vide Memo No.5172 dated 03.05.2008 of the Inspector of School, Bolangir Circle indicating therein that the pay of the Petitioner in the Trained Graduate Scale (Junior SES) has been wrongly fixed and the Petitioner was paid higher salary than he was entitled to and thereby a direction was issued to refix the pay of the Petitioner in a lesser scale of pay directing to recover the excess payment

made to the Petitioner from his salary. He further submitted that that the communication made by Opposite Party Nos.2 and 3 to the Petitioner vide Annexure-9 does not stand to scrutiny in view of the fact that the pay of the Petitioner was fixed in accordance with the Pay Revision Rules and as well as the option exercised by the Petitioner in its proper prospective and the so called refixation made in Annexure-9 was without any notice and without asking the Petitioner in this regard. Therefore, such unilateral fixation of pay of the Petitioner by the Opposite Party Nos.2 and 3 vide Annexure-9 is a nullity and needs to be quashed.

13. It was further submitted that all the pay fixations made in favour of the Petitioner were duly approved by the Opposite Party No.3 and also approved by the Audit Department of the Opposite Party No.2. At no point of time, any objection was raised either by Opposite Party No. 2 or Opposite Party No.3 pertaining to fixation of the pay of the Petitioner. The fixation of pay of the Petitioner by taking the petitioner's entitlement in the Trained Graduate Scale of pay, as directed by this Court with effect from 18.08.1979 and in accordance with the option exercised by the Petitioner for each scale of pay was verified and found correct by all concerned. Therefore, while fixing the pay of the Petitioner in the Senior SES Cadre, objection raised by the Opposite Party No.2 after 27 years of receipt of the salary by the Petitioner, not only appears to be malafide one, but also meant to cause harassment to the Petitioner at the fag end of his service career. Hence, such order passed by the Opposite Party No.2 is in contravention with the service Rules is liable to be quashed. The option exercised by the Petitioner was duly accepted by the authorities and the pay has been fixed in accordance with the Rule 74 of the Orissa Service Code. A right has accrued in favour of the Petitioner and, therefore, any order passed by the Opposite Party No.2 affecting the right of the Petitioner needed a show cause as the Petitioner is the affected party. By this impugned exercise, the Petitioner will be losing more than Rs. 1200/- per month from the date such order was passed and also a substantial amount is going to be recovered from the salary of the Petitioner for such incorrect and wrong order passed by the Opposite Party No.2. It was, therefore, submitted that the pay of the Petitioner is to be fixed with effect from 01.01.2008 in the Senior SES Cadre, i.e. in the scale of pay of Rs.5700-9900/- suitably as on 01.01.2008 considering the last pay drawn by the Petitioner at Rs.8000/- per month in the Junior SES Cadre on that date.

14. The Petitioner seeks to quash the order dated 31.03.2008 passed by the Opposite Party No.2/Director, Secondary Education, Orissa, Bhubaneswar with a direction to the Opposite Parties to fix the pay of the Petitioner in the Senior SES Cadre (Headmaster) with effect from 01.01.2008 as per the option exercised by the Petitioner suitably in the scale of pay of Rs.5700-9900/ taking into account the last pay drawn by the Petitioner in the Junior SES Cadre at Rs.8000/- as on 01.01.2008.

**III. Submissions on behalf of the Opposite Party No.3:**

15. Learned Standing Counsel for the Department of School and Mass Education submitted that the Petitioner has filed the present Writ Petition with a prayer to quash the order dated 31.03.2008 passed by the Opposite Party No.2/Director, Secondary Education, Orissa, Bhubaneswar vide Annexure-9, wherein the Director, Secondary Education has put the scale of pay of thePetitioner to recast as he was found to have been allowed the date of next increment with effect from01.08.1981 instead of 01.01.1982 due to allowance of Trained Graduate scale of pay for the second time in his favour with effect from 18.08.1979 vide Inspector of School office order No.69 dated 04.01.1992.

16. He further submitted that the Managing Committee of Menda High School appointed the Petitioner as an Asst. teacher on 12.11.1974. At the time of his appointment, the school was an aided school. At the time of appointment the Petitioner did not possess any training qualification and he subsequently acquired his training qualification i.e. B.Ed. on 18.08.1979. The Petitioner was allowed Trained Graduate scale of pay, i.e. Rs.400-620/ with effect from 14.08.1980 vide order No.10326 dated 03.09.1980 of the Inspector of Schools, Bolangir pursuant to G.O. No.35635/EYS dated 20.08.1980.

17. It was further submitted that earlier the Petitioner had approached this Court seeking a direction to the Opposite Parties to give him Trained Graduate scale of pay with effect from the date of acquisition of B.Ed. qualification i.e. 18.08.1979 vide O.J.C. No.2070 of 1991. He further made a prayer therein that he should be treated as Trained Graduate teacher with effect from the date of his appointment to the post of Science teacher for the purpose of determining his seniority inter se via-avis other teacher for placement in the common cadre. This Court vide order dated 29.07.1991 directed the Opposite Parties to give the Petitioner Trained Graduate scale of pay with effect from 18.8.1979 i.e., the date of acquisition of training qualification. Pursuant to order dated 29.07.1991 of this Court, the Petitioner was allowed Trained Graduate scale of pay with effect from 18.08.1979 i.e. the date of passing of B.Ed. examination, vide order No.69 dated 04.11.1992 of the Inspector of Schools, Bolangir, wherein it was mentioned that the Petitioner is entitled to the next periodical increment on completion of one year.

18. He further submitted that the Department was pleased to allow revised scale of pay to the employees of aided High schools under O.R.S.P. Rules-1981 with effect from 01.01.1981 vide G.O. No.13233/EYS dated 08.04.1982. As per para-9(1) of the said G.O. the option under the proviso to rule-8 shall be exercised in writing in the form appended (Annexure-C) hereto so as to reach the concerned authority mentioned below in sub-rule (2) within a period of two months from the date of issue of this Resolution. As per Sub-rule-2, the option shall be intimated by the employees of Non-Government Colleges, High Schools and M.E. Schools to the

Director of Public Instruction (HE), concerned circle Inspector and District Inspector of Schools respectively. It is further mentioned that option once exercised shall be final and it shall not be altered on any account.

19. It was further submitted that at para-11 of ORSP Rules, 1981 it has been prescribed that where the pay has been fixed at the minimum of revised scale or at the stage of the revised scale which is equal to the existing scale, his next increment shall be granted on completion of one year from the date of which it so fixed. However, where the pay is fixed in revised scale at the stage next below the pay in respect of existing scale with an increment at that stage, the next increment shall be granted on the anniversary of last increment in the existing scale of pay.

20. Learned Standing Counsel for the Department of School and Mass Education further contended that in the instant case the pay of the Petitioner was fixed for the first time under ORSP Rule 1981 on 14.8.1981 under Annexure-3 series, but inadvertently taking into consideration the option exercised by the Petitioner on 12.08.1981 under Annexure-2 series i.e. much before the extension of benefit under ORSP Rules, 1981 to the teachers of aided schools vide G.O. No.13233/EYS dated 08.04.1982. He further contended that the above said G.O. came into force on 08.04.1982 and the option was exercised by the Petitioner on 12.08.1981 which was much prior to publication of the above said G.O. and as per the said G.O. the option should have been exercised by the Petitioner within two months from the date of publication of G.O. In view of such fact, the said option exercised by the Petitioner is nothing but the nullity and the same should not have been taken into consideration. But inadvertently the said option was considered and the pay of the Petitioner was wrongly fixed at the scale of pay as per Annexure-3 series.

21. He further submitted that after allowing the Trained Graduate scale of pay to the Petitioner from 18.08.1979, the scale of pay to be fixed at Rs.425/- on 01.01.1981 under ORSP Rules,1981 with next date of increment on 18.08.1981 was not correct as per the procedures prescribed in the said Rules relating to sanction of increment.

22. It was also contended that the Petitioner was promoted to the rank of Senior S.E.S. grade in the scale of pay Rs.5700-200-9900/- vide order No.37935 dated 06.08.2007 joined in the rank of Senior S.E.S, Headmaster, on 30.08.2007. Accordingly, necessary proposal for fixation of pay in favour of the Petitioner in Senor S.E.S. grade has been submitted to the Director, Secondary Education, Orissa, according to the option exercised by the Petitioner under Annexure-7. In view of the facts narrated above, considering the option exercised by the Petitioner on 12.08.1981 i.e. much prior to publication of G.O. dated 08.04.1982 and the same option being the nullity, the Director, Secondary Education, Orissa has rightly

passed the order under Annexure-9 recasting the scale of pay of the Petitioner. Therefore, this Writ Petition being devoid of any merit is liable to be dismissed.

**III. Court's reasoning and orders:**

23. In the present case, when the Petitioner was appointed, when Pay Revision Scale of Pay, 1974 was in force and accordingly, the Petitioner was paid his salary in the untrained graduate scale of pay, i.e. @ Rs.320/- per month in the scale of pay of Rs.320-500/-. The Petitioner's pay was fixed by the Opposite Party Nos.2 and 3 in the trained graduate scale of pay, i.e. Rs.400-620 at Rs.410 with effect from 14.08.1980. However, the Petitioner approached this Court vide O.J.C. No. 2070 of 1991 seeking fixation of graduate scale of pay in his favour with effect from 18.08.1979 as he had obtained the training qualification from said date.

24. This Court vide order dated 29.07.1991 directed the Opposite Parties to give the Petitioner Trained Graduate scale of pay with effect from 18.8.1979 i.e., from the date of acquiring training qualification. Pursuant to order dated 29.07.1991 of this Court, the Petitioner was allowed Trained Graduate scale of pay with effect from 18.08.1979 i.e. the date of passing of B.Ed. examination, vide order No.69 dated 04.11.1992 of the Inspector of Schools, Bolangir, wherein it was mentioned that the Petitioner is entitled to the next periodical increment on completion of one year. Therefore, the Petitioner was entitled to periodical increment on August 1980, August 1981 and so on.

25. While the matter stood, the Government revised the scale of pay of the employees of aided High schools under O.R.S.P. Rules-1981 with effect from 01.01.1981 vide G.O. No.13233/EYS dated 08.04.1982. As per para 9(1) of the said G.O. the option under the proviso to rule-8 shall be exercised in writing in the form appended (Annexure-C) thereto so as to reach the concerned authority mentioned below in sub-rule (2)within a period of two months from the date of issue of this Resolution. As per Sub-rule-2, the option shall be intimated by the employees of Non-Government Colleges, High Schools and M.E. Schools to the Director of Public Instruction (HE), concerned circle Inspector and District Inspector of Schools respectively. The option once exercised shall be final and it shall not be altered on any account. Further, at para-11 of ORSP Rules, 1981 it has been prescribed that in cases where the pay has been fixed at the minimum of revised scale or at the stage of the revised scale which is equal to the existing scale, his next increment shall be granted on completion of one year from the date of which it was so fixed. Where the pay is fixed in revised scale at the stage next below the pay in respect of existing scale with an increment at that stage, the next increment shall be granted on the anniversary of last increment in the existing scale of pay.

26. Accordingly, the pay of the Petitioner was revised in the scale of Rs.410-840 at Rs.425/- with effect from 14.08.1981 in accordance with the 1981 ORSP Rules.

Subsequently, the Opposite Parties revised the pay of the Petitioner at Rs.445/- with effect from 18.08.1981 but, a mention was made in the service book of the Petitioner that the pay of the Petitioner has been fixed in accordance with the revised pay Rules of 1981 at Rs.425/- with effect from 01.01.1981. It has been contended by the Opposite Parties that since O.R.S.P. Rules-1981 came into effect from 01.01.1981 vide G.O. No.13233/EYS dated 08.04.1982, the option for coming under such rules could have only been exercised after 08.04.1982, within a period of two months. However, the pay of the Petitioner was fixed for the first time under ORSP Rules 1981 on 14.08.1981. Taking into consideration the option exercised by the Petitioner on 12.08.1981 i.e. much before the extension of benefit under ORSP Rules, 1981 to the teachers of aided schools. Therefore, the Opposite Parties are of the view that the Petitioner's pay has been revised twice under the 1981 ORSP Rules, the first one with effect from 01.01.1981 and the second with effect from 01.08.1981. This revision was alleged to have been done in a wrongful manner as the same is contrary to the guidelines prescribed in Para-11 of vide G.O. No.13233/EYS dated 08.04.1982.

27. However, this Court is of the opinion that even though the 1981 ORSP Rules had not been extended to the Petitioner in the year 1981, considering the resolution was issued on 08.04.1982 and any cause of action pertaining to the said Rules would have arisen after 08.04.1982, the Petitioner would have still been entitled to the pay at Rs.445 per month with effect from 18.08.1981. Since the Petitioner was extended Trained Graduate scale of pay at Rs.410/- with effect from 14.08.1980 and he would've been eligible for next revision in the Trained Graduate Scale of pay after completion of one year i.e. on 14.08.1981. Therefore, the Petitioner would have been entitled to revision at Rs.425/- under the Trained Graduate scale of pay with effect from 14.08.1981, even if the applicability of 1981 ORSP Rules were to be ousted.

28. Further, the decision of this Court in O.J.C. No. 2070 of 1991, whereby, the Petitioner was allowed to draw Trained Graduate Scale of Pay with effect from 18.08.1979 i.e., the date of acquiring qualification, had not been complied and therefore, the Petitioner's pay was revised yet again at Rs.445/- with effect from 18.08.1981. The only error crept into the revision of pay scale of the Petitioner was that the option under 1981 ORSP Rules was exercised before the resolution. The Petitioner's pay scale was revised in accordance with 1981 ORSP Rules on the basis of option exercised on 12.08.1981 when the said resolution had not even been issued. However, such an error cannot be attributed to the Petitioner as there was no misrepresentation or fraud on his part. In fact, it was a result of mechanical action on the part of the Opposite Parties as the option exercised by the Petitioner were duly accepted by the authorities and the pay was fixed in accordance with Rule 74 of the Orissa Service Code. Moreover, no illegality on the part of the Petitioner has been alleged by the Opposite Parties nor have they objected the revision of pay of the Petitioner.

29. Since the Resolution dated 08.04.1982 was not in force on the day the Petitioner exercised his option under 1981 ORSP Rules, it was incumbent upon the Opposite Party No.2 & 3 to issue clarificatory order regarding the same and the entire confusion could have been avoided. However, the Opposite Parties sat over the matter and the Petitioner was allowed such revision. Subsequently, vide order dated 31.03.2008, the Opposite Parties issued a communication to the Petitioner that the scale of pay of the Petitioner in the Trained Graduate Scale (Junior SES) had been wrongly fixed and the Petitioner was paid higher salary than he was entitled to. A direction was issued to refix the pay of the Petitioner in a lesser scale of pay and the excess payment sanctioned to the Petitioner was directed to be recovered from his salary. The Opposite Parties raised this claim after a period of 27 years at the fag end of Petitioner's service career and the order of recovery of excess amount was directed unilaterally without any show cause notice which affronts the principles of natural justice.

30. The Apex Court has dealt with such an issue in ***Syed Abdul Qadir v. State of Bihar***[1], wherein in paragraph 58 the following observation has been recorded:

> *"58. The relief against recovery is granted by courts not because of any right in the employees, but in equity, exercising judicial discretion to relieve the employees from the hardship that will be caused if recovery is ordered. But, if in a given case, it is proved that the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or in cases where the error is detected or corrected within a short time of wrong payment, the matter being in the realm of judicial discretion, courts may, on the facts and circumstances of any particular case, order for recovery of the amount paid in excess."*

31. The Supreme Court in its judgment in ***Syed Abdul Qadir*** (supra) recognized that the issue of recovery revolved on the action being iniquitous. Dealing with the subject of the action being iniquitous, it was sought to be concluded, that when the excess unauthorized payment is detected within a short period of time, it would be open for the employer to recover the same. Conversely, if the payment had been made for a long duration of time, it would be iniquitous to make any recovery. Interference is that because an action is iniquitous, must really be perceived as interference because the action is arbitrary. All arbitrary actions are truly, actions in violation of Article 14 of the Constitution of India. The logic of the action in the instant situation, is iniquitous, or arbitrary, or violative of Article 14 of the Constitution of India, because it would be almost impossible for an employee to bear the financial burden, of a refund of payment received wrongfully for a long span of time. It is apparent, that a government employee is primarily dependent on his wages, and if a deduction is to be made from his/her wages, it should not be a deduction which would make it difficult for the employee to provide for the needs of his family. Based on the above consideration, the Supreme Court iterated that if the mistake of making a wrongful payment is detected within five years, it would be

**1.** (2009) 3 SCC 475

open to the employer to recover the same. However, if the payment is made for a period in excess of five years, even though it would be open to the employer to correct the mistake, it would be extremely iniquitous and arbitrary to seek a refund of the payments mistakenly made to the employee.

32. In ***Shyam Babu Verma v. Union of India***[2], the Supreme Court observed as under:

> *"11. Although we have held that the petitioners were entitled only to the pay scale of Rs 330- 480 in terms of the recommendations of the Third Pay Commission w.e.f. January 1, 1973 and only after the period of 10 years, they became entitled to the pay scale of Rs 330-560 but as they have received the scale of Rs 330-560 since 1973 due to no fault of theirs and that scale is being reduced in the year 1984 with effect from January 1, 1973, it shall only be just and proper not to recover any excess amount which has already been paid to them. Accordingly, we direct that no steps should be taken to recover or to adjust any excess amount paid to the petitioners due to the fault of the respondents, the petitioners being in no way responsible for the same."*

33. In ***State of Punjab v. Rafiq Masih***[3], the Supreme Court observed:

> *"It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to herein above, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:*
>
> *(i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).*
>
> *(ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.*
>
> *(iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.*
>
> *(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.*
>
> *(v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."*

34. Even if it were to be assumed that the Petitioner was extended the revision of pay scale under 1981 ORSP Rules for the second time, a belated claim/order of recovery after 27 years is not only arbitrary, iniquitous but also violative of Article 14 of the Constitution of India. Moreover, neither was any sort of fraud or misrepresentation alleged against the Petitioner, nor has any material or evidence been brought on record to substantiate such allegations. As a matter of fact, the options exercised by the Petitioner was scrutinized, verified,

**2.** (1994) 2 SCC 521 **3**. (2015) 4 SCC 334

and duly approved by the Opposite Party No.3 and the Audit Department of the Opposite Party No.2. Therefore, the letter issued by the Opposite Party No.2 bearing No.17747 dated 31.03.2008, refixing the pay of Petitioner in a lesser scale of pay and the order of recovery of excess amount is illegal and arbitrary and hence, not sustainable. In addition, nothing has been adduced by the Opposite Parties to show that while issuing the impugned order for recovery of excess salary, they have considered the decision of the Supreme Court in the case of ***Rafiq Masih*** (supra).

35. On conspectus of the above facts and guided by the precedents cited hereinabove, this Court is of the view that the order dated 31.03.2008 issued by the Opposite Party No.2 is liable to be quashed and hereby, set aside. Accordingly, the Opposite Parties are directed to consider the Petitioner's fixation of pay in the senior S.E.S. cadre (Headmaster) with effect from the appropriate date, taking into consideration his last drawn salary in the junior S.E.S. cadre. The said pay fixation shall be complete within a period of three months from today.

36. In the final evaluation, the Writ Petition is hereby allowed and accordingly, disposed of. There shall be no order as to costs.

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**2023 (I) ILR - CUT- 208**

**MISS. SAVITRI RATHO, J.**

TRPCRL NO.12 OF 2018

**SABYASACHI MISHRA** .....Petitioner

.V.

**LOPAMUDRA MISHRA** .....Opp. Party

**CODE OF CRIMINAL PROCEDURE, 1973 – Section 407 – Transfer of criminal case – Relevant points/grounds to be considered – Explained.**

**Case Law Relied on and Referred to** :-

1. I.C.C. (GN) No.27 of 2017 : Lopamudra Mishra Vs. Sabyasachi Mishra.

For Petitioner : Ms. Itishree Tripathy on behalf of Mr. B.K. Sharma.

For Opp. Party : Mr. R.K. Acharya.

JUDGMENT Date of Judgment : 01.11.2022

***MISS. SAVITRI RATHO, J.***

This transfer application under section 407 of Cr.P.C. has been filed by the petitioner-husband Sabyasachi Mishra for transfer of I.C.C. (GN) No.27 of

2017 filed by the opposite party –wife - against him for alleged commission of offences punishable under Section – 500 of the Indian Penal Code (in short "I.P.C."), in the Court of the learned Nyayadhikari, Gram Nyayalaya, Ghasipura, Keonjhar, to the Court of learned S.D.J.M., Bhubaneswar.

2. Apart from the transfer application, learned counsel for the petitioner has filed I.A. No. of 2022 enclosing medical documents and an affidavit dated 22.9.2022 of the petitioner indicating the status of the cases involving the parties pending in Bhubaneswar. A written note of submission has also been filed by the learned counsel for the petitioner.

The learned counsel for the opp. party – wife has filed a counter affidavit dated .09.2022 as well as a memo dated 09.09.2022 enclosing the order sheet in I.C.C. (GN) No.27 of 2017 containing orders passed on 18.10.2017, 04.12.2017, 30.04.2018, and 18.09.2019 as well as the deposition of P.W.1.

3. On the consent of the counsels for the parties, the matter was taken up for final disposal.

4. I have heard Ms. Itishree Tripathy, learned counsel appearing on behalf of Mr. Bigyan Sharma, learned counsel for the petitioner-husband and Mr. R.K. Acharya learned ounsel for the opp. party – husband and perused the petitions and the affidavits and their annexures.

5. Ms. Tripathy, learned counsel has submitted that marriage of the petitioner and opp. party has been solemnized on 02.01.2006 at Hotel Marion, Bhubaneswar and they were blessed with a son on 01.12.2010, who is now prosecuting his studies in Sai International School, Bhubaneswar. The opposite party is staying in Bhubaneswar in rented accommodation since 2016. Referring to Annexure-1 in the I.A., which is a copy of the petition in Execution Misc. Case No.24 of 2021 arising out of C.M.C. No.356 of 2016 pending in the Court of the learned S.D.J.M., Bhubaneswar where in the affidavit sworn on 10.11.2021 the address of the opposite party has been indicated to be in Bhubaneswar and she has submitted that the opposite party is staying in Bhubaneswar and attending to her cases in Bhubaneswar but is opposing the prayer for transfer, only to harass the petitioner. Six cases involving the parties or their family members are pending in Bhubaneswar and five of these cases are at the instance of the opposite party-wife, and as she is participating in the proceedings. The six cases pending in Bhubaneswar are :

> (i) CMC No.356 of 2016 pending in the Court of learned S.D.J.M., Bhubaneswar initiated by the opp. party - wife, where order for payment of monthly maintenance to her and their son has been passed ;

(ii) C.T. Case No.2114 of 2016 pending in the Court of learned S.D.J.M., Bhubaneswar at the instance of the wife where trial has started ;

(iii) C.T. Case No.2728 of 2016 pending in the Court of learned S.D.J.M., Bhubaneswar corresponding to Badagada P.S. Case No.164 of 2016 against the petitioner where investigation is in progress ;

(iv) C.T. Case No.2899 of 2016 pending in the Court of learned S.D.J.M., Bhubaneswar arising out of Badagad P.S. Case No.171 of 2016 where father of the petitioner is an accused and investigation is in progress ;

(v) Cr.P. No.27 of 2019 filed by the opposite party – wife under Section – 125 Cr.P.C., pending in the Court of learned Judge, Family Court, Bhubaneswar, where the petitioner has received notice ; and

(vi) C.P. No.589 of 2022 in the Court of learned Judge, Family Court, Bhubaneswar filed by the petitioner for divorce where summons has been issued to the opposite party - wife for her appearance.

6. She has further submitted that the complaint case has been instituted by the opposite party in Ghasipura alleging commission of offence under Section – 500 I.P.C. on the basis of an email sent by the petitioner to the opposite party on 02.06.2016, though such offence is not made out. Trial in the said case has started. On 20.09.2019, this Court had directed for stay of further proceedings in I.C.C. (GN) No.27 of 2017 and this interim order has been extended on 01.11.2019 and 08.11.2019. The interim order was again extended. Vide order dated 30.04.2018, the petitioner has been permitted to be represented through his counsel but the order is a conditional one where one of the conditions is that he will appear personally in the Court when required. P.W.1 had already been examined on 18.09.2019. No other witness has been examined after that. Referring to the medical documents annexed to I.A. No. 21 of 2022, she has submitted that the petitioner has been diagnosed to be suffering from Acute Necrotizing pancreatic (modified CTSI-8) Dyslipidemia since August 2020 and this developed to Chronic pancreatitis for which he has undergone Plastic Stenting on three occasions, i.e., on 06.07.2021, 16.11.2021 and 02.03.2022 and he is still under treatment for which travelling to Ghasipura will be inconvenient for him. He is also apprehensive of going to Ghasipura. As six cases are pending between the parties are pending in Bhubaneswar, in which the opposite party is participating, she will not face any inconvenience if 1.C.C. (GN) No. 27 of 2017 is also transferred to Bhubaneswar. But the 1.C.C. case has been filed in Ghasipura only to harass him.

7. Mr. Acharya, learned counsel for the opposite party-wife has opposed the prayer for transfer and submitted that the house rent agreement pertaining to a house in Bhubaneswar relied on by the petitioner has expired since 2019 and the opposite party is now residing in Ghasipura in the house of her parents. He

has further submitted that by order dated 30.04.2018 application of the petitioner filed under Section – 205 Cr.P.C. has been allowed and he has been permitted to be represented by his counsel (the said order is contained in the ordersheet filed alongwith the Memo) and after that P.W.1 has been examined and cross examined by the petitioner. So the petitioner should not face any difficulty to contest the case if it continues in Ghasipura, Keonjhar. He has further submitted that as cause of action of the case had arisen under the jurisdiction of the Court in Ghasipura, for which the complaint case has rightly been filed at Ghasipura, and as the witnesses of the opposite party reside in Ghashipura, they would be put to unnecessary inconvenience if the case is transferred to Bhubaneswar. The opposite party has however not disputed the health condition of the petitioner or the treatment undergone by him.

8. Section 407 of the Code of Criminal Procedure, 1973, deals with the power of the High Court to transfer a case or appeal, or class of cases or appeals, from one Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction. Section 407 of the Cr.P.C. is extracted below :

> *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.*

9. A perusal of the provision reveals that the power under Section – 407 of the Cr.P.C. can be exercised by the High Court, to transfer a 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, if the High Court is satisfied that a fair and impartial inquiry or trial cannot be held in the said court subordinate to it ; or some question of law of unusual difficulty is likely to arise in the case ; or 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.

In the instant case, the prayer for transfer is to be considered in terms of Section 407 (1) (c) of the Cr.P.C. which provides for transfer of a criminal case if such an order will tend to the general convenience of the parties or witnesses or is expedient for the ends of justice. The convenience of all the parties including the witnesses should be kept in mind, while considering the prayer for transfer of a criminal case on the ground of inconvenience of any particular party. A balance has to be struck so that while making it convenient for one party, the other party or the witnesses do not suffer serious inconvenience. In the present case, the factors/which are required to be considered are :

i) The present health condition of the petitioner who is staying in Bhubaneswar.

ii) The pendency of six cases in Bhubaneswar involving the parties and/or their relatives.

iii) Son of the petitioners' is studying in a school in Bhubaneswar.

iv) Distance of 400 kms between Bhubaneswar and Ghasipura.

v) The witnesses of the complainant – opposite party belong to Ghasipura and only one has been examined.

vi) Application of the petitioner filed under Section -205 Cr.P.C. has been allowed, subject to certain conditions.

10. Considering the submissions of the learned counsels, the provisions of Section – 407 (1) (c) of the Cr.P.C., the health condition of the petitioner, the place of residence of the witnesses of the opposite party, and the comparative convenience/inconvenience which will be faced by the parties if the case is allowed to continue in Ghasipura or in the event it is transferred to Bhubaneswar, I feel that it would cater to the convenience of the parties and would also be expedient in the interest of justice if I.C.C. (GN) No.27 of 2017 is transferred to the court of learned S.D.J.M., Bhubaneswar, but after the examination and cross-examination of the remaining two witnesses of the opposite party – wife, are completed in the Court of the learned Nyayadhikari, Gram Nyalalaya, Ghasipura.

11. The TRP (CRL) is accordingly allowed. The learned trial court, i.e. the learned Nyayadhikari, Gram Nyalalaya, Ghasipura shall proceed with the examination and cross examination of the witnesses of the complainant wife and within two weeks thereafter, transfer the records of I.C.C. (GN) No.27 of 2017 (**Lopamudra Mishra vs. Sabyasachi Mishra**) to the Court of the learned S.D.J.M., Bhubaneswar.

12. With the aforesaid observations, the TRP (CRL) is disposed of.

13. Before parting with the case, I would be failing in my duty if I do not mention that Ms. Tripathy, learned counsel who conducted the case on behalf of the petitioner is a new entrant to the profession, but has conducted the case very efficiently.

14. Urgent certified copy of this order be granted on proper application.

15. Copy of this order be communicated to the learned Nyayadhikari, Gram Nyalalaya, Ghasipura and learned S.D.J.M., Bhubaneswar forthwith.

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**2023 (I) ILR - CUT - 214**

**R.K. PATTANAIK, J.**

CRLMC NO. 5 OF 2014

**BABAJI SWAIN & ORS.** …….Petitioners

.V.

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

**CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Prayer for quashing of complaint – Necessary conditions for the purpose of quashing complaint – Indicated with case laws**. (Para 9)

**Case Laws Relied on and Referred to** :-

1. AIR 1996 SC 2452 : CBI Vs. Duncans Agro Industries Ltd., Calcutta.
2. (2011) 9 SCC 164 : Devendra Kumar Tyagi and Ors. Vs. State of U.P. and Ors.

For Petitioners : Mr. Anirudha Das
For Opp Parties: Mr. Pradip Kumar Rout, AGA & Mr. H.N. Mohapatra.

JUDGMENT Date of Judgment:16.12.2022

***R.K. PATTANAIK,J.***

1. Impugned order dated 7th September 2013 passed in G.R. Case No.531 of 2013 by the learned J.M.F.C., Nuapada for having taken cognizance of the offences under Sections 323, 294, 354, 427, 506 read with 34 IPC besides Section 3(1)(x) of SC & ST (PoA) Act is under challenge on the grounds inter alia that the dispute between the parties is civil in nature as the petitioners had initiated a proceeding under Section 144 Cr.P.C. and also instituted a suit in C.S. No.10 of 2010 before the court of learned Civil Judge (Junior Division), Nimapara with reliefs of declaration of right, title and interest and for confirmation of possession in respect of the case land and that apart, the alleged offences have not been made out against them even by looking at the materials on record.

2. In fact, opposite Party No.2 lodged the FIR (Annexure-1), consequent upon of which, Nimapara P.S. Case No.131 dated 18th June, 2013 was registered and ultimately, it led to the filing of chargesheet (Annexure-2) under the alleged offences and by the impugned order dated 7th September, 2013 (Annexure-3), the learned J.M.F.C., Nimapara took cognizance of the offences. In so far as the alleged incident dated 18th June, 2013 is concerned, it has been described in Annexure-1 by opposite party No.2 as to the manner and circumstances under which she was abused, assaulted and threatened by the petitioners.

3. Heard Mr.Anirudha Das, learned counsel for the petitioners, Mr.P.K. Rout, learned AGA for the State-opposite party No.1 and Mr. H.N. Mohapatra, learned counsel for opposite party No.2.

4. The principal ground of challenge is that the dispute inter se parties to be civil in nature as they are in litigating terms before the civil court as well as both sides had been involved in a proceeding under Section 144 Cr.P.C. and according to Mr. Das, due to the civil litigation, the criminal proceeding initiated at the behest of opposite party No.2 should not be allowed to continue and therefore, the impugned order under Annexure-3 and the proceeding as a whole should be quashed in the interest of justice. Apart from the above, Mr. Das submits that the materials on record do not prove the offences, inasmuch as, the learned court below did not apply its judicial mind rather arbitrarily took cognizance of the alleged offences and summoned the petitioners.

5 Mr. Rout, leaned AGA on the other hand submits that the FIR and the charge sheet with all other materials prima facie establish the alleged overt acts having been committed by the petitioners and therefore, the learned court below did not commit any wrong or error or illegality in taking cognizance of the offences by the impugned order under Annexure-3. Likewise, Mr. Mohapatra, learned counsel for opposite party No.2 justified the order of cognizance in the light of the evidence produced along with charge sheet, hence, submitted that the order under Anneuxre-3 does not call for any interference.

6. During the alleged incident dated 18th June, 2013, the petitioners said to have assaulted and outraged modesty of opposite party No.2 and also manhandled her husband, who received a head injury. The incident said to have happened during the day time and opposite party No.2 mentioned the names of the petitioners in Annexure-1. After the investigation, the chargesheet was filed.

7. It is made to suggest that there has been a dispute between the parties which is not denied by opposite party No.2. A civil suit is stated to be pending before the court of learned Civil Judge, Nimapara in C.S. No.10 of 2010. It is also made to reveal that the parties had even engaged themselves in a proceeding under Section 144 Cr.P.C. However, the question is, whether, under such circumstances and for the fact that the parties are already into litigation, the criminal proceeding in G.R. Case No.531 of 2013 pending in the file of learned J.M.F.C., Nimapara should be interfered with and quashed?

8. If the dispute is civil in nature, no criminal case may be allowed to continue. But if both the proceedings can survive and go along independently, it has to be so. At times, a civil litigation has criminal overtone and in such a situation, both the proceedings may have to be continued. But where a dispute of

civil nature is painted with a brush of criminality, it has to be nipped in the bud. However, if for a pending civil dispute and litigation between the parties, an incident happens resulting in commission of offences punishable under law, the criminal prosecution cannot be tinkered with for its root cause. In other words, only if the dispute appears to be civil in nature but has been given a criminal colour, the Court is to exercise its inherent jurisdiction to interfere with it but not otherwise on the premise that the cause of an incident leading to the offences committed to be on account of a civil dispute. In the instant case, no doubt, the cause behind the alleged incident is on account a civil dispute between the parties but for that the criminal proceeding initiated against the petitioners cannot be quashed, since such a case is not to be equated with a civil litigation artificially blended with a criminal flavour. It is not unusual to experience crimes being committed due to civil disputes between the parties and that does not mean the criminal prosecutions to be tampered with on such ground. To say it differently, if a purely civil dispute is sought to be given a colour of a criminal offence to wreak vengeance, it would not meet the strict standard of proof required to sustain a criminal accusation. In such type of cases, it is necessary to draw a distinction between civil wrong and criminal wrong as has been succinctly put in **Devendra Kumar Tyagi and Others Vrs. State of U.P. and Others** reported in **(2011) 9 SCC 164**. Mr. Das, learned counsel for the petitioners has attempted to bring the case within one of the categories as illustrated in the decision (supra). But with due respect, the Court is in clear disagreement to accept such a contention since the case at hand is not of such category where it can be said that a civil wrong is painted with a criminal tinge.

