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any provision entitling a candidate to have his answer book re-evaluate, that to contrary to the answer key prepared on the basis of views of the expert committee, the prayer for re-evaluation is not permissible.

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

W.P.(C) NO. 8462 OF 2020

SMT. KUNI SAHOO & ORS. .....Petitioners

.V.

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

INCOME TAX ACT, 1961– Section 194A(3)(ixa) as amended or section 194A(3)(ix) – Whether the opposite party is justified in deducting income tax at source in terms of Section 194 A(3)(ixa), as amended or Section 194A(3)(ix), as existed prior to amendment read with Section 56(2) of the Income Tax Act, 1961 in respect of interest computed from the date of application for claim till deposit of cheques before the learned Motor Accidents Claims Tribunal on account of delay in disbursal of the amount of compensation awarded to the claimant – Held, not justified reason indicated with reference to case laws.

(Para 11-14)

Case Laws Relied on and Referred to :-

1. (2019) 417 ITR 169 : Rupesh Rashmikant Vs. Union of India.
2. AIR 2016 Mad 146 : The Managing Director,Tamil Nadu State Transport Corporation (Salem) Ltd. Vs. Chinnadurai.
3. MANU/MP/0755/2020 : Oriental Insurance Co. Ltd. Vs. Kala Bai.
4. (1994) 2 SCC 176 : General Manager, Kerala S.R.T.C. Vs. Susamma Thomas.
5. (2009) 6 SCC 121 : Sarla Verma Vs. DTC.
6. (2013) 9 SCC 65 : Reshma Kumari Vs. Madan Mohan.
7. (2003) 3 SCC 148 : Abati Bezbaruah Vs. Geological Survey of India.
8. (2008) 12 SCC 208 : Dharampal Vs. U.P. State Road Transport Corporation.
9. (2019) 417 ITR 169 : Rupesh Rashmikant Shah Vs. Union of India.
10. 2010 SCC OnLine MP 567 : United India Insurance Co. Ltd. Vs. Ramlal.
11. 2014 SCC OnLine AP 1175 : National Insurance Company Limited Vs. Yeliminti Appanna & Anr.
12. M.P. No.6637 of 2019 : Oriental Insurance Co. Ltd. Vs. Smt. Kala Bai.

For Petitioners : Mr. Bisikesan Pradhan

For Opp. Parties : Mr. Sidhartha Sankar Mohapatra, Sr. Standing Counsel (Income-Tax) (Opp. Party Nos.2 & 3)

Mr. Bibekananda Udgata (Opp. Party No.4)

JUDGMENT Date of Hearing & Judgment: 30.01.2023

BY THE COURT

1. Questioning the propriety and legality of deduction of income-tax at source under Section 194A read with Section 56 of the Income Tax Act, 1961, out of gross amount payable to each of the petitioners-claimants towards interest calculated from date of application for claim on account of delay in deposit of

amount of compensation as modified/reduced in the National Lok Adalat vide Order dated 13.07.2019 in the appeal bearing MACA 366 of 2018 filed under Section 173 of the Motor Vehicles Act, 1988, against the Judgment dated 17.10.2017 awarded by the learned 3rd Motor Accidents Claims Tribunal, Jagatsinghpur in MAC No.149 of 2013, the petitioners have prayed for the following reliefs by way of writ petition under Articles 226 and 227 of the Constitution of India:

> *"*** issue Rule NISI calling upon the opposite parties to show cause as to why the TDS deducted from the interest awarded on compensation to the petitioners vide Annexure-5 shall be held as illegal*
>
> *and as to why opposite party No.4 shall not be directed to pay interest of Rs.9,250/- for one month to the petitioners*
>
> *and if the opposite parties failed to show cause or show insufficient cause make the Rule NISI absolute and allow the writ petition with cost."*

Facts of the case:

2. The petitioners, the wife and the children of the deceased, filed Motor Accident Claims Case being No.149 of 2013 under Section 166 of the Motor Vehicles Act, 1988 (for brevity be referred to as "MV Act") before the 3rd Motor Accidents Claims Tribunal, Jagatsinghpur (MACT) consequent upon death of Sri Mahendra Kumar Sahoo in road accident on 07.01.2013.

2.1. The MACT vide Judgment and Order dated 17.10.2017 awarded compensation to the tune of Rs.17,90,760/- in favour of the petitioners along with interest @ 7% per annum with effect from 01.07.2013, i.e.,date of application till its realization.Aggrieved,the opposite party No.4- National Insurance Co. Ltd. preferred appeal under Section 173 of the MVAct before this Court, which was referred to the National Lok Adalat, where vide Order dated 13.07.2019 the following directions were issued in MACA No.366 of 2018:

> *"***
>
> *With consent of both parties the award is modified and reduced to Rs.15,00,000/- (rupees fifteen lakh) with interest as awarded.*
>
> *Insurance company is directed to make payment of the modified awarded amount with interest within eight weeks hence before the Tribunal. Learned Tribunal is to disburse the amount proportionately.*
>
> *On production of receipt showing payment of awarded amount, statutory deposit, if any, be returned with accrued interest.*
>
> *The MACA is accordingly disposed of."*

2.2. It has been stated by the petitioners that the opposite party No.4 pursuant to aforesaid direction of the National Lok Adalat deposited cheques dated 20.09.2019 and accordingly, order has been passed by the learned MACT on 22.10.2019.

2.3. It is alleged in the writ petition that no disclosure was made with regard to details of interest nor was any intimation given to the petitioners with regard to

tax deducted at source (TDS) on interest. However, on being asked, the opposite party No.4 replied that out of the amounts payable on account of interest of Rs.2,15,834/-, Rs.2,15,833/- and Rs.2,15,333/-, deduction of income-tax at source for sum of Rs.43,167/-, Rs.43,167/- and Rs.43,067/- have been made.

Contention of the counsel for the petitioners:

3. The quantum awarded vide Judgment and Order dated 17.10.2017 of the MACT being modified/reduced in the National Lok Adalat on 13.07.2019, the opposite party No.4 was obligated to pay interest @ 7% per annum till the cheques dated 20.09.2019 are deposited with the learned MACT on 15.10.2019. Since there was a delay of around 6 years and 3 months, there has been less computation of interest for one month and thereby the opposite party No.4 is required to deposit an extra amount of Rs.9,250/-.

3.1. It is urged by Sri Bisikesan Pradhan, learned counsel for the petitioners that since the component of interest in each case relates to the period 2013-14 to 2019-20, i.e., for six years, the interest payable to each of the petitioners by way of spreading over would come around Rs.35,944/-. This amount being less than Rs.50,000/-, in view of Section 194A(3)(ixa) of the Income Tax Act, 1961 ("IT Act" for short) as amended or Section 194A(3)(ix) as existed prior to amendment *ibid.*

3.2. It is further contended that the award of interest being made in terms of Section 171 of the MV Act, deduction of tax at source ought not to have been made as such an interest is awarded for delay in deposit of compensation as modified by the higher forum/Court.

3.3. To fortify aforesaid contentions, the learned counsel has cited *Rupesh Rashmikant Vrs. Union of India, (2019) 417 ITR 169 (Bom); Court on its own Motion Vrs.The Himachal Pradesh State Cooperative Bank Ltd., (2015) 228 TAXMAN 151(HP);The Managing Director,Tamil Nadu State Transport Corporation (Salem) Ltd. Vrs. Chinnadurai, AIR 2016 Mad 146; Oriental Insurance Co. Ltd. Vrs. Kala Bai, MANU/MP/0755/2020.*

Arguments advanced by Senior Standing Counsel for the Income-Tax Department:

4. Referring to the counter-affidavit Sri Sidhartha Sankar Mohapatra, Senior Standing Counsel submitted that income by way of interest received on compensation or on enhanced compensation referred to in Section 145B(1) being deemed to be income of the previous year in which it is received, the same is chargeable to income-tax under the head "INCOME FROM OTHER SOURCES" as provided under Section 56(2) of the IT Act. It is submitted by learned Senior Standing Counsel that inasmuch as the National Insurance Co. Ltd.-opposite party No.4 paid Rs.6,47,000/-, i.e., exceeding Rs.50,000/-, in view of specific provisions contained in Section 194A(3) of the IT Act, the TDS has rightly been made.

Contention of the counsel for the National Insurance Co. Ltd.- opposite party No.4:

5. Sri Bibekananda Udgata, learned Advocate for the opposite party No.4 supporting the case of the opposite party Nos.2 and 3, submitted that having deducted the income-tax at source in terms of Section 194A(3) read with Section 56 of the IT Act, National Insurance Co. Ltd. has deposited the amount(s) with the Income-tax Department.

Issue involved for adjudication:

6. *Whether the opposite party No.4-National Insurance Co. Ltd. is justified in deducting income tax at source in terms of Section 194A(3)(ixa), as amended or Section 194A(3)(ix), as existed prior to amendment read with Section 56(2) of the Income Tax Act, 1961 in respect of interest computed from the date of application for claim till deposit of cheques before the learned Motor Accidents Claims Tribunal on account of delay in disbursal of the amount of compensation awarded to the petitioners-claimants?*

Analysis of the Court:

7. Provisions of Section 2(28A), Section 56, Section 145B and 194A of the IT Act so far as they are relevant for adjudication of present case are extracted hereunder:

> *2. Definitions.—*
>
> *(28A) 'interest' means interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) and includes any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilized;*
>
> *56. Income from other sources.—*
>
> *(1) Income of every kind which is not to be excluded from the total income under this Act shall be chargeable to income-tax under the head 'Income from other sources', if it is not chargeable to income- tax under any of the heads specified in Section 14, items A to E.*
>
> *(2) In particular, and without prejudice to the generality of the provisions of sub-section (1), the following incomes, shall be chargeable to income-tax under the head 'Income from other sources', namely:*
>
> *****
>
> *(viii) income by way of interest received on compensation or on enhanced compensation referred to in sub-section (1) of Section 145B;"*
>
> *145B. Taxability of certain income.—*
>
> *(1) Notwithstanding anything to the contrary contained in Section 145, the interest received by an assessee on any compensation or on enhanced compensation, as the case may be, shall be deemed to be the income of the previous year in which it is received.*
>
> *(2) Any claim for escalation of price in a contract or export incentives shall be deemed to be the income of the previous year in which reasonable certainty of its realisation is achieved.*

*(3) ****

194A. Interest other than 'interest on securities'.—

(1) Any person, not being an individual or a Hindu undivided family, who is responsible for paying to a resident any income by way of interest other than income by way of interest on securities, shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct income tax thereon at the rates in force:

*****

(3) The provisions of sub-section (1) shall not apply—

*****

(ix) to such income credited by way of interest on the compensation amount awarded by the Motor Accidents Claims Tribunal;

(ixa) to such income credited by way of interest on the compensation amount awarded by the Motor Accidents Claims Tribunal where the amount of such income or, as the case may be, the aggregate of the amounts of such income paid during the financial year does not exceed fifty thousand rupees;

*****

7.1. It may be stated that prior to substitution for Sections 145A and 145B, with retrospective effect from 01.04.2017 by virtue of the Finance Act, 2018, at the material period Section 145A stood thus:

"145A.Method of accounting in certain cases.—

Notwithstanding anything to the contrary contained in Section 145,—

*****

(b) interest received by an assessee on compensation or on enhanced compensation, as the case may be, shall be deemed to be the income of the year in which it is received."

8. The MV Act makes detailed provisions for awarding compensation for death or disablement of any person resulting from an accident arising out of the use of a motor vehicle. Essentially, such claim is in the nature of tortious liability.The concept of compulsory third party insurance has been statutorily introduced.The relationshipbetween the insurer and the insured is basically a contractual relationship but interjected by a range of statutory provisions. Under such contract of insurance, the insurer undertakes to indemnify the insured to the extent agreed. The statutory provisions contained in the MVAct make third party insurance compulsory and limit the defences which the insurance company may raise to repudiate its liability.

8.1. Chapters X and XI of the MV Act provide for grant of compensation to the victims of a vehicular accident. The purpose of granting compensation under the MV Act is to ameliorate the sufferings of the victims so that they may be saved from social evils and starvation, and that the victims get some sort of help as early as possible. It is just to save them from sufferings, agony and to rehabilitate them. The Court in *Court on its Own Motion Vrs. The Himachal Pradesh State Cooperative Bank Ltd. and Others, (2015) 276 CTR 264 (HP)* observed that:

"We wonder how and under what provisions of law the Income Tax Authorities have treated the amount awarded or interest accrued on term deposits made in Motor Accident Claims cases as income. Therefore, the said Circular is against the concept and provisions referred to hereinabove and runs contrary to the mandate of granting compensation."

8.2. In *The Managing Director, Tamil Nadu State Transport Corporation (Salem) Ltd. Vrs. Chinnadurai (supra)* it has been held as follows:

"Following the Division Bench Judgment, a learned Single Judge of the Punjab and Haryana High Court, in a recent decision, in New India Assurance Company Ltd. Vrs. Sudesh Chawla and Others, C.R. No.430- of 2015 (O&M), reiterating the reasoning given by the Division Bench of Himachal Pradesh High Court, has opined that award of compensation is on the principle of restitution to place the claimant in the same position in which he would have been loss of life or injury has not been suffered and accordingly held that the orders calling upon the Insurance Company to pay TDS/deduct TDS on the interest part are not sustainable."

8.3. In *New India Assurance Co. Ltd. Vrs. Savitri Devi and Another, C.R. No. 6784 of 2016*, the Hon'ble Punjab and Haryana High Court *vide Judgment dated 04.04.2018* observed as follows:

"Considering the object of the Motor Vehicles Act, 1988, regarding grant of compensation to the victim, it will not only be unjust but cruel to ask the hapless victim to first pay the interest received along with compensation on account of delayed payment, for which he is not responsible, and then to file the income tax return and claim the refund.

As a result of the foregoing discussion, it is held that the interest paid along with the compensation as a result of the order of the Tribunal or of the superior Court is not liable for TDS."

8.4. Section 171 of the MV Act provides that where a Tribunal allows the claim for compensation, such Tribunal may direct that in addition to the amount of compensation, simple interest shall also be paid at such rate and from such date, not earlier than the date of making the claim as it may specify in this behalf.

8.5. The Courts award compensation for loss of dependency benefit, loss of estate, loss of consortium in case of a spouse, loss of love and affection for the family members and funeral charges in the circumstances where the death is caused due to road accident. In case of injury, the compensation is computed under the heads of actual loss of income, future loss of income, pain, shock and suffering, loss of enjoyment of amenities of life, medical treatment, past and future,miscellaneous heads such as attendant charges, special diet, transportation, etc.

8.6. The multiplier method has been accepted to be sound and legally well-established principle vide *General Manager, Kerala S.R.T.C. Vrs. Susamma Thomas, (1994) 2 SCC 176. In Sarla Verma Vrs. DTC, (2009) 6 SCC 121 and Reshma Kumari Vrs. Madan Mohan, (2013) 9 SCC 65*, it has been propounded that for achieving degree of uniformity in awarding compensation in motor accident claim cases, the multiplier method is required to be standardized.

8.7. Thus, be it a fatal case or an injury case, compensation includes future loss. The computation of such future loss is on the basis of the income of the deceased or the injured on the death or accident. This is adjusted by a reasonable future rise in income. Multiplier is applied to ascertain future loss. The method of multiplier takes into account various factors and imponderables of life and, therefore, the multiplier is not equivalent to the full length of the remainder of the expected life of the deceased. The multiplier theory proceeds on the basis that with interest that may be earned on the compensation and a portion drawn from the capital should be equivalent to what the deceased would have contributed to his family. At the end of the period, the capital should be completely utilised. While awarding compensation, though the Claims Tribunal awards future loss in praesenti, interest is awarded for the period between filing of the application for claim till passing of the award for compensation.