9. In the instant case, an incident has happened and offences said to be committed by the petitioners, truthfulness or otherwise of which, shall have to be tested on the floor of the court. Since prima facie a case is made out on a bare consideration of the materials on record, it would rather be apposite to make a mention of a judgment of the Apex Court in **CBI Vrs. Duncans Agro Industries Ltd., Calcutta** reported in **AIR 1996 SC 2452**, wherein, it is observed that for the purpose of quashing a compliant, it is necessary to consider whether the allegations therein prima facie make out an offence or not; it is not necessary to scrutinize, if the allegations are likely to be upheld in the trial; any action in that regard to be taken at the threshold before evidences are led in support of the complaint; it is therefore necessary to consider whether on the face of the allegations, a criminal offence is constituted or not. Looking at Annexure-1 and chargesheet with other materials, accepting the same at its face value, according to the Court, do make out a case for enquiry and trial and in any view of the matter, the contention of the petitioners of a civil wrong has been fully discarded, hence, no ground or any reason exists for interference in exercise of its inherent jurisdiction.

10. Accordingly,it is ordered.

11. In the result, the petition stands dismissed.

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**2023 (I) ILR - CUT- 217**

**R.K. PATTANAIK, J.**

CRLMC NO. 752 OF 2005

**CARGIL INDIA PVT. LTD.** ……Petitioner

.V.

**STATE OF ODISHA** …….Opp. Party

**PREVENTION OF FOOD ADULTERATION ACT, 1954 – Section 16, 13(2) r/w Section 482 of Cr.P.C – The purported food item (sunflower oil) collected on 29th June, 2004 from petitioner – Report of the Public Analyst dated 7th August, 2004 – Complaint was filed on 3rd January 2005 – On 20th January, 2005, the application was moved to send sample to the Central Food Laboratory – On 2nd February, 2005 petitioner filed an application to drop the proceeding due to delay in sending the sample to the Central Food Laboratory as no fruitful purpose would be served since it had outlived for the said purpose – The learned Court below rejected the application – Whether the criminal proceeding should be terminated in exercise of its inherent jurisdiction – Held, Yes – As there has been undue delay while sending the sample no purpose would be served.** (Para 9)

**Case Laws Relied on and Referred to** :-

1. Cri. Appeal No.194 of 1996 : Municipal Corporation of Delhi Vs. Ghisa Ram.
2. 1995 CriLJ 3053 : Nestle India Ltd. Vs. Shri A.K. Chand, Food Inspector & Anr.
3. Criminal Revision No.225 of 2003 : Mohammad Zahir Vs. Food Inspector, Food Cell & Anr.
4. 1992 CriLJ 1479 : The State of Assam Vs. Shri Shiew Kumar Jain & Shiv Kumar.
5. CRLMC No.839 of 2003 : Hindustan Coca Cola Beverages Pvt. Ltd. Vs. State of Orissa.
6. (2011) 1 SCC 176 : PepsiCo India Holding Private Ltd. Vs. Food Inspector & Anr.
7. 1992 Supp (1) SCC335:State of Haryana Vs. Ch. Bhajan Lal.
8. 2006 CriLJ 3988:Hyderabad Beverages Private Limited etc. Vs. State of U.P.
9. 2018 (2) FAC 215:Ashok Khandelwal Vs. P.Singh & Anr.
10. AIR 1971 SC 1277:Babu Lal Hargovindas Vs. State of Gujarat.
11. 2007(7) SCC 71:State of Gujarat &Another Vs. Saileshbhai Mansukhlal Shah.
12. FAC 1991(1)133:J. Kutty Vs. State of Kerala.

For Petitioner : Mr. Devashis Panda.

For Opp. Party: Mr. Pradip Kumar Rout, AGA.

JUDGMENT Date of Judgment:16.12.2022

***R.K. PATTANAIK,J.***

1. Invoking inherent jurisdiction of this Court, the petitioner has assailed the impugned order dated 26th February, 2005 under Annexure-1 passed in 2(C)CC No.2 of 2005 by the learned S.D.J.M., Puri whereby the request for dropping of the proceeding due to delay in sending the sample to the Central Food Laboratory as no fruitful purpose would be served since it had outlived for the said purpose was rejected being oblivious to the relevant provisions of the Prevention of Food Adulteration Act, 1954 (hereinafter referred to as 'the Act') and therefore, it is not tenable in law and hence, liable to be set aside in the interest of justice.

2. In fact, a complaint was filed by the Food Inspector, who had inspected M/s. Sarala Agencies suspected the stock to be adulterated and collected samples of Mustard Oil, Refined Soyabin Oil and Refined Sunflower of the brands specified and sent the same to the Public Analyst, State Public Health Laboratory, Bhubaneswar for testing. It is further made to appear that the Food Inspector purchased the oil from the petitioner and collected the invoice dated 9th June, 2004 and thereafter, he received the report of the Public Analyst dated 7th August, 2004 with the result that the sample of Refined Sunflower oil (Nature Fresh Brand) was adulterated as the quality fell below the prescribed standard and then after obtaining sanction from the State Local Health Authority, the complaint was filed in the court of learned S.D.J.M., Puri on 3rd January, 2005 whereupon the court took cognizance of the offence under Section 16 of the Act read with Rule 7 of the Prevention of Food Adulteration Rules, 1955 (shortly as 'the Rules of 1955'). Later thereto, an opportunity to have the sample sent to the Central Food Laboratory was offered to the petitioner which was availed by him on 20th January, 2005 by making an application in terms of Section 13(2) of the Act. However, sometime thereafter, the petitioner moved the learned court below to drop the proceeding as it would be a futile exercise to send the second sample to the Central Levorotary as the six months shelf-life from the date of manufacture had since long expired, inasmuch as, eight months elapsed not only from the date of manufacture but also from the date of collecting the sample which may not be in a fit condition for analysis. However, according to the petitioner, the learned S.D.J.M. Puri vide the impugned order under Annexure-1 declined such a request and decided to allow the sample to be sent to the Central Laboratory as it had already been ordered while dealing with the application dated 20th January, 2005. Being aggrieved of, the petitioner challenged it on a

solitary ground that the learned court below ought to have dropped the proceeding instead of sending the sample to the Central Laboratory despite the fact that there was expiry of six months shelf-life of the sample by then and such analysis would be a failed exercised possibly with no result. According to the learned court below such a move of the application is incongruous to the earlier request for sending the second sample for test and analysis and therefore, deemed it proper to deny the relief sought for and to drop the proceeding as was prayed for.

3. Heard Mr. Devashis Panda, learned counsel for the petitioner and Mr. P.K. Rout, learned AGA appearing for the State.

4. Mr. Panda, learned counsel for the petitioner submits that the alleged purchase of oil by the Food Inspector was made on 7th June, 2004 and then the Food Inspector sent it to the Laboratory for analysis on 30th June, 2004 and the Public Analyst's report was received with the finding that the sample of Refined Sunflower oil was found to be adulterated as its quality was short of the prescribed standard received by the Food Inspector on 20th August, 2004 and thereafter on 3rd December, 2004, the Joint Director, Health Services (PH) and State Local Heath Authority, Orissa consented for prosecution and finally the PR was filed before the learned court below on 3rd January, 2005 and then on 20th January, 2005, the application was moved to send the sample to the Central Food Laboratory, however, shortly thereafter, another application dated 2nd February, 2005 was filed to drop the proceeding which was not entertained. Mr. Panda referring to the scheme of the Act and after making the Court to go through the relevant provisions thereof read with the Rules of 1955 contended that the packed oil so collected by the Food Inspector carried the month and year of manufacture which indicated its shelf-life and according to Rule 32 of the Rules, 1955 Explanation VIII which indicates the marketability and quality of the product best before the date which signifies the end of the period under any stated storage conditions. It is claimed by Mr. Panda that application dated 20th January, 2005 was filed to avoid any finding to the effect that such a statutory right as envisaged in Section 13(2) of the Act has been waived but immediately moved the second application dated 2nd February, 2005 for dropping of the proceeding on the ground that shelf-life of the sample having expired, further analysis would be a futile exercise as in number of cases acquittal has been directed for having sent the samples for analysis after expiry of the shelf-life period. While advancing such an argument, Mr. Panda cited the following decisions, such as, **Municipal Corporation of Delhi Vrs. Ghisa Ram** decided by the Apex Court in Cri. Appeal No.194 of 1996 and disposed of on 23rd November, 1966; **Nestle India Limited Vrs. Shri A.K. Chand, Food Inspector**

**and Another** 1995 CriLJ 3053; **Mohammad Zahir Vrs. Food Inspector, Food Cell and Another** deiced in Criminal Revision No.225 of 2003 (dated 23rd April, 2004); **The State of Assam Vrs. Shri Shiew Kumar Jain and Shiv Kumar** 1992 CriLJ 1479 besides an order dated 18th July, 2017 of this Court in CRLMC No.839 of 2003 (Hindustan Coca Cola Beverages Pvt. Limited Vrs. State of Orissa). Above all, one more decision in the case of **PepsiCo India Holding Private Limited Vrs. Food Inspector and another** reported in (2011) 1 SCC 176 is placed reliance on wherein the criminal proceeding was quashed in absence of the method and parameters adhered to for the purpose of analysis of the samples.

5. Per contra, Mr. Rout, AGA for the State submits that the learned court below did not err and committed any illegality having declined to drop the proceeding since the request for sending the second sample to the Central Laboratory had already been allowed by that time and that too it was on the request of the petitioner who indeed availed the statutory right under Section 13(2) of the Act. In other words, Mr. Rout, learned AGA justifies the impugned order under Annexure-1.

6. By Section 13(2) of the Act, on receipt of report of the result of the analysis under sub-section (1) to the effect that the article of food is adulterated, the Local Health Authority shall after the institution of prosecution forward a copy of the said report to the person concerned informing him that if he so desired to make an application to the court within ten days of the date of receipt of such report to get the sample analyzed by the Central Food Laboratory. In the instant case, such an application was made by the petitioner but thereafter applied for dropping of the criminal prosecution. The said statutory right under Section 13(2) was availed of on 20th January, 2005 but after realizing the fact that the shelf-life had expired in the meantime, the petitioner applied for closure of the proceeding. There is no denial to the fact that the sample oil was collected on 29th June, 2004 with a manufacture month and year of May, 2004 and by the time, the prosecution had been launched which was on 31st December, 2004, there was expiry of the shelf-life period of six months. The question is, whether, under the above circumstances when the complaint was filed long after period from of fitness of consumption with a shelf life indicated in the sample packet, any purpose would be achieved in the continuance of the proceeding as the result of the Central Laboratory might not yield any useful purpose?

7. Exercise of jurisdiction under Section 482 Cr.P.C. is well defined by catena of decisions and more prominently in the case of **State of Haryana Vrs. Ch. Bhajan Lal reported in 1992 Supp (1) SCC335**. In fact, such jurisdiction has not been conferred on the High Courts but it only reminds that the Court is

possessed of such power to be exercised to give effect to an order under the Code; to prevent abuse of process of Court; and to otherwise secure the ends of justice. The jurisdiction under Section 482 Cr.P.C. is to do real and substantial justice for the administration of which alone the Courts exist. However, there is a rider that inherent jurisdiction which is so wide and expansive, it has to be exercised sparingly which has been reiterated time and again in plethora of decisions of the Supreme Court. It is a settled law that the Court would be justified in exercising the inherent jurisdiction for quashing of a criminal proceeding subject to satisfaction that denial of it would tantamount to abuse of process of law or otherwise needed to advance the cause of justice.

8. In **Nestle India Limited** (supra), the legality of the criminal proceeding was challenged in respect of the prosecution under the Act and therein the food item was stated to have been manufactured in the month of 1992 with a declaration on the package that the same would be fit for consumption within nine months from the date of manufacture and the sample was collected in the September, 1992 and the prosecution report was prepared next year in the same month and thereafter the complaint was instituted on 10th September, 1992 and under the circumstances and with a conclusion that such a criminal action was initiated long after the period of consumption, quashed the proceeding since the allegation would be indefensible. In **Shiew Kumar Jain** (supra), the Gauhati High Court concluded that there is a limitation prescribed in the Act and Rules of 1955 prescribing the Public Analyst to submit the report within the stipulated time and in case of noncompliance thereof, the finding would be vitiated. In the case at hand, the sample was collected and it was sent to the Public Analyst, whose report was received in the month of August, 2004. The same was dispatched in the month of June, 2004 and the report was received in August, 2004, however, the present challenge is not on the ground of non-compliance of any such provision of the Act and Rules leading as was in the case of Shiew Kumar Jain. But the purpose of reliance of the aforesaid decision is to suggest that due to passage of time, articles of food deteriorate and therefore, the Legislature fixed an outer limit for getting the samples tested scientifically in order to find out if they are adulterated or otherwise. In the present case, the contention is that there is a shelf-life in the package of the oil manufactured in May, 2004 and sending the sample in February, 2005 close to a year after would be an exercise which might not bring any positive result of adulteration. In **Mohammad Zahir** case (supra), this Court had the occasion to examine the delay aspect with reference to Section 13(2-A) of the Act which stipulates that the Court shall require the Local Health Authority to forward the sample kept by the authority upon a requisition made in that respect within a period of five days from the date of receipt of such requisition. It has been held therein that violation

of Section 13(2-A) of the Act is likely to cause serious prejudice to the rights of the accused and even if the accused is tried on the complaint of the Food Inspector, no conviction could be recorded against him on the basis of such report which though continues to be a piece of evidence and hence concluded that any such continuation of the proceeding would amount to abuse of process of the Court. It is claimed that there has been delay of eight months in lodging the complaint since the date of manufacture and in the meanwhile, the period of fitness of consumption had lapsed and as such, the valuable right of the petitioner conferred under Section 13(2) of the Act read with Rule 7(3) of the Rules, 1955 is violated. In the decision (supra), the accused had not made an application for sending the sample to the Central Food Laboratory and for other reasons, the Apex Court held that he could not be said to have been prejudiced for any such delay in view of Section 13(2) of the Act. In **Hyderabad Beverages Private Limited etc. Vrs. State of U.P.** 2006 CriLJ 3988, the A.P. High Court declined to quash the prosecution for delay in furnishing the copy of the report of the Public Analyst beyond expiry of best before date or shelf-life of the product.

9. The law is well settled that the accused is having an invaluable right under Section 13(2) of the Act to submit a requisition for direction to the authority by the Court to forward the sample to the Central Food Laboratory. In fact, the Local Health Authority is to inform the person the rights to send the sample to the Central Food Laboratory and to make an application within the stipulated time for scientific analysis in view of Section 13(2) of the Act and it shall be forwarded on receiving a requisition in terms of sub-section (2-A) thereof. Herein the petitioner no doubt submitted the requisition but then claimed for dropping of the prosecution on expiry of the shelf-life period of the sample oil referring to its date of month of manufacture. It is not necessarily that in all cases that a sample is held to be unsuitable for test and analysis after expiry of the shelf-life period which is what has been held in ***M/s Hyderabad Beverages Pvt. Ltd.*** The reason being a food article is held to be best before use a particular period for the purpose of human consumption but that does not mean that it has become unsuitable for analysis to find out whether the same is adulterated or not. An article of food would still be sent for analysis on a requisition made under Section 13(2-A) of the Act even after expiry of the best before use date or its shelf-life if such a request is made in terms of Act and according to the Rules 1955. Some amount of delay from the best before use date cannot be a justifiable ground to reject a criminal prosecution. Though the petitioner applied for sending the sample after receiving a report of the public analyst, however, challenged the action on account of delay of eight months, the Court is of the view that it cannot and could not have been a ground to drop the proceeding.

However, it is contended that DGHS method was adopted which was conveniently followed having no support of law and that too in absence of any prescribed mode of analysis under Section 23(1A)(hh) of the Act and in that connection, the decision of **Pepsi Co India Holding Private Limited** (supra) is placed reliance on, wherein, it is observed that in absence of parameters which ought to have been defined by the Central Government under Section 23(1A)(hh) & (ee) of the Act, samples could not be considered as adulterated. It is further added that relying on the above decision, this Court in ***Ashok Khandelwal Vrs. P.Singh & Another reported in 2018 (2) FAC 215*** quashed the proceeding. It is not denied by the State that the Public Analyst failed to submit the report within the time limit as prescribed in Rule 7(3) of the Rules, 1955 which is required to be adhered to. It is also not drawn to the notice of the Court if the sample was added with any preservative. In the above fact situation, when the complaint is lodged after 8 months, the re-testing by the Central Laboratory might not have yielded a positive result. That apart, the decision in **Babu Lal Hargovindas Vrs. State of Gujarat AIR 1971 SC 1277** is sought to be distinguished by the defence and also the inapplicability of the judgment of **State of Gujarat &Another Vrs. Saileshbhai Mansukhlal Shah reported in 2007(7) SCC 71** as to the obligation to deposit the amount for sending the sample for testing as the earlier decision in **J. Kutty Vrs. State of Kerala FAC 1991(1)133** was prevalent. In any ways, there has been undue delay by passage of time for the sample to be re-tested in the Central Food Laboratory. Would any purpose still be served in sending the sample for analysis on the application under Section 13(2-A) of the Act at this distant point of time? The answer is not in the affirmative considering the totality of the facts and circumstances of the case and the Court after bestowing anxious consideration to all the aspects is of the considered view that the criminal proceeding should be terminated in exercise of its inherent jurisdiction.

10. Accordingly, it is ordered.

11. In the result, the CRLMC stands allowed. As a logical sequitur,the impugned order dated 26th February, 2005 under Annexure-1 and the entire criminal proceeding in connection with 2(C) CC No.2 of 2005 pending in the file of the learned S.D.J.M., Puri is hereby quashed.

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**2023 (I) ILR - CUT - 224**

**SASHIKANTA MISHRA, J.**

CRLA NO. 316 OF 2013

**PABITRA NAYAK** .....Appellant

.V.

**STATE OF ODISHA (VIGILANCE)** .....Respondent

**PREVENTION OF CORRUPTION ACT, 1988 – Sections 7, 13(1)(d) & 20 – Conviction U/ss. 7 & 13(2) of the Act – The trial Court after considering the evidence hold that even though there is no direct or substantial evidence relating to demand and acceptance of bribe by the accused, yet in the absence of proper explanation by the accused, such recovery of tainted money has to be treated as incriminating in nature – Whether presumption under section 20 is applicable to Sections 13(d)? – Held, No.**

**Case Laws Relied on and Referred to** :-

1. (2009) OCR 34 : Arakhita Nath Vs. State of Odisha.
2. (2011) 6 SCC 45 : State of Kerala Vs. C.P. Rao.
3. (2006) 13 SCC 305 : V. Venkata Subbarao Vs. State represented by Inspector of Police, A.P.
4. (2004) 3 SCC 753 : T. Shankar Prasad Vs. State of A.P.
5. (2017) 66 OCR (SC) 732 : Umesh Manan Vs. State of M.P.
6. (2020) 77 OCR (SC) 310 : Vinod Kumar Garg Vs. State (NCT).
7. (1980) 2 SCC 390 :Hazari Lal Vs State (Delhi Administration).

For Appellant : M/s. H.K.Mund, A.K.Dei,R.K.Mishra & B.C.Agrawalla.

For Respondent : Mr. M.S. Rizvi,Addl. Standing Counsel Standing Counsel (Vigilance).

JUDGMENT Date of Judgment : 25.11.2022

***SASHIKANTA MISHRA,J.***

The Appellant challenges the judgment dated 27th May, 2013 passed by learned Special Judge (Vigilance), Berhampur in G.R. Case No.46/2002(V) whereby he was convicted under Sections 7 and 13(2) of the Prevention of Corruption Act, 1988 (for short the "Act") and was sentenced to undergo S.I. for one year and to pay a fine of Rs.5,000/-, in default to undergo further S.I. for three months under Section 7 of the Act and S.I. for two years and fine of Rs.10,000/-, in default to undergo S.I. for four months under Section 13(2) of the Act. All the aforementioned sentences have been directed to run concurrently.

2. The prosecution case, briefly stated, is that one Abdulla Pradhan presented a written report before Superintendent of Police (Vig), Phulbani on

23rd September, 2002 stating that he had applied for solvency certificate in the office of Sub-Collector, Balliguda in the month of July, which was forwarded to Tahasildar, G. Udayagairi for enquiry and report. The said Tahasildar sent the application to R.I., Tikabali for enquiry and report. When the complainant met the R.I. and enquired about his application he was informed that the report was with the certificate clerk namely, Pabitra Nayak (Appellant). When the complainant met the Appellant, he demanded bribe of Rs.1500/- by saying that there was an error in the enquiry report, which was required to be corrected.

The complainant, instead of paying the amount, approached the S.P. (Vig), Phulbani and lodged the report, which led to registration of Phulbani Vigilance P.S. Case No.46/2002 under Sections 7 and 13(1)(d) read with Section 13 (2) of the Act. In course of investigation, it was decided to lay a trap against the Appellant and accordingly, on 24th September, 2022 a trap was laid during which the Appellant was caught red handed while accepting the tainted money of Rs.1500/-. The necessary formalities of the trap were followed and upon completion of investigation and obtaining sanction for prosecution, charge sheet was submitted against the Appellant.

3. The Appellant took the plea of denial and further that he was not dealing with the file relating to solvency certificate.

4. The trial Court framed the following points for determination:-

> *(i) Whether on 24.9.2002 at G. Udayagiri, the accused named above, who was working as a certificate clerk of Tahasil office, G.Udayagiri, Dist-Kandhamal accepted rupees fifteen hundred from the complainant on the basis of a demand to dispatch the report after correction of the enquiry report of R.I. for issuance of solvency certificate in the favour of decoy namely Abdula Pradhan as a gratification other than legal remuneration with a motive or reward for doing an official act such as to provide electricity connection and thus thereby committed an offence punishable under Section 7 of the Act ?*
>
> *(ii) Whether on the date, time and place as alleged by the complainant, the accused being a public servant posted as above corrupt or illegal means or otherwise by abusing his position as a public servant, obtained pecuniary advantage of rupees fifteen hundred for self from the complainant on the purpose mentioned above and thus, thereby committed an offence as specified in Section 13(1)(d) of the Act and made punishable under Section 13(2) of the Act ?*

It is not understood why the trial court referred to the motive or reward for doing an official act to 'as to provide electricity connection' when such an allegation has not been made at all rather, the allegation relates to issuance of solvency certificate.

5. Be that as it may, the prosecution examined 9 witnesses and proved 12 documents apart from 6 material objects. Defence did not adduce any evidence.

6. After scanning the oral evidence particularly, that of the complainant decoy (P.W.3) and the accompanying witness (P.W.5), the trial Court held that the entire case of the prosecution regarding demand of illegal gratification by the Appellant was not proved at all since the complainant himself did not support the prosecution case. The accompanying witness (P.W.5) also did not support the prosecution case. Though both of them were declared hostile, nothing was elicited from them in cross-examination to help the prosecution.

7. As regards the demand of bribe of Rs.1500/-, the trial court, also relying upon the evidence of P.Ws.3 and 5 held that there was absolutely no evidence to show that there was any demand of bribe as alleged by the prosecution. Relying upon a judgment passed by this Court in the case of ***Arakhita Nath v. State of Odisha***; reported in (2009) OCR 34, the trial Court held that once the evidence of decoy and the accompanying witness is rejected, there remained little to sustain the prosecution case. Despite holding so, the learned trial Court took into consideration the fact that the recovery of bribe money from the conscious possession of the accused is an incriminating circumstance against him, which can persuade the Court to raise the statutory presumption under Section 20 of the Act. Analyzing the evidence of the other witnesses namely, P.Ws.1,2,5 and 7, the trial Court held that the tainted money had been recovered from the pant pocket of the Appellant and the hand wash and pant pocket wash had proved that he had accepted the same. Placing the onus on the Appellant to explain as to how the tainted money was recovered from his pocket and finding none, the trial Court held that the defence had not offered proper explanation. On the findings as above, the trial Court held that the evidence relating to recovery of money is adequate to draw the statutory presumption under Section 20 of the Act against the accused and therefore, convicted him for the offences in question and sentenced him as aforesaid.

8. Heard Mr. H.K.Mund, learned counsel for the Appellant and Mr. M.S. Rizvi, learned Addl. Standing Counsel for the Vigilance Department.

9. Assailing the impugned judgment of conviction,Mr. Mund has raised the following points:-

> (i) Once the Court finds that there is no evidence of demand or acceptance of illegal gratification, the entire case of the prosecution falls to the ground.
>
> (ii) It is necessary to prove the voluntary acceptance of the illegal gratification for raising presumption under Section 20 of the Act, which the prosecution failed to do.
>
> (iii) Mere recovery of tainted money divorced from circumstances in which it is recovered is not sufficient to convict the accused.

10. Mr. M.S.Rizvi, on the other hand, contends that demand and acceptance of illegal gratification can be proved both by direct as well as circumstantial evidence. In the case at hand, the informant turned hostile and did not support the prosecution case, but on a cumulative examination of the other evidence on record, it can be clearly inferred that the accused had demanded Rs.1500/- as bribe and had also accepted the same. It is further argued that the accused had the opportunity of explaining the recovery of tainted money from his person but in the instant case, it was found that he had given a false explanation. According to Mr.Rizvi, therefore, the impugned judgment of conviction is correct and does not warrant any interference whatsoever.

11. It goes without saying that to constitute the offence under Sections 7and 13(1)(d) of the Act, it is essential to prove demand acceptance and recovery of the illegal gratification/bribe money. It is also to be noted that demand has two components, i.e., prior demand and demand during detection. It is the latter which weighs the scales in support of the prosecution. Similarly, only demand without proof of acceptance of bribe money by the accused is of no consequence. Thus, both demand and acceptance are inextricably linked to each other so much so that both need to be proved to the hilt to bring home the charge under Sections 7 and 13(1)(d) of the Act. Recovery of the tainted money by itself however does not occupy such importance as demand and acceptance. It is well settled that mere recovery of tainted money divorced from the circumstances in which it is paid, is not sufficient to convict the accused, when the substantive evidence in the case is not reliable. The above view was taken by the Apex Court in the case of ***State of Kerala vs. C.P. Rao***, reported in (2011) 6 SCC 45.

12. The rival contentions may now be considered in the backdrop of above mentioned legal principles.

Be it noted at the outset that the trial court disbelieved the prosecution evidence regarding demand and acceptance of the tainted money by the accused.The complainant/decoy and the accompany witnesses being examined respectively as P.Ws.3 and 5 did not support the prosecution case at all, which led the trial court to hold that the whole of the prosecution case falls to the ground inasmuch as it utterly failed to prove that the accused demanded and accepted Rs.1500/- from the complainant. This part of the impugned judgment is undoubtedly against the prosecution but there has been no challenge to such finding by the State obviously because the ultimate finding has been in its favour. Nevertheless, just to be satisfied that the finding as above is correct, this Court has carefully travelled through the entire prosecution evidence. Particularly, the version of P.Ws.3 and 5. Without delving into details, it is suffice to note that the complainant himself deposed as follows:

*"xx xx xx xx*

*When the clerk (appellant) came to the Tahasil office, I enquired my certificate and told that the matter is pending before the Tahasildar. When I offered the money to him, he was reluctant to receive but I kept the money in his pant pocket. Thereafter, the clerk brought out those stated currency notes from his pocket and handed over to me. At that time, the Vigilance staff came and told about the happenings to the vigilance staff.*

*xx xx xx xx"*

13. P.W.3 was declared hostile and was cross examined at length by prosecution but nothing was elicited to discredit his sworn testimony. On the other hand, he admitted in cross-examination that he had been instructed by the vigilance staff any how to give the money to the accused irrespective of demand.

The accompany witness (P.W.5) testified as follows:-

*"xx xx xx xx*

*Informant proceeded ahead of me and I followed him. The informant entered into the office room and the accused was sitting in his chair. As it was not convenient, I did not enter into the office and remained on the varandah and informant entered inside the office room and stood near the accused. I had instructed the informant to give signal to me after the transaction and as informant gave signal to me, I immediately transmitted the signal to vigilance staff who were outside the Tahasil office at a visible distance.*

*xx xx xx xx"*

In cross- examination, he admitted that he had not heard the conversation between the accused and the informant prior to receiving signal from the informant. Thus, P.Ws.3 and 5 being the most important witnesses of the prosecution have not supported its case even a bit. The trial court therefore, rightly held that the factum of demand of illegal gratification by the accused and acceptance thereof by him was not proved.

After rendering such finding, the trial court dwelt upon the recovery aspect. The evidence in this regard is that the tainted money was recovered from the pant pocket of the accused and the colour of the chemical solution turned to pink on his hand wash and pocket wash being taken. All the other witnesses have deposed more or less in these lines. Being faced with such evidence, the trial court proceeded on the premise that in a trap case recovery of bribe money from conscious possession is an incriminating circumstance against the accused. It was further held that if it is proved that the accused voluntarily received the bribe money and there exists other surrounding circumstances a statutory presumption can be drawn against the accused. The trial Court thereafter, considered the evidence of P.Ws. 1, 2, 5, 7 and 9 to hold that even though there is no direct or substantial evidence relating to demand and acceptance of bribe by the accused, yet in the absence of proper explanation by the accused, such recovery has to be treated as incriminating in nature. In this regard, it would be apposite to refer to Section 20 of the P.C. Act, (as it stood then) which is extracted hereinbefore.

> *"20. Presumption where public servant accepts gratification other than legal remuneration.-*
>
> *(1) Where, in any trial of an offence punishable under section 7 or section 11 or clause*
>
> *(a) or clause (b) of sub-section (1) of section 13 it is proved that an accused person has accepted or obtained or has agreed to accept or attempted to obtain for himself, or for any other person, any gratification (other than legal remuneration) or any valuable thing from any person, it shall be presumed, unless the contrary is proved, that he accepted or obtained or agreed to accept or attempted to obtain that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in section 7 or, as the case may be, without consideration or for a consideration which he knows to be inadequate.*
>
> *(2) Where in any trial of an offence punishable under section 12 or under clause (b) of section 14,it is proved that any gratification (other than legal remuneration) or any valuable thing has been given or offered to be given or attempted to be given by an accused person, it shall be presumed, unless the contrary is proved, that he gave or offered to give or attempted to give that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in section 7, or as the case may be, without consideration or for a consideration which he knows to be inadequate.*
>
> *(3) Notwithstanding anything contained in subsections (1) and (2), the court may decline to draw the presumption referred to in either of the said sub-sections, if the gratification or thing aforesaid is, in its opinion, so trivial that no interference of corruption may fairly be drawn."*

14. Mr. H.K. Mund has argued that the presumption under Section 20 is not applicable to Section 13(1)(d) and secondly, such presumption is contingent upon proof of voluntary acceptance of illegal gratification. Mr. Mund has referred to a decision of the Apex Court in the case of **C.P. Rao** (supra) as also in the case of V**.** ***Venkata Subbarao vs. State represented by Inspector of Police, A.P***., reported in (2006) 13 SCC 305, wherein it was held as under paragraph-10:-

> *"10. In C.M. Girish Babu Vs. CBI Cochin High Court Kerala, this Court while dealing with the case under the Prevention of Corruption Act, 1988, by referring to its previous decision in the case of Suraj Mal Vs. State (Delhi Administration), held that mere recovery of tainted money, divorced from the circumstances under which it is paid, is not sufficient to convict the accused when the substantive evidence in the case is not reliable. The mere recovery by itself cannot prove the charge of the prosecution against the accused. In the absence of any evidence to prove payment of bribe or to show that the accused voluntarily accepted the money knowing it to be bribe conviction cannot be sustained."*

15. Learned trial court has relied upon a decision of the Apex court in the case of ***Hazari Lal vs State (Delhi Administration***), reported in (1980) 2 SCC 390, wherein it was held that where the recovery of the money coupled with other circumstances leads to the conclusion that the accused received gratification from some person, the Court would certainly be entitled to draw the presumption under Section (4)1 of the P.C. Act (Old Act).

Mr. M.S. Rizvi has relied upon the following cases in addition to ***Hazari Lal*** (supra), namely, ***T. Shankar Prasad vs. State of A.P.***, reported in (2004) 3 SCC 753, ***Umesh Manan vs. State of M.P.***, reported in (2017) 66 OCR (SC) 732 and ***Vinod Kumar Garg vs. State (NCT)***, reported in (2020) 77 OCR (SC) 310 to buttress his contention that the trial court rightly invoked the statutory presumption under Section 20 of the act in view of recovery of the tainted money from the pant pocket of the accused.

After objectively viewing the evidence on record, this Court fails to see as to how the ratio of ***Hazari Lal*** (supra) can be made applicable to the present case, the reason being, the Apex Court only reiterated the settled principle that recovery of money 'coupled with the other circumstances' can justify raising of presumption. But then in the present case when the complainant himself says that he had put the tainted money in the pant pocket of the accused and no contrary evidence being adduced to rebut such positive assertion, it cannot by any stretch of imagination be held that the tainted money found from the possession of the pant pocket of the accused was illegal gratification. In fact, it would be reasonable to suppose that keeping in mind such an eventuality the legislature in its wisdom employed the expression "has accepted or obtained" in Section 20. In other words, this was obviously done with the intent of protecting a person from false implication. For instance, in a case where a person willfully pushes the tainted money in the hands or pocket of the accused.

16. In the case of ***T. Shankar Prasad*** (supra),the Apex Court held that the Court is bound to operate the presumption under Section 20, if the condition precedent for drawing such presumption is satisfied. The ratio of the above case is not applicable to the facts of the present case inasmuch as the Apex court held that the only condition for drawing such a legal presumption under Section 4 of the 1947 Act (Section 20 of the 1988 Act) is that during trial it should be proved that the accused has accepted or agreed to accept any gratification.

In the case of ***Umesh Manon*** (supra) there was clear proof of the accused being caught red-handed with the tainted money, which is not the case at hand. As regards, the case of Vinod Kumar Garg (supra), the Apex Court reiterated the principle that the condition precedent to drawing such a legal presumption that the accused has demanded and was paid the bribe money has been proved and established by the incriminating material on record.

In the instant case, as has been discussed hereinbefore, there is no evidence regarding demand and acceptance of bribe by the accused.

17. Mr. Rizvi would argue that the fact of recovery of the tainted money from the possession of the petitioner automatically proves demand and acceptance on the principle that both direct as well as circumstantial evidence

can be utilized to prove the same. As a legal proposition the above is certainly acceptable but then, it is for the prosecution to show as to what the circumstances are. In the instant case, prosecution has banked upon the evidence relating only to recovery of the accused tainted money from the accused, hand wash/pocket wash solution turning to pink and false explanation submitted by the accused. This much is not sufficient for the Court to raise presumption under Section 20. Unless it is shown that what was recovered had been accepted as gratification, the presumption would not be available. Hence, the complainant has himself not stated anything about any demand of bribe by the accused and so also the accompanying witness. Such being the evidence, there is no way by which the Court can 'infer' that the money recovered from the accused was illegal gratification paid on demand. What Mr. Rizvi attempts to persuade the Court to view as an incriminating circumstance is, in fact, an inference that he wants the Court to draw, which, as discussed above, is not at all tenable.

18. Another aspect also needs consideration. It is true that if the initial burden is discharged by the prosecution, the onus shifts to the accused. The trial court has laid much emphasis on the so called false explanation submitted by the accused to hold that the presumption under Section 20 was not rebutted. Firstly, this Court finds that if according to the trial court this was an incriminating fact, the same should have been brought to the notice of the accused in his examination under Section 313 of Cr.P.C. before it could be utilized against him. The same was not done in the present case. There can be no gainsaying that in such a situation the so called incriminating evidence is of no help to the prosecution. Secondly, the question of shifting of burden would arise only when the initial burden is adequately discharged by the prosecution. As has already been discussed hereinbefore, the foundational fact which needs to be established by prosecution in a case of trap is evidence of demand and acceptance of bribe. The trial court has itself held that the prosecution could not establish such a foundation. This Court has also independently scanned the evidence to arrive at similar finding. Under such circumstances, it is not understood as to how the burden would shift to the accused by raising the presumption under Section 20. To reiterate, there can be no quarrel with the proposition that a trap may be proved either by direct or circumstantial evidence, but in the case at hand, there is no direct or circumstantial evidence showing demand and acceptance of illegal gratification by the accused. The trial court must therefore, be held to have committed gross error of law in holding otherwise.

19. In the result, the appeal succeeds and is, therefore, allowed. The impugned judgment of conviction and sentence passed by the trial court is hereby set aside. The appellant being on bail, his bail bond be discharged.

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**2023 (I) ILR - CUT - 232**

**SASHIKANTA MISHRA, J.**

CRLA NO. 367 OF 2015

**ASHOK SUNA** .....Appellant

.V.

**STATE OF ODISHA** .....Respondent

**NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 – Section 20(b)(ii)(c) – Conviction – Appellant plea that mandatory provisions of the statute as contained in sections 50, 52, 52-A, 55 and 57 of the N.D.P.S. Act were not complied – The learned Special Court has held that as the raid was conducted on the basis of a chance recovery, the applicability of the mandatory provision for section 42 of the Act is not required to be complied with – As regards to compliance of section 50, the learned Court below has held that there was no personal search of the accused but only of the vehicles – Effect of – This finding of the Court below is contrary to evidence of record and contrary to the provision of law and as such cannot be sustained**.

(Para 17)

**Case Laws Relied on and Referred to** :-

1. (2014) 57 OCR (SC) 1087 : State of Rajasthan Vs. Paramanda & Anr.
2. (1994) 3 SCC 299 : State of Punjab Vs. Balbir Singh.
3. (2007) 1 SCC 450 : Dilip & Anr. Vs. State of Madhya Pradesh.
4. 2002 (CrlLJ) 1463 : Ved Singh & Ors. Vs. State of Rajasthan.
5. (2009) 16 SCC 644 : Union of India Vs. Shah Alam.

For Appellant : M/s. P.C. Mishra,S.K. Samal & B.P. Mishra.
For Respondent : Mr. S.K. Mishra,ASC.

JUDGMENT Date of Judgment : 16.12.2022

***SASHIKANTA MISHRA,J.***

The judgment passed by the learned Additional Sessions Judge-cum-Special Judge, Boudh on 29.04.2015 in Special Case No.6 of 2014 (T) is under challenge in the present appeal whereby the appellant was convicted for the offence under Section-20(b)(ii)(c) of the N.D.P.S. Act and sentenced to undergo R.I. for ten (10) years and to pay fine of Rs.1,00,000/-(Rupees One Lakh), in default, to undergo further R.I. for two (2) years.

2. Prosecution case, briefly stated is as follows;

One Alakarani Panda, Inspector of Police, Special Task Force (STF), Odisha, Bhubaneswar along with her staff had come to Boudh to collect criminal intelligence and for detection of NDPS cases. While they were moving in Boudh

Police Station area, they received reliable information regarding storage of huge quantity of contraband Ganja in the house of one Panchanan Ghantal of Dhadalapada. The information was conveyed to the Superintendent of Police, S.T.F., Bhubaneswar over phone, who made Station Diary entry and directed to take appropriate action. Accordingly, the services of one Executive Magistrate and two official witnesses were requisitioned. While moving towards Gochhapada and Dhadalapada road, they found an auto rickshaw bearing Registration No.OR- 27-3047 standing on the road in a suspicious manner. Ms. Panda intimated the matter to the D.S.P. who directed her to proceed to the autorickshaw for verification. When the STF staff went towards the auto-rickshaw, its driver suddenly started running away towards the bushy jungle but he was apprehended after a chase. On interrogation, he disclosed his name as Ashok Suna (appellant). Six gunny bags containing contraband Ganja were found to have been kept in the auto-rickshaw. Necessary formalities of search and seizure were followed, the accused was arrested and the case was registered being STF P.S. Case No. 03 of 2014 and investigation commenced. On completion of investigation, charge-sheet was submitted against the accused.

3. The accused took the plea of denial.

4. To prove its case, prosecution examined eleven witnesses and exhibited thirty two documents. The prosecution also proved thirteen material objects. Defence, on the other hand, examined two witnesses including the accused as D.W.1. The learned Trial Court examined the evidence on record both oral and documentary and held that the accused was in unlawful exclusive and conscious possession of six gunny bags containing 239 Kg. 300 grams of contraband Ganja in the auto-rickshaw occupied by him without any licence or permit in violation of Section-8 of the N.D.P.S. Act. It was further held that his running away from the spot reflects his subsequent contact which is relevant under Section-8 of the Indian Evidence Act. Learned Court below further held that the mandatory provisions of the Act namely, Sections-42, 50, 52, 55 and 57 were fully complied with. As regards the defence evidence, learned Court below disbelieved the same on the ground that the same does not in way nullify the positive evidence adduced by the prosecution. On such findings, the accused was convicted and sentenced as aforesaid by judgment which is impugned in the present appeal.

5. Heard Mr. P.C. Mishra, learned counsel for the appellant and Mr. S.K. Mishra, learned Additional Standing Counsel for the State.

6. Assailing the impugned order, Mr. P.C. Mishra, apart from pointing out certain discrepancies in the F.I.R. mainly contends that the mandatory provisions

of the statute as contained in Sections-50, 52, 52-A, 55 and 57 of the N.D.P.S. Act were not complied with for which, the prosecution case cannot be treated as valid. Mr. Mishra further contends that the discrepancies in the evidence of P.W.1 relating to the number of gunny bags allegedly seized from the auto-rickshaw at the spot raise reasonable doubts regarding the veracity of the prosecution case. According to Mr. Mishra, the Trial Court overlooked these vital aspects for which the impugned judgment of conviction cannot be sustained in the eye of law.

7. Per contra, Mr. S.K. Mishra contends that the so called discrepancies in the evidence are minor and cannot be treated as fatal in nature. As regards the mandatory requirements of the statute, Mr. Mishra argues that the same were duly followed and the Trial Court has taken pains to examine each of such mandatory provision vis-à-vis the evidence on record to record his subjective satisfaction in such regard. According to Mr. Mishra, the impugned judgment does not warrant any interference.

8. A case under Section-20(b)(ii)(c) of the N.D.P.S. Act can succeed only upon clear evidence being adduced regarding exclusive and conscious possession by the accused of the contraband Ganja.

9. Now, whether such possession was unlawful would depend entirely on the circumstances under which the search and seizure was made. Thus, the primary question that arises for consideration is, whether the mandatory requirements of the statute were followed. According to Mr. Mishra, learned counsel for the appellant, the provision under Section-50 of the Act was not complied with as admittedly the accused was not searched in the presence of a Gazetted Officer or Magistrate and no option was given to him.

Mr. S.K. Mishra, learned Additional Standing Counsel seeks to counter such argument by submitting that the S.T.F. team was proceeding to a different place and the accused along with auto-rickshaw was found on the way which is nothing but a chance discovery. Therefore, there was no time to comply with the requirement of Section-50. In any case, Section-50 applies only to personal search but not search of vehicle.

10. To appreciate the rival contentions, it would be apposite to refer to the provision under Section-50 of the Act, which is quoted hereunder;

> *"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 person without unnecessary delay to the 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 such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under Section 100 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."*

11. There is no dispute that the contraband Ganja was found in auto-rickshaw and was seized upon its search. It is also in the evidence of all the prosecution witnesses that the accused was also searched. Almost all the prosecution witnesses have admitted in cross-examination that neither any Magistrate or Gazetted Officer was present during search of the accused. In fact, the I.O. himself admits in cross-examination that he had not made any requisition for deputation of Executive Magistrate and had also not separately recorded the consent and willingness of the accused for search. It is common ground that no contraband was found from the person of the accused on his personal search and only a mobile phone was found.

12. It is argued by learned State Counsel that the Provision under Section-50 is not applicable in respect of search of premises, vehicles, bags, articles or any other articles and since no contraband was recovered from the personal search of the accused, he cannot be said to have been prejudiced. The evidence on record shows that no contraband was recovered from the person of the accused. Law is no longer res- integra that non-compliance of Section-50 is fatal to the prosecution case and vitiates the trial. When search is made of a thing or place and also of the accused, compliance of Section-50 is mandatory. In the case of **State of Rajasthan Vrs. Paramanda & Another reported in (2014) 57 OCR (SC)- 1087** the Apex Court after discussing several decisions including the one rendered in the case of State of Punjab Vrs. Balbir Singh reported in (1994) 3 SCC 299 held as follows;

*"Para-10. **In Dilip & Anr. V. State of Madhya Pradesh (2007) 1 SCC 450**, on the basis of information, search of the person of the accused was conducted. Nothing was found on their person. But on search of the scooter they were riding, opium contained*

*in plastic bag was recovered. This Court held that provisions of Section 50 might not have been required to be complied with so far as the search of the scooter is concerned, but keeping in view the fact that the person of the accused was also searched, it was obligatory on the part of the officers to comply with the said provisions, which was not done. This Court confirmed the acquittal of the accused.*

*11. In* ***Union of India v. Shah Alam (2009) 16 SCC 644****, heroin was first recovered from the bags carried by the respondents therein. Thereafter, their personal search was taken but nothing was recovered from their person. It was urged that since personal search did not lead to any recovery, there was no need to comply with the provisions of Section 50 of the NDPS Act. Following Dilip, it was held that since the provisions of Section 50 of the NDPS Act were not complied with, the High Court was right in acquitting the respondents on that ground.*

*12. 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. In this case, respondent No.1 Parmanand's bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of respondent No.2 Surajmal was also conducted. Therefore, in light of judgments of this Court mentioned in the preceding paragraphs, Section 50 of the NDPS Act will have application."*

13. Mr. P.C. Mishra, Learned counsel for the Appellant next argues that the Provisions under Section 52, 52-A (2) and 55, which are also a mandatory Provisions were violated. The provisions are quoted herein below for immediate reference:

"52. **Disposal of persons arrested and articles seized**.—(1) Any officer arresting a person under Section 41, Section 42, Section 43 or Section 44 shall, as soon as may be, inform him of the grounds for such arrest.

(2) Every person arrested and article seized under warrant issued under sub-section (1) of Section 41 shall be forwarded without unnecessary delay to the Magistrate by whom the warrant was issued. (3) Every person arrested and article seized under sub-section (2) of Section 41, Section 42, Section 43 or Section 44 shall be forwarded without unnecessary delay to—

(a) the officer-in-charge of the nearest police station, or

(b) the officer empowered under Section 53.

(4) The authority or officer to whom any person or article is forwarded under sub-section (2) or subsection (3) shall, with all convenient despatch, take such measures as may be necessary for the disposal according to law of such person or article.

***[52-A Disposal of seized narcotic drugs and psychotropic substances.—[ (1)*** xxx xxx xxx xxx]

(2) Where any [narcotic drugs, psychotropic substances, controlled substances or conveyances] has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in

> sub-section (1) shall prepare an inventory of such [narcotic drugs, psychotropic substances, controlled substances or conveyances] containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the [narcotic drugs, psychotropic substances, controlled substances or conveyances] or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the [narcotic drugs, psychotropic substances, controlled substances or conveyances] in any proceedings under this Act and make an application, to any Magistrate for the purpose of—
>
> (a) certifying the correctness of the inventory so prepared; or
>
> (b) taking, in the presence of such magistrate, photographs of [such drugs, substances or conveyances] and certifying such photographs as true; or
>
> (c) allowing to draw representative samples of such drugs or substances, in the presence of such magistrate and certifying the correctness of any list of samples so drawn.
>
> 55. **Police to take charge of articles seized and delivered**.—An officer-in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station."

14. In this regard, it is the contention of Mr. Mishra, that the seized articles and the accused were taken to Bhubaneswar but not to the local Police Station which is at a distance of only 40 Kms. (forty kilometers). The object of Section-52 is safe custody of the seized articles. It is to be noted in this regard that the search and seizure was made by the S.T.F. which has jurisdiction over the entire State. But in all fairness and in compliance of Section 52 and 52-A(2), the seized articles as well as the accused should have been taken to the nearest Police Station, yet the same not having been done, naturally creates a doubt as the accused and the seized articles were taken all the way to Bhubaneswar which is more than 300 Kms. away from the spot that too during the night, whereas the local police station situates at a distance of 40 kms only.

15. It has been further argued that as per Section 55, the seized article is to be taken charge of by the O.I.C. of a Police Station, who shall keep it in safe custody. In the instant case, one Sub-Inspector (P.W.7), who took charge of the six gunny bags filled with Ganja admitted in crossexamination that the seized Ganja had not been weighed before her and that she does not remember the weight of the gunny bags. She also admitted to have not verified the gunny bags. She further admits not to have collected and seized any exclusive sample and that no sealing of the seized articles had been made during receipt. It goes without saying that when the statute has laid such emphasis on proper sealing

and custody of the seized articles, it is incumbent upon the investigating agency to scrupulously adhere to the same. Highlighting the importance of the mandatory provisions of the statute/ the Rajastan High Court in a similar case in the case of Ved Singh and Others vrs. State of Rajasthan, reported in 2002 (CrlLJ) 1463 held as follows;

> *"Para-7 There is no evidence to suggest that the compliance of Section 55 of the Act was ever made. The practice and procedure in such cases is that at the time of the recovery the material has to be sealed by the personal seal of the officer making the recovery: Thereafter, the sealed packets are taken to the 'Maal Khana' of the Police Station or to the office of Narcotics Department, where the packets are to be resealed so that there are no chances of subsequent tampering. In this case there is no evidence to suggest that the packets were resealed when they were deposited in the office. The prosecution has to prove by a positive evidence that the packets were intact after the recovery till they were deposited in the 'Maal Khaana.' It has to be further proved by positive evidence that during the course of their stay in the 'Maal Khana' the packets remained intact. It is further to be proved by positive evidence that after taking from the Maal Khana till they were deposited with the Public Analyst they remained intact. But a testimony to that effect is also not on record. At the office of Public Analyst the material received is to be weighed, so that it is clear that there was no major change in the weight of the material. This is a safeguard provided in the interest of the accused persons and there have been number of cases in which the accused persons have been acquitted simply on the ground that the difference between the weight of the sample at the time of the recovery and the same at the time of their deposit with the public analyst was far in excess. In the instant case a precaution has been taken to not to mention the weight of the sample at the time of receipt in the office of public analyst. This is an infirmity, the benefit of which must go to the accused persons."*

16. Thus the possibility that what was presented to P.W.7 at Bhubaneswar after travelling a distance of 300 kilometers may also have been tampered with during the journey cannot be lost sight of. Thus, the requirement of Section 55 was also not complied with.

17. Reading of the impugned judgment reveals that the learned Special Court has held that as the raid was conducted on the basis of a chance recovery the applicability of the mandatory provision for Section-42 of the Act is not required to be complied with. As regards compliance of Section-50, the learned Court below has held that there had not been any personal search of the accused but only of the vehicles. This is contrary to the evidence on record as discussed earlier. As regards the Sections-52, 52(A) and 55 of the Act, learned Court below did not find any infirmity in the evidence but in view of the discussion made herein before in relation to the evidence on record and the position of law, it is evident that the findings of the learned Special Judge as above cannot be sustained. Thus from an analysis of the evidence on record in the backdrop of the contentions advanced on behalf of the accusedappellant, this Court finds that the order of conviction passed by the learned Court below warrants interference.

18. In the result, the Appeal is allowed. The impugned judgment is set aside. The appellant being on bail his bail bonds be discharged.

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**2023 (I) ILR - CUT - 239**

**A.K. MOHAPATRA,J.**

ABLAPL NO.16352 OF 2022

**SUBASA CHANDRA MALIK** .....Petitioner

.V.

**STATE OF ODISHA** .....Opp. Party

**CODE OF CRIMINAL PROCEDURE, 1973 – Section 438 – Prayer for grant of transit anticipatory bail – Whether in absence of F.I.R the prayer for grant of transit anticipatory bail can be considered? – Held, Yes – This Court is of the considered view that there is no impediment under Section 438 of Cr.P.C. to consider and grant transit anticipatory bail to the applicant in connection with an offence which had taken place beyond the jurisdiction of this Court that too in a different State under the jurisdiction of another High Court for a temporary period only thereby protecting the Petitioner to approach the competent court of law under the appropriate provisions of Cr.P.C.** (Para 14)

**Case Laws Relied on and Referred to** :-

1. R/Criminal Misc. Application No.13550 of 2022: Mansi Jimit Sanghavi Vs. State of Gujarat.
2. 1985 CriLJ 1887 :N.K. Nayar & Ors. Vs. State of Maharashtra & Ors.
3. Anticipatory Bail Application No.14 of 2014 :Teesta Atul Setalvad & Anr. Vs. State of Maharashtra & Ors.
4. Anticipatory Bail Application No.441 of 2021: Nikita Jacob Vs. The State of Maharashtra.
5. Criminal Misc. Anticipatory Bail Application No.5286 of 2022:Amita Garg & Ors. Vs. State of U.P. & Ors.

For Petitioner : Mr. Sanket Kanungo.

For Opp. Party : Mr. P.C. Das, ASC.

ORDER Date of Order : 23.12.2022

***A.K. MOHAPATRA,J.***

1. This matter is taken up through Hybrid Arrangement (Virtual/Physical Mode).

2. Heard Mr. Sanket Kanungo, learned counsel appearing for the Petitioner and Mr. P.C. Das, learned counsel appearing for the State-Opposite Party. Perused the materials placed before this Court for consideration.

3. Invoking the provision under Section 438 of Cr.P.C., the Petitioner has approached this Court for grant of transit anticipatory bail to appear before the competent court in the State of Telengana.

4. The factual background of the case, in short, is that the Petitioner is an absolute owner of the landed property situated at Abhaipur, P.O.-Safa, P.S. Tangi, District-Cuttack, Odisha. The Petitioner resides there with his family members since 2015. Since the house of the Petitioner was damaged during Cyclone Fani that had taken place in the year 2015, the Petitioner along with many other persons which were residing in the aforesaid address. Further, the Petitioner leased out his property vide Deed Agreement dated 22.04.2022 in favour of one Ranjit Samal, S/o. Hrudananda Samal, At-Santhapur, Santhasaran, P.S.-Dhenkanal, District-Dhenkanal to run a poultry firm for a consideration of Rs.8,000/- per month. After leasing out the plot in Dhenkanal, the Petitioner along with his family members were residing in Cuttack and working as a Mason to earn his livelihood. On 18.12.2022, the Petitioner received information from Tangi Police Station with regard to raids being conducted by Telengana Police on his property that was leased out in favour of one Ranjit Samal for the sole purpose of running a poultry firm. The Petitioner was given to understand that the raids were being carried out in connection with seizure of illicit liquor from various liquor manufacturing distillery in the State of Odisha which were engaged in the business of manufacturing and transporting illegal liquor to the State of Telengana. The information received by the Petitioner was confirmed by various newspaper reports regarding the allegation. In support of his contention that the property in question was leased out, the Petitioner has filed a copy of the leased agreement dated 22.04.2022 along with the bail application.

5. The Petitioner is now apprehending arrest in connection with the aforesaid case as he is being summoned by Tangi Police Station for the purpose of investigation.

6. It is submitted by Mr. Kanungo, learned counsel appearing for the Petitioner that the Petitioner has no idea whatsoever with regard to any illicit liquor business taking place on the land leased out to one Ranjit Samal. The Petitioner is stated to be staying at Cuttack and earning his livelihood as Mason. He further contended that in the event the Petitioner is arrested and forwarded to judicial custody, the whole family dependent upon Petitioner's income would die of starvation.

7. Learned counsel for the Petitioner further emphatically submits that the Petitioner is an innocent and poor man and has become a victim of the circumstances which was neither within his knowledge nor in his control. Moreover, the Petitioner had no role in the alleged crime. In such view of the

matter, learned counsel for the Petitioner prays that he may be allowed to be released on transit anticipatory bail so that he can approach the competent court by filing a regular bail application. In such view of the matter, learned counsel for the Petitioner further submits that the Petitioner is ready and willing to abide by any terms and conditions that will be imposed by this court in the event of Petitioner on bail.

8. Learned Additional Standing Counsel appearing for the State-Opposite Party, on the other hand, submits that on perusal of the bail application, it appears that no case has been registered so far and the matter is being investigated by the police. He further submits that in the event the Petitioner is not involved in the alleged crime, it is open for the Petitioner to approach the jurisdictional police and record his statement. Further, he raises objection with regard to release of the Petitioner on transit anticipatory bail as has been prayed for by the Petitioner in the present bail application. Accordingly, learned Additional Standing Counsel appearing for the State-Opposite Party submits that the present bail application is devoid of any merit and the same is liable to be rejected at the threshold.

9. In reply to the contention raised by the learned Additional Standing Counsel appearing for the State-Opposite Parties, learned counsel appearing for the Petitioner relied upon a judgment of the Gujurat High Court in the case of ***Mansi Jimit Sanghavi v. State of Gujarat*** (R/Criminal Misc. Application No.13550 of 2022 decided on 03.08.2022). Referring to the aforesaid judgment, learned counsel for the Petitioner submits that issue involved in the present case, i.e., in the absence of an F.I.R., whether the prayer for grant of transit anticipatory bail can be considered and allowed was directly and substantially issue before the Gujarat High Court. In the above noted decision, the counsel representing the State also argued that in the absence of an F.I.R. and the allegations not being supported by any material, the allegation with regard to apprehension of impending arrest is hypothetical and the Gujarat High Court was urged not to consider the application of the Petitioner and not to grant transit anticipatory bail to the applicant.

10. A Single Judge Bench of Gujarat High Court while considering the identical issue referred to the judgment of Bombay High Court in the case of ***N.K. Nayar and others Vs. State of Maharashtra and others, reported in 1985 CriLJ 1887*** accepted the analysis of law by a Division Bench of Bombay High Court in the case of *N.K. Nayak* (supra). The relevant portion of the order passed by the Division Bench of Bombay High Court in the case of *N.K. Nayar* (supra) is quoted hereinbelow:-

> "…The provisions for the grant of anticipatory bail are contained in Section 438 of the Cr.P.C. An application for such type of bail can be made to the High Court or to the Court of Session whenever a person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence. Thus, the real cause for making an application under Section 438 is the contemplated arrest of a person. If this arrest is likely to be effected within the jurisdiction of this Court, we think that the concerned person should have the remedy of applying to this Court for anticipatory bail. This is more so when the Supreme Court in the case of Gurbaksh Singh Sibbia v. State of Punjab, has observed in para 6 as follows:
>
> The distinction between an ordinary order of bail and an order of anticipatory bail is that whereas the former is granted after arrest and therefore means release from the custody of the police, the latter is granted in anticipation of arrest and is therefore effective at the very moment of arrest.
>
> Thus an order of anticipatory bail would have a relevancy to the moment of arrest of the concerned person. Consequently, this Court would have jurisdiction if a person is likely to be, arrested at a place within, the jurisdiction of this Court. We may with advantage refer to a few decisions of the other High Courts which have taken a similar view. For example, Karnataka High Court in the case of Dr. L.R. Naidu v. State of Karnataka reported in 1984 Cri LJ 757, and the Calcutta High Court in the case of B.R. Sinha v. State reported in 1982 Cri LJ 61, have taken a view similar to the one which we have taken. There is also a decision of the Delhi High Court on the same lines. It would thus be clear that this Court would have jurisdiction to entertain both the applications even if the offences are said to have been committed outside the State of Maharashtra."

11. Accordingly, the Gujarat High Court relying upon the analysis of law by a Division Bench of Bombay High Court came to a conclusion that since the Gujarat High Court is competent to decide the application and being competent to grant anticipatory bail to the applicant as the commission of alleged crime took place within the jurisdiction of Gujarat High Court, i.e., in the State of Gujarat. Hence, the Single Judge Bench of Gujarat High Court allowed transit anticipatory bail application of the applicant in *Mansi Jimit Sanghavi's* case (supra)

12. In course of argument, learned counsel for the Petitioner also relied upon the judgment of Bombay High Court in the case of ***Teesta Atul Setalvad & Anr. Vs. State of Maharashtra & Ors. (vide Anticipatory Bail*** Application No.14 of 2014 decided on 31.01.2014) wherein it was held that the High Court of one State can grant transit bail in respect of a case registered within the jurisdiction of another High Court in exercise of power under Section 438 of Cr.P.C. Such view has also been accepted and adopted by the Bombay High Court in the case of ***Nikita Jacob Vs. The State of Maharashtra*** (Anticipatory Bail Application No.441 of 2021 decided on 17.02.2021).

13. Learned counsel for the Petitioner also relied upon the decision of Allahabad High Court in the case of ***Amita Garg and 6 Others Vs. State of U.P.***

***and 3 Others (Criminal Misc. Anticipatory Bail Application No.5286 of 2022 decided on 06.07.2022)***. On perusal of the judgment in Amita Garg's case (supra), the Allahabad High Court observed that the view taken by Bombay High Court in *Teesta Atul Setalvad* (supra) as well as *Nikita Jacob* (supra) has been accepted and adopted by the Allahabad High Court.

14. Upon hearing the rival contentions advanced by the learned counsels appearing for the respective parties and upon a careful consideration of the proposition of law and taking into consideration the factual background of the present case, this Court is persuaded by the judgment of Bombay High Court in the case of *N.K. Nayar* (supra) as well as the judgment of Gujarat High Court in the case of *Mansi Jimit Sanghavi* (supra).Therefore, this Court is of the considered view that there is no impediment under Section 438 of Cr.P.C. to consider and grant transit anticipatory bail to the applicant in connection with an offence which had taken place beyond the jurisdiction of this Court that too in a different State under the jurisdiction of another High Court for a temporary period only protecting the Petitioner to approach the competent court of law under the provisions of Cr.P.C.

15. Accordingly, this Court directs that the Petitioner shall not be arrested by the local police, more particularly the Tangi Police Station for a period of 30 days from today in connection with the investigation with regard to the alleged crime. Further, it is made clear that it is open for the Petitioner to approach the competent court where the complaint/F.I.R. has been lodged for grant of anticipatory bail/regular bail to the Petitioner in accordance with law. Further, it is also made clear that in the event the Petitioner fails to comply with the aforesaid conditions and does not approach the competent court having jurisdiction over the matter, the transit anticipatory bail granted by this Court shall stand automatically revoked and it will open for the competent court to deal with the Petitioner in accordance with law.

16. With the aforesaid observations and directions, the ABLAPL is disposed of.

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**2023 (I) ILR - CUT -243**

**A.K. MOHAPATRA,J.**

W.P.(C) NO. 22927 OF 2015

**BRAMHANANDA NAYAK** .....Petitioner

.V.

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

**ACADEMIC MATTER – Refund of Course fees – Petitioner took admission into B.Sc. Information Technology and Management (ITM) course for the academic session 2014-15 – Petitioner obtained transfer certificate after the last date of admission but before the classes for academic session 2014-15 begin – Prayer for Refund of Course fees is rejected by the university – Whether such rejection is sustainable under law? – Held, No – The educational institution are required to impart education without any profit motive – The Opposite Party/University should refund the course fee collected from the petitioner within a reasonable time after closure of admission.**

(Para 14,15)

For Petitioner : In person.

For Opp. Parties : Mr. T.K. Pattanaik, Addl. Standing Counsel.

JUDGMENT Date of Hearing : 16.11.2022 : Date of Judgment: 23.12.2022

***A.K. MOHAPATRA,J.***

1. The present writ petition has been filed by the petitioner seeking refund of the course fee along with accrued interest.

2. The petitioner, who is the young boy aged about 17 years in the present writ petition through his father guardian, has approached this Court by filing the above noted writ application with a prayer for a direction to the Opposite Parties to refund Course Fee along with interest, which has been deposited by the petitioner at the time of taking admission into Opposite Party Educational Institution. After taking admission, he did not continue study in the institution.

3. The factual matrix, in a nutshell, is that the petitioner on being duly selected to take admission into B.Sc. Information Technology and Management (ITM) course imparted by Revenshaw University, Cuttack for the academic session 2014-15 took admission on 12.07.2014 and was accordingly assigned the Roll No.as 14DIT-049. On the date of admission, the petitioner was asked to deposit a sum of Rs.30,000/-(rupees thirty thousand) towards course fee in addition to the admission fees that fees for Rs.1760/-(rupees one thousand seven hundred sixty) before the Opposite Parties. Further the petitioner was intimated that the course fee that be deposited at the time of admission in a shape of Bank draft and nowhere in the prospectus/intimation, it was mentioned that the course fee shall be forfeited in the event the petitioner does not continue course in the Opposite Parties college.

4. While the matter stood thus, the petitioner got selected for C.T. Training in the entrance examination conducted by the Directorate of Teacher Education and SCERT, Odisha,Bhubaneswar and accordingly, he was sent to R.N.S.T. School, Cuttack. The date of admission into C.T. Course was fixed from

21.08.2014 to 27.08.2014. Since the petitioner was interested to undergo C.T. Training, the petitioner applied to the Opposite Parties prescribed proforma for issuance of transfer certificate and conduct certificate on 27.08.2014. The petitioner had also made an application to the Opposite Parties to refund course fee of Rs.30,000/-(rupees thirty thousand), which was deposited at the time of admission. On 27.08.2014, the transfer certificate was issued. Further such transfer under Annexure-5 reveals that the tuition fee has been paid upto May, 2015 by the petitioner. On 28.08.2014, another application was filed to refund the admission fees of Rs.1760/-.

5. Since the Opposite Parties did not refund the fees, as paid by the petitioner, the petitioner approached this Court by filing the writ petition bearing W.P.(C) No.23865 of 2015. By order dated 12.12.2014 which was subsequently modified dated 22.01.2015 directing the Opposite Party No.1 to consider and dispose of the representation of the petitioner within a period of two weeks. Accordingly, the petitioner submitted representation on 29.01.2015, however, no action whatsoever was taken on the said representation of the petitioner which compelled the petitioner to file CONTC No.292 of 2015. By order dated 09.12.2015, the said CONTC was disposed by granting further two weeks time to the contemnors. Thereafter, the representation of the petitioner was disposed of vide order dated 16.12.2015 holding that the claim under representation has no merit. Challenging the order dated 16.12.2015 rejecting the petitioner's representation under Annexure-9, the present writ petition has been filed.

6. The Opposite Parties have filed counter affidavit. In the counter affidavit, it has been stated that the admission information brochure undergraduate classes 2014-15 of the Revenshaw University clearly provides that the course fee is not refundable after the last date of admission. Annexure-1 to the writ petition is provisional list of the candidates selected for counseling/admission into ITM Course and the same need not said about the information refunding course fee or admission fee. It has also been stated that the admission information brochure for the U.G. Classes 2014-15 of the Revenshaw University provides a detailed guideline as regards admission. Clause-17 and clasuse20(2) categorically provides that neither the course fee nor admission fee is refundable. It also provides that in case cancellation of admission, the course fee may be refunded only within the last date of admission has declared by the university.

7. In the counter affidavit it has also pleaded by the Opposite Parties that since the petitioner had taken admission on 12.07.2014 in B.Sc ITM Course in the academic session 2014-15. The last date of admission to such course was 31.07.2014. However, the petitioner took transfer certificate on 27.08.2014 for

prosecuting studies in other institution and admittedly, the same after the last date of admission. As such, the petitioner is not entitled to refund of course fee.

8. Heard Mr. B.N. Nayak, father of the petitioner I person and Mr. T. Pattanayak, learned counsel appearing for the Opposite Parties. Perused the pleadings and examine the documents annexed to the pleadings of the respective parties.

9. Mr. B.N. Nayak, the father of the petitioner appearing in person submitted before this Court that although the petitioner took admission on being duly selected and he has also paid admission as well as course fees to the Revenshaw University. He further submitted that after taking formal admission before the classes started, the petitioner was also selected for C.T. Training course and accordingly, the petitioner decided finally to pursue the C.T. Training Course as the petitioner was unable to afford high course fee payable to the Opposite Parties for ITM course and accordingly he had applied for transfer certificate and accordingly, he had applied for the transfer certificate of the petitioner immediately on being selected for C.T. Training Course and the same was supplied to him on 27.08.2014. It is further contended by the father of the petitioner that the petitioner did not attend a single class for the academic session 2014-15 at the Opposite Party institution. He further submits that by the time, transfer certificate was applied the classes for the academic session 2014-15 had not supported and the admission process on different institution under the Government was not over by then.

10. Mr. Nayak, the father guardian of the petitioner, who appeared in person before this Court to argue the mater contended that a sum of Rs,1760/- was paid towards admission fee and a sum of Rs.30,000/- was deposited towards tuition fee up to May, 2015 i.e. for the entire academic year 2014-15. Since the petitioner had taken admission only and had not attended any class at all, therefore, the conduct of the Opposite Parties in withholding the course fee which was collected in advance as highly arbitrary, illegal and unfair. Mr. Nayak, submitted before this Court since the petitioner had taken admission only. Therefore, he does not want to press the claim with regard to admission fee that has been paid to the Opposite Parties at the time of admission. So far the payment of course fee is concerned, it is submitted that it would be highly unfair on the part of the authorities, if they did not refund the course fee to the petitioner, who is young boy belonging very poor family in and with much difficulty he had arranged the money for education of his son. Withholding/retention of the course fee by the Opposite Parties which is a Government institution would be highly unfair, unjust, improper and the same

would amount to **unjust in retention** by a education institution, which is own and managed by the Government of Odisha.