8.8. Taking note of *Abati Bezbaruah Vrs. Geological Survey of India, (2003) 3 SCC 148 in Dharampal Vrs. U.P. State Road Transport Corporation, (2008) 12 SCC 208* it has been held as follows:

> *"8. As per Section 171 of the Motor Vehicles Act, 1988 (hereinafter referred as "the Act") where the claim for compensation made under the Act is allowed by the Claims Tribunal, the Tribunal may direct that in addition to the amount of compensation simple interest shall also be paid at such rate from such date not earlier than the date of making the claim.*
>
> *9. In National Insurance Co. Ltd. Vrs. Keshav Bahadur, (2004) 2 SCC 370 this Court has held that the provisions require payment of interest in addition to compensation already determined. Even though the expression "may" is used, a duty is laid on the Tribunal to consider the question of interest separately with due regard to the facts and circumstances of the case. It was clearly held in the said decision that the provision of payment of interest is discretionary and is not and cannot be bound by rules.*
>
> *10. Interest is compensation for forbearance or detention of money, which ought to have been paid to the claimant. No rate of interest is fixed under Section 171 of the Act and the duty has been bestowed upon the court to determine such rate of interest. In order to determine such rate we may refer to the observations made by this Court over the years. In the year 2001 in Kaushnuma Begum Vrs. New India Assurance Co. Ltd., (2001) 2 SCC 9, on the question of the rate of interest to be awarded it was held that earlier, 12% was found to be the reasonable rate of simple interest but with a change in economy and the policy of Reserve Bank of India the interest rate has been lowered and the nationalised banks are now granting interest @ 9% on fixed deposits for one year. Accordingly, interest @ 9% was awarded in the said case. ***"*

9. The Hon'ble Bombay High Court in the case of *Shri Rupesh Rashmikant Shah Vrs. Union of India, (2019) 417 ITR 169 (Bom)* after taking into consideration the decisions of other High Courts taken in the context, which are cited before this Court during the course of hearing of present writ petition by the counsel for the petitioners, analysed Section 56,145A vis-a-vis other related provisions of IT Act and came to observe as follows:

"To summarise, the decision of the Supreme Court in the case of Rama Bai Vrs. Commissioner Of Income-Tax, (1990) 181 ITR 400 (SC) is not an authority on the question of taxability of interest on compensation or enhanced compensation in motor accident claim cases. In Ghanshyam (HUF), (2009) 8 SCC 412, the Supreme Court held that interest under Section 28 of the Land Acquisition Act would invite capital gain tax. This judgment was rendered before amendment in Section 145A of the Act. The Gujarat High Court in Movaliya Bhikhubhai Balabhai Vrs. Income-Tax Officer, (2016) 388 ITR 343 (Guj), held that the ratio of the Supreme Court in the case of Ghanshyam (HUF) (supra), would continue to apply post amendment in Section 145A by virtue of Finance Act, 2009 also."

9.1. In *Rupesh (supra),* the Bombay High Court went on further to say that:

"Culmination of discussion in these judgments would be that such interest is compensatory in nature and will thus, form part of the compensation itself. Compensation is computed with reference to the date of accident. All calculations of multiplicand and multiplier are based on such reference point. But computation by the Tribunal takes time. If compensation is revised by the High Court it takes further time. Interest is awarded keeping in mind the rate of inflation. Effort thus is to award just compensation. Awarding interest for delayed computation of compensation is therefore integral part of this exercise.

***

The date of passing of the award by Claims Tribunal is the date on which the compensation is determined and the right to receive interest pendente lite ceases. The interest for the period between the filing of the claim petition and passing of the award thus, is for the period when the claimant for the first time approached the Claims Tribunal asking the Tribunal to assess and award compensation and the time consumed in disposing of the Claim Petition. We may also recall, the interest can be awarded even though part of the compensation would comprise of future loss of income. This is so because, the multiplier method factors this aspect also. At the same time, as noted, the Courts do not award interest on future expenditure since the amount is being paid to the claimant for an expenditure which may be incurred at a later point of time. This dichotomy, thus, between awarding interest on future income while not awarding interest for future expenditure brings out the true character of the interest being awarded."

10. Turning to IT Act, Section 194A, being not a charging provision, deals with deduction of tax at source in respect of "interest other than interest on securities". Said provision is attracted only when the payment of interest is in the nature of income in the hands of the recipient. Clause (ix) of sub- section (3) of Section 194A prior to amendment pertains to income credited or paid by way of interest on the compensation amount awarded by the Motor Accident Claims Tribunal where such amount did not exceed Rs.50,000/-. On substitution of this provision by virtue of the Finance Act, 2015, while clause (ix) provides that the provision of sub-section (1) does not apply to such income credited by way of interest on the compensation awarded by the Motor Accident Claims Tribunal, clause (ixa) virtually retains the original provision of unamended clause (ix).

10.1. Section 145A(b) as it existed prior to amendment by virtue of the Finance Act, 2018 stood as follows:

"Notwithstanding anything to the contrary contained in Section 145,—

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> *(b) Interest received by an assessee on compensation or on enhanced compensation, as the case may be, shall be deemed to be the income of the year in which it is received".*

Said provision now finds place in sub-section (1) of Section 145B of the IT Act.

10.2. Therefore, the interest awarded in the motor accident claim cases from the date of the application for claim till the passing of the award or in case of Appeal, till the Judgment of the High Court in such Appeal, would not be exigible to tax, and such interest not being an income as such interest payable on account of delay in deposit of amount awarded shall not attract TDS under Section 194A. The nature of such interest paid/credited to the petitioners does not fall within the ambit of definition of "interest" contained in Section 2(28A).

10.3. In the instant case, it is not denied that interest was paid for delay in depositing the awarded amount. Reading of clause (28A) of Section 2 of the IT Act would show that in order to fall within the connotation of the term "interest", the money must be:

> i. Borrowed or debt incurred (including a deposit, claim or other similar right or obligation)
>
> and includes
>
> ii. Any service fee or other charge in respect of money borrowed or debt incurred or in respect of any credit facility which has not been utilized.

10.4. The marginal heading of Section 194A suggests that said provision deals with TDS in respect of "interest" definition of which term is given in Section 2(28A), but not "interest on securities" which expression is defined in Section 2(28B). The amount of "interest" deposited by the opposite party No.4 with the MACT is on account of delay in deposit of compensation, which can neither be understood as borrowed or debt incurred nor does it fall within meaning of the term "service fee" or the expression "other charge in respect of money borrowed or debt incurred or in respect of any credit facility which has not been utilized". The interest so deposited by the National Insurance Co. Ltd.-opposite party No.4 would not, therefore, be treated as income of the petitioners. Hence, the TDS deducted by the opposite party No.4 is liable to be refunded to the petitioners.

11. Sri Bisikesan Pradhan, counsel for the petitioners has vehemently emphasized that since the interest component is relatable to period from 2013-14 to 2019-20, i.e., for six years, by method of spreading over, the quantum of interest would be less than Rs.50,000/-. In such view of the matter,tax could not have been deducted at source in terms of Section 194A(3)(ixa), as amended or Section 194A(3)(ix), as it stood prior to amendment.

11.1. In *United India Insurance Co. Ltd. Vrs. Ramlal, 2010 SCC OnLine MP 567* it has been discussed as follows:

> *"14. Keeping in view the principles laid down in various cases mentioned hereinabove which would apply with equal force to the claim cases this Court is of the view that the interest awarded has to be spread over in number of years from the date of filing of claim petition till the date of payment because the right to receive compensation arises immediately on occurrence of accident and the interest is awarded by the Tribunal or the Courts for the delay that occurs due to the delay in determination of the compensation and if the interest for the financial year payable to each of individual claimant exceeds Rs. 50000/- then only question of TDS will arise. So far as obligation of petitioner/Insurance Company responsible for the payment is concerned, it is made clear that before releasing the amount of interest claimant shall be required to submit an affidavit to the effect that claimant has furnished a declaration on form No. 15- G of Rule 29-C of the Income Tax Rules in terms of Section 197(1-A) of the Income Tax Act for each financial year in the office of Insurance Company so that concerned Insurance Company is relieved of its obligation of payment of TDS."*

11.2. This Court finds force in the argument of the learned counsel for the petitioners and it is found in the instant case that if the interest is spread over year to year, the amount would not exceed Rs.50,000/-. Under such premise, the deduction of tax at source in respect of interest for delay in deposit of compensation before the MACT would attract provisions of sub-section (3) of Section 194A of the IT Act.

11.3. It is the argument of Sri Bisikesan Pradhan, Advocate for the petitioners that before deducting TDS the opposite party No.4 should have ensured Permanent Account Number (PAN) details from the petitioners. In this regard the following observation of the Hon'ble High Court of Andhra Pradesh in the case of *National Insurance Company Limited Vrs. Yeliminti Appanna and Another, 2014 SCC OnLine AP 1175,* is worthy of notice:

> *"Be it noted that in case a claimant furnishes a declaration, on Form No. 15G of Rule 29C of the IT Rules in terms of Section 197(1A) of the IT Act or such other declaration on such Form as may be applicable, for each financial year, either to the person concerned or in the office of insurance company, in such a case the person/the insurance company is relieved of his/its obligation of payment of TDS."*

11.4. The petitioners having enclosed copies of PAN card to the writ petition urged by demonstrating that had the opposite party No.4 sought for particulars, the petitioners would have furnished such details so that occasion for deduction of tax at source would not have been arisen. Relying on Section 206AA of the IT Act, the learned counsel for the petitioners submitted that if interest in question is liable to be treated as exigible to income tax and thereby attracts provisions for deduction of tax at source, by furnishing PAN, there would have no occasion for National Insurance Co. Ltd.-opposite party No.4 to deduct TDS.

11.5. In Oriental Insurance Co. Ltd. Vrs. Smt. Kala Bai, M.P. No.6637 of 2019, vide Order dated 20th March, 2020, the Hon'ble Madhya Pradesh High Court laid down that:

> *"This Court in the case of The Oriental Insurance Co. Ltd. Vrs. Smt. Swaroopibai (M.P. No.5090/2018) has also held that the Insurance Co. is liable to deduct the TDS on the*

interest paid by it as per provisions of Section 194A(3)(ix)/(ix-a) of the Income Tax Act and if the assessee is of the view that the tax has been deducted in excess, then he can always claim a refund of the same from the Income Tax Department."

11.6. This Court is, therefore, of the considered opinion that the amount so deducted towards tax at source, being on erroneous understanding of the opposite party No.4, said amount is liable to be refunded to the petitioners.

Conclusion and directions:

12. When this Court is faced with the above proposition of law laid down in various Judgments of different Courts, it is not considered proper to accept the contention of the opposite parties, nonetheless, it is reasonable to follow the view expressed in favour of the claimants who are sufferers on account of loss of family member in vehicular accident.

13. This Court is, thus, inclined to hold that the tax is payable on the interest on the amount of compensation under the MV Act with a rider that the interest should not be more than Rs.50,000/- per claimant per financial year. In the present case, after the award being finalised, the opposite party No.4-National Insurance Co. Ltd. has calculated the interest payable on the entire amount of compensation. Had the interest in question been computed by spreading over for six years commencing from 2013-14 till the deposit is made, the interest would be less than Rs.50,000/-. In such eventuality in view of Section 194A(3)(ix) [pre- amendment]/Section 194A(3)(ixa) [post amendment], TDS was not required to be deducted by the opposite party No.4.

14. In the result, the writ petition is allowed and the TDS amount wrongly deducted will be refunded to the petitioners by the Income-tax Department not later than eight weeks from today, failing which simple interest at the rate of 6% per annum on the said sum will be paid to the petitioners for the period of delay.

15. In the aforesaid circumstances, there is no order as to costs.

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2023 (I) ILR – CUT - 635

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

W.A. NOS. 936 OF 2021 AND BATCH

PRINCIPAL SECRETARY TO GOVERNMENT, SCHOOL & MASS EDUCATION DEPARTMENT & ANR. ……..Appellants

.V.

NIRANJAN DAS & ORS. ……Respondents

IN W.A. NO.983 OF 2021
PRINCIPAL SECRETARY TO GOVERNMENT,
SCHOOL AND MASS EDUCATION DEPARTMENT
& ANR. ……...Appellants
.V.
SMITA RANJAN SARANGI & ORS. …….Respondents

IN W.A. NO.985 OF 2021
PRINCIPAL SECRETARY TO GOVERNMENT,
SCHOOL AND MASS EDUCATION
DEPARTMENT & ANR. ……...Appellants
.V.
RANJITA SAHOO & ORS. …….Respondents

IN W.A. NO.1013 OF 2021
PRINCIPAL SECRETARY TO GOVERNMENT,
SCHOOL AND MASS EDUCATION
DEPARTMENT & ANR. ……Appellants
.V.
KIRTI CHANDRA PALAI & ORS. …….Respondents

IN W.A. NO.985 OF 2021
PRINCIPAL SECRETARY TO GOVERNMENT,
SCHOOL AND MASS EDUCATION
DEPARTMENT & ANR. …….Appellants
.V.
MANOJ KUMAR PARHI & ORS. …….Respondents

SERVICE LAW – Regularization – Effective date – Honourable single judge directed the authority to regularize the service of the private opposite parties from the date of their initial joining as full time resource person i.e 31.01.2001 – The Principal Secretary to government School and Mass Education Department challenge the same on the ground that government can't be expected to regularize their services from a date earlier than the actual date of regularization which is 3rd July 2016 – Effect of – Held, the court finds no ground for interference with judgment of the learned single judge as direction have been given to regularized the service notionally for the purpose of seniority,without any consequential monetary benefit. (Para 13)

Case Laws Relied on and Referred to :-

1. (2002) 10 SCC 656 :Dhyan Singh Vs.State of Haryana.
2. AIR 1984 (SC) 1527 :G.P. Doval Vs.Chief Secretary,Government of U.P.
3. AIR 2010 (SC) 2159 :S. Sumnyan Vs.Limi Niri.

For Appellants : Mr. D.R. Mohapatra, Sr. Standing Counsel

For Respondents : Mr. Budhadev Routray, Sr. Adv., Mr. J. Biswal
Mr. Gautam Misra, Sr. Adv., Mr. D.K. Patra
Mr. K.P. Mishra, Sr. Adv., Mr. S. Rath & Mr. Gopinath Sethi.

JUDGMENT Date of Judgment: 15.02.2023

Dr. S. MURALIDHAR, C.J.

1. These writ appeals by the School and Mass Education Department (S & ME Department),Government of Odisha are all directed against a common judgment dated 7th October 2021 passed by the learned Single Judge disposing of a batch of writ petitions filed by the respective Respondents seeking a direction to the S & ME Department to regularize their services from the date of their initial joining in the post of Junior Lecturers.

2. By the impugned judgment, the learned Single Judge, while rejecting the prayer that they should be regularised from the date of their initial joining as Part Time Lecturers, has directed that their services be regularised from the date of their initial joining as Full Time Resource Persons (FTRPs).

3. The background facts are that pursuant to the National Policy on Education introduced in 1986, 31 Higher Secondary Vocational Schools were opened by the Government of Odisha under the Centrally Sponsored Scheme "Vocationalisation of Secondary Education" by an order dated 27th July 1988 during the academic session 1988-89. A circular was issued by the Government of Odisha on 17th March 1989 for appointment of a qualified Post Graduate (PG) Teacher against the vacant post of Vocational Teachers (PGT) on contract basis. In the second phase, for the academic year 1990-91,150 Higher Secondary Vocational Schools were opened.An advertisement was issued on 1st April 1991 inviting applications from eligible candidates for the post of Junior Lecturers in the said vocational institutions. Since this was a centrally sponsored scheme, 75% of the salary payable to the staff was to be reimbursed by the Government of India. Unless the posts were filled up, the Government of Odisha could not claim reimbursement.

4. On 6th June 1996, a gazette notification was issued regarding engagement of Part Time Resource Person (PTRP) in the Higher Secondary Vocational Schools. This was followed on 21st August 1996 by another gazette notification regarding Full Time Resource Person (FTRP).

5. The Respondents who were PTRPs continued as such without regularisation as Junior Lecturers. Aggrieved by the failure to regularize their services, the respective Respondents filed OJC No.9392 of 1999 in this Court through an association of such Respondents praying for regularisation of their services. During the pendency of the writ petition, the Respondents were appointed as FTRPs against the vacant post of Junior Lecturers with effect from 31st January, 2001.

6. OJC No.9392 of 1999 which was pending in this Court was transferred to the Odisha Administrative Tribunal (OAT) in the year 2010. By a judgment dated 10th July 2014, the OAT disposed of TA No.15 (C) of 2010 directing the Government of

Odisha to regularize the services of the Respondents in view of the order of the OAT in a similar batch of cases. When the said judgment was not implemented, the Respondents filed contempt petition being CP No.543 (C) of 2014.