11. Next it was argued by Mr. Nayak that the time and again, it has been held by the Hon'ble Supreme Court as well as this Court that while imparting education, the educational institution are not expected to operate with a profit motive more so when the institution own run by the Government. Therefore, the Opposite Parties be directed to refund the course fee deposited before them along with interest to the petitioner.

12. Mr. T.N. Pattanayak,learned counsel appearing for the University argues that no doubt the petitioner had deposited admission course fee at the time of admission, however, the same is non-refundable in nature in view of the admission information brochure of the Revenshaw University regarding to clause-17 of the admission information brochure under Annexure-A/1. Mr. Pattanaik argued that processing charge Rs.500/- only be deducted from the course fee if the candidate so far as to leave the course within the last date of admission and after the last date of admission the course fee is not refundable. Referring to clause-20 Sub-clause(2), he also submitted that once admission fee is paid at the time of admission, in no case the same shall be refunded. However in case of cancellation of admission, the course fee may be refunded only within the last date of admission as declared by the university. On a specific query was put to the learned counsel for the Opposite Parties as to whether there is any statutory rules/regulations governing the payment of course fee and refund thereof, Mr. Pattanaik fairly submitted that there is no such statutory provision either in past statute or in the academic regulations of the university with regard to admission fee/course fee. However, he submitted that in the admission information brochure, the declaration of the University with regard to payment of fee and refund thereof has been clearly mentioned. Therefore, Mr. Pattanaik, submitted that the conduct of the University in no refunding/withholding the course is perfectly legal and justified.

13. On a conspectus of the factual matrix pleaded by the respective parties as well as upon hearing the rival contentions raised by the learned counsel for the parties, this Court is of the prima facie view that the petitioner after taking admission did not attend a single class in Revenshaw University before he took transfer certificate. So far refund of course fee is concerned, provisions under clause-17 and 20 of the admission information brochure of the University provides that the same can be refunded, however, before the last date of admission. In the represent case, the petitioner took transfer certificate after the last date of admission but before the close for academic session 2014-15 started. On perusal of clause-16 of the brochure, it appears that the Vice-chancellor

vested with extraordinary power to grant relaxation like extending the last date of admission. Further admission information brochure is a document evidencing declaration of university. However, it cannot be said that the same as backing/rules, therefore, as has been provided under the clause16 the Vice-chancellor of the University has been vested extraordinary power to extent last date of admission, said poser can also be exercised by the Vice-chancellor University in appropriate and deserving cases.

14. In the present case, it is crystal clear that after depositing the entire course in advance, the petitioner has not attended a single class. Therefore, the decision of the University to withhold the entire course fee is not in the large interest of justice. This is more so in view of the settled position of law by a catena of judgment rendered by the Hon'ble Supreme Court as well as by this Court on educational institutions are to be run to impart education without any profit motive. Such principle applies Government educational institution even more and without any exception, this Court is also considered view that withholding of the course fee by the Opposite Parties as has been done in the present case appears to be unfair and unjust vis-à-vis the poor and young student like the petitioner.

15. On a careful scrutiny of the counter affidavit filed by the Revenshaw University, this Court observed that they have not stated that the seat in question remained vacant causing financial loss to the university. In the absence of such pleading, this Court has valid reason to presume that the seat was filled up subsequently. Therefore, the Opposite Party-University should have refunded the course fee collected from the petitioner within a reasonable time after closure of admission.

16. In view of the aforesaid analysis of fact, this Court allowing the writ petition, directs the Opposite Parties to refund the course fee of Rs.30,000/- (rupees thirty thousand) that has been deposited by the petitioner to the petitioner within a period of four weeks from today. However, it is made clear that the refund of the aforesaid amount was not carrying any interest and the petitioner shall not claim any interest on the aforesaid amount.

17. With the aforesaid observation/direction, the writ petition stands disposed of.

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**2023 (I) ILR - CUT - 249**

**V. NARASINGH,J.**

BLAPL NO. 7695 OF 2022

**DOLAGOBINDA @ TALUCHHA ASHIS MOHAPATRA** .....Petitioner

.V.

**STATE OF ODISHA** .....Opp. Party

**INDIAN EVIDENCE ACT, 1872 – Section 27 – Evaluation of the statement under Section 27 of the Act – Explained with reference to case laws.**

**Case Laws Relied on and Referred to** :-

1. SCC Online SC 765 : Venkatesh @ Chandra & Anr. Vs. State of Karnataka.
2. 2022 SCC OnLine SC 883 : Shahaja @ Shahajan Ismail Mohd. Shaikh Vs. State of Maharashtra.
3. AIR (1947) PC 67 : Phulukuri Kottaya Vs.Emperor.

For Petitioner : Mr. B.P. Pradhan

For Opp. Party : Mr. Karunakar Gaya, ASC, Mr. A. Pradhan, ASC
Mr. J. Pal, (Informant)

ORDER Date of Order:15.11.2022

***V. NARASINGH, J.***

1. This matter is taken up through hybrid mode.

2. Heard learned counsel for the petitioner and learned counsel for the State.

3. The petitioner is an accused in G.R. Case No.580 of 2022, pending in the file of learned S.D.J.M., Puri, arising out of Puri Town P.S. Case No.90 of 2022, for commission of alleged offences under Sections 302/120(B)/34 of IPC read with Section 25 and 27 of the Arms Act and is in custody since 21.03.2022.

4. Being aggrieved by the rejection of his application for bail U/s.439 Cr.P.C. by the learned 1st Additional District & Sessions Judge, Puri by order dated 04.08.2022 in the aforementioned case, the present BLAPL has been filed.

5. It is submitted by Mr. B.P. Pradhan, learned counsel for the petitioner that the deceased Krushna Chandra Pratihari @ Kalia succumbed to the gun shot injuries and the overt act is attributed to the two co-accused persons Tutu @Prafulla Ku. Mohapatra and Kunmuni @ Laxman Suara.

6. On the basis of materials on record, it is submitted that there were two other co-accused Hari Panda and Baba @ Asish Mohapatra, who were present at the spot of occurrence. It is stated with vehemence that even if the entire

prosecution allegation is accepted at its face value the petitioner's implication at best can be under Section 120-B of the IPC and as he is in custody since 02.03.2022 and charge sheet having been filed on 17.07.2022, his further continuance in custody is not warranted and more so when he is the first offender.

7. Learned counsel for the State Mr. A. Pradhan, ASC and Mr. K.K. Gaya, ASC as well as the informant Mr. J. Pal oppose the prayer for bail inter alia on the ground that an analysis of the entire prosecution case unerringly points to the involvement of the present petitioner and his father who conspired to take revenge against the deceased whom they perceived to be the master mind in the murder of their uncle. And, since the accused involved in the said case were acquitted to reek vengeance they designed for killing the deceased.

7(A). It is stated by the learned counsel for the State as well as the informant that there are cogent materials to establish motive for the crime.

7(B). Since investigation has been kept open, petitioner ought not to be released on bail at this stage.

8. Perused the statement of eyewitness Narasingha Panda and Pichi Kalia @ Trinath Mohanty. In both the statements, specific overt act is attributed, as rightly stated by the learned counsel for the parties, to Tutu and Kunmuni and the eye witnesses speak about the presence of the two other co-accused namely Hari Panda and Baba.

9. On a close scrutiny of the statement of eye witness Narasingha Panda, it is seen that while referring to the overt act as committed and noted hereinabove, he has also stated that while running away from the place of occurrence they (Tutu & Kunmuni) were shouting that the desire of the present petitioner and his father, has been fulfilled.

10. It is submitted by the learned counsel for the petitioner that there is no other legally admissible material to connect the petitioner with the alleged crime except the statement of eyewitness Narasingha Panda, as noted above. Hence, his further continuance in custody is punitive.

11. Per contra, learned counsel for the State as well as the informant relied on the statements of the accused Tutu who gave recovery of the weapon of offence and ammunition, Kalu @ Satya Narayan Panigrahi who lead to recovery of Rs. 1 Lakh which was paid as the alleged contract amount out of the agreed amount of Rs.2 Lakh and that of Hari Panda who gave recovery of one Oppo Mobile Phone under Section 27 of the Evidence Act.

12. It is submitted by the learned counsel for the State as well as the informant with vehemence that the statements of the said coaccused Tutu, Kalu @ Satya Narayan Panigrahi and Hari Panda, explicitly state about the conspiracy which was hatched at the instance of the present petitioner and his father to avenge the death of one of their family members.

Hence it is submitted that at this stage, the petitioner ought not to be released on bail more so when the investigation is admittedly kept open under Section 173(8) of the Cr.P.C.

13. This Court perused the statement of the eye witnesses as noted above and the statements of the co-accused under Section 27 of the Evidence Act.

14. On analysis of the statement of the eye-witnesses along with the statement of the co-accused under Section 27 of the Evidence Act, this Court is of the prima facie view that apart from the disclosure statement of the co-accused under Section 27 of the Evidence Act on which much reliance is placed by the learned counsel for the State and the statement of witness Narasingha Panda, who heard the shouting of the co-accused that the desire of the present petitioner and his father has been fulfilled, there is no other material to connect the present petitioner with the alleged crime.

15. At this stage, it would be apposite to extract Section 27 of the Indian Evidence Act, 1872;

> "27. ***How much of information received from accused may be proved***.- *Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved*."

The evaluation of the statement made under Section 27 of the Evidence Act had engaged the attention of the apex Court recently in the case of ***Venkatesh @ Chandra & Another vs. State of Karnataka*** reported in ***2022 SCC Online SC 765*** and in the case of ***Shahaja @ Shahajan Ismail Mohd. Shaikh vs. State of Maharashtra*** reported in ***2022 SCC OnLine SC 883.***

Referring to "locus classicus" relating to the manner of construing section 27 of the Evidence Act in the case of ***Phulukuri Kottaya v. Emperor, AIR (1947) PC 67*** the apex Court had cautioned against the "tendency on the part of the prosecuting agency in getting the entire statement recorded rather than only that part of the statement which leads to the discovery of fact".

The apex Court further observed that because of the same "a confession of an accused which is otherwise hit by the principles of Evidence Act finds its

place on record. Such kind of statements may have a direct tendency to influence and prejudice the mind of the Court. This practice must immediately be stopped". Ref- Para19 of Venkatesh @ Chandra (Supra)

16. If considered on the touchstone of the law laid down in the aforementioned cases relating to evaluation of statement(s) under Section 27 of the Evidence Act, the so-called disclosure statement of the co-accused does not in any way come to the aid of the prosecution regarding the alleged role ascribed to the petitioner in the commission of offence.

17. Considering the materials on record, the basis and the manner of implication of the present petitioner, this Court is persuaded to hold that further continuance of the petitioner in custody is not warranted.

18. Hence, it is directed that the petitioner shall be released on bail on such terms to be fixed by the learned Court in seisin over the matter.

19. Taking into account that further investigation is going on, to allay the legitimate apprehension of the learned Public Prosecutor(s) and the informant, this Court additionally directs that the petitioner shall not leave the jurisdiction of the learned Court in seisin without prior intimation to the Investigating Officer and shall not leave the State of Odisha without express permission of the Court in seisin and shall cooperate with the ongoing investigation.

20. While releasing the petitioner on bail learned Court shall verify the assertions that the petitioner is a first offender. If it comes to the fore that the petitioner has any criminal antecedent of similar nature, this order shall stand recalled.

21. It is apt to state that the analysis as above is only for the limited purpose of considering this bail application and ought not to be construed as expressing any opinion regarding the evidentiary value of the materials on record.

21(A). The observation(s) are made in the context of the allegation vis-à-vis present accused only and cannot be relied upon qua any other accused whose complicity has to be adjudged independently on its own merit.

22. Accordingly, the BLAPL stands disposed of.

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2023 (I) ILR - CUT- 253

**BIRAJA PRASANNA SATAPATHY, J.**

W.P.(C) NO. 23116 OF 2022

**ODISHA STATE ROAD TRANSPORT CORPORATION, BHUBANESWAR** .....Petitioner

.V.

**ARSS BUS TERMINAL PVT. LTD., BBSR.** .....Opp. Party

**CONSTITUTION OF INDIA, 1950 – Articles 226 & 227 r/w Sections 5, 36(3) of the Arbitration & Conciliation Act – Scope of interference by the Writ Court – The order passed under Sec. 36(3) of the Act is not an appealable order – Held, interference in writ jurisdiction will only be in exceptional rarity, where one party is remediless under the statute though intervention of this Court with regard to the order passed under the Act is very limited, but there is not a clear bar for such intervention by this Court in exercise of its power under Article 227 of the Constitution of India.** (Para 7)

**Case Laws Relied on and Referred to** :-

1. 2021 SCC On Line SC 469: Navayuga Engineering Company Vs. Bangalore Metro Rail Corporation Ltd.
2. 2021 SCC OnLine SC 8 : Bhaben Construction Vs. Executive Engineer Sardar Sarovar Nigam.
3. (2020) 15 SCC 706 : Deep Industries Ltd. Vs. ONGC Ltd. & Anr.
4. (2015) 5 SCC 423 : Radhey Shyam & Anr. Vs. Chhabi Nath & Ors.
5. (2010) 8 SCC 329 : Shalini Shyam Shetty & Anr. Vs. Rajendra Shankar Patil.
6. (2008) 10 SCC 128 : Punjab Agro Industries Corporation Vs. Kewal Singh Dhillon
7. W.P.(C) No. 31938 of 2021 : National Aluminum Company Ltd. Vs. UBV Infrastructure Ltd.

For Petitioner : M/s. Ashok Parija (Sr. Adv.),Amitav Tripathy, B.Mohanty, A.K. Behera.

For Opp. Party : M/s. Amrut Baral,Mr. A. Jain, Mr. Manish Panda, Mr. S. Saxena.

JUDGMENT Date of Hearing: 19.12.2022 : Date of Judgment: 06.01.2023

***BIRAJA PRASANNA SATAPATHY, J.***

Impugned in the present writ petition is the order dtd.29.07.2022 passed by the learned Sr. Civil Judge (Commercial Court), Bhubaneswar in ARBP No. 07 of 2022.The present Petitioner is also the Petitioner in ARBP No. 07 of 2022 filed under Sec. 34 of the Arbitration & Conciliation Act, 1996 (in short "Act") with a prayer to set aside the interim order/award dtd.11.12.2020 and also the award dtd.30.11.2021 passed

by the learned Arbitration Tribunal in Arbitration Proceeding No. 68 of 2019. The Petitioner was the Respondent in ARBP No. 68 of 2019 filed by the Claimant/the present Opp. Party.

The Petitioner subsequent to filing of the proceeding in ARBP No. 07 of 2022 filed a Petition under Sec. 36(3) of the Act vide Annexure-4 with a prayer to stay the operation of the award dtd.30.11.2021 passed by the leaned Arbitration Tribunal (in short "Tribunal") in ARBP No. 68 of 2019 till disposal of the proceeding in question. Learned Commercial Court vide the impugned order dtd.29.07.2022 under Annexure-1 while staying the enforcement of the award dt.30.11.2021 since directed the Petitioner to deposit 100% of the awarded amount i.e. 18,43,48,401/- (Eighteen crore forty three lakh forty eight thousand four hundred one), the Petitioner being aggrieved by the said stipulation is before this Court in the present writ petition.

**2.** The factual backdrop giving rise to filing of the proceeding in ARBP No. 07 of 2022 is that the Department of Commerce & Transport (Govt. of Odisha) vide its Request For Proposal (RFP) dtd.14.12.2009 invited proposals for the development of Baramunda Bus Terminal along with commercial facilities on PPP Mode. Pursuant to such invitation M/s. ARSS Infrastructure Project Ltd. ("ARSS Infra") was selected as the preferred bidder of Rs.56,00,00,000/- (Rupees fifty six crore) towards concession fee. Subsequently on 25.08.2010 ARSS Infra made payment of Rs.18,66,66,667/- (Rupees Eighteen crore sixty six lakh sixty six thousand six hundred sixty seven) towards the first installment of concession fee and Rs. 2,33,24,038/- (Rupees Two crore thirty three lakh twenty four thousand thirty eight) towards non-refundable project development fee.

As per the RPF, a Special Purpose Vehicle Entity by the name of ARSS Bus Terminal Pvt. Ltd.-Opp. Party herein(a JointVenture between ARSS Infra & one Welspun Infratech Ltd. ("Welspun") was incorporated,who was made the 'concessionaire' and was to implement the project.

Accordingly, the concession agreement was executed between the Petitioner and the Opp. Party and ARSS Infra on 16.03.2011, wherein lease of 14.43 acres of land was granted to the Opp. Party. As per the said agreement 90 years lease was granted with respect to 40% land over which it was to build the commercial complex and further a lease of 15 years was granted to the Opp. Party with respect to the balance 60% of the land over which the bus terminal was to come up. The Concessionaire was also granted the right to collect user fee, entry fee etc. from users of those facilities. In the said

agreement at Clause 16.3 contained the arbitration clause, which provides for dispute resolution by a panel of three (3) Arbitrators.

**2.1.** But subsequent to execution of the agreement on 16.03.2011, the same was challenged before this Court in W.P.(C) No. 30961 of 2011. This Court initially vide order dtd.30.03.2012 passed an order of status quo and because of that the project work came to a stand still. Subsequently, this Court vide order dtd.20.12.2012 declared the Concession Agreement to be void *ab initio* and quashed the same on different grounds. The said order passed by this Court on 20.12.2012 was never challenged by any of the Parties to the agreement dtd.16.03.2011 and accordingly it attained finality in the eye of law.

**2.2.** As this Court declared the concession agreement dtd.16.03.2011 as void *ab initio*, the Parties to the agreement terminated the concession agreement on 30.04.2013. Thereafter, Welspun moved the Hon'ble Bombay High Court in Arbitration Petition (L) No. 711 of 2013, filed under Sec. 9 of the Act on 20.05.2013 against ARSS Infra taking into account the Joint Venture Agreement executed in between them for restraining the Petitioner herein to return the amount to the present Opp. Party i.e. ARSS Bus Terminal Pvt. Ltd. In the said proceeding Hon'ble Bombay High Court passed an interim order on 30.05.2013 restraining the Petitioner from making payment of the amount of Rs.18, 66,66,667/- (Rupees Eighteen crore sixty six lakh sixty six thousand six hundred sixty seven) either to the ARSS Infra or to the Private Opp. Party. The order dtd.30.05.2013 is reproduced hereunder:-

> *"5. I am thus not inclined to accept the submissions made by the 1st respondent that in view of pendency of the application made by the 2nd respondent before the High Court of Orissa, this application need not be entertained.*
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> *XXX XXX XXX*
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> *6. In view of the fact that the concession agreement has already been declared void by the High Court of Orissa, it is likely that 3rd respondent may release the payment made by the 2nd respondent in favour of the 1st respondent. In my view, prima facie case is made out for grant of ad-interim relief. If the 3rd respondent makes any payment to the 1st respondent directly, in my view, rights of the petitioner would be seriously affected."*

**2.3.** The matter in Arbitration Petition No. 711 of 2013 was finally disposed of by the Hon'ble Bombay High Court on 03.08.2015 with the following order:-

> *"52. 1, therefore, pass the following order :-*

*(a) Respondent no.3 is restrained from making payment of amount of Rs.18,66,66,667/- or any other amount in relation to the project on account of cancellation of the concession agreement to respondent no.1, petitioner or respondent no.2.*

*(b) Respondent no.3 is directed to deposit the aforesaid amount with the Prothonotary and Senior Master of this court within two weeks from the date of communication of this order by the petitioner. Upon such deposit of the amount by the respondent no.3 as directed, Prothonotary and Senior Master shall invest the said amount in a fixed deposit of any nationalized bank initially for a period of two years and for like period after obtaining further orders from this court. The deposit of the said amount would be subject to further orders as may be passed by the arbitral tribunal.*

*(c) Petitioner, respondent no.1 and respondent no.2 are directed to proceed with the arbitral proceedings without any further delay.*

*(d) Parties to the present proceedings to act on the authenticated copy of this order."*

**2.4.** In terms of the final order passed by the Hon'ble Bombay High Court on 03.08.2015 the Petitioner as directed deposited the entire amount of Rs. 18,66,66,667/- (Rupees Eighteen crore sixty six lakh sixty six thousand six hundred sixty seven) before the said Court on 05.10.2015 and the said amount subsequently was released in favour of Welspun on 28.10.2015. But in the meantime the Opp. Party herein filed a Petition under Sec. 11 of the Act before this Court in ARBP No. 53 of 2016. This Court vide order dtd.15.11.2019 appointed Sri Justice Basudev Panigrahi and Dr. Justice A.K. Rath, former Judges of this Court as the Arbitrators for the Parties. The said two Arbitrators were permitted to nominate a third arbitrator and to commence the proceeding thereafter. Though the order passed by this Court on 15.11.2019 was challenged by the Petitioner herein before the Hon'ble Suprement Court in Special Leave petition (Civil) Diary No(S). 10086 of 2020, but the said SLP was dismissed vide order dtd.10.06.2020. The Opp. Party thereafter filed the statement of claim before the learned Arbitrators. On being noticed the Petitioner herein also filed the written statement in Arbitration Proceeding No. 68 of 2019. Learned Arbitrators initially passed an order/interim award on 11.12.2020 and dispose of the matter with passing of the final award on 30.11.2021. As per the said award, the Petitioner was directed to pay award amount of Rs.18,43,48,401/- (Rupees eighteen crore forty three lakh forty eight thousand four hundred one).

**2.5.** The Petitioner being aggrieved by the said award as stated hereinabove approached the learned Commercial Court in ARBP No. 07 of 2022. In the said proceeding when the prayer of the Petitioner to stay the operation of the award was allowed subject to deposit of the entire

award amount vide the impugned order dtd.29.07.2022 the present writ petition has been filed challenging the said stipulation to deposit 100% of the awarded amount.

**3.** It is the case of the Petitioner that pursuant to the order passed by he Hon'ble Bombay High Court on 03.08.2015 the Petitioner herein has already deposited the first installment amount of Rs.18,66,66,667/- (Rupees Eighteen crore sixty six lakh sixty six thousand six hundred sixty seven) on 05.10.2015. But the learned Arbitrators while passing the final award, held the Petitioner liable on different counts more particularly mentioned under the heading Nos. (A) to (DD) amounting to Rs. 17,93,48,401/- (Rupees Seventeen crore ninety three lakh forty eight thousand four hundred one) and litigation expenses of Rs.50,00,000/- (Rupees Fifty lakhs) in total Rs. 18,43,48,401/- (Rupees eighteen crore forty three lakh forty eight thousand four hundred one).

**3.1.** Mr. Parija, learned Sr. Counsel appearing for the Petitioner along with Mr. A. Tripathy, vehemently contended that learned Arbitrators while passing the award under different headings have committed wrong in allowing interest @ 7% per annum from 23.08.2010 to 05.10.2015 on the first installment amount of Rs. 18,66,66,667/- (Rupees Eighteen crore sixty six lakh sixty six thousand six hundred sixty seven). Learned Sr. Counsel also contended that learned Arbitrators also illegally awarded interest @ 7% per annum from 28.08.2010 to 30.10.2021 on the non-refundable amount deposited by the ARSS Infra amounting to Rs.2,33,24,038/- (Rupees Two crore thirty three lakh twenty four thousand thirty eight). It is contended that on those two counts interest on the first installment amount of Rs. 18,66,66,667/- (Rupees Eighteen crore sixty six lakh sixty six thousand six hundred sixty seven) & interest on the non- refundable amount of Rs.2,33,24,038/- (Rupees Two crore thirty three lakh twenty four thousand thirty eight) which comes to Rs.6,68,51,806/- (Rupees Six crore sixty eight lakhs fifty one thousand eight hundred six) and Rs.1,82,40,567/- (Rupees One crore eight two lakh forty thousand five hundred sixty seven) respectively has been awarded.

**3.2.** It is further contended that since in view of the interim order passed by the Hon'ble Bombay High Court on 30.05.2013 the Petitioner was restrained from making the payment till the Petitioner is directed to deposit the said amount before the Hon'ble Bombay High Court as per order dt.03.08.2015, the Petitioner is not liable to pay interest on the above said amount for the period from 30.05.2013 to 05.10.2015. It is also contended that since the amount of Rs.2,33,24,038/- (Rupees Two crore thirty three lakh twenty four thousand thirty eight) was non-refundable in nature, the Petitioner is not liable to pay any interest on the same for the period

from 28.08.2010 to 30.10.2021. Because of such wrong committed by the learned Arbitrators in awarding interest on the amount of Rs.18,66,66,667/- (Rupees Eighteen crore sixty six lakh sixty six thousand six hundred sixty seven) for the period from 23.08.2010 to 05.10.2015 & the interest on the non-refundable amount of Rs. 2,33,24,038/- (Rupees Two crore thirty three lakh twenty four thousand thirty eight) for the period from 28.08.2010 to 30.10.2021, the Petitioner has been directed to deposit Rs. 17,93,48,401/- (Rupees Seventeen lakh ninety three lakh forty eight thousand four hundred one) towards the claim on different counts under headings (A) to (DD).

**3.3.** Learned Sr. Counsel also contended that if the interest calculated on the above said two deposits made by ARSS Infra will be deducted for the present without prejudice to the claim of either of the Parties, the Petitioner is ready to deposit the balance amount. All those points though were raised before the learned Commercial Court while filing the petition under Sec. 36(3) of the Act, but the learned Commercial Court without proper appreciation of the grounds taken in the petition in ARBP No. 07 of 2022 as well as the grounds taken in the petition filed under Sec. 36(3) of the Act while allowing the petition directed for deposit of the entire awarded amount of Rs.18,43,48,401/- (Rupees eighteen crore forty three lakh forty eight thousand four hundred one). It is fairly submitted by the learned Sr. Counsel that if the Petitioner for the present and without prejudice to the rights of the Parties will be permitted to deposit the balance amount save and except the interest awarded on the amount of Rs.18,66,66,667/- (Rupees Eighteen crore sixty six lakh sixty six thousand six hundred sixty seven) and Rs. 2,33,24,038/- (Rupees Two crore thirty three lakh twenty four thousand thirty eight) vide headings B & C of the award dtd.30.11.2021, the Petitioner is ready to deposit the amount in question.

**4.** Mr. Manish Panda, learned counsel appearing for the Opp. Party on the other hand raised the question of maintainability of the present writ petition against the impugned order passed by the learned Commercial Court on 29.07.2022. In view of such stand taken by the learned counsel appearing for the Opp. Party with regard to maintainability of the present writ petition against the impugned order, this Court thinks it proper to decide the same at the first instance prior to going into the merits of the case.

**4.1.** Learned counsel for the Opp. Party contended that in view of the provision contained under Sec. 5 of the Act there is very limited scope of judicial intervention save and except as prescribed under the Act only. For better appreciation Sec. 5 of the Act is reproduced hereunder:-

> *"Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."*

**4.2.** It is also contended by the learned counsel appearing for the Opp. Party that although an order passed under Sec. 36(3) of the Act is not appealable and therefore, the writ petition can be preferred against the same, but the scope of interference by the writ court is only by the way of exceptional rarity and where there must be a patent lack of inherent jurisdiction. It is also contended that since the learned Commercial Court has directed the Petitioner herein to deposit the entire award amount in view of the decision of the Hon'ble Apex Court rendered in the case of ***Navayuga Engineering Company v. Bangalore Metro Rail Corporation Limited (2021 SCC OnLine SC 469)***, no illegality can be found with the impugned order passed by the learned Commercial Court on 29.07.2022.

**4.3.** On the question of maintainability of the writ petition learned counsel appearing for the Opp. Party relied on the decision of the Hon'ble Apex Court rendered in the case of ***Bhaben Construction v. Executive Engineer Sardar Sarovar Nigam (2021 SCC OnLine SC 8)*** and the decision in the case of ***Deep Industries Ltd. Vs. ONGC Ltd. & Anr. ((2020) 15 SCC 706).*** Learned counsel appearing for the Opp. Party also relied on another decision in the case of ***Radhey Shyam & Anr. Vs. Chhabi Nath & Ors. (2015) 5 SCC 423***. The decision in the case of ***Shalini Shyam Shetty & Anr. Vs. Rajendra Shankar Patil ((2010) 8 SCC 329)*** was also relied on by the learned counsel appearing for the Opp. Party.

**4.4.** In the case of ***Navayuga Engineering Company (supra)*** Hon'ble Apex Court in Para 3 & 4 has held as follows:-

> *"3. An Arbitral Award dated 16.08.2018 was made in favour of the appellant allowing 10 out of 16 claims which amounted to Rs. 175.32 Crores. The Award was made of a sum of Rs. 122.76 Crores amounting to Rs. 56.23 Crores principal and Rs. 66.53 Crores on various heads. A Section 34 petition that has been filed by the respondent is pending before the learned Additional City Civil and Sessions Judge at Bengaluru. On 21.12.2019, execution of the said Award was stayed on deposit of 60% of the figure of Rs. 122.76 Crores and security being given for the balance. Both parties filed writ petitions against the aforesaid order. The writ petition filed by the appellant was dismissed. The writ petition filed by the respondent was allowed in which a deposit of 50% of the principal amount of Rs. 56.23 Crores was ordered.*
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> *4. Despite this Court repeatedly referring to Section 5 of the Arbitration Act in particular and the Arbitration Act in general and despite this Court having laid down in Deep Industries Ltd. v. ONGC (2020) 15 SCC 706 that the High Court under Article*

*226 and 227 should be extremely circumspect in interfering with orders passed under the Arbitration Act, such interference being only in cases of exceptional rarity or cases which are stated to be patently lacking in inherent jurisdiction, we find that High Courts are interfering with deposit orders that have been made. This is not a case of exceptional rarity or of any patent lack of inherent jurisdiction."*

**4.5.** Similarly in the case of ***Bhaben Construction (supra)*** Hon'ble Apex Court in Para 17 to 19 has held as follows:-

*"17. In any case, the hierarchy in our legal framework, mandates that a legislative enactment cannot curtail a Constitutional right. In Nivedita Sharma v. Cellular Operators Association of India, (2011) 14 SCC 337, this Court referred to several judgments and held:*

*"11. We have considered the respective arguments/submissions. There cannot be any dispute that the power of the High Courts to issue directions, orders or writs including writs in the nature of habeas corpus, certiorari, mandamus, quo warranto and prohibition under Article 226 of the Constitution is a basic feature of the Constitution and cannot be curtailed by parliamentary legislation L. Chandra Kumar v. Union of India, (1997) 3SCC 261. However, it is one thing to say that in exercise of the power vested in it under Article 226 of the Constitution, the High Court can entertain a writ petition against any order passed by or action taken by the State and/or its agency/instrumentality or any public authority or order passed by a quasi-judicial body/authority, and it is an altogether different thing to say that each and every petition filed under Article 226 of the Constitution must be entertained by the High Court as a matter of course ignoring the fact that the aggrieved person has an effective alternative remedy. Rather, it is settled law that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.*

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*18. It is therefore, prudent for a Judge to not exercise discretion to allow judicial interference beyond the procedure established under the enactment. This power needs to be exercised in exceptional rarity, wherein one party is left remediless under the statute or a clear 'bad faith' shown by one of the parties. This high standard set by this Court is in terms of the legislative intention to make the arbitration fair and efficient.*

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*19. In this context we may observe Deep Industries Limited v. Oil and Natural Gas Corporation Limited, 2019 SCC OnLine SC 1602, wherein interplay of Section 5 of the Arbitration Act and Article 227 of the Constitution was analyzed as under:*

*"15. Most significant of all is the nonobstante clause contained in Section 5 which states that notwithstanding anything contained in any other law, in matters that arise under Part I of the Arbitration Act, no judicial authority shall intervene except where so provided in this Part. Section 37 grants a constricted right of first appeal against certain judgments and orders and no others. Further, the statutory mandate also provides for one bite at the cherry, and interdicts a second appeal being filed (See Section 37(2) of the Act).*

*16. This being the case, there is no doubt whatsoever that if petitions were to be filed under Articles 226/227 of the Constitution against orders passed in appeals under Section 37, the entire arbitral process would be derailed and would not come to fruition for many years. At the same time, we cannot forget that Article 227 is a constitutional provision which remains untouched by the non-obstante clause of Section 5 of the Act. In these circumstances, what is important to note is that though petitions can be filed under Article 227 against judgments allowing or dismissing first appeals under Section 37 of the Act, yet the High Court would be extremely circumspect in interfering with the same, taking into account the statutory policy as adumbrated by us herein above so that interference is restricted to orders that are passed which are patently lacking in inherent jurisdiction."*

**4.6.** In the case of ***Deep Industries (supra)*** Hon'ble Apex Court in Para16, 17 & 18 has held as follows:-

*"**16.** Most significant of all is the non obstante clause contained in Section 5 which states that notwithstanding anything contained in any other law, in matters that arise under Part I of the Arbitration Act, no judicial authority shall intervene except where so provided in this Part. Section 37 grants a constricted right of first appeal against certain judgments and orders and no others. Further, the statutory mandate also provides for one bite at the cherry, and interdicts a second appeal being filed [see Section 37(2) of the Act].*

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***17.** This being the case, there is no doubt whatsoever that if petitions were to be filed under Articles 226/227 of the Constitution against orders passed in appeals under Section 37, the entire arbitral process would be derailed and would not come to fruition for many years. At the same time, we cannot forget that Article 227 is a constitutional provision which remains untouched by the non obstante clause of Section 5 of the Act. In these circumstances, what is important to note is that though petitions can be filed under Article 227 against judgments allowing or dismissing first appeals under Section 37 of the Act, yet the High Court would be extremely circumspect in interfering with the same, taking into account the statutory policy as adumbrated by us hereinabove so that interference is restricted to orders that are passed which are patently lacking in inherent jurisdiction.*

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***18.** In Nivedita Sharma v. COAP, this Court referred to several judgments and held: (SCC pp. 343-45, paras 11-16)*

*"11. We have considered the respective arguments/submissions. There cannot be any dispute that the power of the High Courts to issue directions, orders or writs including writs in the nature of habeas corpus, certiorari, mandamus, quo warranto and prohibition under Article 226 of the Constitution is a basic feature of the Constitution and cannot be curtailed by parliamentary legislation- L Chandra Kumar v. Union of India'. However, it is one thing to say that in exercise of the power vested in it under Article 226 of the Constitution, the High Court can entertain a writ petition against any order passed by or action taken by the State and/or its agency/instrumentality or any public authority or order passed by a quasi- judicial body/authority, and it is an altogether different thing to say that each and every petition*