7. The Government of Odisha in the Higher Education Department did not challenge the above order dated 10th July 2014 of the OAT.After the aforementioned contempt petition was filed, the Government of Odisha on 3rd July 2016 issued orders regularizing 201 FTRPs working in different Vocational Junior Colleges and re- designated them as Junior Lecturers with effect from the date of issuance of such order i.e., 3rd July, 2016. While the contempt petition was closed by the OAT, liberty was granted to the Respondents to claim benefits consequent to the order of regularisation in accordance with law. The respective Respondents then filed O.A. No.1074 (C) of 2017 before the OAT praying for regularisation of services from the date of initial appointment against the vacant post of Junior Lecturers.

8. After the abolition of the OAT, the aforementioned application came to be transferred to this Court and was heard by the learned Single Judge who passed the impugned judgment on 7th October 2021 granting notional benefits to each of the Respondents from 31st January 2001 which was the date of their appointment as FTRPs against the vacant post of Junior Lecturers.

9. Mr. D.R. Mohapatra, learned Senior Standing Counsel for the S & ME Department relies on the decision of the Supreme Court of India in ***Dhyan Singh v. State of Haryana (2002) 10 SCC 656*** and contends that since the initial appointment of the Respondents as FTRPs was under a centrally sponsored scheme, the State Government cannot be expected to regularise their services from a date earlier than the actual date of regularisation which in this case was 3rd July, 2016.

10. On the other hand, Mr. Budhadev Routray, learned Senior Advocate, Mr. Gautam Misra, learned Senior Advocate and Mr. K.P. Mishra, learned Senior Advocate appearing for the respective Respondents submit that the relief granted by the learned Single Judge was limited. The regularisation as directed by the learned Single Judge was only on notional basis from the date of the Respondents joining as FTRPs i.e. 31st January 2001 without any consequential monetary benefits. Relying on the decisions in ***G.P. Doval v. Chief Secretary, Government of U.P., AIR 1984 (SC) 1527 and S. Sumnyan v. Limi Niri, AIR 2010 (SC) 2159***, it is contended that the plea for regularisation from the initial date of joining as FTRPs was not unreasonable and ought to be granted in light of those decisions.

11. The above submissions have been considered. What is evident from the above narration of facts is that each of the Respondents was appointed initially as PTRPs. Although, they claimed benefit of regularization from their initial appointment as PTRPs, the learned Single Judge did not grant them that relief. What was directed to be granted only was regularisation on notional basis, with effect from the date of their appointment as FTRPs i.e. 31st January, 2001.

12. The plea that the Respondents are entitled to regularisation only from the date that they were regularly appointed to the post and not earlier when they were still engaged under a centrally sponsored scheme, cannot ipso facto be applied in the present case considering that the Respondents were, pursuant to selection process appointed as FTRPs with effect from 31st January, 2001. It is for this reason that the relief has been granted by the learned Single Judge to the Respondents to a limited extent of regularisation of their services with effect from 31st January 2001 and not from the date when they were first appointed as PTRPs.

13. The decisions of the Supreme Court in ***G.P. Doval v. Chief Secretary, Government of U.P. (supra) and S. Sumnyan v. Limi Niri (supra)***, support the contention of the Respondents that they were entitled to have their services regularised from the initial date of their joining as FTRPs through a selection process. Considering that the said date of 31st January 2001, from which date they have been asked to be regularised, is only for the notional purpose, length of service, seniority etc. without any consequential monetary benefit, the Court is of the view that the impugned judgment of the learned Single Judge granting such limited relief does not call for interference. The impugned judgment is also consistent to the law explained by the Supreme Court in ***G.P. Doval v. Chief Secretary, Government of U.P. (supra) and S. Sumnyan v. Limi Niri (supra)***. Such relief can also not be said to be inconsistent with law laid down in ***Dhyan Singh v. State of Haryana (supra)***.

14. For all of the aforementioned reasons, the Court finds no ground is made out for interference with the impugned judgment of the learned Single Judge. The writ appeals are accordingly dismissed. Consequently, it is directed that orders shall be issued by the S & ME Department by way of implementation of the impugned judgment of the learned Single Judge within four weeks from today.

15. The intervention application of the persons, who were before the learned Single Judge as writ Petitioners, but were not made parties by the S & ME Department in the appeal, have already been allowed by this Court on 23rd September 2022 in W.A. No.936 of 2021. Their cases will also be covered by this judgment.

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2023 (I) ILR – CUT - 639

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

AHO NO. 34 OF 1998

HATANAGAR GHOSE & ORS. .....Appellants

.V.

DURGAMANI GHOSE & ORS. .....Respondents

APPRECIATION OF EVIDENCE – Burden of Proof – The self-acquired property of a coparcener of a Hindu joint family has brought into the hotch pot – The coparcener claimed a portion to be self-acquired – Onus of proof – Held, where a person claims that a property is self-acquired, the burden is on such person to prove that it is self-acquired.

Case Law Relied on and Referred to :-

1. AIR 1966 Madras 266: P.N. Venkatasubramania Iyer Vs. P.N. Easwara Iyer.

For Appellants : Mr. Avijit Pal

For Respondents : Mr. Dwarika Prasad Mohanty.

JUDGMENT Date of Judgment: 17.02.2023

Dr. S. MURALIDHAR, C.J.

1. This appeal, by the legal representatives (LRs) of the unsuccessful Plaintiff in Civil Suit O.S. No.50 of 1974-I (Late Dayanidhi Ghose) is directed against a judgement dated 23rd June 1998 passed by the learned Single Judge of this Court dismissing the Plaintiff's appeal F.A. No.41 of 1979.

2. The said F.A. No.41 of 1979 was in turn filed by Dayanidhi Ghose against the judgment dated 30th October, 1978 and a Decree dated 9th November, 1978 passed by the trial Court, i.e.,the Subordinate Judge, Balasore in Civil Suit O.S. No.50 of 1974. The trial Court negatived the challenge by the Plaintiff to the validity of a partition deed dated 27th March 1962 (Ext. N) and the consequential division of the properties thereunder between the Plaintiff Dayanidhi Ghose and his brother Baina Ghose (Defendant No.1). The trial Court however accepted the plea of the Plaintiff that the properties mentioned in Schedule 'Ga' to the partition deed (Ext. N) were kept joint and were to be partitioned in equal shares between the Plaintiff Dayanidhi Ghose and his brother Baina Ghose (Defendant No.1). F.A. No. 41 of 1979 filed in this Court by Dayanidhi Ghose against the trial Court judgment was limited to questioning its rejection of the Plaintiff's challenge to the validity of the partition deed dated 27th March 1962 (Ext. N).

3. By the impugned judgment dated 23rd June 1998 dismissing F.A. No.41 of 1979, the learned Single Judge of this Court reversed the finding of the trial Court that the 'Ga' Schedule properties were joint family properties and held that they were the self-acquired properties of Defendant No.1. The learned Single Judge held that the 'Ga' Schedule properties were not liable to be partitioned between the Plaintiff and Defendant No.1. That is how this appeal has been filed by the LRs of the original Plaintiff.

4. The principal question that arises in this appeal is whether a portion of the properties standing in the name of a male Hindu (Defendant No.1) who was the

Karta of a joint Hindu family were his self-acquired properties or acquired under the joint family nucleus?

5. The background facts leading to the filing of the suit were that Baina and Dayanidhi Ghose were the two children of the second wife of the son of late Nandi Ghose who was their common ancestor. Of the two sons Pahali and Dhinu, the latter branch was extinct. Pahali had two wives. Ganesh was the son of the first wife and Baina (Defendant No.1), Nandu and Dayanidhi (the Plaintiff) were the children of the second wife. Ganesh died leaving four sons Abhinash, Krutibash, Kailash and Srinibas.

6. Kailash died leaving behind his widow Dhira, Defendant No.5 and daughter Jema alias Katibudhi (Defendant No.6). Baina's sons were Subodh (Defendant No.7), Jhadeswar (Defendant No.8), Banishidhar (Defendant No.9) and Isaneswar (Defendant No.10). Nandu died leaving his wife Padmabati, who also died. Nandu's branch thereby became extinct. Baina Ghose was the karta of the joint Hindu family consisting of himself and his brother Dayanidhi Ghose.

7. The case of Dayanidhi Ghose in the suit O.S. No.50 of 1974-I was that in an earlier partition, Ganesh took Ac 4.40 dec of land and was separated from the joint family. The property described in Schedule 'Kha' of the plaint were ancestral and those in "Ga" were the properties acquired in the name of Defendant No.1 as karta of the joint family out of the joint family nucleus. Earlier Padmabati, the widow of Nandu, had filed a partition suit i.e.,O.S. No.53 of 1959 and by compromise the suit was decreed with her getting Ac. 1.88 dec of land in schedule 'Uan', cash of Rs. 4,000 and paddy.

8. The further case of the Plaintiff was that by virtue of a partition deed dated 27th March, 1962, Baina Ghose took a larger share of the joint family properties than what he was entitled to. According to the Plaintiff the properties in Schedule 'Ga' measuring Ac 4.000, although stands recorded in the name of Defendant No.1 Baina Ghose, were in fact purchased out of the joint family nucleus and were therefore kept 'joint'. According to the Plaintiff the 'Ga' Schedule properties were liable to be partitioned between him and Defendant No.1.

9. After pleadings were completed in the suit, the trial Court framed the following issues for consideration:

> "1. Whether the registered partition deed dated 27.3.62 is fraudulent illegal and not duly executed by the plaintiff?
>
> 2. Whether the 'Chha' schedule properties are the self acquired properties of the plaintiff?
>
> 3. Whether the plaintiff is entitled to the share claimed?
>
> 4. Has the plaintiff any right, title and interest over properties mentioned under lot Nos.36, 39, 40, 42 and 44 of 'Ga' schedule?

5. Are the properties in all lots of 'Ga' schedule except 18, 19, 23 are self acquired properties of deft. No.1?

6. Whether all the properties have been brought to the hotch pot?

7. Is the suit bad for non-joinder of parties?

8. Is the suit maintainable in the present form?

9. Is there cause of action for the suit?

10. What relief, if any, the plaintiff is entitled to?"

10. Taking up the Issue Nos.1 to 5, the trial Court on analyzing the evidence held that there was a partition between the Plaintiff and Defendant No.1 in the year 1961 which was reduced to writing. The deed registered in 1962 (Ext. N) was "valid, duly executed and is not fraudulent or illegal". Some properties were left joint which were given in the 'Ga' schedule of Ext N. The trial Court noted that Defendant No.1, who could have given the best evidence about the said properties having been purchased by him and his sons in their own names and the source of funds being traced to his wife who got some properties as gift from her mother, "has not chosen to come to the witness box". His son, DW-1 had stated that the lands kept joint in the partition deed in the year 1962 had been partitioned in 1963. However, the trial Court noted that there was no document to that effect and "DW-2 does not say anything about it". DW-5 also could not say "if the Pala lands, which were kept joint in the partition of the year 1961, were partitioned between them". The trial Court then concluded as under:

> "Therefore, in absence of clear proof of subsequent partition of the 'Ga' schedule lands of the registered partition deed Ext.N plaintiff is entitled to hold share from out of it. These issues are therefore answered accordingly."

11. On Issue No.6, it was held that the four acres and odd lands purchased by the Plaintiff from the year 1963 to 1976 were not brought into the hotch pot. Issue No.7 was not pressed at the time of hearing. On Issue Nos.8 to 10, it was held that while the suit was maintainable, the Plaintiff had cause of action for claiming partition of those lands kept joint in Ext-N and was therefore, entitled to the relief of the partition of the lands in 'Ga' schedule of Ext-N. The operative order was that the Plaintiff was entitled to get half of the properties described in schedule 'Ga' of Ext-N of the registered partition deed and Defendant No.1 is entitled to the other half.

12. As noted earlier, aggrieved by the above decree and judgment to the extent that it declined the prayer of the Plaintiff for revisiting the partition deed (Ext-N), the LRs of the Plaintiff preferred FA No.41 of 1979 in this Court.

13. Given the limited challenge in the first appeal, the only issue before the learned Single Judge was whether Ext-N, viz., the partition deed dated 27th March 1962 was legal. There was no occasion, particularly since Defendant No.1 had not filed any appeal, for the learned Single Judge to consider in the appeal whether the properties in Schedule 'Ga' were the self-acquired properties of Defendant No.1.

This Court notes that while summarizing the findings of the trial Court in para-5 of the impugned judgment, the learned Single Judge wrongly noted that the trial Court found "that the properties in schedule 'Ga' of the plaint are the self-acquired properties of Defendant No.1" when in fact the trial Court found that the 'Ga' schedule properties were not proved to be the self-acquired properties of Defendant No.1 and were therefore, liable to be partitioned.

14. This error led the learned Single Judge to erroneously formulate an issue in regardto the 'Ga' schedule properties. The two questions framed for consideration in the first appeal by the learned Single Judge read as under:

> "(1) Whether the deed of partition, Ext.N is legal, valid and binding on the plaintiff and if this question is answered in affirmative, whether the plaintiff is entitled to reopen partition in respect of the very same properties; and
>
> (2) Whether the properties described in schedule 'Ga' of the plaint are the self-acquired properties of defendant No.1 or the same were acquired out of the joint family nucleus?"

15. While question (1) above did arise from the first appeal of the Plaintiff, question (2) did not. In the discussion on Question No.1, the learned Single Judge noted that in order to prove the execution of the deed of partition (Ext.N), Defendant No.2 was examined. His evidence could not be shaken in cross-examination. He confirmed that the deed was presented for registration and he identified the parties to the Sub-Registrar. It was accordingly held that the deed of partition was valid and binding on the Plaintiff. Since there was amicable division of the properties between the Plaintiff and the Defendant No.1, the Plaintiff was not entitled to reopen the partition.

16. On Question (2), it was held by the learned Single Judge as under:

> "It may be recalled, plaintiff an defendant no.1 effected partition of their properties under the deed of partition, Ext.N on 27.3.62. Assuming for the sake of argument that there was no partition between them and Ext.N was inoperative, it cannot be denied that the parties remained in separate mess and property at least from that day and enjoyed the properties separately without there being partition by metes and bounds. Out of the properties described in schedule 'Ga' of the plaint lot nos.28, 29,30, 31, 32, 33, 34 and 39 had been purchased by defendant no.1 under various sale deeds (Exts. A/5, A/7, A/8, A/9, A/10, A/11, A/12, A/13, A/14 and A/15) much after execution and registration of the deed of partition Ext.N. Likewise defendant no.7, purchased lot nos.37 and 38 under the registered sale deed Ext.A/26 on 12.2.74 and he along with his brothers defendants 9 and 10 purchased properties in lot nos.40 and 41 under registered sale deeds Exts. A/24 and A/25 on 29.3.72 and 9.3.73. Since the family was separated by the time the aforesaid properties were acquired, plaintiff's claim that those had been purchased out of joint family nucleus cannot be accepted."

17. The learned Single Judge then referred to the stand of the Defendant No.1 in his written statement to the effect that the source of money for acquiring the 'Ga' schedule properties was the property given to his wife as dowry by her mother by

way of a gift deed. The case of the Plaintiff, on the other hand, was that the 'Ga' schedule properties had been acquired out of the joint family nucleus. The learned Single Judge then observed as under:

> "Since admittedly the sale deeds in respect of 'Ga' schedule properties stand in the name of defendant no.1, burden lies on the plaintiff to prove that those had been purchased by him as well as defendant no.1 out of their own income. This initial burden he has not discharged. He in his evidence has denied to have any knowledge as to how 'Ga' schedule properties were acquired. In paragraph 1 of his cross-examination he stated thus:
>
> "xxx I also cannot say how 'Ga' schedule properties were acquired. I cannot say the total extent of property of my father. I cannot say what were the income from our ancestral land and what were expenses and what remained as surplus. xxx"
>
> This being the evidence of the plaintiff, it cannot be said that 'Ga' schedule properties had been acquired by defendant no.1 out of joint family nucleus."

18. On the above basis, it was held by the learned Single Judge that the Plaintiff has no share in the properties in Schedule 'Ga' of the plaint which were the self-acquired properties of Defendant No.1. The appeal was accordingly dismissed.

19. This Court has heard the submissions of Mr. Avijit Pal, learned counsel appearing for the Appellants and Mr. Dwarika Prasad Mohanty, learned counsel appearing for the Respondents. Mr. Pal pointed out that there was a very limited scope of the appeal filed by the Plaintiff, viz., whether the Plaintiff was entitled to have the partition deed at Ext-N declared invalid and for a partition of those properties which had already been purportedly partitioned by the said deed? The Plaintiff had already succeeded as far as schedule 'Ga' properties were concerned. In other words, the trial Court had accepted the Plaintiff's plea that the 'Ga' Schedule properties were kept joint in Ext-N and had to therefore be partitioned between him and the Defendant no.1 in equal shares. With the Plaintiff already having succeeded in the said plea concerning the 'Ga' Schedule properties, and with the Defendant No.1 not having filed any appeal against the said finding of the trial Court, there was no occasion for the learned Single Judge to have reopened that question.

20. Mr. Pal further pointed out that Defendant No.1, who was in the best position to prove that he had acquired the 'Ga' schedule properties out of his own funds, did not step into the witness box. Further, the trial Court was not convinced with the evidence led by his sons to that effect.

21. On the other hand, Mr. Dwarika Prasad Mohanty, learned counsel appearing for the Defendants/Respondents submitted that the findings of the learned Single Judge that the Plaintiff had failed to discharge the burden of showing that the properties in Schedule 'Ga' were not the self-acquired properties of Defendant No.1, ought to be upheld by this Court. While he did not dispute that Defendant No.1 had not filed any appeal before the learned Single Judge to question the finding of the

trial Court against Defendant No.1 in that regard, he submitted that the sale deeds were in the name of Defendant No.1 and his sons and, therefore, there was a presumption that they were self-acquired properties.

22. The above submissions have been considered. At the outset, it requires to be noticed that the trial Court in its judgment, partly decreed the suit in favour of the Plaintiff, i.e., the predecessor-in- interest of the Appellants. While the trial Court rejected the plea of the Plaintiff that the partition deed Ext-N was invalid, it accepted the plea of the Plaintiff that the 'Ga' schedule properties were joint and required to be partitioned, which is why the trial Court in the operative portion of the decree directed partitioning of the said 'Ga' schedule properties half each in favour of Defendant No.1 and the Plaintiff.

23. The important point to be noted is that the Defendant No.1 accepted the above decree of the trial Court. It is only the Plaintiff who filed an appeal in this Court and not the Defendant No.1. In the first appeal filed before this Court, it was clearly stated by the Plaintiff that the appeal is confined to questioning the trial Court judgment to the extent that the trial Court declined the prayer of the Plaintiff as regards the validity of the partition deed Ext-N.

24. At this stage, it must be noticed that the trial Court held the Plaintiff had in fact not prayed for setting aside the entire partition deed but that this did not materially affect the prayer of the Plaintiff for claiming partition of lands in schedule 'Ga' which have been kept joint. The Plaintiff obviously was not aggrieved by this part of the trial Court decree since it was in his favour. It had granted the relief of partitioning of schedule 'Ga' properties. If at all, it was Defendant No.1 who would have been aggrieved by that portion of the decree of the trial Court and yet Defendant No.1 did not question it.

25. As a result, there was no occasion for the learned Single Judge to have framed any question regarding the validity of the decree of the trial Court in so far as it required partitioning of the Schedule 'Ga' properties. Such an issue did not arise in the appeal filed by the Plaintiff, which was the only appeal before the learned Single Judge. It must be noted here that the specific finding of the trial Court was that in the absence of clear proof of subsequent partitioning of the 'Ga' Schedule properties, "Plaintiff is entitled to half share from out of it".

26. Consequently, the learned Single Judge fell in error in reopening the question whether the 'Ga' Schedule properties were the self-acquired properties of Defendant No.1 and proceeding to answer the said question in favour of Defendant No.1, thereby reversing the trial Court on this point, despite the fact that Defendant No.1 never questioned to it. Even before this Court, learned counsel for the Respondents/Defendants did not dispute that the Respondents never filed any appeal challenging the finding of the trial Court as regards the 'Ga' Schedule properties, which finding was in favour of the Plaintiff. Consequently, this Court is

unable to sustain the impugned order of the learned Single Judge in so far as it holds that the 'Ga' Schedule properties are the self-acquired properties of the Defendant No.1 and, therefore, not available to be partitioned.

27. The question is whether a coparcener of a Hindu joint family has brought into the hotch pot self-acquired properties has arisen in several cases before the Courts. What is clear is that where a person claims that a property is self-acquired, the burden is on such person to prove that it is a self-acquired. In this case, it was Defendant No.1 who contended before the learned Single Judge that the 'Ga' Schedule properties were self-acquired. The burden of proof in this regard was therefore on Defendant No.1. As held by the trial Court Defendant No.1 was unable to discharge that burden.

28. In ***P.N. Venkatasubramania Iyer v. P.N. Easwara Iyer AIR 1966 Madras 266***, it was held that if there is a considerable 'nucleus of joint family estate and in proportion to such nucleus, the property claimed to be self-acquired is insubstantial' then "the presumption arises that the acquired property is joint property, and the onus certainly lies on the party alleging self-acquisition". The Court reminded that "the income yielding capacity of the nucleus is equally an important factor". It was observed in the said case as under:

> "It is well settled that if in fact on the dale of acquisition by a member of a joint family of any particular item of properly the joint family had sufficient resources with the aid of which the property in question could have been acquired, the property should be presumed to be acquired from out of the joint family funds and so partible property of the family. Of course it is only a presumption, the person claiming the property as his own could show the contrary and establish that the acquisition was without the aid of joint family property."

29. It was further observed as under:

> "A person standing in a fiduciary position to another cannot, by taking advantage of his position, gain exclusively for himself an advantage which he could not have obtained but for the position."

30. In the present case, as already noticed the Defendant No.1 did not choose to come into the witness box at all, the claim of DW-1, that the lands kept joint in the partition deed had been partitioned in 1963 was not supported by any documentary proof. DW-2 did not say anything about it either. Again DW-5 could not say if those lands had been partitioned after 1961.

31. In other words, the finding of the trial Court was clear that notwithstanding that the sale deeds may have been in the names of Defendant No.1 and his sons, there was nothing to show that those properties, which had been shown as joint in the partition deed Ext-N, had in fact been partitioned.

32. Having accepted the finding of the trial Court that Ext-N was a validly executed partition deed, the learned Single Judge was in error in holding that the

'Ga' Schedule lands reflected in the said partition deed were not joint but were the self-acquired properties of Defendant No.1.

33. For all of the aforementioned reasons, the Court sets aside the impugned judgment of the First Appellate Court to the extent that it has observed that the 'Ga' Schedule properties were the self-acquired property of the Defendant No.1. The Court makes it clear that it is not interfering with the finding of the trial Court as well as the learned Single Judge as regards the validity of the partition deed Ext-N. This Court concurs with the said finding upholding the validity of the said document.

34. The effect of this judgment is that the judgment and the decree of the trial Court is restored to file. The decree will now be drawn up accordingly.

35. The appeal is disposed of in the above terms.

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2023 (I) ILR – CUT - 647

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

W.P.(C) NO. 11275 OF 2022

SUJEET ARYA (HINDU UNDIVIDED FAMILY) ……....Petitioner

.V.

PRINCIPAL CHIEF COMMISSIONER OF INCOME TAX, BHUBANESWAR & ORS. ……Opp. Parties

DIRECT TAX VIVAD SE VISHWAS ACT, 2020 r/w section 271 (1) (C) of The Income Tax Act – Whether an application for waiver of penalty is maintainable under the DTVSV Act – Held, Yes – The DTVSV Act is a beneficial legislation for both the Revenue and the tax-payer and interpretation of the provisions of the DTVSV Act has to reflect the object and the purpose of the statute accordingly – The Department cannot deprive the Petitioner the benefit of the DTVSV Act only because the Petitioner filed an application for waiver of penalty.

(Para 16-20)

Case Laws Relied on and Referred to :-

1. (2022) 328 CTR 662 (Del) : Kapri International Pvt. Ltd. Vs. Commissioner of Income Tax-IV
2. (2021) 434 ITR 474 (Bom) : Sadruddin Tejani Vs. ITO

For Petitioner : Mr. S.S. Padhy & Mr. Sunil Mishra

For Opp. Parties : Mr. R.S. Chimanka, Sr. Standing Counsel, Mr. Avinash Kedia, Jr. Standing Counsel

ORDER Date of Order: 23.02.2023

Dr. S. MURALIDHAR, C.J.

1. The challenge in the present petition is to an order/letter dated 20th January, 2021 issued by the Principal Commissioner of Income Tax, Bhubaneswar (PCIT) informing the Petitioner that the Petitioner's application under the Direct Tax Vivad Se Vishwas Act, 2020 (DTVSV Act) was not eligible since it was filed "against the rejection of penalty waiver petition". It was stated that such waiver petitions were not 'appeal' within the meaning of DTVSV Act.

2. The background facts are that the Petitioner is a Hindu Undivided Family (HUF) and an income tax assessee. The Petitioner filed returns for the Assessment Year (AY) 2014-15 on 19th March, 2015 disclosing a total income of Rs.12,95,840/- and admitting a tax liability of Rs. 2,25,315/-. Long term capital gain on shares was disclosed as Rs.37,35,321/-. However, the said income was claimed to be exempted under Section 10(38) of the Income Tax Act, 1961 (IT Act).

3. In the scrutiny assessment that followed, the Assessing Officer (AO) passed an assessment order dated 29th July, 2016 accepting the disclosure by the Petitioner and determining total tax and interest at Rs.18,40,073/-. The entire tax demanded was deposited on 9th August, 2016.

4. The AO however, initiated penalty proceedings under Section 271 (1) (c) of the IT Act and ultimately passed a penalty order in December, 2016 raising a penalty of Rs.11,59,091/-. The Petitioner then filed a petition under Section 273(A) of the IT Act seeking waiver of penalty. A supplementary petition was also filed for the same relief.

5. The PCIT, Bhubaneswar intimated the Petitioner by letter dated 30th May, 2017 that approval for waiver of penalty was not accorded. W.P. (C) No.13576 of 2017 was then filed in this Court questioning the levy of penalty and rejection of the Petitioner's application for waiver.

6. While the said writ petition was pending, the DTVSV Act came into force on 17th March, 2020. The Petitioner made an application in Form I to the PCIT, Bhubaneswar on 2nd December, 2020 for full and final settlement of the arrears in respect of AY 2014-15.

7. In terms of Section 5 of the DTVSV Act, the PCIT, Bhubaneswar determined the amount payable by the Petitioner for such full and final settlement. The electronically generated certificate in Form 3 dated 14th December, 2020 was furnished to the Petitioner and in terms thereof, the Petitioner paid Rs.2,89,773/- on 23rd December, 2020.

8. On 20th January, 2021 the impugned order was issued by PCIT, Bhubaneswar informing the Petitioner of the rejection of its application under the DTVSV Act

on the ground that waiver petitions were not appeals within the meaning of the DTVSV Act and the Circular No.7 of 2020 dated 4th March, 2020. Aggrieved, the Petitioner filed the present petition in which notice was issued on 18th May, 2022. It was indicated that the payments made by the Petitioner pursuant to the DTVSV Act would be subject to outcome of the writ petition.

9. In response to the notice issued in this petition, a counter affidavit has been filed by the Department dated 15th June, 2022. Inter alia, it is contended that in terms of question No.13 of the circular No.7/2022 dated 4th March, 2020 "waiver applications are not appeals within the meaning of Vivad Se Vishwas" Scheme and, therefore,the Petitioner's application under the DTVSV Act was rightly rejected. Reference is also made to Section 273-A(5) which states that every order made under that provision "shall be final and shall not be called into question by any Court or any other authority".

10. This Court has heard the submissions of Mr. S.S. Padhy, learned counsel appearing for the Petitioner and Mr. Radhey Shyam Chimanka, learned Senior Standing Counsel appearing for the Department.

11. It is seen that under Rule 4 of the DTVSV Rules 2000, "the designated authority shall grant a certificate electronically referred to in sub Section 1 of Section 5 in Form-1." Further, even Forms 1and 2 and Form 4 shall be furnished electronically under digital signature. In other words, once a certificate in terms of Rule 4 is generated, it should be taken to be conclusive. This is further made clear by Section 5 of the DTVSV Act which reads as under:

> "5.(1) The designated authority shall, within a period of fifteen days from the date of receipt of the declaration, by order, determine the amount payable by the declarant in accordance with the provisions of this Act and grant a certificate to the declarant containing particulars of the tax arrear and the amount payable after such determination, in such form as may be prescribed.
>
> (2) The declarant shall pay the amount determined under sub-section (1) within fifteen days of the date of receipt of the certificate and intimate the details of such payment to the designated authority in the prescribed form and thereupon the designated authority shall pass an order stating that the declarant has paid the amount.
>
> (3) Every order passed under sub-section (1), determining the amount payable under this Act, shall be conclusive as to the mattes stated therein and no matter covered by such order shall be reopened in any other proceeding under the Income Tax Act or under any other law for the time being in force or under any agreement, whether for protection of investment or otherwise, entered into by India with any other country or territory outside India.
>
> Explanation.— For the removal of doubts, it is hereby clarified that making a declaration under this Act shall not amount to conceding the tax position and it shall not be lawful for the income-tax authority or the declarant being a party in appeal or writ petition or special leave petition to contend that the declarant or the income-tax authority, as the case may be, has acquiesed in the decision on the disputed issue by settling the dispute."

12. When both Section 5 of the DTVSV Act as well as Rules 4 and 6 of the DTVSV Rules are read together, it is plain that for operationalizing the DTVSV Scheme, the Department has decided to adopt the electronic mode. In this mode, a certificate generated electronically would have the same probative value as a certificate issued manually. This explains why Section 5 itself accords impramatur to an electronically generated certificate.

13. The stand taken in the counter affidavit of the Department is simply that the certificate had been wrongly generated and that because it was not signed by the PCIT and also not issued to the Assessee, it should not be acted upon. In other words, it is not disputed that such certificate was in fact generated and the Petitioner has also made payment pursuant to the generation of such certificate.

14. Therefore, the explanation offered that merely because the said certificate was not signed by the PCIT and not issued to the Petitioner, would not result in nullifying such certificate.

15. It also appears to the Court that the stand of the Department in its counter affidavit that waiver applications would not constitute 'appeal' for the purposes of the DTVSV Act is not also entirely correct. The relevant portion of the Circular No.7 of 2020 dated 4th March, 2020 which is relied upon by the Department in this regard reads as under:

> **"Question No.13** With respect to interest under section 234A, 234B or 234C, there is no appeal but the assssee has filed waiver application before the competent authority which is pending as on 31 Jan 2020? Will such cases be covered under Vivad se Vishwas?
>
> **Answer:** No, such cases are not covered. Waiver applications are not appeal within the meaning of Vivad se Vishwas."

16. As pointed out by Mr. Padhy, learned counsel for the Petitioner, the question itself talks of applications for waiver of **interest** and not for waiver of **penalty**. Secondly, as explained by the Delhi High Court in ***Kapri International Pvt. Ltd. v. Commissioner of Income Tax-IV (2022) 328 CTR 662 (Del***) the waiver application referred to in the aforementioned Question No.13 should mean "a pending waiver application before the Department and not proceeding emanating out of a decision by the Department on a waiver application". Further, it was explained by the Delhi High Court in ***Kapri International Pvt. Ltd***. (supra), relying on the judgment of the High Court of Bombay in ***Sadruddin Tejani v. ITO (2021) 434 ITR 474 (Bom)*** that the DTVSV Act is a beneficial legislation for both the Revenue and the tax-payer and interpretation of the provisions of the DTVSV Act has to accordingly reflect the object and the purpose of the statute. It was explained by the Delhi High Court that "any proceeding challenging a decision by the Department in respect of tax, interest, penalty, fee etc., would come within the purview of a 'dispute' which would enable a party to approach the Department for a resolution under the VSV Act". Mr. Padhy states that to the best of his information, the above

decision of the Delhi High Court in ***Kapri International Pvt. Ltd***. (supra) has not further been questioned by the Department in appeal.