*filed under Article 226 of the Constitution must be entertained by the High Court as a matter of course ignoring the fact that the aggrieved person has an effective alternative remedy. Rather, it is settled law that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.*

*12. In Thansingh Nathmal v. Supt. of Taxes, this Court adverted to the rule of self-imposed restraint that the writ petition will not be entertained if an effective remedy is available to the aggrieved person and observed: (AIR p.1423, para 7)*

*'7. ... The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up.'*

*13. In Titaghur Paper Mills Co. Ltd. v. State of Orissa", this Court observed:*

*'11. It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in Wolverhampton New Waterworks Co. v. Hawkesford10 in the following passage: (ER p. 495)*

*"… There are three classes of cases in which a liability may be established founded upon a statute..... But there is a third class viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it…. the remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to."*

*The rule laid down in this passage was approved by the House of Lords in Neville v. London Express Newspapers Ltd.11 and has been reaffirmed by the Privy Council in Attorney General of Trinidad & Tobago v. Gordon Grant & Co. Ltd. 12 and Secy of State v. Mask & Co.13 It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine.'*

*14. In Mafatlal Industries Ltd. v. Union of India, B.P. Jeevan Reddy, J. (speaking for the majority of the larger Bench) observed:*

*'77. … So far as the jurisdiction of the High Court under Article 226 or for that matter, the jurisdiction of this Court under Article 32 is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious that while exercising the power under Article 226/Article 32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment."*

*15. In the judgments relied upon by Shri Vaidyanathan, which, by and large, reiterate the proposition laid down in Baburam Prakash Chandra Maheshwari v. Antarim Zila Parishad, Muzaffarnagaris, it has been beld that an alternative remedy is not a bar to the entertaining of writ petition filed for the enforcement of any of the fundamental rights or where there has been a violation of the principles of natural justice or where the order under challenge is wholly without jurisdiction or the vires of the statute is under challenge.*

*16. It can, thus, be said that this Court has recognised some exceptions to the rule of alternative remedy. However, the proposition laid down in Thansingh Nathmal v. Supt. of Taxes and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field."*

**4.7.** In the case of ***Radhey Shyam (supra)*** Hon'ble Apex Court in Para 25 and 26 has held as follows:-

*"25. It is true that this Court has laid down that technicalities associated with the prerogative writs in England have no role to play under our constitutional scheme. There is no parallel system of King's Court in India and of all the other courts having limited jurisdiction subject to the supervision of the King's Court. Courts are set up under the Constitution or the laws. All the courts in the jurisdiction of a High Court are subordinate to it and subject to its control and supervision under Article 227. Writ jurisdiction is constitutionally conferred on all the High Courts. Broad principles of writ jurisdiction followed in England are applicable to India and a writ of certiorari lies against patently erroneous or without jurisdiction orders of tribunals or authorities or courts other than judicial courts. There are no precedents in India for the High Courts to issue writs to the subordinate courts. Control of working of the subordinate courts in dealing with their judicial orders is exercised by way of appellate or revisional powers or power of superintendence under Article 227. Orders of the civil court stand on different footing from the orders of authorities or tribunals or courts other than judicial/civil courts. While appellate or revisional jurisdiction is regulated by the statutes, power of superintendence under Article 227 is constitutional. The expression "inferior court" is not referable to the judicial courts, as rightly observed in the referring order! in paras 26 and 27 quoted above.*

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*26. The Bench in Surya Dev Rai also observed in para 25 of its judgment that distinction between Articles 226 and 227 stood almost obliterated. In para 24 of the said judgment distinction in the two articles has been noted. In view thereof, observation that scope of Articles 226 and 227 was obliterated was not correct as rightly observed by the referring Bench in para 32 quoted above. We make it clear that though despite the curtailment of revisional jurisdiction under Section 115 CPC by Act 46 of 1999, jurisdiction of the High Court under Article 227 remains unaffected, it has been wrongly assumed in certain quarters that the said jurisdiction has been expanded. Scope of Article 227 has been explained in several decisions including Waryam Singh v. Amarnath45, Ouseph Mathai v. M. Abdul Khadir, Shalini Shyam Shetty v. Rajendra Shankar Patil and Sameer Suresh Gupta v. Rahul Kumar Agarwals In Shalini Shyam Shetty7 this Court observed: (SCC p. 352, paras 64-67)*

*"64. However, this Court unfortunately discerns that of late there is a growing trend amongst several High Courts to entertain writ petition in cases of pure property disputes. Disputes relating to partition suits, matters relating to execution of a decree, in cases of dispute between landlord and tenant and also in a case of money decree and in various other cases where disputed questions of property are involved, writ courts are entertaining such disputes. In some cases the High Courts, in a routine manner, entertain petitions under Article 227 over such disputes and such petitions are treated as writ petitions.*

*65. We would like to make it clear that in view of the law referred to above in cases of property rights and in disputes between private individuals writ court should not interfere unless there is any infraction of statute or it can be shown that a private individual is acting in collusion with a statutory authority.*

*66. We may also observe that in some High Courts there is a tendency of entertaining petitions under Article 227 of the Constitution by terming them as writ petitions. This is sought to be justified on an erroneous appreciation of the ratio in Surya Dev and in view of the recent amendment to Section 115 of the Civil Procedure Code by the Civil Procedure Code (Amendment) Act, 1999. It is urged that as a result of the amendment, scope of Section 115 CPC has been curtailed. In our view, even if the scope of Section 115 CPC is curtailed that has not resulted in expanding the High Court's power of superintendence. It is too well known to be reiterated that in exercising its jurisdiction, High Court must follow the regime of law.*

*67. As a result of frequent interference by the Hon'ble High Court either under Article 226 or 227 of the Constitution with pending civil and at times criminal cases, the disposal of cases by the civil and criminal courts gets further impeded and thus causing serious problems in the administration of justice. This Court hopes and trusts that in exercising its power either under Article 226 or 227, the Hon'ble High Court will follow the time-honoured principles discussed above. Those principles have been formulated by this Court for ends of justice and the High Courts as the highest courts of justice within their jurisdiction will adhere to them strictly."*

**4.8.** In the case of ***Shalini Shyam Shetty (supra)*** Hon'ble Apex Court in Para 37, 43, 48 & 49(d) to (o) has held as follows:-

*"37. The Constitution Bench in Nagendra Nath, unanimously speaking through B.P. Sinha, J. (as His Lordship then was) pointed out that High Court's power of interference under Article 227 is not greater than its power under Article 226 and the power of interference under Article 227 of the Constitution is limited to ensure that the tribunals function within the limits of its authority. (emphasis supplied)*

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*43. In a rather recent decision of the Supreme Court in Surya Dev Rai v. Ram Chander Rai, a two-Judge Bench of this Court discussed the principles of interference by the High Court under Article 227. Of course in Surya Dev Rai this Court held that a writ of certiorari is maintainable against the order of a civil court, subordinate to the High Court (SCC p. 688, para 19 of the Report). The correctness of that ratio was doubted by another Division Bench of this Court in Radhey Shyam v. Chhabi Nath and a request to the Hon'ble Chief Justice for a reference to a larger Bench is pending. But insofar as the formulation of the principles on the*

*scope of interference by the High Court under Article 227 is concerned, there is no divergence of views.*

*XXX XXX XXX*

*48. The jurisdiction under Article 226 normally is exercised where a party is affected but power under Article 227 can be exercised by the High Court suo moto as a custodian of justice. In fact, the power under Article 226 is exercised in favour of persons or citizens for vindication of their fundamental rights or other statutory rights. The jurisdiction under Article 227 is exercised by the High Court for vindication of its position as the highest judicial authority in the State. In certain cases where there is infringement of fundamental right, the relief under Article 226 of the Constitution can be claimed ex debito justitiae or as a matter of right. But in cases where the High Court exercises its jurisdiction under Article 227, such exercise is entirely discretionary and no person can claim it as a matter of right. From an order of a Single Judge passed under Article 226, a letters patent appeal or an intra-court appeal is maintainable. But no such appeal is maintainable from an order passed by a Single Judge of a High Court in exercise of power under Article 227. In almost all the High Courts, rules have been framed for regulating the exercise of jurisdiction under Article 226. No such rule appears to have been framed for exercise of High Court's power under Article 227 possibly to keep such exercise entirely in the domain of the discretion of High Court.*

*XXX XXX XXX*

*49. On an analysis of the aforesaid decisions of this Court, the following principles on the exercise of High Court's jurisdiction under Article 227 of the Constitution may be formulated:*

*(d) The parameters of interference by High Courts in exercise of their power of superintendence have been repeatedly laid down by this Court. In this regard the High Court must be guided by the principles laid down by the Constitution Bench of this Court in Waryam Singh and the principles in Waryam Singh have been repeatedly followed by subsequent Constitution Benches and various other decisions of this Court.*

*(e) According to the ratio in Waryam Singh', followed in subsequent cases, the High Court in exercise of its jurisdiction of superintendence can interfere in order only to keep the tribunals and courts subordinate to it, "within the bounds of their authority".*

*(f) In order to ensure that law is followed by such tribunals and courts by exercising jurisdiction which is vested in them and by not declining to exercise the jurisdiction which is vested in them.*

*(g) Apart from the situations pointed in (e) and (). High Court can interfere in exercise of its power of superintendence when there has been patent perversity in the orders of the tribunals and courts subordinate to it or where there has been a gross and manifest failure of justice or the basic principles of natural justice have been flouted.*

*(h) In exercise of its power of superintendence High Court cannot interfere to correct mere errors of law or fact or just because another view than the one taken by the tribunals or courts subordinate to it, is a possible view. In other words the jurisdiction has to be very sparingly exercised.*

*(i) The High Court's power of superintendence under Article 227 cannot be curtailed by any statute. It has been declared a part of the basic structure of the Constitution by the Constitution Bench of this Court in L. Chandra Kumar v. Union of India and therefore abridgment by a constitutional amendment is also very doubtful.*

*(j) It may be true that a statutory amendment of a rather cognate provision, like Section 115 of the Civil Procedure Code by the Civil Procedure Code (Amendment) Act, 1999 does not and cannot cut down the ambit of High Court's power under Article 227. At the same time, it must be remembered that such statutory amendment does not correspondingly expand the High Court's jurisdiction of superintendence under Article 227. (k) The power is discretionary and has to be exercised on equitable principle. In an appropriate case, the power can be exercised suo motu.*

*(l) On a proper appreciation of the wide and unfettered power of the High Court under Article 227, it transpires that the main object of this article is to keep strict administrative and judicial control by the High Court on the administration of justice within its territory.*

*(m) The object of superintendence, both administrative and judicial, is to maintain efficiency, smooth and orderly functioning of the entire machinery of justice in such a way as it does not bring it into any disrepute. The power of interference under this article is to be kept to the minimum to ensure that the wheel of justice does not come to a halt and the fountain of justice remains pure and unpolluted in order to maintain public confidence in the functioning of the tribunals and courts subordinate to the High Court.*

*(n) This reserve and exceptional power of judicial intervention is not to be exercised just for grant of relief in individual cases but should be directed for promotion of public confidence in the administration of justice in the larger public interest whereas Article 226 is meant for protection of individual grievance. Therefore, the power under Article 227 may be unfettered but its exercise is subject to high degree of judicial discipline pointed out above.*

*(0) An improper and a frequent exercise of this power will be counterproductive and will divest this extraordinary power of its strength and vitality."*

**5.** Learned Sr. Counsel appearing for the Petitioner along with Mr. A.Tripathy on the other hand while relying on the decision reported in ***Bhaben Construction (supra)*** as well as ***Deep Industries (supra)*** so relied on by the learned counsel appearing for Opp. Party also relied on the decision in the case of ***Punjab Agro Industries Corporation Vs. Kewal Singh Dhillon (2008) 10 SCC 128*** and the order passed by this Court on 24.11.2022 in ***W.P.(C) No. 31938 of 2021***(***National Aluminum Company Ltd. Vs. UBV Infrastructure Ltd***.).

**5.1.** In the case of ***Punjab Agro Industries (supra)*** Hon'ble Apex Court in Para 7 and 9 has held as follows:-

> *"7. The Act does not provide for an appeal against the order of the Chief Justice or his designate made under sub-section (4) or sub-sections (5) and (6) of Section 11. On the other hand, sub-section (7) of Section 11 makes it clear that a decision of the designate under sub-sections (4), (5) or (6) of Section 11 is final. As no appeal was maintainable against the order of the designate and as his order was made final, the only course available to the appellant was to challenge the order, even if it is a judicial order, by a writ petition under Article 227 of the Constitution of India.*
>
> *XXX XXX XXX*
>
> *9. We have already noticed that though the order under Section 11(4) is a judicial order, having regard to Section11(7) relating to finality of such orders and the absence of any provision for appeal, the order of the Civil Judge was open to challenge in a writ petition under Article 227 of the Constitution. The decision in SBP [(2005) 8 SCC 618] does not bar such a writ petition. The observations of this Court in SBP [(2005) 8 SCC 618] that against an order under Section 11 of the Act, only an appeal under Article 136 of the Constitution would lie, is with reference to the orders made by the Chief Justice of a High Court or by the designate Judge of that High Court. The said observations do not apply to a subordinate court functioning as designate of the Chief Justice."*

**5.2.** In the case of ***National Aluminum Company (supra)*** this Court in Para 6 has held as follows:-

> *"6. The Supreme Court in Bhaven Construction (supra) had said interference in writ jurisdiction will only be in exceptional rarity, where one party is remediless under the statute or clear bad faith is shown by one of the parties. Here, both contingencies appear to have happened. An illegal order made by the Court hearing the application for stay of operation of the award is not appealable under the Act of 1996. On the other hand, opposite party having chosen to stay away and move for execution with different address than given in the reference, has shown bad faith."*

**6.** I have heard Mr. Ashok Parija, learned Senior Counsel appearing along with Mr.A.Tripathy for the Petitioner and Mr.M.Panda, leaned counsel appearing for the Opp. Party. On the consent of the learned counsels appearing for the Parties, matter was taken up for disposal at the stage of admission.

**7.** This Court after going through the view expressed by the Hon'ble Apex Court in the aforementioned cases, finds that though intervention of this Court with regard to the order passed under the Act is very limited, but there is not a clear bar for such intervention by this Court in exercise of its power under Article 227 of the Constitution of India. Therefore, this Court placing reliance on the decisions of the Hon'ble Apex Court as cited supra held the writ petition as maintainable before this Court.

**7.1.** On the question of merit, this Court finds that in terms of the concession agreement executed on 16.03.2011, ARSS Infra deposited a

sum of Rs. 18,66,66,667/- (Rupees Eighteen crore sixty six lakh sixty six thousand six hundred sixty seven) towards first installment as concession fee and Rs. 2,33,24,038/- (Rupees Two crore thirty three lakh twenty four thousand thirty eight) towards non-refundable project development fee. Though the Parties to the concession agreement dtd.16.03.2011 were very much interested to proceed with the work in question, but in view of the order passed by this Court on 30.03.2012 and the final order passed on 20.12.2012 in W.P.(C) No. 30961 of 2011, the Parties to the agreement could not proceed with the work. Subsequent to such order passed by this Court on 20.12.2012 in declaring the concession agreement dtd.16.03.2011 as void *ab initio*, the Petitioner though was willing to refund the first installment of Rs. 18,66,66,667/- (Rupees Eighteen crore sixty six lakh sixty six thousand six hundred sixty seven) during April 2013, but in view of the interim order passed by the Bombay High Court on 30.05.2013 in Arbitration Petition No. 711 of 2013, the Petitioner could not refund the said amount. The said fact is also reflected in Para 17 of the order passed by the Bombay High Court on 03.08.2015.

**7.2.** Subsequently, pursuant to the order passed by the Bombay High Court on 03.08.2015 while disposing the Arbitration Petition No. 711 of 2013, the Petitioner as directed deposited the entire amount of Rs. 18,66,66,667/- (Rupees Eighteen crore sixty six lakh sixty six thousand six hundred sixty seven) before the said Court on 05.10.2015. This Court however, finds that learned Arbitrators while passing the final award on 30.11.2021 has allowed interest on the amount of Rs. 18,66,66,667/- (Rupees Eighteen crore sixty six lakh sixty six thousand six hundred sixty seven) for the period from 23.08.2010 to 05.10.2015 @ 7% per annum and that comes to Rs.6,68,51,806/- (Rupees Six crore sixty eight lakh fifty one thousand eight hundred six) under heading 'B'. Similarly, this Court also finds that though the amount of Rs. 2,33,24,038/- (Rupees Two crore thirty three lakh twenty four thousand thirty eight) was a non- refundable one, but the learned Arbitrators under Heading 'C' has held the Petitioner liable to pay interest @ 7% per annum from 28.08.2010 to 30.10.2021 amounting to Rs.1,82,40,567/- (Rupees One crore eighty two lakh forty thousand five hundred sixty seven).

**7.3.** Though the interest awarded on those two counts under heading 'B' & 'C' were contested by the Petitioner by submitting that the Petitioner cannot be held liable to pay interest for the entire period on the amount of Rs. 2,33,24,038/- (Rupees Two crore thirty three lakh twenty four thousand thirty eight) and for the period from 30.05.2013 to 05.10.2015 on the amount of

Rs. 18,66,66,667/- (Rupees Eighteen crore sixty six lakh sixty six thousand six hundred sixty seven), but learned Commercial Court has not taken that point into consideration while passing the impugned order with a direction to deposit the entire awarded amount.

**7.4.** Since pursuant to the order passed by the Hon'ble Bombay High Court the Petitioner has already deposited the first installment amount of Rs. 18,66,66,667/- (Rupees Eighteen crore sixty six lakh sixty six thousand six hundred sixty seven) on 05.10.2015, the stand taken by the learned Sr. Counsel that the petitioner is not liable to pay interest for the period from 30.05.2013 to 05.10.2015 on the aforesaid amount & interest for the entire period from 28.07.2010 to 30.10.2021 on the non-refundable amount of Rs. 2,33,24,038/- (Rupees Two crore thirty three lakh twenty four thousand thirty eight) as per the view of this Court has not been considered by the learned Commercial Court in its proper prospective.

**7.5.** In view of such material irregularity committed by the learned Commercial Court, this Court placing reliance on the decisions of the Hon'ble Apex Court as cited Supra while holding the present writ petition as maintainable, this Court on the question of merit finds that the Petitioner since was restrained by the Bombay High Court from making the deposit of the first installment amount of Rs.18,66,66,667/- (Rupees Eighteen crore sixty six lakh sixty six thousand six hundred sixty seven) for the period from 30.05.2013 to03.08.2015, the interest awarded by the learned Arbitrators for the said period from 30.05.2013 to 03.08.2015 under Heading 'B' is an issue to be decided finally by the learned Commercial Court in the proceeding in question. Similarly, the interest awarded on the non- refundable amount of Rs.2,33,24,038/- (Rupees Two crore thirty three lakh twenty four thousand thirty eight) for the entire period by the learned Arbitrators under heading 'C' is also an issue to be decided by the learned Commercial Court while deciding the matter in ARBP No. 07 of 2022. However, this Court expresses no opinion on the merits and contentions so raised by the learned counsels appearing for the Parties and learned commercial Court is free to take its own view.

**7.6.** The stand taken by the learned counsel appearing for the Opp. Party relying on the decision of the Hon'ble Apex Court in ***Navayuga Engineering Company (supra)*** with regard to direction by the Commercial Court to deposit the entire award amount, it is the view of this Court that since the Petitioner has already deposited the first installment amount of Rs. 18,66,66,667/- (Rupees Eighteen crore sixty six lakh sixty six thousand six hundred sixty seven) before the Bombay High Court, the direction to deposit the entire

award amount of Rs.18,43,48,401/- (Rupees eighteen crore forty three lakh forty eight thousand four hundred one) is not just and proper. In view of the same, this Court while interfering with the impugned order, permits the Petitioner to deposit 60% of the award amount within a period of one (1) month from today. However, it is observed that any view expressed by this Court on any of the issues will not be treated as binding on the learned Commercial Court and the said Court is to decide the matter in ARBP No. 07 of 2022 on its own merit. The writ petition is disposed of with the aforesaid observation and direction.

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**2023 (I) ILR - CUT -270**

**MURAHARI SRI RAMAN, J.**

CRLMC NO. 3828 OF 2015

**DIBAKAR SAHANI** ……Petitioner

**.V.**

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

**(A) CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Cognizance of offence under Sections 294/420/406/506 of Indian Penal Code – Petitioner's plea that a false case was foisted by his mother-in-law out of frustration – Held, whether the allegations are true or untrue, would have to be decided in the trial – In exercise of power under section 482 of the Cr.P.C., the Court does not examine the correctness of the allegations in a complaint.**

**(B) CODE OF CRIMINAL PROCEDURE, 1973 – Section 190 – "Taking cognizance of offence" – The meaning and implications explained with case laws.**

**Case Laws Relied on and Referred to** :-

1. (2008) 14 SCC 661 :Lakhwant Singh Vs. Jasbir Singh and Ors.
2. AIR 1990 SC 494 :Mrs. Dhanalakshmi Vs. R. Prasanna Kumar
3. (1988) 1 SCC 6929 :Madhavrao Jiwajirao Scindia Vs. Sambhajirao Chandrojirao Angre
4. (2021) 5 SCC 524 :Kapil Agarwal & Ors. Vs. Sanjay Sharma & Ors.
5. 2022 SCC OnLine SC 484:Ramveer Upadhyay and Anr. Vs. State of U.P.
6. AIR 1951 SC 207 : R.R. Chari Vs. State of Uttar Pradesh.
7. AIR 1963 SC 765 : Ajit Kumat Palit Vs. State of West Bengal and Ors.
8. (1977) 4 SCC 459: Tularam and Others Vs. Kishore Singh.
9. (1978) 4 SCC 58 : Hareram Satpathy Vs. Tikaram Agarwala And Ors.

10.AIR 2014 SC 957 : Fiona Shrikhande Vs. State of Maharashtra and Anr.
11.2018 (II) ILR-CUT 578 : Sushmita Das @ Patnaik Vs. Soumya Ranjan Tripathy.
12.2021 SCC OnLine SC 1140 :Pradeep S. Wodeyar Vs. The State of Karnataka.
13.2018 (I) ILR-CUT 659 (SC) = (2018) 16 SCC 299:Asian Resurfacing of Road Agency Pvt. Ltd. & Anr. Vs. Central Bureau of Investigation.

For Petitioner : Mr. Soubhagya Kumar Dash
For Opp. Parties : Mr. Ishwar Mohanty. ASC

JUDGMENT Date of Judgment: 23.12.2022

***MURAHARI SRI RAMAN, J.***

1. The petitioner, aggrieved by Order dated 13th May, 2015 passed by the learned Sub-Divisional Judicial Magistrate, Paralakhemundi (herein after be referred to as "SDJM") in I.C.C. No.47 of 2014 taking cognizance of offence under Sections 294/420/406/506, Indian Penal Code, 1860 (for brevity, "IPC"), approached this Court with the petition under Section 482 of the Code of Criminal Procedure, 1973 (for short referred to as "Cr. P.C.") with the following prayer(s):

> *"*** to admit this CrlMC, call for the record issue notice to the opposite parties and upon hearing be further pleased to allow this application and set aside the impugned Order dated 13.05.2015 passed by the learned Sub-Divisional Judicial Magistrate, Paralakhemundi in I.C.C. No.47 of 2014."*

***Facts of the case:***

2. The opposite party No.2-Smt. Gurubari Kuntia of Basundhara, Meliaputti Mandalam, Meliaputti P.S. in the District of Srikakulam (Andhra Pradesh), mother-in-law, lodged complaint against the petitioner before the learned SDJM, registered as ICC No.47/2014, to the effect that though her daughter-Sunita led conjugal life after solemnization of marriage, the petitioner demanding more dowry tortured her and ultimately Sunita succumbed to mental and physical torture and died on 29.08.2008. It is alleged by her that the petitioner has murdered Sunita. On complaint being made and charge framed, the petitioner stood trial for offence under Sections 498A/302/304B, IPC read with Section 4 of the Dowry Prohibition Act, 1961. After the Judgment dated 17.07.2010 rendered by the learned Additional Sessions Judge, Parlakhemundi, with conclusion that the prosecution could not establish the charge under neither Sections 498A/304B/302, IPC nor Section 4 of the Dowry Prohibition Act, and the petitioneraccused was found "not guilty" of any of the aforesaid offences alleged, the mother-in-law, Smt. Gurubari Kuntia, lodged complaint before the learned SDJM, Parlakhemundi under Section 200, CrPC that the petitioner was approached on 02.09.2014 to return utensils and other articles, which were presented by her, but to no avail. Hence, the complaint petition has been filed on

18th September, 2014 before said SDJM with a prayer to take cognizance of offences under Sections 294/323/420/406, IPC against the petitioner.

2.1. After taking initial statement of complainant on 18.09.2014, and conducting further inquiry under Section 202 of Cr. P. C, the learned SDJM recorded statement of a cousin of the complainant on 28.10.2014. Accordingly, on 13th May, 2015, cognizance of offences has been taken under Sections 292/420/406/506, IPC against the accused-petitioner-Dibakar Sahani.

***The contentions of the petitioner in the present case:***

3. Except household articles, the petitioner had never demanded dowry, rather he led happy marital life being married to Sunita, the daughter of the opposite party No.2, but to his misfortune his wife succumbed to burn injury. A false case was foisted by his mother-in-law out of frustration. However, in trial before the learned Additional Sessions Judge, Paralakhemundi, Gajapati in ST No.41/2008 (arising out of G.R. Case No.113/2008 in connection with Paralakhemundi P.S. Case No.59/2008), vide Judgment dated 17.07.2010 he was acquitted with the following observation:

> *"15. Now taking note of the entire scenario and the evidence of both side witnesses it is seen that there is a strong possibility that the deceased committed suicide when her husband suspected her fidelity. She was a young house wife and she was in carrying condition. Parents were then very old and the brothers got married. So she became very sensitive looking to the conduct of her husband and under such circumstances she took such a harsh decision to finish her life and she done it. The relations when rushed to the spot on hearing the incident from the accused got extremely annoyed to see the charred body and so out of vengeance and hatredness they made allegation of bride burning for dowry. The police officer believed their statements and instead of following the strict procedure of honest investigation did the investigation in biased manner. So whatever the circumstances may be a change of homicidal murder is found not established beyond reasonable doubt.*
>
> *16. Hence in conclusion after careful consideration of the evidence given by the prosecution and the defence plea and the arguments made by both sides lawyers I found that the prosecution has not established any of the charges under Section 498A/304B/302, IPC or the charge under Section 4 of the D.P. Act. So the accused is found not guilty of any of the aforesaid charges and so he is acquitted of all these charges. He be set at liberty forth with from the jail if there is no other case pending against him."*

3.1. The petitioner also contended that during course of investigation of aforesaid G.R. Case No.113/2008 arising out of Paralakhemundi P.S. Case No.59/2008, when the I.O. visited the spot and examined the witnesses, seizure of articles were effected and consequent thereto statement of Sri Balaram Khuntia in vernacular (Odia) was recorded on 12.05.2008 (Annexure-6). Translated version in English of such statement reads thus:

> *"Statement of BalaramKhuntia (30) son of Damodar Khuntia of Village Basundhara, P.S.: Meliaputty, District: Srikakulam, recorded under Section 161, Cr.P.C. in PKL P.S. Case No.59/2008 under Section 302/304B, IPC*
>
> *My name is Balaram Khuntia (30) years, son of Damodar Khuntia, Village: Basundhara, District: Srikakulam. This is my oral statement before the S.I. of Gurandi Police Station that on being furnished, said S.I. has seized a photograph of Sunita and Dibakar from Murali Khuntia and a list of dowry articles. The seizure is effected at around 9 a.m. in the morning. Knowing that the list of seizure is correct, I have put my signature."*

3.2. It is fact on record that after the Judgment in the trial before the learned Additional Sessions Judge being concluded and Judgment being pronounced in the year 2010 acquitting the petitioner, the opposite party No.2 took another four years to foist another case wherein the learned SDJM has taken cognizance of offences under Sections 292/420/406/506, IPC against the petitioner-Dibakar Sahani, which is abuse of process of law.

3.3. On the face of the record when the statement of Balaram Khuntia is clear and loud to the effect that the articles claimed to be given as dowry to the petitioner were seized by the S.I. of Guranda Police Station, the learned SDJM has mechanically exercised his power by taking cognizance of offence under Sections 292/420/406/506, IPC against the accused-Dibakar Sahani.

***Contention of the Additional Standing Counsel for the State opposite party No.1:***

4. Save and except stating that the learned SDJM after conducting due enquiry had taken cognizance of offence under Sections 292/420/406/506, IPC against the petitioner and cognizance being taken after due application of mind with reference to material available on record, he is required to face the trial.

***Discussion:***

5. This Court while issuing notice in the matter, vide Order dated 01.09.2015 passed the following interim order:

> *"As an interim measure, the further proceeding in ICC Case No.47 of 2014 pending before the learned Sub-Divisional Judicial Magistrate, Paralakhemundi shall remain stayed till next listing.*
>
> *Put up this matter on 05.10.2015."*

5.1. It is noticed that notice for admission being issued to the opposite party No.2 by registered post with acknowledgement due, the same got served on "Gurubari Kuntia" on 15.09.2015. However, none appeared for the said party as on date.

5.2. Going through the Judgment dated 17.07.2010 of the learned Additional Sessions Judge reveals that the trial in ST Case No.41/2008 (arising out of commitment of G.R. Case No.113/2008 made by the learned SDJM on 01.10.2008) was under Section 4 of the Dowry Prohibition Act, 1961 apart from offences under Sections under 498A/302/304B, IPC, wherein the following was the observation:

> *"6. On the allegation under Section 4 of the D.P. Act in the body of the FIR which is proved as Ext.3 nothing has been mentioned. The informant Murali as P.W. 7 in the cross-examination denied that he omitted to speak about dowry demand and its acceptance by the accused but on plain reading of the Ext.3 it is seen that actually such fact is not at all mentioned and for this initially the police had not registered any case under Section 498A, IPC. The P.W.1 is the wife of the informant whereas the P.W.2 is the old mother of the informant and the deceased and the P.W.8 is the brother in law of the informant who deposed in the court that the accused on demand received Rupees 75,000 at the time of marriage but after some months of the marriage they came to know from the deceased that her husband such as the accused was again demanding Rupees 20,000 as dowry. They also deposed that when they could not able to give such additional dowry the deceased was subjected to torture and assault by the accused husband. All of them are confronted with their previous statements before the IO that they have not stated about such allegation. The IO such as the P.W.16 when subjected to cross-examination is not confronted with the court statements of these witnesses with their 161 Cr.P.C. statements recorded by him.* ***But the IO deposed in the cross-examination that he had not seized any dowry articles except a list vide Ext.4/4.*** *On this aspect it is seen that the said list was handed over to the I.O. by the complainant on 12.05.2008 after 13 days of filing of the FIR and there is no explanation that as to why such a delay was there in producing such document had been there with the informant right from the beginning. It creates doubt that such a document might have been created for the case later on to heighten a case under Section 4 of D.P. Act. This apprehension is quite reasonable that no independent witnesses deposed in the court including the priest such as P.W.13 that there was dowry demand and acceptance before him when he performed the marriage. The mediator of the marriage is not examined by the prosecution. There is no evidence that on the point of dowry demand there was ever any caste or village meeting. So the evidence of the relation witnesses in the court which is found to be developed by them in course of the trial brands them as tainted witnesses on this aspect of the prosecution case. On this aspect I am following the settled position of law as decided by the Hon'ble Supreme Court in the matter between Baladin and others Vrs. State of U.P., reported in AIR 1956 SC at page 181 which is followed by the Hon'ble Division Bench of Orissa High Court in the matter between Premananda Sahu and others Vrs. State of Odisha. Here a case under Section 4 of D.P. Act is found not established beyond reasonable doubt."*

5.3. When the said Judgment was passed way back in the year 2010 holding that the opposite parties failed to prove the case under the provisions of the Dowry Prohibition Act, after about 4 years there from at the behest of mother-in-law of the petitioner, the ICC No.47/2014 has been launched under Sections 294/420/406/506, IPC, as the petitioner refuted to return the articles of dowry

and he turned down the request of the complainant by using abusive words. It is noteworthy to refer to orders dated 18.09.2014 and 16.12.2014 as passed by the learned SDJM in said ICC No. 47/2014 prior to taking cognizance:

> *"Sl. No.1 dtd. 18.09.2014*
>
> *Complaint petition under Section 200, Cr.P.C. is filed by the above named complaint against the accused persons cited in her complaint petition through her advocate Sri R. Babu Rao who filed power for the complainant. Vakalatnama is accepted. Verified and Register. Statement of complainant is recorded in the opposite side of complaint petition. Case is posted to 25.09.2014 for enquiring under Section 202, Cr.P.C.*
>
> *Sl. No.7 dtd. 16.12.2014*
>
> *Advocate for complainant files hazira. The record is put up today for order on cognizance. Perused the case record, the complaint petition initial statement of the complaint, statement of witness under Section 202, Cr.P.C. the documents submitted by the complainant etc. The complainant has filed this case on the allegation of misappropriation of dowry articles by the accused persons, which were given to her daughter during her marriage. Some photographs of the marriage of the victim have also been filed.*
>
> *Subsequently, the daughter of the complainant was murdered, as alleged by the complainant and a case was filed against the accused persons. However, charge sheet was submitted by police against accused Dibakar Sahani under Section 302/498A/304B, IPC / 4 D.P. Act.*
>
> *The Xerox copy of charge sheet filed by the complainant shows that the I.O. did not seize the dowry articles during submission of the charge sheet and mentioned in the charge sheet that he will seize the same later on. So, it is not clear, whether he has seized the dowry articles in this case or not.*
>
> *Hence, call for the record from the J/C, Record Room, Parlakhemundi in G.R. 113/08, if available, along with the concerned Session case record, after which order on cognizance can be passed. Put on 03.01.2015 awaiting for the record."*

5.4. After perusal of documents available on record and taking into consideration the statements recorded in the matter in course of enquiry under Section 202 of the Cr.P.C. on complaint under Section 200, the learned SDJM recorded his prima facie satisfaction with respect to offences under Sections 294/420/406/506, IPC against Dibakar Sahani and accordingly, cognizance was taken on 13.05.2015. It cannot be stated that there was mechanical application or non-application of mind while taking cognizance.

5.5. Under the aforesaid premise, it is found that cognizance in ICC No.47/2014 has been taken by the SDJM with due consideration to the material record.