17. The Court is of the view that in the present case, the answer to FAQ No.13 forming part of Circular No.7 of 2020 of the Department does not enable the Department to reject the Petitioner's application under the DTVSV Act only because the Petitioner had filed an application for waiver of penalty. None of the reasons put forth by the Department to reject the Petitioner's application are valid or convincing.

18. Mr. Chimanka, learned Senior Standing Counsel for the Department, then pointed out that the relief granted in ***Kapri International Pvt. Ltd***. (supra) was only for the matter to be sent back to the PCIT with directions to the CIT to re-examine/reassess the declaration filed by the Petitioner and decide the application on merits. He accordingly submitted that in this case also, a similar direction should be issued.

19. As pointed out by Mr. Padhy, in the present case, the Department had already accepted the application filed by the Petitioner and in proof of such acceptance, the system-generated certificate under Rule 4 of the DTVSV Rules was issued to the Petitioner. It had the stamp of finality and conclusivity in terms of Section 5(3) of the DTVSV Act. In other words, the Department cannot possibly resile from such certificate on the ground that it was not printed out or not physically signed by the PCIT. It had the same effect as a certificate validly issued and which has already been acted upon by the Petitioner by paying the requisite amount.

20. Further, as already explained, the Department cannot deprive the Petitioner of the benefit of the DTVSV Act only because the Petitioner filed an application for waiver of penalty.Following the judgment of the Delhi High Court in ***Kapri International Pvt. Ltd.*** (supra) this Court holds that such an application for waiver of penalty cannot make the Petitioner ineligible within the meaning of the DTVSV Act.

21. For the aforementioned reasons, the impugned order/letter dated 20th January, 2021 of the PCIT, Bhubaneswar is hereby set aside.The result would be the Petitioner's application under the DTVSV for the AY 2014-15 will be treated as accepted. The writ petition is disposed of in the above terms, but in the circumstances, with no order as to costs.

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2023 (I) ILR – CUT - 652

S. TALAPATRA, J & MISS. SAVITRI RATHO, J.

WPCRL NO.100 OF 2022

TAPU @ PRASANTA DAS …….Petitioner

.V.

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

NATIONAL SECURITY ACT,1980 – Section 3(3) – Extension of the period detention – Duty of the detaining Authority – Held, at the time of passing the order, extending the period of detention, the detaining authority is fastened with the duty to make assessment whether the extension is essential or not – They cannot pass the bald order of extension – The order of extension should reflect the crux of the consideration – The legislature has specifically provided that the "Advisory Board" shall review the grounds of detention – Placing a person under detention for a period of twelve months at a stretch without proper review, is detrimental to the rights of the detenu.

(Para 38)

Case Laws Relied on and Referred to :-

1. AIR 1986 SC207:State of U.P. Vs. Mahant Singh.
2. 2003 (11) OLR (NOC) 74: Rabi @ Rabindra Behera @ Chickan Rabi Vs. State of Orissa and Ors.
3. AIR 2018 SC 3419: Hetchin Haokip Vs. State of Manipur and Ors.
4. AIR 1986 SC 207 : State of Uttar Pradesh Vs. Mahant Singh.
5. (1975) 2 SCR 832 : Khudi Ram Das Vs. State of West Bengal.
6. (1982) 2 SCR 272 : A.K. Roy Vs. Union of India.
7. 1990 SCR (1)836 : Mrs. T. Debaki Vs. Government of Tamil Nadu and Ors.
8. AIR 1992 SC 979,1992 SCR (1) 234 : Harpreet Kaurharvinder Vs. State. of Maharashtra and Another.

For Petitioner : Mr. Manoranjan Das.

For Opp. Parties : Mr. J. Katikia, AGA

JUDGMENT Date of Judgment: 09.02.2023

S. TALAPATRA, J.

1. By means of this writ petition, the petitioner has challenged the Order No.01/C.P Judl (NSA) dated 14.03.2022 (Annexure-1 to the writ petition) passed by the Commissioner of Police Bhubaneswar-Cuttack, the detaining authority, and urged to set aside the consequential proceedings and orders as illegal and barred. The detention of the petitioner, hereinabove referred to as the detenu, under the National Security Act, (in short NSA) has been given effect to, in pursuance to the said order.

2. The facts, germane to the challenge, are introduced at the outset briefly. The detenu was in custody in the circle jail, Choudwar in connection with Kandarpur PS Case No.181 of 2021 for commission of offences under Sections 386/387/120/34 IPC [corresponding to GR Case No.1742/2021 pending in the court of J.M.F.C. (R) Cuttack], the said order of detention on 14.03.2022 was served on the detenue in the district jail, Sundargarh declaring him to be detained in exercise of the powers conferred under Section 3(2) of NSA.On 17.03.2022, by the Communication No.165/CP-Judl. dated 17.03.2022 (Annexure-2 to the writ petition) the detaining authority served the grounds of detention. It has been stated in the said communication dated 17.03.2022 that being satisfied with the letter submitted by the Opposite Party No.4 dated 14.03.2022, regarding the past activities of the petitioner and the documents as relied, the Commissioner of Police, Bhubaneswar- Cuttack was satisfied that the detention of the petitioner/detenu is required in order to prevent him from acting in any manner prejudicial to the maintenance of public order and tranquility. The communication containing the grounds of the detention is available at Annexure-2 of the writ petition.

3. On scrutiny, it appears that the Commissioner of Police,Bhubaneswar-Cuttack has also made reference that he had received a full report detailing the petitioner's past activities along with various documents which he had contended as the ground of detention, as communicated on 17.03.2022. The detaining authority has been subjectively satisfied that the petitioner's detention is required to prevent him from acting in any manner prejudicial to the maintenance of Public Order and Tranquility, in Para Cof the grounds of detention,it hasbeen noted that the Deputy Commissioner of Police, Cuttack UPD has reported that the petitioner's criminal act and anti-social activities have become a challenge and threat for maintenance of public order in Cuttack city. According to the Deputy Commissioner of Police, the petitioner is a "*a dreaded criminal and threat as well for maintenance of public order in Cuttack city*" and he is involved in a series of cases of dacoity, murder, assault, criminal intimidation, attempt to murder, extortion, robbery, bombing, tender fixing and smuggling of illegal fire arms/ammunition.

4. It has been also noted that the petitioner had indulged in attacking the innocent citizens publicly and damaged both public and private properties. In view of such nature of activities, the peace loving people is scared of reaching out to police. The petitioner's criminal activities are disrupting public order and that cannot be prevented by the normal legal processes. The Deputy Commissioner of Police, Cuttack apprehended that on the release of the petitioner from judicial custody, the petitioner will indulge in the similar activities as stated in his Report. Based on the antecedents of the petitioner, which are prejudicial to the maintenance of Public Order in the Cuttack City and other districts, the order of detention under NSA has been issued. For providing a summary of criminal activities of the petitioner/the detenu, specific references have been made to: (1) Jagatsinghpur PS Case No.253

of 2016 under Section 395/120(B)IPC/25/27 Arms Act, (2) Badachana (Jajpur) PS Case No.258 of 2006 under Section 395/120(B)/25 Arms Act, (3) Nilagiri (Balasore) PS Case No.131 of 2009 under Section 302/34, IPC/25/27 Arms Act, (4) Kishorenagar (Cuttack Rural) PS Case No.68 of 2012 under Section 9(B), I.E.Act turned to under Section 3 E.S. Act/120(B)/34 IPC, (5) Nuagaon (Jagatsinghpur) PS Case No.36/2012 under Section 294/323/506/379/34 IPC/ read with 25/27 Arms Act, (6) Kandarpur (Cuttack UPD) PS Case No.09 of 2012 under Section 9(B), I.E Act (7) Jagatsinghpur PS Case No.22 of 2013 under Section 395 IPC read with 25/27 Arms Act, (8) Biridi (Jagatsinghpur) PS Case No.85 of 2014 under Section 307/34 IPCread with Section 25/27Arms Act,(9)Biridi (Jagatsinghpur) PS Case No.86 of 2014 under Section 25(1B) (a), Arms Act, (10) Jagatsinghpur PS Case No.375/2015 under Section 294/506/353 IPC, (11) Balikuda PS Case No.231 of 2015 under Section 387/506/120-B/34 IPC, (12) Kandarpur (Cuttack UPD) PS Case No.03 of 2016 under Section 294/385/506/34 IPC, (13) Rambha (Ganjam) PS Case No.34 of 2018 under Section 395 IPC read with Section 25/27 Arms Act, (14) Sadar (Cuttack UPD) PS Case No.80of 2018 under Section 392/34 IPC, (15) Sadar (Cuttack UPD) PS Case No.100 of 2018 under Section 341/326/307/324/34 IPC read with Section 25/27 Arms Act, (16) Sadar (Cuttack UPD) PS Case No.481 of 2018 under Section 25 of Arms Act, (17) Cuttack Sadar PS Case No.183 of 2021 under Section 451/506 IPC read with Section 25 Arms Act, (18) Choudwar PS Case No.281 of 2021 under Section 386/387/506/34 IPC,(19) Kandarpur PSCase No.181 of 2021 under Section 386/387/120(B)/34 IPC, (20) Sadar (Cuttack UPD) PS SDE/GD No.21of 2020, (21) Kandarpur (Cuttack UPD) SDE/GD No.31 of 2020,(22) Kandarpur (Cuttack UPD) SDE/GD No.30 of 2020, (23) Kandarpur (Cuttack UPD) SDE/GD No.18 of 2021, (24) Kandarpur (Cuttack UPD) SDE/GD No.17 of 2021 and (25) Kandarpur (Cuttack UPD) SDE/GD No.16 of 2022.

5. Having referred to the occurrences as reported to the police, the Deputy Commissioner of Police, Cuttack has observed in the said grounds of detention as follows:

> *"The above series of verified incidents clearly established that Tapu @ Prasanta Kumar Das (35) of village Nimeisapur, PS-Kandarpur, Dist-Cuttack is a threat to public order in the jurisdiction of districts of Cuttack, Jagatsinghpur, Balasore, Puri, Ganjam and especially a matter of serious concern in Sadar,Madhupatna and Kandarpur PS areas of Cuttack Urban Police district. By creating terror, he is throwing normal rhythm of life out of gear. He has now established such notoriety that people are scared to report against him to the law enforcement agencies. His modus operandi is to commit heinous crimes in public and create terror, establish his dreaded presence and extort money so that he can rule the street as a done. It is also alarming to see how often he has been associated with crimes involving guns and explosives, many in full open public view and broad-day light. He operates in gang and also creates more dreaded criminals like himself in the society."*

6. Even for the suspicious activities inside the Circle jail, Choudwar the petitioner was sent to the District Jail, Sundargarh on 06.03.2022 and he is now in

the district jail, Sundargarh. The petitioner has applied for bail in all the above cases which were not disposed as yet. As such, it has been estimated that his release as contemplated would allow him to renew his criminal activities of unleashing terror, extortion of money and disrupting public order. It may be noted that in the GDEs against the petitioner/the detenu some allegation has been made. On the date of filing of the grounds of detention against those GDEs, Specific police cases were not registered. But in Jagatsinhpur PS Case No.253 of 2006, the petitioner has been acquitted by the Addl.District Judge, Jagatsinghpur on 22.12.2009. In Kishorenagar (Cuttack Rural) PS Case No.68 of 2012, as referred above, the petitioner has been acquitted on 10.12.2013 by the 1st Addl. District Judge, Cuttack. Sadar (Cuttack UPD) Case No.481 of 2018 under Section 25 of the Arms Act is still pending awaiting the sanction order. In all other cases, the police has filed the charge sheet against the petitioner and those are pending for trial.

7. It may be noted at this stage that by the order dated 14.03.2022, the petitioner was detained under Section 3(2) of NSA. The grounds of detention was communicated after 3 days after the communication or of the order of detention i.e.17.03.2022 and the order of detention dated 14.03.2022 has been approved by the State Government on 29.03.2022. It appears that the grounds of detention in support of the order of detention dated 14.03.2022 have been formed on the report of the Commissioner of Police Bhubaneswar-Cuttack which had taken note of the report of the DCP Cuttack on the activities of the petitioner/the detenu. The order of detention and documents in support of the grounds of detention were sent to the NSA Advisory Board. In the initial order of detention dated 14.03.2022, there is no specific period of detention. The Government of Odisha by their order dated 26.04.2022 approved the said detention order and had directed to keep the petitioner under detention in the District Jail, Sundargarh for 3 months from the date of his detention or until further orders.

8. On the request of the Commissioner of Police, the detaining authority, the period of detention was extended to 6 months from the date of the detention in exercise of power as conferred by Section 12(1) read with Sections 3(3) and 13 of NSA. The Government approved the order dated 10.06.2022 (Annexure-5 to the writ petition). The petitioner/the detenu has challenged the said order of detention on the ground that there was infraction in compliance of the provisions of NSA as there is no threat to the national security, defence, maintenance of public order and maintenance of supplies and services essential to the community by the detenue. As such, all the consequential proceedings are also bad in law. Having referred to Section 3(1) and Section 3(2) of NSA, it has been contended that the explanation provided below Section 3(2) of the NSA clearly provides that "acting in any manner prejudicial to the maintenance of supplies of commodities essential to the community" does not include "*acting in any manner prejudicial to the maintenance of supplies of commodities essential to the community"* as defined in the Explanation

to the Sub section (1) of Section 3 of the Prevention of Black Marketing and Maintenance Act, 1980 and hence, no order of detention shall be made unless the grounds provided in the NSA are made out.

9. It has been asserted by the petitioner in the petition that he had never threatened the national security. From the catalogue of the cases as provided in the grounds of detention it will appear that all those cases were under trial or under investigation.Not a single case has been referred where the petitioner was convicted. In reply to the averments of the petitioner, the detaining authority P.W.3 has provided the sequence of events in the following manner:

> *"(a) 14.03.2022 - Detention order was passed.*
>
> *(b)15.03.2022 -The detention order was communicated to the Home Department thorough E-Mail.*
>
> *(c) 17.03.2022 - Grounds of detention was served on the petitioner. (d) 25.03.2022 - State Government made a reference to the Advisory Board.*
>
> *(e) 28.03.2022 - The petitioner submitted his representation to the Advisory Board.*
>
> *(f) 18.04.2022 - Representation of the detenue (the petitioner) was rejected by the Government."*

10. It has been asserted by the Opposite Party No.3 in his counter affidavit that the court may examine whether the procedure has been observed or not. According to the Opposite Party No.3, the grounds of detention had been explained to the petitioner. It has been contended that the release of the petitioner will definitely cause threat to the public order. In order to maintain the public order in Cuttack City the preventive order was passed on due diligence. It has been also asserted that the Government of Odisha has approved the detention order. The Opposite Party No.3 had revisited the cases as aforenoted for making reference to the pattern of activities the detenu/the petitioner had indulged in. It has been asserted that at the time of making the order for extension of detention, all the factors were carefully reviewed again by the State Government.The detention of the petitioner has prevented further disruption of public order and the confidence of the public in the administration in Cuttack City has been restored. The police is now maintaining the public order efficiently. It is pertinent to note that the representation of the petitioner as submitted through the Superintendent,District Jail, Sundargarh on 28.03.2022 (Annexure-D3 to the counter affidavit filed by the Opposite Party No.5) was dismissed by the Government and the said decision was communicated on 18.04.2022 (Annexure-E3 to the counter affidavit filed by the Opposite Party No.3). The Central Government did not accede to the request of the petitioner/the detenu for interfering with the detention order dated 14.03.2022. One additional affidavit has been filed by the wife of the petitioner on 07.09.2022 by stating that even though the detention/order was passed by the Opposite Party No.3 on 14.03.2022,the petitioner was produced before the NSA Advisory Board on 12.04.2022 after lapse of 3 weeks-which violates the mandatory provision of Section 20 of NSA which clearly provides as follows:

> *"Reference to Advisory Boards.—Save as otherwise expressly provided in this Act, in every case where a detention order has been made under this Act, the appropriate Government shall, within three weeks from the date of detention of a person under the order, place before the Advisory Board constituted by it under section 9, the grounds on which the order has been made and the representation, if any, made by the person affected by the order, and in case where the order has been made by an officer mentioned in sub- section (3) of section 3, also the report by such officer under sub-section (4) of that section."*

11. In this regard, we may refer to a decision of the Apex Court in **State of U.P. V. Mahant Singh: AIR 1986 SC207** where the apex court had observed that Section 10 of NSA is mandatory and non- compliance with or infraction thereof would certainly be fatal. Section 10 provides that the State Government has the obligation to cause the papers relating to detention placed,along with the representation, if made, within three weeks from the date of detention before the Advisory Board.