***Provisions of Cr.P.C. and reference to case laws:***

6. Section 482 of the Cr.P.C provides for "Saving of inherent powers of High Court". Said provision lays down that.

*"Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."*

6.1. It has been well-settled that even though, the inherent power of the High Court under Section 482 of the Cr.P.C., to interfere with criminal proceedings is wide, such power has to be exercised with circumspection, in exceptional cases. Jurisdiction under Section 482 of the Cr.P.C is not to be exercised for the asking. The Hon'ble Supreme Court of India in the case of Lakhwant Singh Vrs. Jasbir Singh and Others (2008) 14 SCC 661 laid down that:

*"9. As noted above, the powers possessed by the High Court under Section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. Court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. The High Court being the highest Court of a State should normally refrain from giving a prima facie decision in a case where the entire facts are incomplete and hazy, more so when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material. Of course, no hard and fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceeding at any stage. [See :The Janata Dal etc.Vrs. H.S. Chowdhary and others, etc.(AIR 1993 SC 892), Dr. Raghubir Saran Vrs. State of Bihar and another, AIR 1964 SC 1]. It would not be proper for the High Court to analyse the case of the complainant in the light of all probabilities in order to determine whether a conviction would be sustainable and on such premises, arrive at a conclusion that the proceedings are to be quashed. It would be erroneous to assess the material before it and conclude that the complaint cannot be proceeded with. In proceeding instituted on complaint, exercise of the inherent powers to quash the proceedings is called for only in a case where the complaint does not disclose any offence or is frivolous, vexatious or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same in exercise of the inherent powers under Section 482 Cr.P.C. It is not, however, necessary that there should be meticulous analysis of the case before the trial to find out whether the case would end in conviction or acquittal. The complaint has to be read as a whole. If it appears that on consideration of the allegations in the light of the statement made on oath of the complainant that the ingredients of the offence or offences are disclosed and there is no material to show that the complaint is mala fide, frivolous or vexatious, in that event there would be no justification for interference by the High Court. When an information is lodged at the police station and an offence is registered, then the mala fides of the informant would be of secondary importance. It is the material collected during the investigation and evidence led in Court which decides the fate of the accused person. The allegations of mala fides against the informant are of no consequence and cannot by itself be the basis for quashing the proceeding. [See : Mrs. Dhanalakshmi Vrs. R. Prasanna Kumar and others, AIR 1990 SC 494; State of Bihar and another Vrs. P. P. Sharma, I.A.S. and another, (1992 Suppl (1) SCC 222); Rupan Deol Bajaj (Mrs.) and another Vrs. Kanwar Pal Singh Gill and another, (1995) 6*

*SCC 194; State of Kerala and others Vrs. O.C. Kuttan and others, (1999) 2 SCC 651; State of U.P. Vrs. O. P. Sharma, (1996) 7 SCC 705; Rashmi Kumar (Smt.) Vrs. Mahesh Kumar Bhada, (1997) 2 SCC 397; Satvinder Kaur Vrs. State (Govt. of NCT of Delhi) and another, (1999) 8 SCC 728; Rajesh Bajaj Vrs. State NCT of Delhi and others, AIR 1999 SC 1216)."*

6.2. In exceptional cases, to prevent abuse of the process of Court, the High Court might in exercise of its inherent powers under Section 482 quash criminal proceedings. However, interference would only be justified when complaint did not disclose any offence, or was patently frivolous, vexatious or oppressive, as held by this Court in Mrs. Dhanalakshmi Vrs. R. Prasanna Kumar, AIR 1990 SC 494.

6.3. In ***Madhavrao jiwajirao Scindia Vrs. Sambhajirao Chandrojirao Angre***, (1988) 1 SCC 6929, a three-Judge Bench of Supreme Court summarized the law with regard to quashing of criminal proceedings under Section 482 of the Cr.P.C. The Court held:

*"The legal position is well settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the court is as to whether the uncontroverted allegations as made prima facie establish the offence. It is also for the court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the court cannot be utilised for any oblique purpose and where in the opinion of the court chances of an ultimate conviction are bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the court may while taking into consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage."*

6.4. In ***Inder Mohan GoswamiVrs. State of Uttaranchal***, (2007) 12 SCC 1, the Supreme Court observed:

*"46. The court must ensure that criminal prosecutin is not used as an instrument of harassment or for seeking private vendetta or with an ulterior motive to pressurise the accused. On analysis of the aforementioned cases, we are of the opinion that it is neither possible nor desirable to lay down an inflexible rule that would govern the exercise of inherent jurisdiction. Inherent jurisdiction of the High Courts under Section 482 CrPC though wide has to be exercised sparingly, carefully and with caution and only when it is justified by the tests specifically laid down in the statute itself and in the aforementioned cases. In view of the settled legal position, the impugned judgment cannot be sustained."*

6.5. In ***Kapil Agarwal & Ors. Vrs. Sanjay Sharma & Others, (2021) 5 SCC 524,*** the Supreme Court observed that Section 482 of the Cr.P.C. is designed to achieve the purpose of ensuring that criminal proceedings are not permitted to generate into weapons of harassment.

6.6. Whether the allegations are true or untrue, would have to be decided in the trial. In exercise of power under Section 482 of the Cr.P.C., the Court does not examine the correctness of the allegations in a complaint except in exceptionally rare cases where it is patently clear that the allegations are frivolous or do not disclose any offence. Reference may be had to Ramveer Upadhyay and Anr.Vrs. State of U.P., 2022 SCC OnLine SC 484.

**Cognizance under Section 190:**

7. As per Section 2(c) of the Code of Criminal Procedure, 1973, 'cognizable offence' means an offence for which, and 'cognizable case' means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant; and per Section 2(l) 'non-cognizable offence' means an offence for which, and 'noncognizable case' means a case in which, a police officer has no authority to arrest without warrant. A complaint referred to under sub-section (1)(a) of Section 190 is defined under Section 2 (d) of the Code of Criminal Procedure, which is as follows:

> *"(d) 'complaint' means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.*
>
> *Explanation.—*
>
> *A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant."*

7.1. Chapter XIV which deals with Conditions requisite for initiation of proceedings contains Section 190 of the CrPC to deal with "Cognizance of offences by Magistrates". Said section reads as follows:

> *"(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under subsection (2), may take cognizance of any offence—*
>
> *(a) upon receiving a complaint of facts which constitute such offence;*
>
> *(b) upon a police report of such facts;*
>
> *(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.*
>
> *(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try."*

7.2. The word 'Cognizance' roots from an old French word 'Conoisance' based on Latin word *'Cognoscere'*. The word 'cognizance' has not been deciphered and defined in procedural law being the Code of Criminal Procedure 1973.

7.3. The Hon'ble Apex Court in the case of ***R.R. Chari Vrs. State of Uttar Pradesh, AIR 1951 SC 207*** has held that 'taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a magistrate as such applies his mind to the suspected commission of an offence'.

7.4. Said Hon'ble Court in the case of ***Ajit Kumat Palit Vrs. State of West Bengal and Others*** AIR 1963 SC 765 has held as under:

> *"19. The provisions of Section 190(1) being obviously, and on its own terms, inapplicable, the next question to be. considered is whether it is the requirement of any principle of general jurisprudence that there should be some additional material to entitle the Court to take cognizance of the offence. The word 'cognizance' has no esoteric or mystic significance in criminal law or procedure. It merely means, become aware of and when used with reference to a Court or judge, to take notice ofjudicially. It was stated in Gopal Marwari v. Emperor A.I.R. (1943) Pat. 245 by the learned judges of the Patna High Court in a passage quoted with approval by this Court in R. R. Chari Vrs. State of Uttar Pradesh [1951] S.C.R. 312, 320 that the word, 'cognizance' was used in the Code to indicate the point when the Magistrate or judge takes judicial notice of an offence and that it was a word of indefinite import, and is not perhaps always used in exactly the same sense. As observed in Emperor Vrs. Sourindra Mohan Chuckerbutty I.L.R. 37 Cal. 412, 416 'taking cognizance does not involve any formal action ; or indeed action of any kind, but occurs as soon as a Magistrate, as such, applies his mind to the suspected commission of an offence.' Where the statute prescribes the materials onwhich alone the judicial mind shall operate before any step is taken, obviously the statutory requirement must be fulfilled. Thus, a sessions judge cannot exercise that original jurisdiction which magistrates specified in s. 190(1) can, but the material on which alone he can apply his judicial mind and proceed under the Code is an order of commitment. But statutory provision apart, there is no set material which must exist before the judicial mind can operate. It appears to us therefore that as soon as a special judge receives the orders of allotment of the case passed by the State Government it becomes vested with jurisdiction to try the case and when it receives the record from the Government it can apply its mind and issue notice to the accused and thus start the trial of the proceedings assigned to it by the State Government."*

7.5. In the case of ***Tularam and Others Vrs. Kishore Singh,*** *(1977) 4 SCC 459* it has been observed as under:

> *"7. The question as to what is meant by taking cognizance is no longer res integra as it has been decided by several decisions of this Court. As far back as 1951 this Court in the case of R. R. Chari v. State of Uttar Pradesh [1951] S.C.R. 312 observed as follows:*
>
> *'Taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate as such applies his mind to the suspected commission of an offence.'*
>
> *While considering the question in greater detail this Court endorsed the observations of Justice Das Gupta in the case of Superintendent and Remembrancer of Legal Affairs, West Bengal Vrs. Abani Kumar Banerjee A.I.R.1950 Cal. 347 which was to the following effect.*

*'It seems to me clear however that before it can be said that any Magistrate has taken cognizance of any offence under section 190(1)(a), Criminal Procedure Code, he must not only have applied his mind to the contents of the petition but he must have done so far the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter-proceeding under Section 200 and thereafter sending it for inquiry and report under Section 202. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind, e.g. ordering investigation under section 156(3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence.'*

**** It seems to us that there is no special charm or any magical formula in the expression 'taking cognizance' which merely means judicial application of the mind of the Magistrate to the facts mentioned in the complaint with a view to, taking further action. Thus what Section 190contemplates is that the Magistrate takes cognizance once he makes himself fully conscious and aware of the allegations made. in the complaint and decides to examine or test the validity of the said allegations The Court prescribes several modes in which a complaint can be disposed of after taking cognizance.*

*In the first place, cognizance can be taken on the basis of three circumstances:*

*(a) upon receiving a complaint of facts which constitute such offence;*

*(b) upon a police report of such facts; and*

*(c) upon information received from any person other than the police officer or upon his own knowledge, that an offence has been committed. These are the three grounds on the basis of which a Magistrate can take cognizance and decide to act accordingly.*

*It would further appear that this Court in the case of Narayandas Bhagwandas Madhavdas Vrs. The State of West Bengal, [1951] S.C.R. 312, observed the mode in which a Magistrate could take cognizance of an offence and observed as follows:*

*'It seems to me clear however that before it can be said that any Magistrate has taken cognizance of any offence under section 190(1)(a), Criminal Procedure Code, he, must not only have applied his mind to the contents of the petition but must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter-proceeding underSection 200 and thereafter sending it for inquiry and report under Section 202.'*

7.6. In the case of ***Hareram SatpathyVrs. Tikaram Agarwala And Others***, (1978) 4 SCC 58, the Hon'ble Supreme Court of India has observed as under:

*"6. To the same effect is the decision of this court in Chandra Deo Singh Vrs. Prokar Chandra Bose, AIR 1963 SC 1430 where after a full discussion of the matter it was held that at the time of taking a decision whether a process should issue against the accused or not what the Magistrate has to see is whether there is evidence in support of the allegations of the complainant so as to justify the issue of process and commencement of proceedings against the accused, and not whether the evidence is sufficient to warrant his conviction."*

7.7. In ***Fiona ShrikhandeVrs. State of Maharashtra and Anr.,*** AIR 2014 SC 957 while referring to an earlier decision of the Hon'ble Apex Court reported in

(1976) 3 SCC 736 (Smt. Nagawwa Vrs. Veeranna Shivlingappa Kanjalgi & Ors.) it was observed as follows:

> *"Once the Magistrate has exercised his discretion in forming an opinion that there is ground for proceeding, it is not for the Higher courts to substitute its own discretion for tht of the Magistrate. The Magistrate has to decide the question purely from the point of view of the complaint, without at all adverting to any defence that the accused may have."*

7.8. In the case of ***Sushmita Das @ Patnaik Vrs. Soumya Ranjan Tripathy***, 2018 (II) ILR-CUT 578 this Court held as follows:

> *"6. The position of law is undisputed that at the time of taking cognizance and issuing process against the accused persons, the Magistrate is merely concerned with the allegations made out in the complaint and has only to be prima-facie satisfied whether there are sufficient grounds to proceed against the accused and it is not the province of the Magistrate to enter into a detailed discussion on the merits and demerits of the case. ***"*

7.9. Thus, 'taking cognizance' means cognizance of an offence and not of offender. Once, the Magistrate takes the cognizance of an offence then it is the duty to find out the real offender. The aforesaid process itself personifies taking cognizance is a serious matter which presupposes a condition whereby the Magistrate has to apply his judicious mind. Any Magistrate of the first class, any Magistrate of the second class specially empowered in that behalf under sub-section (2) of Section 190 may take cognizance of an offence upon receiving the complaint of facts which constitute the offence, upon a police report of said facts, upon information received from any person other than the police officer or upon his own knowledge that said offence has been committed. Sub Section (2) itself authorises Chief Judicial Magistrate to empower any Magistrate of second class to take cognizance under subsection (1) of said offence as are within his competence to enquire into or trial. Under Section 190, discretion has been casted upon the Magistrate concerned to act judicially keeping in account the facts of a particular case as well as law on the said subject. Section 190 is a starting point for taking appropriate judicial action as the Magistrate under said section has to apply his mind on the motion so set up in sub-clauses (a)/(b)/(c) of sub-section (1) of Section 190 of the CrPC.

7.10. It would, therefore, be seen that cognizance of offence is the first and foremost step towards trial. The CrPC has not defined or specifically explained the expression 'taking cognizance of an offence'. The meaning of the expression, however, has been considered in various judicial authorities as discussed above.

7.11. In case of ***Pradeep S. WodeyarVrs. The State of Karnataka***, 2021 SCC OnLine SC 1140 scope of Section 465 Cr.P.C. was considered and it has been observed as:

> *"53. In order to prove that the irregularity vitiates the proceeding, the accused must prove a 'failure of justice' as prescribed under Section 465 Code of Criminal Procedure. In view of the discussion in the previous section on the applicability of Section 465 Code of Criminal Procedure (and the inability to prove failure of justice) to the cognizance order, the irregularity would not vitiate the proceedings. Moreover, bearing in mind the objective behind prescribing that cognizance has to be taken of the offence and not the offender, a mere change in the form of the cognizance order would not alter the effect of the order for any injustice to be meted out.*
>
> ***
>
> *85(ii) The objective of Section 465 is to prevent the delay in the commencement and completion of trial. Section 465 Code of Criminal Procedure is applicable to interlocutory orders such as an order taking cognizance and summons order as well. Therefore, even if the order taking cognizance is irregular, it would not vitiate the proceedings in view of Section 465 Code of Criminal Procedure;"*

7.12. Therefore, as per Pradeep S. Wodeyar (supra), even if there is an irregularity in cognizance order then also on that ground proceedings in view of Section 465 Cr.P.C. cannot be vitiated.

***Conclusion and decision***:

8. In the instant case the learned SDJM took cognizance of the offence after causing due enquiry under Chapter XV of the Code of Criminal Procedure. On perusal of the record and considering the statement of witness, he appears to have been satisfied himself that there was prima facie ground for issuing process against the petitioner-Dibakar Sahani. In so doing, the learned SDJM did not exceed the power vested in him under law. In the Order dated 13.05.2015 while taking cognizance, the learned SDJM perused the documents available on record, complaint petition and statements of the complainant as also the witness.

8.1. Therefore, from the above discussion, it is clear that although there is no illegality in the cognizance order dated 13.05.2015, as before taking cognizance the learned SDJM perused the relevant material on record. Nonetheless, even if there was an irregularity in the cognizance order, then also on the basis of it proceedings of the present case cannot be quashed as order of taking cognizance are interlocutory in nature and as per Section 465 Cr.P.C. proceedings on the basis of that irregularity cannot be vitiated.

9. Since the interim order dated 01.09.2015 has not been extended at any point of time thereafter even though the matter was on board. In view of authoritative pronouncement of the Hon'ble Supreme Court of India in the cases of *Asian Resurfacing of Road Agency Pvt. Ltd. &Anr. Vrs. Central Bureau of Investigation, 2018 (I) ILR-CUT 659 (SC) = (2018) 16 SCC 299 and Asian Resurfacing of Road Agency Pvt. Ltd. and Another Vrs. Central Bureau of Investigation, 2020 SCC OnLine SC 1046;* read with Standing Order No.1 of

2019, dated 09.01.2019 issued by this Court, said interim order appears to have been expired.

9.1. In *Asian Resurfacing of Road Agency Pvt. Ltd. &Anr. Vrs. Central Bureau of Investigation, 2018 (I) ILR-CUT 659 (SC) (2018) 16 SCC 299* the Supreme Court observed:

> *"36. In view of the above, situation of proceedings remaining pending for long on account of stay needs to be remedied. Remedy is required not only for corruption cases but for all civil and criminal cases where on account of stay, civil and criminal proceedings are held up. At times, proceedings are adjourned sine die on account of stay. Even after stay is vacated, intimation is not received and proceedings are not taken up. In an attempt to remedy this situation, we consider it appropriate to direct that in all pending cases where stay against proceedings of a civil or criminal trial is operating, the same will come to an end on expiry of six months from today unless in an exceptional case by a speaking order such stay is extended. In cases where stay is granted in future, the same will end on expiry of six months from the date of such order unless similar extension is granted by a speaking order. The speaking order must show that the case was of such exceptional nature that continuing the stay was more important than having the trial finalized. The trial court where order of stay of civil or criminal proceedings is produced may fix a date not beyond six months of the order of stay so that on expiry of period of stay, proceedings can commence unless order of extension of stay is produced.*
>
> *37. Thus, we declare the law to be that order framing charge is not purely an interlocutory order nor a final order. Jurisdiction of the High Court is not barred irrespective of the label of a petition, be it under Section 397 or 482 Cr.P.C. or Article 227 of the Constitution. However, the said jurisdiction is to be exercised consistent with the legislative policy to ensure expeditious disposal of a trial without the same being in any manner hampered. Thus considered, the challenge to an order of charge should be entertained in a rarest of rare case only to correct a patent error of jurisdiction and not to reappreciate the matter. Even where such challenge is entertained and stay is granted, the matter must be decided on day-to-day basis so that stay does not operate for an unduly long period. Though no mandatory time-limit may be fixed, the decision may not exceed two-three months normally. If it remains pending longer, duration of stay should not exceed six months, unless extension is granted by a specific speaking order, as already indicated. Mandate of speedy justice applies to the PC Act cases as well as other cases where at trial stage proceedings are stayed by the higher court, i.e. the High Court or a court below the High Court, as the casemay be. In all pending matters before the High Courts or other Courts relating to the PC Act or all other civil or criminal cases, where stay of proceedings in a pending trial is operating, stay will automatically lapse after six months from today unless extended by speaking order on the above parameters. Same course may also be adopted by civil and criminal appellate/Revisional Courts under the jurisdiction of the High Courts. The trial courts may, on expiry of the above period, resume the proceedings without waiting for any other intimation unless express order extending stay is produced."*

9.2. In the said case by order dated 15th October, 2020 *(2020 SCC OnLine SC 1046)* the Supreme Court has further observed that,

*"whatever stay has been granted by any court including the High Court automatically expires within a period of six months, and unless extension is granted for good reason, as per our judgment, within the next six months, the trial Court is, on the expiry of the first period of six months, to set a date for the trial and go ahead with the same."*

9.3. The interim order dated 01.09.2015 passed by this Court in the instant case was operative "till next listing". The matter was listed on 23.08.2022, on which date none appeared for the petitioner. Thereafter on 16.09.2022 when the matter was listed, this Court directed as follows:

*"Learned counsel for the petitioner in the course of hearing the CRLMC application prays for one week time to apprise the Court about the present status of the case."*

9.4. On 28.10.2022 this Court passed further order to the following effect:

*"As undertaken by the learned counsel on 16th September, 2022 for furnishing the current status of the case, the same could not be furnished today.*

*Due to the aforesaid reason, the matter stands adjourned to 25th November, 2022 on which date counsel for the petitioner is directed to place the present status of the case."*

9.5. On 25th November, 2022, current status of the case has not been furnished, but the counsel for the petitioner argued the matter on merit.

9.6. It is hoped that by virtue of *Asian Resurfacing of Road Agency Pvt. Ltd. &Anr.Vrs. Central Bureau of Investigation, 2018 (I) ILRCUT 659 (SC) = (2018) 16 SCC 299 and 2020 (2020 SCC online SC 1046)*, since the interim order dated 01.09.2015 did lapse on the date of listing, i.e., 23.08.2022 and the same being not extended on subsequent occasions when the matter was listed, the learned SDJM would have proceeded with the case being ICC No. 47/2014.

10. From the above discussion, this Court is not inclined to interfere with the impugned order of cognizance.Accordingly, the CRLMC is dismissed. However, since the case is of the year 2014, the trial of the same be expedited.

11. A copy of this judgment be communicated to the Court concerned Court by the Registry forthwith.

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**2023 (I) ILR - CUT - 284**

**SANJAY KUMAR MISHRA, J.**

W.P.(C) NO. 3029 OF 2016

**Dr. SAROJ KUMAR PRADHAN** .....Petitioner

**.V.**

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

**SERVICE LAW – Termination – The Petitioner was a Ayush Doctor – Show cause notice for unauthorized absent issued but never served upon the petitioner – Impugned order vide which the service of the petitioner were brought to an end by way of termination, were issued by an incompetent authority i.e. CDMO-Cum-District Mission Director – The Competent Authority is Collector as per circular dt 07/06/13 – Whether impugned order is sustainable in law? – Held, No – Law is well settled that if the power has been vested with the particular authority, that can only be exercised by the same authority.** (Para 15-17)

**Case Law Relied on and Referred to** :-

1. (2015) 7 SCC 690 :Zuari Cement Limited Vs. Regional Director, Employees' State Insurance Corporation, Hyderabad and Ors.
2. (1875) LR I Ch D 426:Taylor Vs. Tailor.
3. AIR 1936 PC 253(2) :Nazir Ahmad Vs. King Empero.
4. (1999) 3 SCC 422:Babu Verghese Vs. Bar Council of Kerala.
5. AIR 1964 SC 358 :State of Uttar Pradesh Vs. Singhara Singh.
6. AIR 2001 SC 1512 :Dhananjay Reddy Vs. State of Karnataka.
7. AIR 1999 SC 3558 :Chandra Kishore Jha Vs. Mahabir Prasad.
8. AIR 2008 SC 1921 :Gujrat Urja Vikas Nigam Ltd. Vs. Essar Power Ltd.
9. (2009) 6 SCC 735 :Ram Deen Maurya Vs. State of U.P.

For Petitioner : Mr. Samir Kumar Das
For Opp. Parties : Mr. G.N. Rout, ASC

JUDGMENT Date of Judgment: 08.12.2022

***SANJAY KUMAR MISHRA, J.***

1. The Petitioner, who was appointed as Ayush Doctor, vide engagement Order dated 30.05.2007, has prayed to quash the show cause notice dated 05.01.2016, as at Annexure-8, so also Office Order dated 27.01.2016, as at Annexure-9, on the ground that the CDMO-Cum-District Mission Director, Jharsuguda Opposite Party No.5 is incompetent to issue the show cause notice, so also Office Order of termination in view of the Resolution of the Government of Odisha, Health and Family Welfare Department, dated 16.08.2012.

2. The factual matrix leading to filing of the present case is that the Petitioner, who having BAMS qualification, was selected for the post of Ayush Doctor and was engaged by the Order of CDMO, Jharsuguda on 30.05.2007. Then, he was posted as such under the Zilla Swasthya Samiti, Jharsuguda and engaged as Medical Officer In-Charge, in Rajpur PHC, vide Order dated 30.05.2007.

While continuing as such, the Petitioner was transferred and posted to Lakhanpur CHC by the Order of CDMO, Jharsuguda dated 30.10.2007 and was

relieved by the Order dated 03.11.2007 of the Medical Officer In-Charge, CHC Brajarajnagar and directed to join his new place of posting i.e. at Lakhanpur CHC. While discharging his duties at Lakhanpur CHC, due to his personal difficulty, he applied for seven days leave, vide Application dated 09.11.2015 for the period from 10.11.2015 to 16.11.2015. But, due to his misfortune during such period of leave, his wife suffered from abdomen pain, for which the Petitioner had to extend his leave further. When the Petitioner was on leave, during such extended period, the Collector, Jharsuguda, vide Office Order dated 13.11.2015, deputed the Petitioner from CHC Lakhanpur to PHC Konaktora. As the Petitioner was on leave, the said Order of deputation/transfer could not be served on him and he was not aware about Order of transfer.

It is further case of the Petitioner that the Mission Director issued a Circular dated 07.06.2013 fixing guidelines for transfer of Ayush Doctors. As per the said Circular, the Collector of the District became the Authority to pass an Order of transfer of a Doctor within the District. But such Order of transfer is to be made as per the requirement, not in a routine manner.

3. When the matter stood thus, the CDMO-Cum-District Mission Director, Jharsuguda, vide letter dated 05.01.2016 issued a show cause notice to the Petitioner asking him to submit necessary explanation within seven days as to the alleged irregularities pointed out in the said show cause notice. Since the Petitioner was still on leave and notice of show cause could not be served on him, there was no question of tendering his explanation in response to the said show cause notice.

4. Ultimately, vide Order dated 27.01.2016, as at Annexure-9, the CDMO-Cum-District Mission Director, Jharsuguda terminated the services of the Petitioner in pursuance of the decision taken in the Contract Renewal Committee-NHM.

It is further case of the Petitioner that the impugned show cause notice, so also Order of termination are bad as the Commissioner-Cum-Secretary to Government, Health and Family Welfare Department, Bhubaneswar, vide Resolution dated 16.08.2012 circulated about the decision of the Government with regard to transfer of Ayush Doctors working under NRHM to the control of DIM & H, Odisha and in view of Clause-5 of the said Resolution, the disciplinary authority shall be with DIM & H. Similarly, referring to the said Resolution of the Government (supra), the Mission Director, NRHM & ExOfficio Additional Secretary to Government, vide letter dated 28.08.2012 communicated to the Director, Indian Medicine & Homeopathy, Odisha, Bhubaneswar, so also all CDMO-Cum District Mission Director, Odisha

indicating therein that the establishment of contractual Ayush Doctors now under the control of NRHM stood transferred to the control of Director, Indian Medicine & Homeopathy, Odisha, with certain terms and conditions, w.e.f. 16.08.2012 and it was requested to follow the terms and conditions scrupulously, as mentioned in the relevant paragraphs of the said Resolution.

It is also the case of the Petitioner that the Authority concerned issued the Order of termination without verifying the fact as to whether the show cause notice was served on the Petitioner or not and without affording him an opportunity to have his say. The Petitioner came to know about the said Order of termination only on 02.02.2016 when he reported for duty after recovering from his suffering. As such, the Order of termination being illegal and in clear violation of principles of natural justice and being without jurisdiction and authority in terms of the Resolution dated 16.08.2012 and the consequential Order of Mission Director, NRHM & Ex-Officio Additional Secretary to Government, dated 28.08.2012, the impugned communications, as at Annexures 8 and 9, are liable to be set aside.

It is further case of the Petitioner that he had put in 8 years of uninterrupted service and never mis-conducted himself during his entire period of service and only because of personal difficulty, he had to take leave with due intimation and permission of the Authority concerned and the Order of termination suffers from violation of principles of natural justice and deserves interference by this Court. Hence, both the impugned show cause notice dated 05.01.2016 as well as Office Order dated 27.01.2016 being illegal and beyond authority, deserve to be set aside.

5. In response to the averments made in the Writ Petition, the stand of the State in its Counter Affidavit is that the Petitioner was engaged as Ayush Doctor at PHC Rajpur vide engagement Order dated 30.05.2007 issued by the Chief District Medical Officer, Jharsuguda for a period of 11 months. Thereafter, on completion of 11 months, the Petitioner was given further engagement after submission of his Performance Appraisal Report and the Petitioner has signed his contractual service Agreement dated 05.01.2015. After completion of tenure of Agreement on 04.12.2015, his service has not been renewed. Apart from reiterating the facts, as pleaded in the Writ Petition, with regard to applying for leave, it has been averred in the Counter Affidavit that the Petitioner remained absent unauthorizedly and to demonstrate the same, the leave applications submitted by the Petitioner have been annexed as Annexure-C/5 Series. It has been stated that the Petitioner was unauthorizedly absent on 17.11.2015 as he had not applied for leave and the said leave was not sanctioned by the Medical Officer In-Charge, CHC, Lakhanpur. Further, the Petitioner also tampered the

staff attendance register of the office by signing on 18th & 19th November, 2015 without joining in duty in the Office.

It has also been stated in the Counter Affidavit that the Petitioner was appointed by the CDMO and he signed the service contract Agreement with CDMO as per the letter dated 21.07.2014 of the Mission Director, NHM, Odisha and hence,the Disciplinary Authority, who is the Chief District Medical Officer, has the full power to reposition the Ayush Doctors within the District with the prior approval of Collector-CumDistrict Magistrate in a routine manner only and the letter dated 21.07.2014, so also letter dated 07.06.2013 issued by the Commissioner-Cum-Director, NRHM supersede the previous Order issued in the year, 2012 and the said Orders were carried out in case of the Petitioner. It has also been stated that the show cause notice dated 05.01.2016 was sent by the O/o the CDMO, Jharsuguda to the Petitioner and the same was refused by the Petitioner, which was again resent to the Petitioner through Special Messenger, which was also refused by the Petitioner.

It is also the stand of the Opposite Parties that the Petitioner was terminated vide Office Order dated 27.01.2016,as per the decision taken in the Contract Renewal Committee meeting of NHM held on 27.01.2016 under the Chairmanship of Collector-Cum-District Magistrate, Jharsuguda, because of his non-submission of Performance Appraisal Report for renewal of contract period beyond 05.12.2015 before expiry of the contract period, unauthorized absence continuously from 22.06.2015 to 24.06.2015, 25.12.2015 to 30.12.2015 and 17.11.2015, absence during visit of vigilance team to working place (CHC, Lakhanpur) dated 08.09.2015, recommendation for initiation of action against the Petitioner by the Superintendent of Police, Vigilance, Sambalpur Division, Sambalpur, vide Memo dated 06.10.2015, not staying at headquarter, willful disobedience of repositioning Order issued by the Collector & District Magistrate, Jharsuguda, not replying to the show cause notice and manipulation of office attendance register on 18th & 19th November, 2015.

6. In response to the Counter Affidavit filed by the StateOpposite Party, the Petitioner has filed Rejoinder Affidavit and more particularly, to demonstrate before this Court that the show cause notice dated 05.01.2016, as at Annexure-8, was never served on him and without following principles of natural justice, his services were brought to an end, the Petitioner has annexed an Affidavit sworn by the Process Server, through whom the allegedly show cause notice was sent to the Petitioner, whose report has been annexed to the Counter Affidavit as Annexure-K/5.

Today also, during hearing, the learned Counsel for the Petitioner files the original of the said Affidavit in the Court, which be kept on record.

7. Learned Counsel for the Petitioner submits that the impugned show cause notice, so also Order of termination are illegal and void *ab initio* being issued by the incompetent Authority in view of the Resolution dated 16.08.2012, so also the letter of the Mission Director, NRHM & Ex-Officio Additional Secretary to Government, dated 28.08.2012, and because of violation of principles of natural justice as to not give opportunity to the Petitioner to have his say in response to the show cause notice dated 05.01.2016.

8. Learned Counsel for the Petitioner further submits that though the show cause notice is dated 05.01.2016, vide which he was given seven days time to have his say but to the contrary, the postal receipt annexed to the Writ petition, as at Annexure-K/5, is dated 20.01.2016 and there is no documentary evidence on record to prove that the said show cause notice dated 05.01.2016 was duly served on him.

9. Further, Mr. Das, learned Counsel for the Petitioner submits that though the Process Server's endorsement, as at Annexure-K/5, indicates that the Petitioner allegedly denied to receive the letter and asked the Process Server to send the letter officially via post, to the contrary, an Affidavit sworn by the Process Server Jatindra Kumar Sahu, which is annexed as Annexure-10, clearly demonstrates that rather he has stated on oath to the effect that he was deputed to serve a letter/notice addressed to the Petitioner. On reaching the house of the Petitioner, at Village-R. Katapali, he found that door of the house of the Petitioner was locked and none of the family members, including the Petitioner, was present nearby the said house. Hence, he returned the said notice to the Medical Officer, In-Charge giving a report to the effect that he did not find the Petitioner nor his family members in his house as the house was locked and after filing of the case, the Medical Officer put pressure on the Process Server Mr. Sahu to write a letter mentioning therein that the Petitioner refused to receive the letter addressed to him and on being so pressurized, under the threat of removal from service, the Process Server Mr. Jatindra Kumar Sahu wrote another letter as per the instruction of the Medical Officer Dr. Jay Prakash Pradhan declaring therein that the Petitioner refused to receive the said letter.

The conduct of the concerned Officer well demonstrates that the show cause notice dated 05.01.2016 was never served on the Petitioner giving opportunity to him to have his say before terminating his service vide Office Order dated 27.01.2016 and that too by an incompetent Authority in view of the Government Resolution dated 16.08.2022, the same being issued by the CDMO-Cum-District Mission Director, Jharsuguda instead of the concerned Director, Indian Medicine and Homeopathic, Odisha, Bhubaneswar.

Learned Counsel for the Petitioner, referring to Clause-9 of the Contractual Service Agreement dated 05.01.2015 as Annexure-B/5, submits that the service of the Petitioner could only have been terminated by the competent Authority following due process of law and CDMO-Cum-District Mission Director, Jharsuguda, being incompetent to issue the show cause notice, so also Order of termination, both the impugned Orders deserve to be set aside.

10. Learned Counsel for the State submits that in view of Clause-9 of service Agreement dated 05.01.2015, as at Annexure-B/5 and the communications of the Mission Director, NHM, Odisha, Bhubaneswar, so also the Commissioner-CumDirector, NRHM, Bhubaneswar, dated 18.07.2014 and 07.06.2013, respectively, as at Annexure H/5 and I/5, which are in supersession of the Resolution dated 16.08.2012, the CDMO-Cum-District Mission Director was competent to act as the Disciplinary Authority and there is no infirmity or illegality in the impugned show cause notice dated 05.01.2016, so also Order of termination dated 27.01.2016, by which sufficient opportunity was granted to the Petitioner to have his say but the Petitioner choose not to give his explanation. Hence, the Authority concerned was justified to issue the Order of termination for the misconduct/irregularity committed by the Petitioner.