12. In support of the aforenoted contention, in the affidavit filed by Sarojini Das, the wife of the detenu, the communication dated 06.04.2022 has been referred. By the said communication, the Commissioner of Police, Bhubaneswar-Cuttack, the detaining authority has directed the Deputy Commissioner of Police, Cuttack, UPD to make the necessary escort arrangement for production of the petitioner before the NSA Advisory Board on 12.04.2022. According to the petitioner, it is apparent that he was only produced before the NSA Advisory Board on 12.04.2022. Meanwhile, the State Government had rejected the representation of the petitioner dated 28.03.2022, as would be evident from the communication dated 18.04.2022. By the representation, the petitioner has seriously questioned the detention for being in defiance of provisions of NSA. When the detention order was passed, the petitioner was in the judicial custody. His detention itself shows that the detaining authority did not consider the fact of petitioner's detention that is why the further detention had been asked for. According to the petitioner, the detaining authority had, without any sustainable reason exercised the jurisdiction on contemplation which is more imaginative, than subjective. The subjective satisfaction means an interference which is grounded on facts but its analysis may differ from one individual to other. But according to the petitioner, this ground of disruption of the public order by the petitioner did not even exist at the time of passing the said order of detention on 14.03.2022. According to the petitioner, the police had been framing him in several cases, but he had been securing acquittal. He got bail in some of the cases and in other cases he is trying to obtain bail. Hence, as in a lawful manner the petitioner detention cannot be secured by the State, they have arbitrarily used the provision of NSA to detain the petitioner/the detenu. The materials relied according to the petitioner are grossly inadequate.

13. The petitioner/the detenu has given his views in detail in regard to the cases which are catalogued in the grounds of detention. Those materials are not quoted for sake of brevity, as those have been recorded. It has been asserted further that no

detention order can be passed to prevent a person from getting released on bail as that is not the object of NSA. Reference has been made to a case of this court in **Rabi @ Rabindra Behera @ Chickan Rabi –Vrs- State of Orissa and Others: 2003 (11) OLR (NOC) 74**.

14. The petitioner/the detenu has asserted that *"the detenue has been wrongly estimated as an antisocial and habitual criminal. No doubt the detenu has got some political affiliation and a social activist in the locality in the habit of protesting the high-handness of the persons of ruling party as well as the police against the downtrodden people of his locality, which has caused the irk of the police of that area who have become a tool in the [hand] of the political leader. The detenu has been languishing in jail custody since 09.04.2018 as the under trial and thereafter by the order of detention also."*

15. It appears from the additional affidavit filed by the petitioner's wife on 11.11.2022 that the petitioner was released on 13.09.2022 as he had completed six months from the date of detention vide the order dated 14.03.2022. The petitioner was released from the judicial custody on 13.09.2022 at about 6 a.m. The Superintendent of Circle Jail, Sundargarh contacted him over phone and requested him to return to jail. Accordingly, the petitioner reached the jail on 14.09.2022. In this context, the question that has been raised is that whether the order of extension being purportedly not passed before expiry of the earlier order, is valid or whether by operation of the said order, the detenu can be detained again. In this regard, the Superintendent of District Jail, Sundargarh has, in terms of our direction dated 02.12.2022, filed an affidavit and stated that by the order dated 14.03.2022, the petitioner was detained under NSA until further order. Thereafter, by the order dated 26.04.2022, the petitioner's detention was confirmed and it was directed that the detention will be continued for 3 months from the date of his detention under NSA meaning from 15.03.2022, the date when the copy of the order was served on the petitioner. Latter on by the order dated 10.06.2022, the detention was extended for 6 months in total from the date of commencement of detention from i.e. on 15.03.2022. It has been admitted by the Superintendent, Sundargarh District Jail that he had released the detenue on 13.09.2022 on expiry of 6 months' detention from the date of first detention and he had communicated the same to the O.S.D.-cum-Special Secretary to Government, Home Department, Bhubaneswar, also to Superintendent of Police, Sundargarh, Superintendent of Police, Rourkela, Commissioner of Police, Bhubaneswar-Cuttack Commissionerate, Bhubaneswar, Director General & Inspector General of Police, Odisha, Cuttack, Revenue Divisional Commissioner (C.D), Cuttack and Director General of Prisons, Odisha, Bhubaneswar vide his letter No.1906 dated 13.09.2022 as he did not receive any order for extension of detention. According to him on 13.09.2022 at about 2.30 PM another order was received by him from the O.S.D -Cum- Special Secretary to the Government, Home Department vide the Memorandum No.820/C dated 13.09.2022.

The same order was also received from the Commissioner of Police, Bhubaneswar-Cuttack Commissionerate (the detaining authority) on the same day i.e. 13.09.2022 at about 6 p.m, regarding further extension of detention period of the detenu for further 3 months. The Superintendent of Sundargarh District Jail contacted the detenu- petitioner to return to the jail custody. On 14.09.2022, the order of extending the term of detention was served on the petitioner.The Superintendent of District Jail, Sundargarh in Para 9 of his affidavit has stated as follows:

> *"That it is submitted that the date of release of the detenue-petitioner was calculated and arrived to 13.09.2022 instead of 14.09.2022 (as the first detention order was served on 15.03.2022) which was due to over-sight and pressure of official works, though the detenu was inadvertently released only day before the actual date and brought to back to Jail custody on the same night. In view of the above irregularities, an enquiry was conducted by the Deputy Inspector General of Prisons, Sambalpur Range, Sambalpur as per direction of the Government in Home Department vide letter No.831 dated 15.09.2022 and Director General of Prisons, Odisha, Bhubaneswar and after conclusion of the said enquiry, the deponent has been warned/cautioned by the Director General of Prisons & D.C.S., Odisha not to repeat such type of irregularities henceforth."*

16. Mr. M. Das, learned counsel appearing for the petitioner has submitted that there was clear infraction of the Section 3(4) of NSA, which provides that where any order is made under this section by an officer mentioned in sub-section (3), he shall forthwith report the fact to the State Government to which he is subordinate together with the grounds on which the order has been made and such other particulars as, in his opinion, have a bearing on the matter, and no such order shall remain in force for more than twelve days after the making thereof,unless, in the meantime, it has been approved by the State Government; provided further that where under section 8, the grounds of detention are communicated by the officer making the order after five days but not later than 10 days from the date of detention, this sub-section shall apply subject to the modification that, for the words "twelve days", the words " fifteen days" shall be substituted.

17. It would be appropriate to refer to the provisions of Section 3(3) of NSA. It provides that "*if, having regard to the* ***circumstances prevailing or likely to prevail*** *in any area within the local limits of the jurisdiction of a District Magistrate or a Commissioner of Police, the State Government is satisfied that it is necessary so to do, it may, by order in writing, direct, that during such period as may be specified in the order, such District Magistrate or Commissioner of Police may also, if satisfied as provided in sub-section (2), exercise the powers conferred by the said sub-section; provided that the period specified in an order made by the State Government under this sub-section shall not, in the first instance, exceed three months, but the State Government may, if satisfied as aforesaid that it is necessary so to do, amend such order to extend such period from time to time by any period not exceeding three months at any one time."* **[*Emphasis Added*]**

18. Sub-Section 2 of Section 3 of the NSA stipulates that "*the Central Government or the State Government may, if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of supplies and services essential to the community it is necessary so to do, make an order directing that such person be detained.*"

19. The explanation as referred by the writ petition cannot have any bearing in the present case, in as much as the grounds of detention have been supplied within the period as prescribed.

20. Mr. Das, learned counsel has contended that the grounds on which the order of detention has been made was communicated forthwith with such other particulars as having bearing on the matter. He has categorically stated that such order of detention is not supposed to be routinely in force for 12 days after making it, unless in the meantime, it has been approved by the State Government. As we have already referred from the counter affidavit filed by the Opposite Party No.3 that the detention order was passed on 14.03.2022 and that was communicated to the Home Department through E-Mail on 15.03.2022 and on 17.03.2022 grounds of detention was served on the petitioner and the State Government had approved the order of detention on 25.03.2022.

21. According to Mr. Das, learned counsel the word "forthwith" as appearing in Section 3(4) of NSA has been interpreted by the Apex Court in **Hetchin Haokip v. State of Manipur and Others: AIR 2018 Supreme Court 3419**. In that case, the order of detention was challenged on the ground that the District Magistrate failed to report the detention to the State Government "forthwith," in terms of Section 3(4) of the Act. The District Magistrate reported the detention after a lapse of five days, which violated Section 3(4), NSA. Section 3(4), NSA provides that detaining authority in terms of Section 3(3) NSA shall report of the detention order to the State Government, along with the grounds, based on which the order was made, and any other relevant facts. It also provides that no detention order shall remain in force for more than twelve days after making the order, unless it is approved by the State Government.

22. It was contended in that petition that proviso to Section 3(4) postulates that if the ground of detention were communicated by the officer making the order after five days but not later than ten days from the date of detention, the words 'twelve days', will be substituted by the words 'fifteen days'.

23. Section 8, NSA requires the authority making the detention order to communicate the detenu the grounds for his detention. The said communication has to be made "as soon as may be," but not later than five days from the date of detention, in ordinary circumstances, and not later than ten days from the date of

detention, in exceptional circumstances (with reasons to be recorded in writing for the delay). The section also requires the detaining authority to give the detenu the earliest opportunity to make a representation against the detention order to the appropriate government.

24. The question before the High Court of Manipur was whether the act of the District Magistrate, in reporting the order of detention to the State Government, after five days, was in contrast to the requirement of reporting it "forthwith". The appellant had contended before the High Court that "forthwith" means immediately or without delay. It was further submitted that the delay of five days by the Magistrate, in reporting the detention to the State Government vitiates the order of detention.

25. The High Court of Manipur dismissed the writ petition, holding that the scope of Section 3(4) has to be understood according to the scheme of the Act, and not in isolation. The High Court juxtaposed Section 3(4) with Section 8 and it has been held that under Section 3(4), the report of the detention has to be sent along with the grounds for the detention. On conjoint reading of Sections 3(4) and 8, the High Court reasoned that the purpose of sending the report (with grounds) to the State Government under Section 3(4), is to enable the State Government to decide whether or not to approve the order of detention. If the State government does not approve the order of detention within twelve (or fifteen) days, it will lapse. On the other hand, the purpose of Section 8 is more sacrosanct, as it is to make the detenu aware of the reasons for his detention so that he may make a representation to the authorities for his release. The requirement under Section 8 was held to be on a higher pedestal than the one under Section 3(4). If Section 3(4) was interpreted in isolation, it would mean that while the authority can furnish the grounds of detention to the detenu within five days (or in exceptional circumstances, ten days), it must furnish the report with grounds to the State Government immediately, or instantaneously. According to the High Court, such action is not contemplated in NSA.

26. The apex Court while examining the correctness of that interpretation of the High Court in respect of the term "forthwith" under Section 3(4) of NSA had occasioned to dwell upon various precedents. It has been observed thereafter as follows:

> *"10. This Court has examined the meaning of "forthwith," in the context of the statutes providing for preventive detention. In Keshav Nilkanth Joglekar v The Commissioner of Police, Greater Bombay, a Constitution Bench of this court interpreted Section 3(3) of Preventive Detention Act, 1950 [now repealed], which was similar to Section 3(4) of the Act. The court compared the text of Section 3(3) with Section 7 (equivalent to Section 8 of the Act). It observed that "forthwith" is different from "as soon as may be" in that, under Section 7 the time permitted is "what is reasonably convenient," whereas under Section 3(3), only that period of time is allowed, where the authority could not, without its own fault, send the report. The court laid down the following test for determining whether the action of the authority was compliant with the "forthwith" requirement:*

"Under section 3(3) it is whether the report has been sent at the earliest point of time possible, and when there is an interval of time between the date of the order and the date of the report, what has to be considered is whether the delay in sending the report could have been avoided." (emphasis supplied)

11. In Bidya Deb Barma v D.M. Tripura, Agartala2, a Constitution Bench of this court held that:

"When a statute requires something to be done 'forthwith,' or 'immediately' or even 'instantly,' it should probably be understood as allowing a reasonable time for doing it."

12. In S.K. Salim v State of West Bengal3, a two judge Bench of this court observed that laws of preventive detention must be construed with the greatest strictness. However, the rule of strict interpretation does not mean that the act has to be done instantaneously, or simultaneously with the other act, without any interval of time. Here, the court was dealing with Section 3(3) of the Maintenance of Internal Security Act, 1971 (which is equivalent to Section 3(4) of the Act). The Court held that:

"…the mandate that the report should be made forthwith does not require for its compliance a follow-up action at the split- second when the order of detention is made. There ought to be no laxity and laxity cannot be condoned in face of the command that the report shall be made forthwith. The legislative mandate, however, cannot be measured mathematically in terms of seconds, minutes and hours in order to find whether the report was made forthwith. Administrative exigencies may on occasions render a post-haste compliance impossible and therefore a reasonable allowance has to be made for unavoidable delays."

13. From the above cases, the position that emerges is that "forthwith," under Section 3(4), does not mean instantaneous, but without undue delay and within reasonable time. Whether the authority passing the detention order reported the detention to the State Government within reasonable time and without undue delay, is to be ascertained from the facts of the case. In Joglekar, (AIR 1957 SC 28) there was a delay of eight days by the Police Commissioner, in sending the report to the State Government. However, the court found that the reasons for the delay were reasonable, since the Commissioner and his team were occupied in maintaining law and order during a particularly tense time in Mumbai.

14. The High Court held in its impugned judgment that:

"While the delay in furnishing grounds of detention under Section 8 of the Act may prejudice the right of the detenu as guaranteed under Article 22(5) of the Constitution, furnishing of the grounds of detention under Section 3(4) may not prejudice the detenu so long as the report along with the grounds of detention are furnished within a reasonable time, but certainly within 12 days of the detention…If the report along with the grounds of detention is submitted beyond 12 days, it would certainly vitiate the detention order as without the report and the grounds of detention,the State Government could not have applied their minds whether to approve or not to approve the detention order under Section 3(4) of the Act."

15. The High Court is not correct in holding that as long as the report to the State Government is furnished within twelve days of detention, it will not prejudice the detenu. It is settled law that a statute providing for preventive detention has to be construed strictly. While "forthwith" may be interpreted to mean within reasonable time and without undue delay, it certainly should not be laid down as a principle of law that as long as the report to the State Government is furnished within 12 days of detention, it will not prejudice the detenu. Under Section 3(4), the State Government is required to give its approval to an order of detention within twelve, or as the case may be, fifteen days.

> *16. The expression "forthwith" under Section 3(4), must be interpreted to mean within reasonable time and without any undue delay. This would not mean that the detaining authority has a period of twelve days to submit the report (with grounds) to the State Government from the date of detention. The detaining authority must furnish the report at the earliest possible. Any delay between the date of detention and the date of submitting the report to the State Government, must be due to unavoidable circumstances beyond the control of the authority and not because of administrative laxity."*
>
> ***[Emphasis Added]***

27. Mr. Das, learned counsel has also referred to a decision in **State of Uttar Pradesh Vs. Mahant Singh: AIR 1986 SC 207** where the apex court has observed that the provisions of Section 10 of NSA are mandatory. This Court has on more than one occasion indicated in unmistakable terms that the safeguards available to a detenu are what is guaranteed to him under Article 22(5) of the Constitution. The inflexible time schedule for screening by the Advisory Board is an example of strict compliance. Reference has been made to Khudi Ram Das v State of West Bengal: (1975) 2 SCR 832 where the apex court had occasion to observe as follows:

> *"The constitutional imperatives enacted in this Article 22 are twofold: (1) the detaining authority must, as soon as may be, that is as soon as practicable after the detention, communicate to the detenu the grounds on which the order of detention has been made, and (2) the detaining authority must afford the detenu the earliest opportunity of making a representation against the order of detention. These ate the barest minimum safeguards which must be observed before an executive authority can be permitted to preventively detain a pet son and thereby drown his right of personal liberty in the name of public good and social security."* ***[Emphasis Added]***

28. In **Mahant Singh** (supra) reference has been made in **A.K. Roy v. Union of India:(1982) 2 SCR 272**. In that report, similar view was taken regarding compliance of the procedural requirements. In **Mahant Singh** (supra), it has been categorically stated that the State Government has the obligation to cause the papers relating to the detention placed, along with the representation, if made, within three weeks from the date of detention before the NSA Advisory Board. Where a representation is not made in regard to the detention, the papers without the representation shall have to be placed before the NSA Board within the time prescribed. Where a representation is made within reasonable time, the same has also to be promptly attended to and has to be placed before the Board.

29. Mr. Das, learned counsel has referred a decision of this court in **Sagar Parida Vs. State of Odisha and Others,[Judgment dated 19.08.2020** delivered in Writ Petition(Criminal) No.37 of 2020] where this court, having considered **Hetchin Haokip (supra) and Commissioner of Police Vs. C.Anita: 2004 (7) SCC 467** regarding the extension of detention period by the Government without approval of the Advisory Board, held that the detention order for a period of twelve months at a stretch without proper review is deterrent to the rights of the detenu. However, a reference was made to **A.K. Roy** (supra), where the apex court has observed as follows:

"On reading of both the aforesaid decisions it appears, the legal position involving the above aspect has been settled expressing that it is only after the Advisory Board's opinion a duty is cast on the appropriate Government to confirm the detention order and continue the detention of person concerned for such periodas it thinks fit. This Court, therefore, observes, after the opinion and report of the Board, a power is already vested with appropriate Government to fix the period for which the detenu shall be detained. This court is of the opinion that discretion lies to the appropriate Government to pass extension order without further reference of the matter to the Advisory Board for its further opinion."

30. Mr.Das,learned counsel has referred to **Sagar Parida** (supra), particularly Para 11.3, which reads as follows:

"In the case at hand, the Government received the report from the Commissioner of Police (O.P.No.3) on 27.12.2019 about the detention of the petitioner commencing from 19.12.2019. No explanation has been given in any manner as to why report could not be submitted to the Government earlier .This is a laxity remains unexplained and this vitiates the order of detention."

31. Mr. J. Katikia, learned Addl. Government Advocate appearing for the State, particularly for the Opposite Party No.3, has clearly submitted that the release of the petitioner (the detenu) from the jail was a clear mistake by the Superintendent of Jail which he has corrected subsequently by restricting the custody. He has also stated that there was no infraction of Section 3(4) or Sections 8 or 10 in as much as it has been clearly stated by the Opposite Party No.3 that the detention order was passed on 14.03.2022 and on 15.03.2022, the same was communicated to the Home Department through E-Mail. Apart from that, the State Government made reference to the NSA Advisory Board on 25.03.2022. Meanwhile, the petitioner had received the grounds of detention on17.03.2022. It would be apparent from the representation filed by the petitioner under Section 8 of NSA that the said representation was filed on 28.03.2022, meaning the State Government did not wait for the receipt of the representation from the detenu (the petitioner) and they transmitted all records to the NSA Board for their review. It is needless to say that the grounds of detention were made available to the petitioner within 3 days from the date when the order of the detention was implemented.

32. As such, according to Mr. J. Katikia, learned Addl. Government Advocate there is no infraction. It has been well settled that where the NSA Advisory Board has reported that there is, in their opinion, sufficient cause for the detention of a person, the appropriate Government may confirm the detention order and continue the detention of the person concerned for such a period, as it thinks fit. Therefore, there is no question of further review by the NSA Advisory Board. On review after every 3 months, if it is found by the State Government that detention is no more required, then at their discretion, the detenu may be released.

33. According to Mr. J. Katikia, learned Addl. Government Advocate that whenever the extension order is issued by the State Government, they take into their consideration all the material facts and only thereafter, they decide to extend the

period of detention. Section 13, NSA clearly provides that nothing contained in section 13 shall affect the power of the appropriate Government to revoke or modify the detention order at any earlier time.

34. Section 13 provides the maximum period of detention for which any person may be detained in pursuance to any order of detention which has been confirmed under section 12 shall be twelve months from the date of detention.

35. Having appreciated the submission of the learned counsel for the parties, we would like to observe that in the case of **Mrs. T. Debaki Vs. Government of Tamil Nadu and Others: 1990 SCR (1) 836 and Harpreet Kaurharvinder Vs. State of Maharashtra and Another: AIR 1992 SC 979, 1992 SCR (1) 234**, it has been enunciated by the apex court that the detention order for a period of 12 months at a stretch without proper review is prejudicial to the rights of detenu. But in the case in hand, no such issue has been raised and as a result, we did not have the opportunity to consider whether after proper review the order of detention was extended by the State Government or not.

36. We gather from the records that on the very day when the order of detention dated 14.03.2022 was communicated to the petitioner, the State Government was also communicated the said order of detention for their approval. Hence, there is no infraction of Section 3(4) of NSA. Therefore, the ratio of ***Hetchin Haokip (supra)*** has no relevance in the present case. Even the State Government had without waiting for the representations to be filed by the petitioner made the reference to the NSA Advisory Board, on 25.03.2022. Hence, there is no delay.

37. As the NSA Advisory Board had reported their opinion to the effect that there is sufficient cause for detention of the petitioner and the appropriate Government may confirm the detention order and continue the detention of the person concerned for such period as they think fit.

38. Having observed thus, we hold that there is no procedural impropriety. But we would like to observe that at the time of passing the order extending the period of detention, the detaining authority is fastened with the duty to make assessment whether the extension is essential or not.They cannot pass the bald order of extension, but the order of extension shall reflect the crux of the consideration. No challenge has been raised on this point. Consequently, no records have been produced before us to consider that aspect. A person who is detained under the provisions of NSA suffers incarceration without trial. Hence, safeguards as provided to the detenu are to be protected by the constitutional courts for deterring the State from arbitrary use of detention. In such cases, whether continuous detention of such person is necessary or not, is to be assessed and reviewed from time to time. The legislature has specifically provided that the "Advisory Board" shall review the grounds of detention. Placing a person under detention for a period of twelve months at a stretch without proper review, is detrimental to the rights of the detenu.

Hence, after every three months, there shall be a substantive review to decide whether the detenu should be released or not (See Section 3(3), NSA). In absence of such review, the extension order is bound to vitiate. In such circumstances, the detenu would be entitled for release.

39. But in the present case, no records have been produced from which we can discover that there had been no review for extension.

40. In view of the aforesaid discussion, we do not find any merit in this writ petition and hence, it is dismissed.

41. However, the petitioner is at liberty to ask for the review of his detention. In that event, the State Government shall consider his prayer and review whether further extension of the period of detention is warranted or not.

42. There shall be no order as to costs.

43. Certified copies be granted as per rules.

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2023 (I) ILR – CUT - 666

S. TALAPATRA, J & MISS. SAVITRI RATHO, J.

MATA NO. 45 OF 2015

LINGARAJ CHOUDHURY .....Appellant

.V.

PRATIVA CHOUDHURY .....Respondent

HINDU MARRIAGE ACT, 1955 – Section 13 (1) (i-a) – Mental cruelty – The allegation of extra marital relation of husband made in the complain by the complainant/wife could not be proved – To prove the extra marital relation the ocular evidence is considered as the basic evidence – Whether the accusation and character assassination of the husband by the respondent /wife in the complain and written statement constitutes mental cruelty for sustaining the claim for divorce under section 13 (1) (i-a) of the Act? – Held, Yes.

Case Laws Relied on and Referred to :-

1. 2007 (4) SCC 511:Samar Ghosh Vs. Jaya Ghosh.
2.(2003) 6 SCC 334 :Vijay Kumar Ramchandra Bhate Vs. Neela Vijay Kumar Bhate.

For Appellant : Mr. D. Mohapatra on behalf of Mr. B.P. Tripathy.

For Respondent : None

JUDGMENT Date of Judgment: 09.02.2023

S. TALAPATRA, J.

1. Heard Mr. D. Mohapatra, learned counsel appearing on instruction of Mr. B.P. Tripathy, learned counsel for the Appellant. Despite due notice from this Court, none appears for the Respondent.

2. This is an appeal under Section 19 (1) of the Family Courts Act, 1984 from the judgment dated 07.02.2015,delivered in Civil Proceeding No. 11 of 2012 by the Judge, Family Court, Berhampur. By the said judgment, the petition filed by the Appellant under Section 13 (1) (i-a) of the Hindu Marriage Act, 1985 for dissolution of marriage on the ground of cruelty has been dismissed having observed that the Respondent herein, herself is victim of cruelty perpetrated by the Appellant. As such, the Appellant should not be allowed to take advantage of his own matrimonial mis-conduct and to succeed in the action for dissolution of marriage. It has also been observed that the Appellant herein was engaged in the extra-marital affair with one lady. The Respondent adduced evidence, both oral and documentary to prove these allegations brought against the Appellant.

3. Mr. Mohapatra, learned counsel appearing for the Appellant has stated that the marriage was solemnized between the parties on 20.07.1991 and was consummated happily for some period. In the wedlock, two sons namely Sankar Prasad Choudhury and Sameer Prasad Choudhury are born. Both of them have become major by this time and they are pursuing their vocation. The Appellant has suffered mental cruelty of extreme form as his name was connected with one lady, [whose name is withheld] by us.It has been stated that husband of that lady instituted a criminal action against the Appellant under Sections 497/498/363/ 365/294/506 of the IPC [see the records of G.R. Case No. 354 of 2003]. However, the appellant was acquitted from the charge. It has been further stated that the Respondent had filed a complaint in the Berhampur Mahila Police Station against the Appellant alleging attempt to murder her as she was opposed to the said illicit relation. The said complaint had culminated in to G.R. Case No.1368 of 2011 under Sections 307/506/294/497/406/341/323/34 of the IPC, read with Section 4 and 6-A of the D.P. Act.As the Appellant was detained in the custody, he was placed under suspension. Thus, according to the appellant, he has suffered extreme cruelty for the above role of the Respondent.

4. Mr. Mohapatra, learned counsel has submitted that after trial as indicated, all the allegations were proved to be false. But, the Appellant has suffered extreme form of mental cruelty and loss of dignity in the society for malicious conduct of the respondent.

In this regard, Mr. Mohapatra, learned counsel, has referred to the decisions of ***Samar Ghosh Vrs. Jaya Ghosh :2007 (4) SCC 511*** whereby the apex court as follows:

"The commentary of American Jurisprudence that the Mental Cruelty as a course of unprovoked conduct toward one's spouse which causes embarrassment, humiliation, and anguish so as to render the spouse's life miserable and unendurable. The plaintiff must show a course of conduct on the part of the defendant which so endangers the physical or mental health of the plaintiff as to render continued cohabitation unsafe or improper, although the plaintiff need not establish actual instances of physical abuse."

In the report, it has been observed that no inflexible standard can ever be laid down for guidelines yet certain illustrations, not exhaustive, are laid, and those are as follows:

"(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day to day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill- conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behavior of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty."

Illustrations are culled out from the previous decisions of the apex court.

Mr. Mohapatra, learned counsel has submitted that the parties are living separately for more than a decade and there is no chance of restitution of the conjugal life. Mr. Mohapatra, learned counsel has on the aspects of levelling unfounded allegations in the written statement and leaving those allegations without any proof, submitted that such conduct constitutes grave cruelty and in this regard, he has relied on a decision of the apex Court in ***Vijay Kumar Ramchandra Bhate Vrs. Neela Vijay Kumar Bhate : (2003) 6 SCC 334*** where the apex Court has observed as follows:

"7. The question that requires to be answered first is as to whether the averments, accusations and character assassination of the wife by the appellant husband in the written statement constitutes mental cruelty for sustaining the claim for divorce under Section 13(1) (i-a) of the Act. The position of law in this regard has come to be well settled and declared that leveling disgusting accusations of unchastity and indecent familiarity with a person outside wedlock and allegations of extra marital relationship is a grave assault on the character, honour, reputation, status as well as the health of the wife. Such aspersions of perfidiousness attributed to the wife, viewed in the context of an educated Indian wife and judged by Indian conditions and standards would amount to worst form of insult and cruelty, sufficient by itself to substantiate cruelty in law, warranting the claim of the wife being allowed." [Emphasis added]

5. This legal principle will equally apply in the case of the husband. We have examined the pleadings in the written statement filed by the Respondent. It has been pleaded that the appellant is involved in nefarious activates and illicit relation with another lady [the name of the lady withheld by us] and has been neglecting the Respondent and their two sons. It has been stated that the Appellant used to harass and torture them both physically and mentally, as the Respondent objected to the appellant's illicit relation. According to her, the extra- marital relation is still continuing. The Judge, Family Court, Berhampur, having appreciated the evidence, has observed as follows :

"Similarly, it is revealed from the evidence of D.W. 1 and 2 that for such illicit relationship between the petitioner and that lady [the name withheld], Anirudh Nayak husband of the said lady [the name withheld] has also filed a case against the petitioner. It is also admitted by the petitioner in his cross-examination that in the year 2003, he was under suspension for remaining inside the custody for more than two days in connection with a criminal case registered on the complaint of Anirudh Nayak, the husband of the lady [the name withheld]

alleging that she eloped with him. In view of the fact that charge- sheets have been submitted in both the cases (one filed by the Respondent and another filed by the husband of the said lady) against the petitioner, after proper investigation, is more than sufficient to establish that the petitioner has extra marital relation with that lady [the name withheld] and in the premises, the plea of the petitioner that allegation of extra marital relation is false, is not at all maintainable. It is revealed from the cross- examination of the petitioner (the appellant herein) that he has been acquitted in that cases but no such document is filed to testify his version. In absence of the same, the facts remains (sic.) relating to his extra marital relationship with that lady [the name withheld]. Two complaints have been filed and in both the cases, the petitioner was arrested and sent to custody. So the simple refutal of the petitioner that the allegations are false can never be accepted."

6. Mr. Mohapatra, learned counsel has contended that the charge-sheet cannot be proof of any conduct. Similarly, the police report cannot be treated as the legal evidence. Even, for purpose of prima facie evidence, unless the Investigating Officer is adduced as the witness, any statement available under the police report cannot be accepted in the evidence.

7. According to Mr.Mohapatra, learned counsel, the inference has been wrongly drawn by the Judge, Family Court, and hence, such inference is totally unsustainable, inasmuch as, the Respondent could not prove that after trial, the allegations were sustained.On the contrary, the Appellant has categorically in his cross-examination stated that he had been acquitted from those cases. In such circumstances, according to Mr. Mohapatra, learned counsel, the finding of Judge, Family Court warrants to be interfered with and set aside.

8. Having regard to the evidence as recorded in the trial, we are of the view that the complaint itself cannot be a proof of the extra-marital relation. To prove the extra marital relation, the ocular evidence is considered as the basic evidence. But, there is no ocular evidence except the sweeping allegations made by D.W.1. It is an admitted position that the investigating officer was not examined while admitting the charge sheet (Ext.2). The Appellant's plea that for such allegation, as referred above, he was put under suspension has been proved. Further, to prove that fact, Ext.B was introduced in the evidence. According to us, the standard of proof as required by ***Vijay Kumar Ramchandra Bhate*** has been met by the appellant. The grave allegation as made in the written statement, could not be proved by the Respondent. Hence, the opinion of the Judge, Family Court deserves to be reversed. As the allegations as levelled by the Respondent in the written statement have been left without proof. Such conduct constitutes grave mental cruelty against the Appellant.Moreover,despite due notice from this Court,the Respondent has preferred not to participate in the hearing.Whatever we have recorded as the Respondent's contention,has been gathered from the judgment and the written statement.

9. In the premises, as noted above, we are inclined to set aside the impugned judgment dated 07.02.2015. We are of the further view that the marriage that was solemnized on 20.07.1991 is liable to be dissolved on the ground of cruelty. Accordingly, it is ordered.

10. Since a decree of divorce is going to be issued in terms of the judgment, we have taken the exercise for determining the permanent alimony in absence of any prayer as the Respondent has abstained from the hearing.

11. The Appellant is a Senior Assistant working in the Industries Department, Government of Odisha and his monthly income now will be more than Rs.40,000/-.