11. This Court perused the Resolution dated 16.08.2012 of the Commissioner-Cum-Secretary to Government, Health and Family Welfare Department and for ready reference, the relevant portions of the said Resolution are extracted below:

> "The proposal for transfer of AYUSH Establishment from NRHM to DIM & H, Odisha was under the active consideration of Govt. after due consideration, **it has been decided to transfer the AYUSH Doctors under NRHM to the control of DIM & H, Odisha for smooth management of contractual AYUSH Doctors now working under NRHM with the following terms and conditions.**
>
> (i) xxx
>
> (ii) xxx
>
> (iii) xxx
>
> (iv) xxx
>
> (v) **Disciplinary authority shall be with DIM & H**. Any instruction issued DIM & H in this regard shall be in consonance with the existing rules of the Govt. & as per the terms and condition of the PIP of AYUSH, Mission Directorate shall be kept informed.
>
> (vi) The AYUSH Doctors will be making contract agreement with the CDMO of the concerned districts as is being done now.
>
> (vii) Day to day administration and technical supervision shall continue to be with the concerned MOI/C.
>
> (viii) Special skill up-gradation training etc. shall be given by NRHM/ SIHFW/ DIM & H.

(ix) As per decision taken in the AYUSH Core Committee Meeting held on 01.10.201, the AYUSH Inspectors working under DIM & H will do monitoring & supportive supervision of AYUSH Doctors & submit the observation report to the CDMOs for follow-up action.

**This will come into effect from the date of issue of this Resolution**."

By order of Governor
Sd/-
(P.K. Mohapatra)
Commissioner-cum-Secretary
to Government"
(Emphasis supplied)

12. In pursuance of the said Resolution dated 16.08.2012, the Mission Director, NRHM & Ex-Officio Additional Secretary to Government, vide communication dated 28.08.2012 circulated to the Director, IM & H, Odisha, Bhubaneswar, so also all CDMO-Cum-District Mission Director, Odisha, which reads as follows:

"Sir,

**Please refer to the Resolution No.21532 dated 16.08.2012 (copy enclosed) of Government in Health & Family Welfare Department on the above subject, in which the establishment of contractual Ayush doctors now under the control of NRHM has been transferred to the control of Director Indian Medicine & Homeopathy, Odisha with certain terms and conditions, with effect from 16.08.2012**.

**You are therefore requested to follow the terms and condition scrupulously henceforth, as mentioned in the relevant para's of the Resolution relating to your office.**

Yours faithfully
Sd/-
Mission Director, NRHM &
Ex-Officio Additional Secretary
to Govt."
(Emphasis supplied)

13. It may not be out of place to mention here that the Clause-9 of the service agreement deals with termination of service of the Petitioner, the relevant portion of which extracted
below:

" 9. Termination xxx … … …

Notwithstanding anything contained hereinabove, the services of the Second Party may be terminated at any point of time by the competent authority of the Society if the Second Party is found to be involved in criminal offence or guilty of any insubordination, intemperance or other misconduct or of breach or non-performance or at the completion of the project as intimated."

14. So far as the letter of the Mission Director, NHM, Odisha, as at Annexure-H/5, dated 21.07.2014, which is addressed to the CDMO-Cum-DMDs of various District, is pertaining to contractual engagement of Ayush Doctors for PHC (New)/CHC under NHM from the panel pertaining to advertisement No.121/12, vide which it was requested to take steps for verification of documents, finalization of place of posting along with issue of engagement Order on the same day and it was indicated that the engagement Order for the Doctors are to be issued by the CDMO-Cum-DMD concerned after strict verification of necessary original documents by a Committee, as provided in the Guideline issued earlier for the said purpose vide letter dated 15.09.2008 of the Commissioner-CumSecretary, H & F.W. Department. Similarly, the Office Order dated 07.06.2013, as at Annexure-I/5, issued by the Commissioner-Cum-Director, NRHM, Bhubaneswar is pertaining to reposition of contractual employees working under the Odisha State Health & Family Welfare Society and from both the said communication dated 21.07.2014, so also Office Order dated 07.06.2013, it can be well revealed that it is not in supersession of the Resolution of the Government dated 16.08.2012, wherein it has been clearly indicated that so far as Ayush Doctors under NHM, it was decided by the Commissioner-Cum-Secretary, H & F.W. Department for smooth management of contractual Ayush Doctors now working under NRHM and for that the disciplinary authority shall be with the DIM & H and any instructions issued by DIM & H in this regard shall be in consonance with the in existing Rules of the Government and as per the terms and conditions of the PIP of Ayush, Mission Directorate shall be kept informed.

Further, from the Affidavit of Mr. Jatindra Kumar Sahu, Process Server, through whom alleged show cause notice was communicated to the Petitioner, clearly indicates that the said show cause notice was never served on the Petitioner as has been falsely averred. Rather, being pressurized by the officer concerned, the Process Server wrote the report in terms of instruction given by the Medical Officer Dr. Jay Prakash Pradhan. For ready reference, Paragraphs 3 to 6 of the Affidavit dated 12.10.2017 are extracted below:

> "3. That, on reaching to the house of Dr. Saroj Kumar Pradhan at village- R. Katapali, I found that the house door of Dr. Saroj Kumar Pradhan was locked and none of the family members including Dr. Saroj Kumar Pradhan was/were present nearby to the said house. Hence I returned the said Letter to M.O., I/C, giving a written report to the effect that I do not find Dr. Saroj Kumar Pradhan or his family members in his house as the house was locked.
>
> 4. That, after filing of this case my Medical Officer, Dr. Jay Prakash Pradhan put pressure on me to write a report mentioning that Dr. Saroj Kumar Pradhan refused to receive the letter address to him.
>
> 5. That, under pressure and on the there at of my removal from the service, I wrote another report as per the instruction of my Medical Officer, Dr. Jay Prakash Pradhan declaring that Dr. Saroj Kumar Pradhan refused to receive the said letter.

6. That, I am swearing this affidavit in order to produce it before the Hon'ble High Court, Cuttack as my evidence of above mentioned facts."

15. Law is well settled that if the power has been vested with the particular authority, same can only be exercised by the same authority. In **Zuari Cement Limited v. Regional Director, Employees' State Insurance Corporation, Hyderabad and others**,[1] the apex Court held that it is the basic principle of law long settled that if the manner of doing a particular act is prescribed under any statute, the act must be done in that manner or not at all. The origin of this Rule is traceable to the decision in **Taylor v. Tailor**[2] which was subsequently followed by Lord Roche in **Nazir Ahmad v. King Emperor,**[3] and subsequently, the said principle has also been followed in **Babu Verghese v. Bar Council of Kerala**,[4.]

16. In **Nazir Ahmed v. King Emperor**, it was held that "where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden." The said principles have been followed subsequently in **State of Uttar Pradesh v. Singhara Singh,**[5] **Dhananjay Reddy v. State of Karnataka**[6]**,Chandra Kishore Jha v. Mahabir Prasad,**[7] **Gujrat Urja Vikas Nigam Ltd. v. Essar Power Ltd.,**[8] **and Ram Deen Maurya v. State of U.P.,**[9].

17. Since admittedly, the notice of show cause dated 05.01.2016 was never served on the Petitioner and both the impugned show cause notice dated 05.01.2016 (Annexure-8), so also Office Order dated 27.01.2016 (Annexure-9), vide which, the services of the Petitioner were brought to end by way of termination, were issued by an incompetent authority i.e. CDMO-Cum-District Mission Director, Jharsuguda, the same are hereby set aside. The Petitioner be reinstated in service with all consequential service and financial benefits, as prayed for.

18. Accordingly, the Writ Petition stands disposed of. No Order as to costs.

**1**. (2015) 7 SCC 690 , **2**. (1875) LR I Ch D 426, **3**. AIR 1936 PC 253(2) ,**4**. (1999) 3 SCC 422, **5**. AIR 1964 SC 358
**6**. (2009) 6 SCC 735 , **7**. AIR 1999 SC 3558 , **8**. AIR 2008 SC 1921, **9**. AIR 2001 SC 1512

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**2023 (I) ILR - CUT - 293**

**SANJAY KUMAR MISHRA, J.**

L.A.A NO.41 OF 2021

**SUJATA SENAPATI** .....Appellant

**.V.**

**LAND ACQUISITION ZONE OFFICER, KHURDA ROAD, BOUDH** .....Respondent

**RIGHT TO FAIR COMPENSATION AND TRANSPARENCY IN LAND ACQUISITION, REHABILITATION AND RESETTLEMENT ACT, 2013 – Sections 64, 74 – The referral court dismissed the reference petition on the ground that the Claimant/Appellant has never raised any objection in writing to the award at any point of time – Whether such rejection on technical ground sustainable under law? – Held, No – On a hyper-technical ground that express protest was not made, on the sub said basis State cannot deny the land owner, the right to seek reference to the Civil Court for a reasonable compensation.** (Para 7)

**Case Laws Relied on and Referred to** :-

1. (1994) 4 SCC 67: Ajit Singh & Ors. Vs. State of Punjab & Ors.
2. (2015) 15 SCC 343: Chandra Bhan (Dead) Vs. Ghaziabad Development Authority
3. (2007) SCC Online Orissa 167 : (2007) 104 CLT 460 :Bulani Swain Vs. Special Land Acquisition Officer M.C.I.I. Project & Anr.

For Appellant : Mr. M.K. Mohapatra
For Respondent : Mr. G. Rout, A.S.C

JUDGMENT Date of Judgment: 13.12.2022

***SANJAY KUMAR MISHRA, J.***

1. This Appeal has been preferred against the judgment dated 24.08.2021, passed by the Presiding Officer LAR & R Authority, Berhampur, in LAR & R Case No. 86 of 2020 vide which the reference Petition under Section-64 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, shortly, (RFCTLAR & R) Act, 2013, was dismissed solely on the ground that the present Appellant received the awarded compensation amount without any protest.

2. Mr. Mohapatra, learned Counsel for the Appellant submits that the referral court has mis-directed himself in dismissing the reference petition on the ground that the Claimant/Appellant has never raised any objection in writing to the award at any point of time, which is contrary to the written objection filed by the Respondent under Annexure-2, wherein the Respondent admitted that the Appellant/Petitioner has received the compensation under protest. Further, he submits that there is no express provision under the RFCTLAR & R Act, 2013 to raise objections after passing of award by the Collector under Section-37 of the Act, 2013 except filing of reference Petition under Section-64 of the Act.

3. He submits that though the Appellant filed an Application under Section-64 of the Act, 2013 within 42 days of the receipt of the award stating therein that the award has been passed behind the back of the Appellant and subsequent thereafter, she has been noticed by the Respondent to receive the compensation amount, which compelled her to receive the same under protest and claimed for

higher compensation by filing the Petition to refer the matter to the Authority for determination of the actual amount and additional amount of compensation for the acquired land, the Respondent, while denying the aforesaid pleadings in his objection, vide which it was admitted that the present Appellant/Petitioner has received the compensation under protest, erroneously dismissed the application filed under Section-64 of the RFCTLAR & R Act, 2013.

4. Learned Counsel for the Petitioner submits that even if for the sake of argument, it is accepted that the Appellant/Petitioner has received the compensation without any protest, in view of the settle position of law, the very fact of filing an application for reference by the interested person(present Appellant) within the stipulated period of limitation will leave to an inference of fact that she never accepted the compensation without protest and the protest is very much inherent. To substantiate his argument Mr. Mohapatra relied on the judgments of the Apex Court in case of ***Ajit Singh and Others v. State of Punjab and Others*** reported in (1994) 4 SCC 67, ***Chandra Bhan (Dead) v. Ghaziabad Development Authority*** reported in (2015) 15 SCC 343, so also judgment passed by coordinate bench in case of ***Bulani Swain v. Special Land Acquisition Officer M.C.I.I. Project and another*** reported in (2007) SCC Online Orissa 167 : (2007) 104 CLT 460.

5. Learned Counsel for the State submits that the said judgments are not applicable, so far as the present Appeal is concerned as those judgments have been passed refereeing to the provisions enshrined under Section-18 of the Land Acquisition Act, 1894, shortly, L.A Act, 1894, whereas the impugned Order of rejection/judgment passed by the Court below is in terms of Section-64 of the RFCTLAR & R Act, 2013. Hence, the ratio resided by the apex Court, so also coordinate Bench are not applicable to the present proceeding.

6. For better appreciation, it is apt to reproduce below the Section-18(1) of the L.A. Act, 1894, so also Section-64(1) of the RFCTLAR & R Act, 2013 to demonstrate that the said provisions are almost similar to each other.

> "18. Reference to Court. - (1) ***Any person interested who has not accepted the award may, by written application to the Collector, require that the matter be referred by the Collector for the determination of the Court, whether his objection be to the measurement of the land, the amount of the compensation, the person to whom it is payable***, or the apportionment of the compensation among the persons interested.
>
> 64. Reference to Authority.–(1) ***Any person interested who has not accepted the award may, by written application to the Collector, require that the matter be referred by the Collector for the determination of the Authority, as the case may be, whether his objection be to the measurement of the land, the amount of the compensation, the person to whom it is payable***, the rights of Rehabilitation and Resettlement under Chapters V and VI or the apportionment of the compensation among the persons interested:

> Provided that the Collector shall, within a period of thirty days from the date of receipt of application, make a reference to the appropriate Authority:
>
> Provided further that where the Collector fails to make such reference within the period so specified, the applicant may apply to the Authority, as the case may be, requesting it to direct the Collector to make the reference to it within a period of thirty days.
>
> (Emphasis supplied)

7. That apart, on bare perusal of RFCTLAR & R Act, 2013 vis-avis L.A. Act, 1894, it is crystal clear that there is no such specific procedure or form provided under the said acts for recording the protest and the very fact of filing an application for reference by interested person within the stipulated period of limitation, will lead to an inference of fact that the interested person never accepted the compensation without protest and the protest is very much inherent. The right to file a petition for proper assessment of the market value of the land acquired is inherent in the right of ownership of a person to the property that is sought to be acquired by the State, which is the only protection granted to the owner of the land.

On a hyper-technical ground that express protest was not made, on the said basis State cannot deny the land owner, the right to seek reference to the Civil Court for a reasonable compensation. Fair administration of the State demands that they bestow objective approach to such a situation and citizens are not deprived of their property just for hyper-technical reason.

8. Further, the provisions do not prescribe any particular mode of protest. It is also no where postulate that the protest must be in writing. Hence, the referral Court should bear in mind the purport and purpose in reference. As the award of the Collector is nothing but an offer on behalf of the Government, the amount of compensation payable to a person, who is deprived of his property in a Welfare State under the State's right of eminent domain, a person so deprived of his property is entitled to have fair and reasonable amount of compensation with reference to the true market value of the land as on the date of issuance of notification and the same should not be denied on mere technical plea.

9. In case of ***Ajit Singh and Others*** (supra), the apex Court held as follows:

> 5. Having regard to the contiguity of these lands the High Court is correct in its valuation. Besides, the date of notification, issued under Section 4 of the Act, is October 4, 1978 while Exh. R-6 is nearer to it, namely, August 16, 1978, in comparison to Exh. A-6 dated January 14, 1977. Inasmuch as the appellants have filed an application for reference under Section 18 of the Act that will manifest their intention. Therefore, the protest against the award of the Collector is implied notwithstanding the acceptance of compensation. The District Judge and the High Court, therefore, fell into patent error in denying the enhanced compensation to the appellants.

Similarly, in case of ***Chandra Bhan*** (Dead) (supra), referring to the judgment in ***Ajit Singh and Others*** (supra), it was held as follows:

> "The principal contention urged by the learned counsel for GDA was that since the compensation was accepted by the claimants without any protest, the reference was not maintainable. In our opinion, this contention is without any substance for several reasons. In Ajit Singh v. State of Punjab2 it was held that since the appellants therein had filed an application for reference under Section-18 of the Act, it manifested their intention. Consequently, the protest against the award of the Collector was implied notwithstanding the acceptance of compensation."

A coordinate Bench in case of ***Bulani Swain*** (supra), referring to the judgment of the apex Court in ***Ajit Singh and Others*** (supra), held as follows:

> "5. The learned Counsel for the Petitioner submitted that the Petitioner filed an application for reference under Section 18 of the Act immediately after receiving the compensation amount and considering the said application the Land Acquisition Officer passed the order without giving her an opportunity of hearing. If any such opportunity would have been given to the petitioner, she would have explained that she has protested at the time of receiving compensation. The very fact that she had filed an application for reference immediately after receiving the compensation clearly shows her intention to protest was implied against the award of the Land Acquisition Officer notwithstanding acceptance of compensation. Law is well settled that at the time of deciding the question as to whether a reference can be made or not principle of natural justice should be followed. (See (1994) 4 SCC 67 , *Ajit Singh v. State of Punjab*).
>
> 6. The right to seek a reference under Section 18 of the Act is valuable right of the person whose land has been acquired and in the process of deciding an application seeking a reference to the Civil Court, the basic principles of natural justice are to be observed. As the petitioner has filed an application for reference under Section 18 of the Act that will manifest that intention. xxx …."

10. In addition to the settled position of law, the objection filed by the Land Acquisition Zonal Officer, as at Annexure-2, clearly demonstrates that the Appellant received the awarded compensation amount under protest. In view of the said admitted facts on record, so also the judgments of the apex Court as well as this Court as detailed above, the impugned judgment dated 24.08.2021, passed in LAR & R Case No.86 of 2020, is hereby set aside and the matter is remanded back to the Court below for re-adjudication of the said case in accordance with law giving opportunity to the parties.

11. As the referral case is of the year 2020, the referral Court is directed to conclude the proceeding in LAR & R Case No.86 of 2020 at the earliest, preferably within a period of six months from the date of communication of the certified copy of the Judgment.

12. Accordingly, the Appeal stands disposed of.

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**2023 (I) ILR - CUT - 298**

**G. SATAPATHY, J.**

CRLMC NO.1392 OF 2016

**BIJAYA MANJARI SATPATHY** .....Petitioner

.V.

**STATE OF ORISSA & ORS.** .....Opp. Parties

**NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 138, 141 – Complainant filed the complain case U/s.138 against the petitioner as General Secretary, M/s. Bijay Laxmi Trust and opposite party No.3 as President of Trust – Whether complain case is maintainable without arraigning the "Trust" as an accused in pursuance to the provision of section 141 of NI Act? – Held, not maintainable – The mandate of section 141 of NI Act having not pleaded and established remotely in this case together with admitted incurable and inherent defect of non-impletion of 'Trust' as an accused in the complaint makes it very clear that, the complaint is not maintainable in the eye of law**. (Para 10)

**Case Laws Relied on and Referred to** :-

1. AIR 2022 SC 225 : Dillip Hariramani Vs. Bank of Baroda.
2. AIR 2013 SC 3210: Aparna A. Saha Vs. Self Developers Pvt. Ltd and Ors.
3. (2010) 3 SCC 330 : National Small Industries Corporation Limited Vs. Harmeet Singh Paintal.

For Petitioner :Mr. M. Agarwal

For Opp. Parties : Mr. S.S. Pradhan, AGA [O.P. No.1],
Mr. A.P. Bose, [O.P. No.2],
None [O.P. No.3]

JUDGMENT Date of Hearing: 15.11.2022: Date of Judgment: 01.12.2022

***G. SATAPATHY, J.***

1. The petitioner in this CRLMC seeks the indulgence of the Court U/S.482 of Cr.P.C. to quash the complaint in 1.C.C. Case No.60 of 2014 of the Court of learned S.D.J.M., Angul in an application U/S.482 of Cr.P.C. for not arraigning the trust as an accused in terms of Section 141 of Negotiable Instruments Act, 1881 (for short the N.I. Act).

2. Facts in precise are opposite party No.2-Kanheilal Choudhury instituted the complaint in 1.C.C. Case No.60 of 2014 against the petitioner as General Secretary, M/s. Bijay Laxmi Trust and opposite party No.3- Dinabandhu Mishra in the Court of learned S.D.J.M., Angul for commission of offences U/S.138 of N.I. Act on account of dishonour of cheque bearing No.083955 dated 31.12.2013 issued by opposite party No.3 as President of M/s. Bijay Laxmi Trust for an amount of Rs.7,30,550/- (Rupees Seven Lakh Thirty Thousand and Five

Hundred Fifty) as the cheque on presentation returned back to opposite party No.2 as unpaid with endorsement from Bank of Baroda, Angul Branch on 18.02.2014 "account closed". Opposite party No.2 accordingly issued Demand notice to petitioner and opposite party No.3 within the prescribed period and when they did not respond, opposite party No.2 instituted the aforesaid complaint. On perusal of complaint and initial statement of complainant filed in the shape of affidavit together with documents annexed with the affidavit, learned S.D.J.M., Angul by the impugned order took cognizance of offence U/S.138 of N.I. Act and issued process in the form of summons to the petitioner and opposite party No.3. On receipt of summon, the petitioner approach this Court by way of this CRLMC petition U/S.482 of Cr.P.C.

3. In the course of hearing of the CRLMC, Mr. Mohit Agarwal, learned counsel for the petitioner has raised a preliminary objection at the threshold on the maintainability of the complaint for want of trust arraigned as an accused in pursuance to the provision of Section 141 of N.I. Act. In raising such objection, learned counsel for the petitioner has submitted that the cheque in question was neither issued by the petitioner in individual capacity nor in the capacity of a General Secretary of the Trust, but the cheque was issued by the opposite party No.3 as the President of Trust and thereby, primarily the criminal liability cannot be fastened on the petitioner. It is further submitted by him that Section 141 of N.I. Act mandates impletion of the trust as a party since the cheque in question was issued by a person for/on behalf of the trust and when the mandatory provision has not been complied, the complaint itself is not maintainable. Learned counsel for the petitioner by submitting inter alia above issue of maintainability of the complaint prays to quash it by relying upon the decisions in ***Dillip Hariramani v. Bank of Baroda; AIR 2022 SC 2258 and Aparna A. Saha v. Self Developers Pvt. Ltd and others; AIR 2013 SC 3210.***

4. In reply, Mr. Amit Prasad Bose, learned counsel for opposite party No.2 has submitted that although the trust has not been made as an accused in the complaint, but that per se would not absolve the petitioner from the liability arising out of cheque issued for the trust and she, accordingly, is vicariously liable as a General Secretary of the Trust with her husband-opposite party No.3 who had issued the cheque for the trust and the provisions of Section 141 of N.I. Act would not stand on the way of discharge of the liability of the petitioner and her husband arising out of the cheque which was dishonored and thereby, the complaint is squarely maintainable. It is, therefore, contended by the learned counsel for the opposite party No.2 that not only the complaint is maintainable but also the order passed by the learned S.D.J.M., Angul taking cognizance of

offence is valid and the present CRLMC being unmerited is liable to be dismissed. He accordingly has prayed to dismiss the CRLMC.

5. Aforesaid rival submissions make it very clear that the singular question required to be decided here is the maintainability of the complaint in absence of trust as an accused person by taking into consideration the provision of Section 141 of N.I. Act which primarily lays down the criminal liability for commission of offence U/S.138 of N.I. Act by Companies and the same is extracted under:

> **"141. Offences by companies.-**
>
> *(1) If the person committing an offence under section 138 is a company, every person who, at the time of offence was committed, was incharge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:*
>
> *Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence:*
>
> *[Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.]*
>
> *(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.*
>
> *Explanation.- For the purpose of this section,-*
>
> *(a) "company" means, any body corporate and includes a firm or other association of individuals; and*
>
> *(b) "director", in relation to a firm, means a partner in the firm."*

5.1. A comparative reference of Section 138 and Section 141 of N.I. Act makes it apparently clear that Section 138 of N.I. Act prescribes criminal liability on a individual person who issues a cheque towards discharge of a debt or liability in whole or in part when such cheque is dishonoured by the bank on presentation, whereas Section 141 of N.I. Act refers about criminal liability for commission of offence of Section 138 of N.I. Act by the companies in case the cheque was issued for the company and such criminal liability extends to every person who

at the time the offence was committed, was in-charge of, and was responsible to the company for the conduct of the business of the company, as well as the company who shall be liable to be proceeded against and if found guilty, be punished accordingly. The explanation appended to Section 141 of N.I. Act indicates that for the purpose of this Section; (a) "Company" means anybody corporate and includes a firm or other association of individuals; and (b) "Director" in relation to a firm, means a partner in the firm.

5.2. For better appreciation to analyze the contentions raised by the parties, the description of accused as appended in Column No.2 of the complaint is exactly reproduced as under:

| | |
|---|---|
| *Name, Address of the accused persons* | *1. Bijaya Manjari Satpathy, aged about 32 years, General Secretary, M/s. Bijaya Laxmi Trust, W/O. Dinabandhu Mishra.*<br>*2. Mr. Dinabandhu Mishra, aged about 37 years, S/O. Late Bansidhar Mishra, both are of Qtr. No. T.A/123, Nalco Nahar, P.O/P.S. Nalco Nagar, Dist. Angul-759145.* |

5.3. For clarity of understanding, the paragraphs-(i) and (ii) as stated in Column-7 of the complaint are also exactly extracted as under:

> *"(i) That, the accused persons are namely Bijaya Manjari Satpathy, General Secretary, M/s. Bijaya Laxmi Trust, W/O. Dinabandhu Mishra and Mr. Dinabandhu Mishra, President of M/s. Bijaya Laxmi Trust, S/O. Late Bansidhar Mishra, both are residing at Qtr. No. T.A/123, Nalco Nahar, P.O/P.S. Nalco Nagar, Dist. Angul.*
>
> *(ii) That, in order to clear up the outstanding dues of the vacant premises of the complainant at Panchmahala, a post dated cheque bearing No.083955, Dt.31.12.2013 amounting of Rs.7,30,550/- (Rupees Seven Lakh Thirty Thousand and Five Hundred Fifty) only was issued by the accused persons to the complainant along with an affidavit made by the accused persons on Dt.30.09.2013."*

6. A bare perusal of the averments made in the complaint would unambiguously disclose that there are no averments in the complaint who, at the time when offence was committed, was incharge of, and was responsible to the trust for the conduct of its business. Besides, the petitioner is admittedly neither the signatory of the cheque nor is there any averment made by the complainant in the complaint that the petitioner was in-charge of and was responsible to the trust for the conduct of its business. Undeniably the trust has not been made or implicated as an accused in the complaint.

7. There appears no hesitation in the mind of the Court that the complaint suffers from the above infirmity as noted, but whether such infirmity would go to

the root of the maintainability of the complaint so as to make it incurable may also be required to be answered in this case inasmuch as the petitioner prays for quashing of the complaint, whereas the opposite party No.2 has alternatively prayed not to quash the complaint against opposite party No.3. In order to answer the same, this Court falls back to the law laid down in ***Pawan Kumar Goel v. State of Uttar Pradesh and another; 2022 SCC Online SC 1598***, wherein at paragraph-25, the apex Court has observed thus:

> *"This Court has been firm with the stand that if the complainant fails to make specific averments against the company in the complaint for the commission of an offence under Section 138 of NI Act, the same cannot be rectified by taking recourse to general principles of criminal jurisprudence. Needless to say, the provisions of Section 141 impose vicarious liability by deeming fiction which pre-supposes and requires the commission of the offence by the company or firm. Therefore, unless the company or firm has committed the offence as a principal accused, the persons mentioned in sub-Section (1) and (2) would not be liable to be convicted on the basis of the principles of vicarious liability."*

8. In ***Dillip Hariramani***(supra) as relied on by the petitioner the Apex Court in paragraph-16 of the decision has observed thus:-

> *"Such vicarious liability arises only when the company or firm commits the offence as the primary offender."*

In laying down the aforesaid principle in the above case, the Apex Court has referred the principle summarized on Section 141 of N.I. Act lays down earlier by it in ***National Small Industries Corporation Limited Vrs. Harmeet Singh Paintal; (2010) 3 SCC 330*** wherein the Apex Court at paragraph-39 has laid down the principle as follows:-

> *"(i) The primary responsibility is on the complainant to make specific averments as are required under the law in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every Director knows about the transaction.*
>
> *(ii) Section 141 does not make all the Directors liable for the offence. The criminal liability can be fastened only on those who, at the time of the commission of offence, were in charge of and were responsible for the conduct of the business of the company.*
>
> *(iii) Vicarious liability can be inferred against a company registered or incorporated under the Companies Act, 1956 only if the requisite statements, which are required to be averred in the complaint/petition, are made so as to make the accused therein vicariously liable for the offence committed by the company along with averments in the petition containing that the accused were in charge of and responsible for the business of the company and by virtue of their position they are liable to be proceeded with.*
>
> *(iv)Vicarious liability on the part of a person must be pleaded and proved and not inferred.*

*xxx xxx xxx*

*(vii) The person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a Director in such cases."*

9. In ***Aparna*(*supra)*** the Apex Court in paragraph-28 has held that:-

*"Under Section 138 of N.I. Act, in case of issuance of cheque from joint accounts, a joint account holder cannot be prosecuted unless the cheque has been signed by each and every person who is a joint account holder. The said principle is an exception of Section 141 of N.I. Act."*

10. In the ultimate appraisal of totality of facts and law involved in this case, there appears hardly any dispute about petitioner not to be a signatory of the cheque and her implication in this case as General Secretary of the Trust is without arraigning the "Trust" as an accused in the complaint, but Section 141 of NI Act makes it obligatory for the complainant-OP No.2 in this case to arraign the Trust as an accused to make the person in charge of and responsible to such Trust for the conduct of its business as vicariously liable for dishonor of cheque issued for the Trust, which was not done in this case, nonetheless there is no averment in the complaint as to who, at the time of the commission of offence, was in charge of and was responsible to the Trust and further, such inherent defect remains incurable in view of the law laid down in ***Pawan***(supra) which lacuna under law gets further widened when the complainant fails to discharge his primary responsibility to make specific averment as required under Section 141 of NI Act so as to make either the petitioner as the Secretary or OP No. 3 as the President of Trust vicariously liable for dishonor of cheque. Hence, the mandate of Section 141 of NI Act having not pleaded and established remotely in this case together with admittedly the incurable and inherent defect of non-impletion of the Trust as an accused in the complaint makes it very clear that the complaint is not maintainable in the eye of law and therefore, the further proceeding in the complaint is nothing but an abuse of process of Court and to secure the ends of justice, the complaint as a whole being unsustainable in the eye of law needs to be quashed and accordingly, the complaint in 1.C.C. Case No.60 of 2014 of the Court of learned S.D.J.M., Angul is hereby quashed.

11. Resultantly, the CRLMC is accordingly allowed to the extent indicated above on contest, but in the circumstance, there is no order as to costs.

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**2023 (I) ILR - CUT -304**

**G. SATAPATHY, J.**

CRLMC NO. 2476 OF 2015

**SOMYA RANJAN PARIDA** .....Petitioner

.V.

**STATE OF ORISSA & ANR.** .....Opp. Parties

**CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – The Petitioner has challenged the order passed in protest petition taking cognizance of offence U/s. 302/34 of IPC & issuance of process against the Petitioner and others – Whether the cognizance taken merely on the basis of suspicion is liable to be quashed? – Held, Yes.** (Para 10-11)

**Case Laws Relied on and Referred to** :-

1. AIR 2007 SC 1117 :Harischandra Prasad Mani & Ors. Vs. State of Jharkhand & Anr.
2. (2012) 5 SCC 424 :Bhusan Kumar & Anr. Vs. State (NCT of Delhi) & Anr.

For Petitioner : Mr. A.R.Das
For Opp. Parties : Mr. P.K. Pattnaik, AGA,
Mr. D. Nayak, Sr. Adv. [O.P. No. 2]

JUDGMENT Date of Hearing: 27.10.2022: Date of Judgment:22.12.2022

***G. SATAPATHY, J.***

The Petitioner has challenged the order passed on 25.04.2014 by learned S.D.J.M., Bhadrak in protest petition in 1CC Case No.404 of 2013 taking cognizance of offence U/Ss. 302/34 of IPC as well as the issuance of process against the Petitioner and others and consequently, the complaint in an application U/S. 482 Cr.P.C.

2. The factual matrix in nutshell is that on 11.05.2011, one Bibhu Prasad Dash was found drowned in river Salandi at Bagurai Ghat near Januganj railway bridge and accordingly, Bhadrak Rural P.S U.D. Case No. 26 of 2011 was registered which was inquired into, but being dissatisfied, the father of deceased namely Satya Narayan Das presented a report addressing IIC Bhadrak Police Station on 15.11.11 which was registered as FIR vide Bhadrak Rural P.S. Case No. 487 of 2011 corresponding to G.R. Case No. 1848 of 2011 of the Court of S.D.J.M., Bhadrak in obedience to the order passed by this Court in W.P.(Crl) No. 1142 of 2011. In such FIR, the father of the deceased has alleged that he came to know that his son had not died out of drowning, but he suspects the five friends of deceased including the Petitioner Somya Ranjan Parida had conjointly

killed his son in a pre-planned manner. It is also stated in the FIR that the Petitioner is senior to the deceased and his friends had forcibly taken money from the deceased during his life time out of his mess expenses and they were also forcing him to roam outside. It is also alleged that during 28.04.2011 to 30.04.2011, one call had been received by the younger brother in the mobile phone of the deceased and in such call, co-accused Banti had threatened by taking the nick name of deceased as Raja to not to come to Bhadrak,otherwise he would not return. However, the younger brother of the deceased did not take it seriously. On the above facts, the father of the deceased suspects that his son had been killed by the Petitioner and his four friends in a pre-planned way.

3. On receipt of the FIR, the matter was investigated into, but the I.O. submitted a final report as "mistake of fact" in G.R. Case No. 1848 of 2011, whereafter the learned Court issued notice to the informant and pursuant to such notice, the informant Satya Narayan Das filed a protest petition in 1CC Case No. 404 of 2013 in which the learned S.D.J.M., Bhadrak recorded the initial statement of the complainant and conducted inquiry U/S. 202 of Cr.P.C. by recording statement of witnesses. After going through the complaint, initial statement of the complainant and statement of other witnesses examined for the complainant in inquiry U/S. 202 of Cr.P.C. and on finding prima facie and sufficient materials, learned S.D.J.M., Bhadrak took cognizance of offence 302/34 of IPC and issued processes against the Petitioner and others. Hence, this CRLMC.

4. In assailing the impugned order, learned counsel for the Petitioner has submitted that pursuant to an order passed in W.P. (Crl.) No. 1142 of 2011 filed by OP No.2, Bhadrak Rural P.S. case No. 487 of 2011 was registered against the Petitioner and others for offence U/Ss. 302/34 of IPC, but such allegation was not found to be established in the course of investigation resulting in submission of final report as "mistake of fact" by the Investigating Police Officer and OP No. 2 being dissatisfied with such report of police has filed a protest petition in shape of complaint against the Petitioner and others in 1.C.C. Case No. 404 of 2013 in which the learned S.D.J.M., Bhadrak by the impugned order has issued process against the Petitioner. Learned counsel for the Petitioner by drawing attention of the Court to the Post Mortem Report of the deceased has submitted that the cause of death of the deceased was opined by the Doctor to be on account of drowning and at the inception, the cause of death being not homicidal, no ingredient offence U/S. 302 of IPC is thereby, disclosed in the complaint and all the allegations made against the Petitioner and others are on the basis of the suspicion as the assertions made by the OP No. 2 in Paragraph 1 to 4 and 6 of the column No. 8 of the complaint under the heading "facts" discloses allegation against the Petitioner merely on surmises.

It is also submitted that the complainant in his initial statement has merely suspected the involvement of the Petitioner which was also reiterated by her husband in the inquiry U/S. 202 of Cr.P.C., but suspicion howsoever strong cannot take the place of proof and in this case, the learned S.D.J.M., Bhadrak without applying his mind has mechanically taken cognizance of the offence U/Ss. 302/34 of IPC which is never made out against the Petitioner and none of the ingredients of offence U/S. 302 of IPC is disclosed either in the complaint or in the statement of the complainant or witnesses and thereby, the impugned order having passed without any basis may be required to be quashed. In summing up his argument and relying upon the decision in the case of ***Harischandra Prasad Mani and others Vrs. State of Jharkhand and another; AIR 2007 SC 1117***, learned counsel for the Petitioner has submitted that when the order taking cognizance is merely on the basis of suspicion, such order together with the complaint is liable to be quashed. Accordingly, learned counsel for the Petitioner has prayed to quash the impugned order and the criminal proceeding against the Petitioner.

5. In reply Mr. D.Nayak, learned Senior counsel by taking through the averments of the complaint and initial statement of the complainant has submitted that the learned S.D.J.M., Bhadrak has never committed any illegality in taking cognizance of offence in view of the fact that the place where the deceased was stated to have died due to drowning had depth of two to three feet in the river in which a normal person knowing swimming cannot die due to drowning, unless he is forcibly drowned. It is also submitted that the informant after lodging the FIR had many times requested the I.O. for proper investigation and measurement of the depth of water at the spot, but the I.O. had avoided such plea of the Informant in the investigation of the case for reason best known to him and the statement of witnesses were distortedly recorded by the I.O. and the motive of the crime, which was on account of relationship between the deceased and the sister of accused Bramhaswarup Mohapatra, was never investigated into which compelled the informant to file a protest petition in the shape of complaint and the learned S.D.J.M., Bhadrak after taking into consideration the materials in the complaint together with initial statement of the complainant and statement of witness in an inquiry U/S. 202 Cr.P.C. has taken cognizance of offence and, therefore, the same having considered in proper prospective, the impugned order does not need any interference in this CRLMC. In relying upon the decision in the case of ***Bhusan Kumar and another Vrs. State (NCT of Delhi) and another;(2012) 5 SCC 424***, learned counsel for the Petitioner has submitted that at the stage of summoning of the accused, Magistrate is not required to explicitly state the reason for issuance of summon and when the Magistrate is of the opinion that there exists sufficient grounds for summons to be issued, he can

issue summons to the accused and in this case, the Magistrate having judicially applied his mind has issued process against the Petitioner which cannot be faulted with and thereby, the impugned order having passed on sound judicial discretion of law needs no interference and accordingly, the CRLMC being unmerited may kindly be dismissed.

6. Reverting back to the facts on record, admittedly there appears death of one Bibhu Prasad Dash on 11.05.2011 and pursuant to such death, Bhadrak Rural P.S. U.D. Case No. 26 of 2011 was registered and the matter was enquired into, but subsequently, on 15.11.2011 an F.I.R. being presented by one Satya Narayan Dash (Father of the deceased), Bhadrak Rural P.S. Case No. 487 was registered against the Petitioner and others on 28.11.2011, pursuant to the direction passed in W.P. (Crl.) No. 1142 of 2011 and the allegation made by the informant was investigated into, but upon investigation, the police found the case to be a "mistake of fact" and accordingly, submitted final report and thereafter, the said Satya Narayan Dash instituted a complaint in the shape of protest petition in which the cognizance was taken by the impugned order which is under challenge by the Petitioner in this CRLMC. The word cognizance has not been defined in the Cr.P.C. although the expression "cognizance" and "issue of process" are found place in Sections 190 and 204 of Cr.P.C. According to Section 190 Cr.P.C., cognizance of any offence may be taken upon receiving a complaint of facts which constitute such offence or upon a police report of such facts or upon information received from any person other than a police officer, or upon the knowledge of the Court taking cognizance, that such offence has been committed. It is, thus, clear that cognizance of offence can be taken only on commission of offence and, therefore, in essence the complaint or information must disclose commission of offence, otherwise cognizance cannot be taken. At the stage of taking cognizance, the Magistrate has to be satisfied on analysis of complaint of the facts/police reports of such facts/information received from any person other than a police officer, or upon his own knowledge, that there exists sufficient ground disclosing commission of offence for proceeding in the matter and at that stage, it is not the duty of the Magistrate to apply his mind to the evidence collected to be adequate for supporting the charge which can be determined only at the trial, but not at the stage of enquiry preceding taking cognizance, and if the Magistrate considers that there are sufficient grounds for proceeding against the accused persons, the Magistrate may issue processes against such accused persons as contemplated U/S. 204 of Cr.P.C. In this case, the learned S.D.J.M.,Bhadrak by the impugned order has taken cognizance of offence and issued process against the Petitioner and it is ,therefore, required to be scrutinized whether the complaint and materials collected/submitted disclose the necessary ingredients of offence U/Ss. 302/34 of IPC which will enable the

Magistrate to take cognizance of offence. On proceeding to examine to find out the impugned order to have successfully passed the legal scrutiny on the aforesaid principles, it appears that the informant has presented the FIR on 15.11.2011 before the IIC, Bhadrak which was registered on 28.11.2011 pursuant to the direction of this Court in W.P. (Crl.) No. 1142 of 2011 for the death of his son on 11.05.2011, but the date of death was not mentioned in the FIR. A careful perusal and scrutiny of the aforesaid FIR would go to disclose that the informant has lodged the FIR on suspicion as he has stated in the FIR that the death of his son is not an unnatural death, but he suspects it to be pre-planned murder and he suspects the Petitioner and four others to have killed his son. One of the ingredients of murder is homicidal death of the deceased, but the Doctor who had conducted autopsy over the deceased has opined the cause of death was due to Asphyxia for drowning. The Post Mortem Report also discloses that the Doctor had conducted autopsy within six hours of death of the deceased. The Doctor in such Post Mortem Report has not mentioned any external injury to have found on the person of the deceased. It is stated in the Inquest Report of the deceased by the witness Radheshyam Dash (Brother of the Informant) about suspicious death, but the involvement of the Petitioner and others have never been stated in such Inquest Report.

7. Feeling aggrieved with the investigation of the case and submission of final report as a "mistake of fact", the Informant has instituted the complaint, but in such complaint, nowhere the complainant has specifically attributed any allegation for the role of the Petitioner or anybody in the commission of murder of his son, no matter he suspects the Petitioner and others for the death of his son in the complaint, but law is well very clear that suspicion howsoever strong cannot take the place of proof. This Court, however, is conscious of the fact that what would be the mental condition of the father on the unnatural death of his young son and thereby, this Court has every sympathy for the complainant-father, but it cannot deviate the Court from the path of rectitude in rendering justice to the person who is entitled for it by taking a contrary view to the law merely on the ground of sympathy or emotion. It be noted, the learned Senior Counsel appearing for O.P. No. 2 has strenuously argued and tried to convince this Court that the learned S.D.J.M., Bhadrak has not committed any illegality in taking cognizance of offence, but the Court is duty bound to examine the allegations/materials as produced before it in the final form/complaint and to carefully consider the evidence to find out whether the necessary ingredients of any offence are disclosed and to satisfy itself, whether the same make out any case against the accused to proceed further in the case by way of taking cognizance of offence and issuing process against the accused persons.

8. On coming back to scrutinize the initial statement of the complainant, it appears that the complainant in his initial statement has stated that on being asked by his wife, all the accused persons (Including the Petitioner) narrated different stories regarding death of his son and hence, suspecting the accused persons, he lodged the FIR against them. In his initial statement, the complainant has definitely complained of defect/fault in the investigation, but that perse would not attract any criminal liability against the Petitioner.

9. Similarly, it appears from the statement of the wife of the complainant in the inquiry U/S. 202 Cr.P.C. that when she asked them (accused persons) about the cause of death of her son, they reacted in a suspicious manner and accused Satyajit told her that her son died by drowning in the water while they were taking bath in the river Salandi and she found the depth of the water to be only two to three feet at the spot and suspecting the accused persons, she lodged the FIR. Besides, one Nidhi Sethy has also been examined on behalf of the complainant in the inquiry U/S. 202 Cr.P.C. and it appears from his statement in such enquiry that he along with son of the complainant visited the spot where Raja (Deceased) died by drowning, but there, he found only knee level water, where a man cannot die by drowning. A careful scrutiny of the statement of complainant and witnesses in the inquiry U/S. 202 Cr.P.C., it goes without saying that they suspect the involvement of the accused persons in this case for murder of the deceased, but it is again reiterated that suspicion howsoever strong cannot take the place of proof.

10. Admittedly, the complainant appears to have not brought any direct evidence/material against the Petitioner and others for commission of murder of the deceased and the complainant suspects the accused persons mainly on the basis of conduct of accused persons giving prevaricating stories and one of the accused Brahmaswarup giving threatening for love relationship of the deceased with his sister and lastly, noticing some blood stain on the mouth and nose of the deceased as well as finding of sand inside the mouth of the deceased but the Post Mortem report does not disclose about finding any injury, either external or internal, on the person of the deceased nor it discloses finding of any blood stain on the mouth and nose of the deceased as well as the inquest report also reveals neither any injury nor any blood stain on the person of the deceased. Naturally, when the dead body of the deceased was recovered from the river, there may not be any possibility of finding any blood stain on the person of the deceased, especially when no injury was noticed by the Doctor conducting Post Mortem over the dead body as per his report. The circumstances as stated above by the complainant and his witnesses would only go to show some suspicion, which cannot be the foundation for taking cognizance of offence U/S. 302 of IPC, more

particularly when one of the essential ingredients of offence U/S. 302 of IPC which is homicidal death of the deceased, has not been disclosed/established in any of the material produced by the complainant. There cannot be any dispute about the fact that at least there must be some material on the basis of which cognizance may be taken and summon can be issued, but cognizance cannot be taken merely on suspicion. It is no doubt advanced on behalf of the O.P. No. 2 by relying upon the decision in ***Bhusan Kumar*** (Supra) that once the Magistrate has exercised his discretion, it is not for the High Court, or even the Apex Court, to substitute its own discretion for that of the Magistrate or to examine the case on merits with a view to find out whether or not the allegation in the complaint, if proved, would ultimately end in conviction of the accused, but there is no such exercise by this Court to find out the guilt of the accused persons in this case, however, it has been held more than once by the Apex Court in catena of decisions that the High Court would be justified in quashing the complaint/criminal proceeding where on a bare perusal of uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused. Besides, the decision relied upon by the Petitioner in ***Harish Chandra*** (Supra), the Apex Court has held that order taking cognizance merely on the basis of suspicion is liable to be quashed.

11. A cumulative assessment of complaint together with the initial statement of the complainant and the statement of the witnesses recorded in the inquiry U/S. 202 Cr.P.C. by the learned S.D.J.M., Bhadrak, this court is of the considered view that the complainant has raised only mere suspicion, but such suspicion raised by the complainant after a long lapse of time of around six months as has been done in this case together with the complaint and other materials so produced by the complainant only disclose some feeble suspicion of involvement of the Petitioner in the case and when such suspicion is considered on the face of the opinion of Doctor as to the cause of death of the deceased to be on account of drowning and in absence of any allegation by the complainant either in his initial statement or in the complaint that the death of the deceased was on account of forcible drowning and taking into consideration a bare perusal of the complaint and the statement of the complainant and witnesses do not prima facie disclose the necessary ingredients of murder, this Court is of the considered view that the criminal proceeding against the Petitioner is nothing but an abuse of process of Court and a meticulous examination of the aforesaid materials, it is considered that the ultimate chances of conviction of the petitioner in this case are bleak and no useful purpose would likely to be served by allowing the criminal prosecution to continue against the Petitioner. Hence, the impugned order is considered to have been passed without proper application

of judicial mind and, therefore, the order summoning the accused is liable to be quashed and accordingly, the impugned order taking cognizance of offence together with issuance of process against the Petitioner is hereby quashed.

Resultantly, this CRLMC is allowed to the extent indicated above on contest, but in the circumstance without any order of costs. As a necessary corollary, the criminal complaint and the criminal proceeding as a whole being unsustainable in the eye of law is hereby quashed.

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**2023 (I) ILR - CUT - 311**

**CHITTARANJAN DASH, J.**

CRLMC NO.6452 OF 2014

**ANAND CHANDRA PATRA** .....Petitioner

.V.

**STATE OF ORISSA** .....Opp. Party

**CODE OF CRIMINAL PROCEDURE, 1973 – Sections 482, 197 – On the basis of complaint cognizance taken against the petitioner for the offence U/s. 294/506 of IPC read with offences U/s. 3(1)(i)(x) of the SC & ST (PA) Act – The plea of petitioner is that provision enumerated U/s.197 Cr.P.C. was not followed – Whether a public servant should insist upon for a sanction under section 197 Cr.P.C when his overt act shown dehors the official duty? – Held, Yes – Sanction under section 197 Cr.P.C was necessary.** (Para 9.10 &14)

**Case Laws Relied on and Referred to** :-

1. (2012) 12 SCC 72 :Om Prakash & Ors. Vs. State of Jharkhand to the Secretary, Department of Home, Ranchi.
2. (2006) 4 SCC 584 : Sankarsan Maitra Vs. Sadhana Das & Ors.
3. Criminal Appeal No.458 of 2020: D. Debaraja Vs. Owais Sabber Hussain.
4. 133(2022) CLT 742: Rabinarayan Nanda Vs. State of Orissa and Anr.

For Petitioner : Mr. Jagabandhu Sahoo

For Opp. Party: Mrs. S. Patnaik, AGA

JUDGMENT Date of Judgment: 23.12.2022

***CHITTARANJAN DASH, J.***

1. Heard learned counsel for the parties.

2. By means of this application, the Petitioner (the Inspector In Charge) seeks to quash the order dated 10th November, 2014 passed by the S.D.J.M., Baliguda in I.C.C. No.23 of 2014.

3. The background facts of the case are that the complainant in 1 C.C No. 23 of 2014 visited K. Nuagaon Police Station on 14th August, 2014 at the noon hour for the purpose of lodging a report regarding missing of his buffaloes. It is alleged that the Petitioner being the Inspector In Charge of the Police Station was present. When the complainant tendered the report, the Inspector In Charge, without accepting or even going through the contents of the FIR scolded the Complainant (Opposite Party No.2), in obscene words and filthy languages in a public place causing annoyance to him, he being a respected person of the society. The utterance of filthy language and scolding by the Inspector in Charge attributing to his caste and none acceptance of the report compelled him to bring it to the notice of the higher authority. As the action of the complainant did not yield any result, he filed the complaint. The learned court below upon initial examination of the complainant and witnesses and the enquiry conducted U/s. 202 Cr.P.C. satisfied as to the existence of material to proceed against the Petitioner and took cognizance in the offence U/s. 294/506 IPC read with offences U/s. 3(1)(i) (x) of the SC & ST (PA) Act and issued process against the Petitioner. Being aggrieved by the said order passed by the learned court below in taking cognizance, the Petitioner moved in the present as mentioned above.

4. It is submitted by Mr. Jagabandhu Sahoo, learned counsel for the Petitioner, inter alia, that the learned court below erred in law by taking cognizance not being conscious of the position of law as regards the sanction of prosecution enumerated U/s.197 Cr.P.C. which the court ought to have gone into before taking cognizance against a public servant inasmuch as the very complaint candidly reveals that the Petitioner being the Inspector in Charge of the Police Station was present in the Police Station and was discharging his official duty allegedly to have committed the overt act.

5. It is further submitted by the learned counsel for the Petitioner that the issuance of process against the present Petitioner without a sanction under Section 197 Cr.P.C. is illegal and cannot sustain in the eye of law. He relied upon the decision of the Apex Court in the case of ***Om Prakash and others v. State of Jharkhand to the Secretary, Department of Home, Ranchi*** reported in (2012) 12 SCC 72, in the case of ***Sankarsan Maitra v. Sadhana Das and others***, reported in (2006) 4 SCC 584 and in the case of ***D. Debaraja v. Owais Sabber Hussain in Criminal Appeal No.458 of 2020***.

6. Despite service of notice, the Informant, Opposite Party No.2 though represented by his counsel found not present on call.

7. Learned ASC, on the other hand, contended that the act alleged and the overt act shown dehors the official duty of a public servant could not have been insisted upon for a sanction under Section 197 Cr.P.C. and has rightly been proceeded and the order impugned in taking cognizance is, therefore, just and legal.

8. Perusal of the averments made in the complaint emerges that at the time of visit of the complainant, the Petitioner was very much present in the Police Station on duty and the incident took place in the premises of the Police Station. The alleged act of the Petitioner admittedly is one while he was discharging his duty which is not in dispute. The sole question remained scrutiny is on the face of the act complained required for the court below to insist the requirement of sanction for prosecution U/s. 197 Cr.P.C before issuance of process.

9. The Allahabad High Court in ***Umesh Chandra vs State Of U.P. And Another on 14 January, 2020*** while dealing with matter similar to the one before this court held as under:

> "197. Prosecution of Judges and public servants.-(1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction-
>
> (a)in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government;
>
> (b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government:
>
> Provided that where the alleged offence was committed by a person referred to in clause (b) during the period while a Proclamation issued under clause (1) of Article 356 of the Constitution was in force in a State, clause (b) will apply as if for the expression" State Government" occurring therein, the expression" Central Government" were substituted.
>
> (2) No Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government.
>
> (3) The State Government may, by notification, direct that the provisions of sub- section (2) shall apply to such class or category of the members of the Forces charged with the maintenance of public order as may be specified therein, wherever they may be serving, and thereupon the provisions of that sub-section will apply as if for the expression

"Central Government" occurring therein, the expression "State Government" were substituted.

(3A) Notwithstanding anything contained in sub- section (3), no court shall take cognizance of any offence, alleged to have been committed by any member of the Forces charged with the maintenance of public order in a State while acting or purporting to act in the discharge of his official duty during the period while a Proclamation issued under clause (1) of Article 356 of the Constitution was in force therein, except with the previous sanction of the Central Government.

(3B) Notwithstanding anything to the contrary contained in this Code or any other law, it is hereby declared that any sanction accorded by the State Government or any cognizance taken by a court upon such sanction, during the period commencing on the 20th day of August, 1991 and ending with the date immediately preceding the date on which the Code of Criminal Procedure (Amendment) Act, 1991, receives the assent of the President, with respect to an offence alleged to have been committed during the period while a Proclamation issued under clause (1) of Article 356 of the Constitution was in force in the State, shall be invalid and it shall be competent for the Central Government in such matter to accord sanction and for the court to take cognizance thereon.

(4) The Central Government or the State Government, as the case may be, may determine the person by whom, the manner in which, and the offence or offences for which, the prosecution of such Judge, Magistrate or public servant is to be conducted, and may specify the Court before which the trial is to be held."

11. Section 197 Cr.P.C. has referred to two terms. One is the "public servant" and another "offence".

12. The term "offence" has been defined in Section 2(n) of Cr.P.C. and Section 40 IPC and both may be reproduced as under:

"(n) "Offence" means any act or omission made punishable by any law for the time being in force and includes any act in respect of which a complaint may be made under Section 20 of the Cattle-trespass Act, 1891 (1 of 1871)."

"40. "Offence"-Except in the Chapters and Sections mentioned in clauses 2 and 3 of this Section, the word "offence" denotes a thing made punishable by this Code.

In Chapter IV, Chapter V-A and in the following sections, namely, Sections 64, 65, 66, 67, 71, 109, 110, 112, 114, 115, 116, 117, 187, 194, 195, 203, 211, 213, 214, 221, 222, 223, 224, 225, 327, 328, 329, 330, 331, 347, 348, 388, 389 and 445, the word "offence" denotes a thing punishable under this Code, or under any special or local law as hereinafter defined.

And in Sections 141, 176, 177, 201, 202, 212, 216 and 441, the word "offence" has the same meaning when the thing punishable under the special or local law is punishable under such law with imprisonment for a term of six months or upwards, whether with or without fine."

13. Term "public servant" has not been defined in Cr.P.C. but is defined in Section 21 IPC. I may refer the definition of "public servant" at a later stage if it is necessary.

14. Section 197 Cr.P.C. was also available in Code of Criminal Procedure, 1898. It came up for consideration before Bombay High Court in Hanumant Shrinivas Kulkarni Versus Emperor, (31) 1930 Crl.L.J. 353. Court observed that object of sanction is to guard against vexatious proceedings against public servants and to secure the well considered opinion of a superior authority before their prosecution.

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25. The object of the legislature for making provision pertaining to sanction seems to be clear. Where a public servant is prosecuted for an offence, which challenges his honesty and integrity, the issue in such a case is not only between the prosecutor and the offender but the State is also vitally concerned in it as it affects the morale of the public servants and also the administrative interests of the State. For these reasons, the discretion to prosecute appears to be taken away from the prosecuting agency and is vested in departmental authorities, i.e., the employer probably with the view that they may assess and weigh the accusation in a far more dispassionate and responsible manner. The ultimate justification is public interest. It, however, does not condone the commission of an offence by a public servant or to use it as shield to escape from legal proceedings on mere technicalities.

26. The observations of Supreme Court in State of Himachal Pradesh Vs. M.P. Gupta (supra); State of Orissa and others Vs. Ganesh Chandra Jew (supra); and, Rakesh Kumar Mishra Versus State of Bihar (supra) clearly shows that protection provided in Section 197 is for "responsible public servants" who are mainly involved in superior duties including policy decision so that such superior officials may not be harassed in taking policy decision etc. This protection is not available to every public servant. When State itself has made a distinction based on degree of responsibility, nature of duties, nature of functions etc., and that is why the public servants who are removal with sanction of Government and those who are not, are treated in a two different classes, it cannot be said that distinction is artificial and has no nexus to the object sought to be achieved. The very distinction in the category of two government servants, namely, those who are supposed to take responsible decisions and those who are not, shows that neither it is artificial nor irrational nor lack nexus to the object sought to be achieved.

10. In the observation of the Apex Court in ***D. Devaraja v. Owais Sabeer Hussain in Criminal Appeal No.458 of 2020;***

"8. The short question involved in this appeal is, whether the learned Magistrate could, at all, have taken cognizance against the appellant, in the private complaint being P.C.R No.17214 of 2013, in the absence of sanction under Section 197 of the Code of Criminal Procedure read with Section 170 of the Karnataka Police Act, 1963, as amended by the Karnataka Police (Amendment) Act, 2013, and if not, whether the High Court should have quashed the impugned order of the Magistrate concerned, instead of remitting the complaint to the Magistrate concerned and requiring the accused appellant to appear before him and file an application for discharge.

32. The object of sanction for prosecution, whether under Section 197 of the Code of Criminal Procedure, or under Section 170 of the Karnataka Police Act, is to protect a public servant/police officer discharging official duties and functions from harassment by initiation of frivolous retaliatory criminal proceedings. As held by a Constitution Bench of this Court in Matajog Dobey v. H.C. Bhari13 held:

"...Public servants have to be protected from harassment in the discharge of official duties while ordinary citizens not so engaged do not require this safeguard……. There is no question of any discrimination between one person and another in the matter of taking proceedings against a public servant for an act done or purporting to be done by the public servant in the discharge of his official duties. No one can take such proceedings without such sanction..."

33. In Pukhraj v. State of Rajasthan and another 14 this Court held:-

"2. ..While the law is well settled the difficulty really arises in applying the law to the facts of any particular case. The intention behind the section is to prevent public servants from being unnecessarily harassed. The section is not restricted only to cases of anything purported to be done in good faith, for a person who ostensibly acts in execution of his duty still purports so to act, although he may have a dishonest intention. Nor is it confined to cases where the act, which constitutes the offence, is the official duty of the official concerned. Such an interpretation would involve a contradiction in terms, because an offence can never be an official duty. The offence should have been committed when an act is done in the execution of duty or when an act purports to be done in execution of duty. The test appears to be not that 13 AIR 1956 SC 44 14 (1973) 2 SCC 701 the offence is capable of being committed only by a public servant and not by anyone else, but that it is committed by a public servant in an act done or purporting to be done in the execution of duty. The section cannot be confined to only such acts as are done by a public servant directly in pursuance of his public office, though in excess of the duty or under a mistaken belief as to the existence of such duty. Nor need the act constituting the offence be so inseparably connected with the official duty as to form part and parcel of the same transaction. What is necessary is that the offence must be in respect of an act done or purported to be done in the discharge of an official duty. It does not apply to acts done purely in a private capacity by a public servant. Expressions such as the 'capacity in which the act is performed', 'cloak of office' and 'professed exercise of the office' may not always be appropriate to describe or delimit the scope of section. An act merely because it was done negligently does not cease to be one done or purporting to be done in execution of a duty..."

36. In Ganesh Chandra Jew (supra) this Court held:

"7. The protection given under Section 197 is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they are acting or purporting to act as public servants. The policy of the legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause, and if sanction is granted, to confer on the Government, if they choose to exercise it, complete control of the prosecution. This protection has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant of the protection. The question is not as to the nature of the offence such as whether the alleged offence contained an element necessarily dependent upon the offender being a public servant, but whether it was committed by a public servant acting or purporting to act as such in the discharge of his official capacity. Before Section 197

can be invoked, it must be shown that the official concerned was accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties. It is not the duty which requires examination so much as the act, because the official act can be performed both in the discharge of the official duty as well as in dereliction of it. The act must fall within the scope and range of the official duties of the public servant concerned. It is the quality of the act which is important and the protection of this section is available if the act falls within the scope and range of his official duty." (emphasis supplied)

37. In State of Orissa v. Ganesh Chandra Jew (supra) this Court interpreted the use of the expression " official duty" to imply that the act or omission must have been done by the public servant in course of his service and that it should have been in discharge of his duty. Section 197 of the Code of Criminal Procedure does not extend its protective cover to every act or omission done by a public servant while in service. The scope of operation of the Section is restricted to only those acts or omissions which are done by a public servant in discharge of official duty.

39. The scope of Section 197 of the old Code of Criminal Procedure, was also considered In P. Arulswami v. State of Madras 20 where this Court held:

"...It is the quality of the act that is important and if it falls within the s cope and range of his official duties the protection contemplated by Section 197 of the Criminal Procedure Code will be attracted." If the act is totally unconnected with the official duty, there can be no protection. It is only when it is either within the scope of the official duty or in excess of it that the protection is claimable…." 20 AIR 1967 SC 776

40. In B. Saha and Others v. M.S. Kochar21 this Court held:

"18. In sum, the sine qua non for the applicability of this section is that the offence charged, be it one of commission or omission, must be one which has been committed by the public servant either in his official capacity or under colour of the office held by him."

41. In Virupaxappa Veerappa Kadampur v. State of Mysore (supra) cited by Mr. Poovayya, a three Judge Bench of this Court had, in the context of Section 161 of the Bombay Police Act, 1951, which is similar to Section 170 of the Karnataka Police Act, interpreted the phrase "under colour of duty" to mean "acts done under the cloak of duty, even though not by virtue of the duty".

45. In Om Prakash and others v. State of Jharkhand and another (supra) this Court, after referring to various decisions, pertaining to the police excess, explained the scope of protection under Section 197 of the Code of Criminal Procedure as follows:

"32. The true test as to whether a public servant was acting or purporting to act in discharge of his duties would be whether the act complained of was directly connected with his official duties or it was done in the discharge of his official duties or it was so integrally connected with or attached to his office as to be inseparable from it (K. Satwant Singh [AIR 1960 SC 266]). The protection given under Section 197 of the Code has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant of the

protection (Ganesh Chandra Jew [(2004) 8 SCC 40]). If the above tests are applied to the facts of the present case, the police must get protection given under Section 197 of the Code because the acts complained of are so integrally connected with or attached to their office as to be inseparable from it. It is not possible for us to come to a conclusion that the protection granted under Section 197 (1) of the Code is used by the police personnel in this case as a cloak for killing the deceased in cold blood."(emphasis supplied)

46. In Sankaran Moitra v. Sadhna Das and another 22 the majority referred to H.H.B. Gill v. R23 H.H.B. Gill v. Emperor 24; Shreekantiah Ramyya Munippali v. State of Bombay 25; Amrik Singh v. State of Pepsu26; Matajog Dobey v. H.C. Bhari27; Pukhraj v. State of Rajasthan 28; B. Saha and others v. M.S. Kochar29; Bakhshish Singh Brar v. Gurmej Kaur 30; Rizwan Ahmed Javed Shaikh and others v. Jammal Patel and others 31; and held :

"25. The High Court has stated that killing of a person by use of excessive force could never be performance of duty. It may be correct so far as it goes. But the question is whether that act was done in the performance of duty or in purported performance of duty. If it was done in performance of duty or purported performance of duty, Section 197 (1) of the Code cannot be bypassed by reasoning that killing a man could never be done in an official capacity and consequently Section 197 (1) of the Code could not be attracted. Such a reasoning would be against the ratio of the decisions of this Court referred to earlier. The other reason given by the High Court that if the High Court were to interfere on the ground of want of sanction, people will lose faith in the judicial process, cannot also be a ground to dispense with a statutory requirement or protection.Public trust in the institution can be maintained by entertaining causes coming within its jurisdiction, by performing the duties entrusted to it diligently, in accordance with law and the established procedure and without delay. Dispensing with of jurisdictional or statutory requirements which may ultimately affect the adjudication itself, will itself result in people losing faith in the system. So, the reason in (2001) 5 SCC 7 that behalf given by the High Court cannot be sufficient to enable it to get over the jurisdictional requirement of a sanction under Section 197 (1) of the Code of Criminal Procedure. We are therefore satisfied that the High Court was in error in holding that sanction under Section 197 (1) was not needed in this case. We hold that such sanction was necessary and for want of sanction the prosecution must be quashed at this stage. It is not for us now to answer the submission of learned counsel for the complainant that this is an eminently fit case for grant of such sanction."

54. In D.T. Virupakshappa v. C. Subash (supra), cited by Mr. Poovayya, the question raised by the appellant before this Court was, whether the learned Magistrate could not have taken cognizance of the alleged offence which was of police excess in connection with investigation of the criminal case, without sanction from the State Government under Section 197 of the Code of Criminal Procedure and whether the High Court should have quashed the proceedings on that ground alone.

55. This Court held that the whole allegation of police excess in connection with the investigation of the criminal case, was reasonably connected with the performance of the official duty of the appellant. The learned Magistrate could not have, therefore, taken cognizance of the case, without previous sanction of the State Government. This Court found that the High Court had missed this crucial point in passing the impugned order, dismissing the application of the concerned policeman under Section 482 of the Code of Criminal Procedure.

> 71. If in doing an official duty a policeman has acted in excess of duty, but there is a reasonable connection between the act and the performance of the official duty, the fact that the act alleged is in excess of duty will not be ground enough to deprive the policeman of the protection of government sanction for initiation of criminal action against him.
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> 77. It is well settled that an application under Section 482 of the Criminal Procedure Code is maintainable to quash proceedings which are ex facie bad for want of sanction, frivolous or in abuse of process of court. If, on the face of the complaint, the act alleged appears to have a reasonable relationship with official duty, where the criminal proceeding is apparently prompted by mala fides and instituted with ulterior motive, power under Section 482 of the Criminal Procedure Code would have to be exercised to quash the proceedings, to prevent abuse of process of court.
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> 80. In our considered opinion, the High Court clearly erred in law in refusing to exercise its jurisdiction under Section 482 of the Criminal Procedure Code to set aside the order of the Magistrate impugned taking cognizance of the complaint, after having held that it was a recognized principle of law that sanction was a legal requirement which empowers the Court to take Cognizance. The Court ought to have exercised its power to quash the complaint instead of remitting the appellant to an application under Section 245 of the Criminal Procedure Code to seek discharge.

11. The alleged overt act must have been committed while performing official duty and has been a part of such duty and only under such circumstances immunity is enjoyed by the public servant which is what statutorily mandated under Section 197 Cr.P.C. If the act alleged to be an offence is no part of such official duty or the public servant cannot claim to be part of the duty to be performed in that case he cannot have protection under Section 197 Cr.P.C. The question is whether, in the facts and circumstances of the case, for the alleged overt act committed by the Petitioner any sanction was required.

12. The core of the complaint as regards the excess in discharging of duty is obviously an area that requires adjudication. However, as apparently reveals from the complaint it is candidly mentioned that the Petitioner was present in the Police Station in discharge of his duties. Consequently, the duty officially assigned to the Petitioner and the protection given to the public servant in discharge of the duty could be applied inasmuch as a reasonable communication between the act and the performance of official duty has to be decided as it would deprive the public servant from the immunity given to it by the wisdom of the legislature.

13. The complaint also reveals a mention about an incident that took place on 15.10.2014 involving the Opp.Party Complainant in connection with an election issue. Once again, it was allegedly to have taken place while the petitioner was discharging the law and order duty in due discharge of his official duty.

14. This Court in the matter of ***Rabinarayan Nanda vrs. State of Orissa and another in 133(2022) CLT 742*** took the view that insisting for sanction U/s.197 Cr.P.C was necessary even though the conduct of the Petitioner was outrageous and unbecoming of on the part of a police officer since he being at the PS was discharging his official function.

15. Although ordinarily the matter regarding accessibility of the act of public servant could be gathered in evidence, in the peculiarity of the case in hand, the learned court having not gone to the said aspect that the Petitioner was very much present in the Police Station and was discharging his official duty makes it imperative as a pre-requisite for the court to insist for sanction for prosecution under Section 197 Cr.P.C. by the appropriate authority before invoking jurisdiction and taking cognizance of the offence as otherwise it would be an abuse of process of law.

16. In the result, Petition U/s. 482 Cr.P.C filed by the Petitioner stands allowed. In corollary the impugned order of cognizance dated 10th November, 2014 passed by the S.D.J.M., Baliguda in I.C.C. No.23 of 2014 is hereby set aside. However, the court below is not precluded from proceeding against the petitioner in the event sanction under section 197 Cr.P.C is received.

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