12. Mr. Mohapatra, learned counsel has drawn our attention to the fact that the appellant will retire very shortly. From the records, we gathered that the Respondent does not have any independent means of earning.

13. In this circumstances,we direct the Appellant to pay a sum of Rs.10,00,000/- (Rupees ten lakhs) as the permanent alimony. The said alimony shall be paid within a period of three months from today. We make it abundantly clear that, if the said permanent alimony is paid, the Appellant will not be required to pay any further maintenance to the Respondent. But, till such permanent alimony is fully paid, the Appellant shall be liable to pay the maintenance allowance, as directed by the court.

14. In the result, the Appeal stands allowed. Registry is directed to prepare the decree accordingly.

15. If the physical records are still lying in the registry, those shall be returned forthwith.

16. Urgent certified copy of this order be granted as per rules.

17. The records of the CRLREV No. 536 of 2015 be de-tagged from this case.

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2023 (I) ILR – CUT - 671

Dr. B.R.SARANGI, J & M.S. SAHOO, J.

W.P.(C) NO. 18043 OF 2018

GENERAL MANAGER, EAST COAST RAILWAY, BHUBANESWAR & ORS. .....Petitioners

.V.

HEMANTA KUMAR TRIPATHY ….....Opp. Party

DISCIPLINARY PROCEEDING – Judicial Review – When can be exercise by the Court? – Discussed with case law.

(Para 11-12)

Case Laws Relied on and Referred to :-

1. 1979 (4) SCC 526 : Panalal Damodar Rathi Vs. State of Maharashtra.
2. 1979 (4) SCC 725 : Suraj Mal Vs. State (Delhi Administration).
3. 1996 SCC (L&S) 627 : State of Tamilandu Vs. S. Subramaniam.
4. Civil Appeal No.3340 of 2020 : State of Rajasthan & Ors. Vs. Heem Singh.
5. (2006) 5 SCC 446 : G.M. Tank Vs. State of Gujarat & Ors.
6. 2021 (II) ILR-CUT-787 : Samir RanjanSahoo Vs. State of Orissa & Ors.
7. AIR 2002 SC 834State : Financial Corporation and another Vs. M/s. Jagadamba Oil Mills & Anr.
8. (2008) 3 SCC 484 : Moni Shankar Vs. Union of India & Anr.
9. (2006) 3SCC 276 : 2006 SCC (L& S) 521: U.P. Vs. Sheo Shanker Lal Srivastava.
10. (2007) 4 SCC 669 : (2007) 2 SCC (L&S) 68 : Coimbatore District Central Coop. Bank Vs. Employees Assn.
11. 2004 QB 1044 : (2004) 2 WLR 1351 (CA) : E v. Secy. of State for the Home Deptt.

For Petitioners : Mr.D.R.Mohapatra,Central Government Counsel

For Opp. Party : Mr. N.R. Routray.

JUDGMENT Date of Hearing: 21.02.2023: Date of Judgement : 09.03.2023

M. S .SAHOO, J.

The petitioners are functionaries of East Coast Railway;who were respondents before the learned Central Administrative Tribunal, have filed the writ application seeking to quash the judgment and order dated 15.03.2018 passed in O.A. No.260/00816 of 2011.

The opposite party-employee, who was working as a Head Clerk (working in the Accounts & Stores Establishment, East Coast Railway, Talcher (Constructions), had filed the Original Application challenging the order dated 28.11.2009 under Annexure-6 passed by the Disciplinary Authority-Deputy Chief Manager (Construction)-I/SBP (Petitioner No.4) imposing major penalty of removal from service confirmed by the Appellate Authority-the Chief Manager (Construction)-III, East Coast Railway, (Petitioner No.2) vide order dated 19.07.2010 in Annexure-7 and also affirmed in Annexure-8 by the Revisional Authority-Chief Administrative Officer (Construction), East Coast Railway, Bhubaneswar, Petitioner No.3 vide order dated 03.08.2010.

Factual background

2. The facts that emerge from the pleadings are that the opposite party-employee was initially appointed as a casual gangman and was engaged under the administrative control of the D.R.M., the, then S.E. Railway,Chakradharpur and after working some years,he was posted as Junior Clerk vide order dated 09.11.1989 and was deputed to construction Division, Talcher. Thereafter the opposite party-employee appeared in the suitability test and promoted to the post of Senior Clerk/Head Clerk.

While working as such as a Deputationist at Talcher under the administrative control of the petitioner no.4, on 02.07.1994 a trap was laid by the Central Bureau of Investigation (C.B.I. for short) against the opposite party-employee on the allegation of demanding illegal gratification from another Railway employee. The CBI did not proceed further after the said trap but a disciplinary proceeding/departmental proceeding was initiated against the opposite party-employee on the basis of report of CBI and memorandum of Articles/charge-sheet was served upon the opposite party-employee on 31.03.1995.

2.1 The article of charges framed against Sri H.K.Tripathy (opposite party) issued as per the Railway Servants Discipline & Appeal Rules, 1968 contain the following imputations:

> *"That Sri H.K.Tripathy during his incumbency as in-charge DSK(C)/SERly, Talcher acted in a manner unbecoming of a Railway Servant in as much as he demanded and accepted illegal gratification of Rs.100/- from the complainant Sri S.K.Mohanty, Senior Clerk for his timely relieve to S.E.Rly., Angul transferred vide office order no.59/94 dt.23.06.94 and thereby committed misconduct in contravention of Rule 3 Clauses (i) & (iii) Railway Service Conduct Rule-1966 as detailed in the statement of imputation of misconduct."*

2.2 Pursuant to the above charge, an ex-parte enquiry was conducted, and report was submitted accordingly. Basing upon the said enquiry report, the disciplinary authority vide order dated 25.12.1999 passed an order of removal from service against the opposite party-employee which was subsequently upheld by the appellate authority vide order dated 25.02.2000.Against the same, the opposite party-employee filed O.A.No.131/2000 before the learned Central Administrative Tribunal which was dismissed vide order dated 26.02.2001.Against the said order of dismissal of O.A., the opposite party-employee filed OJC No.2948/2001 before this Court, which was allowed by judgment dated 11.10.2007, wherein the ordering portion reads as follows:

> *"In the result, the writ petition is allowed in part. The impugned order passed by the Tribunal, the departmental proceeding conducted from 29.12.1997 and the order of removal as well as the appellate order are quashed. It will be open to the opposite parties to conduct de novo enquiry as directed above after providing opportunity to the petitioner to defend himself in accordance with the rules. However, if the proceeding is*

not started within a period of three months from the date of production of a copy of this order, the petitioner shall be entitled to reinstatement with all consequential service benefits."

2.4 After about a month of receiving the above order passed by this Court, the petitioner no.4 issued a letter to the opposite party-employee intimating him regarding appointment of new Enquiry Officer and presenting officer to conduct the de-novo enquiry pursuant to the direction of this Court dated 11.10.2007.

2.5 The opposite party-employee again approached the learned Central Administrative Tribunal by filing O.A. No.72/2008 praying therein to direct the respondents to reinstate him in his earlier post as well as to complete the de-novo enquiry within a specific period, but the O.A. was dismissed by the learned Tribunal vide order dated 25.06.2008 and the said order was challenged before this Court in W.P.(C) No.10638/2008, which was disposed of vide order dated 25.09.2008, observing as follows :

"The order of removal from service having been set aside by this Court in the aforesaid writ application, the petitioner should have been relegated to the post which he was holding on the date of removal from service. If on the date of removal from service he was continuing, he should be allowed to continue and if on the said date he was under suspension, he should be paid subsistence allowance. The learned counsel for the opposite parties informs us that pursuant to the direction of this Court, a de novo inquiry has already commenced. It is, therefore, further observed that it is open for the opposite parties to pass orders for placing the petitioner under suspension pending disposal of the departmental proceeding. However, this observation may not be considered as a direction.

With the above direction, the writ application is disposed of."

2.6 The de-novo enquiry was completed and the enquiry report was submitted by the enquiry officer on 01.11.2008 in which the charges leveled against the opposite party-employee were held to be established. After receiving a copy of the inquiry report, the opposite party-employee submitted his defence to the inquiry report on 19.11.2008.During enquiry the petitioner no.4 vide order dated 01.12.2008 placed the opp. party under suspension.The opposite party-employee again approached the learned Central Administrative Tribunal by filing O.A. No.110/2009 praying therein to quash the order of suspension as well as the charges leveled against him.The said O.A. was dismissed by the learned Tribunal vide order dated 20.04.2009 and challenging the order, the opposite party-employee approached this Court in W.P.(C) No.7834/2009 which was disposed of vide order dated 30.06.2009 with a direction to the Authority to complete the Departmental proceeding as early as possible.Thereafter, petitioner no.4 being disciplinary authority passed order of removal from service dated 28.11.2009 which states as follows:

The following findings were given by the Disciplinary Authority:

"(i) In all the hearings, CO attended the inquiry. All the reasonable opportunities including adequate time for submission of defence brief, representation on Inquiry Report etc. were given to CO duly observing the principles of Natural Justice.

(ii) The undersigned have carefully gone through the Major Penalty Charge Sheet No.SPMANGL/Steno/Conf/D&A/HKT/24, Dated 31.03.1995 made against the charged official, Sri H.K.Tripathy, Head Clerk, Stores & Accounts/Con/Talcher, articles of charges, Statement of imputations therein, defence brief of the charge official, Statement of witnesses made during de-novo inquiry, evidence produced, reports and findings of the Inquiry Officer, P.O.'s brief and representation of the party on the inquiry report.

(iii) On careful consideration of all the above, the undersigned accept the P.O's brief and findings of the Inquiry Officer and holds the charges mentioned in the above Charge Sheet No. SPM/ANGL/Steno/ Conf/D&A/HKT/24, Dated 31.03.1995 been established & proved and the undersigned is satisfied that Sri H.K.Tripathy is guilty of the charges leveled against him.

(i) As per Clause specified in the Railway Servant (D&A) Rules, 1968, one of the following penalties should normally be imposed, in trap case.

a. Dismissal.

b. Removal from service.

c. Compulsory retirement (When superannuation is at least five years away)

In view of the above, the undersigned, being DA has decided that Sri H.K.Tripathy is not a fit person to be retained in Railway Service and now, therefore, in exercise of powers conferred by Rules of Disciplinary Powers of RS (D&A) Rules 1968 decided for punishment of "Removal from Service".

2.7 The opposite party-employee preferred an appeal before the appellate authority/petitioner no.2 which was dismissed vide order dated 19.07.2010. Against the order passed by the appellate authority the opposite party-employee preferred a revision on 03.08.2010 before the Revisional Authority/ petitioner no.3 who in turn confirmed the order of disciplinary authority as well as the Appellate Authority against which the Original Application No. 260/00816 of 2011 was filed before the learned Central Administrative Tribunal with the following prayers:

"(a) To issue notice to the respondents.

(b) To quash/set aside the order of removal dated 27/28.11.2009 passed by the respondent no.4 (Annexure-6)

(c) To quash the order dated 15.02.2011 passed by the respondent no.3 in the revision (Annexure-9)

(d) To direct the respondents to pay the applicant all consequential service benefits treating him in service.

(e) To pass any other order(s), direction(s), as this Hon'ble Tribunal may deem fit and proper to meet the ends of justice and equity."

3.1 Counter was filed by the authorities/present petitioners before the learned Tribunal, after giving due opportunity, the learned Tribunal allowed the Original Application by judgment dated 15.03.2018 stating as follows :

"5. Before delving into the merit of this case, it may be stated at the outset that this is peculiar case where in spite of a CBI trap laid by the CBI staff, there was no criminal case under Prevention of Corruption Act and rather the department swung into action in view of a CBI trap. Had the CBI case proceeded against the delinquent employee (present applicant) certainly the department could have initiated a simultaneous departmental proceeding

against the applicant but such a liberty is not available to the department when CBI itself has not proceeded with the CBI case. Had there been separate report to the authority (department) regarding demand of bribe, certainly the department could have initiated an action. Admittedly, the decoy/informant has not made any complaint either before the higher authority of the present applicant or before any authority of the department to strengthen the case of harassment by a colleague. The FIR was lodged before the CBI authority and not before the department and initiation of a departmental proceeding when CBI did not initiate a criminal case speaks of malafide and vindictive attitude of the department.When no CBI case pending, initiating a departmental proceeding on the same issue is a futile departmental exercise.

6. *Coming to the legal lacuna, it is noticed that except the solitary statement of demand of bribe by the decoy informant, there is no corroborative evidence either of demand of bribe or acceptance of bribe. Except the informant, not a single departmental or independent witness came forward to say that he has heard demand of bribe or about acceptance of bribe or even harassment by the applicant at any point of time. Knowing fully well that no corroborative evidence could be established the CBI has not charge sheeted the accused. There are judicial pronouncements to that effect which the CBI sleuths knew very well for which they did not venture to file a chargesheet against the applicant in the CBI court. In the case of* ***PanalalDamodarRathi v. State of Maharashtra reported in 1979 (4) SCC 526****, a Three judge Bench of the Hon'ble Apex Court have authoritatively held that when there was no corroboration of testimony of complaint regarding demand or acceptance of bribe, it is to be accepted that the version of the complainant is not corroborated and version of the complainant cannot be relied upon. The Disciplinary Authority, the Appellate Authority and the Revisional Authority have nowhere whispered, who is the second departmental witness who vouchsafe regarding authenticity of the statement of the informant, Mr. S.K. Mohanty. Furthermore, in view of the decisions rendered in the case of* ***Suraj Mal v. State (Delhi Administration) reported in 1979 (4) SCC 725.*** *Their Lordships have categorically held that "mere recovery of tainted money, divorced from the circumstances under which it is paid, is not sufficient to convict theaccused 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 bribeconviction cannot be sustained." We have every reason to hold that the evidence of Mr. S.K. Mohanty is not reliablebecause of the prevailing andsurrounding circumstances. Once, there is a transfer order, the person, who is authorized for relieving that person for retaining that person or delaying the relieve date, can demand bribe and that is understood but for immediate giving effect to the transfer order the demand of bribe becomes remote because if the concerned officer does not relieve the employee in time, he has ample scope to approach his higher authority for not obeying the transfer order. So, in the present case demand of bribe for an early relieve becomes unacceptable on the backdrop when the informant candidly admitted that, only once he had approached the applicant on 30.06.1994. In view of such statement, the question of harassment also does not arise. [Emphasis Supplied]*

7.*To sum up, had the CBI charge-sheeted the accused certainly the department would have been right in initiating a proceeding and to deal with the case by way of independent evidence but such liberty is not available when the CBI itself failed to substantiate its case for which the accused did not face trial before the CBI court and initiating a departmental proceeding on an unfounded criminal case amounts to misuse of official dissertation. In a departmental proceeding generally we do not go into the details of the evidence but in this case we have scanned the entire proceeding to examine if there is any legal evidence on record to hold the delinquent employee guilty of misconduct. In the case of* ***State of Tamilandu v. S. Subramaniam reported in 1996 SCC (L&S) 627****. Their lordships observed*

that the only consideration of the Tribunal in its judicial review is whether the acquisition is based on evidence on record to support the finding and whether its conclusion is based on no evidence. Here, there is absolutely no legal evidence to come to a finding of demand and acceptance of bribe and it is unsafe to rely on the uncorroborated testimony of the complaint in view of the Trade Union rivalry. Since, legally the charge could not be proved for want of reliable evidence, the findings recorded by the Disciplinary Authority, Appellate Authority and the Revisional Authority becomes vulnerable and is liable to be set aside in her larger interest of justice, equity and good conscience. Hence ordered." [Emphasis Supplied]

4. Being aggrieved by the judgment of the Central Administrative Tribunal dated 15.03.2018 the petitioners have filed this application. This Court heard Shri Deb RanjanMohapatra, learned Central Government Counsel for the petitioners and Mr.N.R. Routray, learned counsel for opposite party-employee and perused the records available in the present proceeding as well as pleadings before the learned Tribunal in O.A.No.260/00816 of 2011 disposed of on 15.03.2018. With the consent of the parties, the matter is disposed of at the stage of admission.

Contentions of the petitioners and judgments relied on.

Learned Central Government Counsel has relied on the decisions dated 20.05.2022 & dated 02.09.2022 rendered by the Hon'ble Supreme Court in Civil Appeal No. 3490 of 2022 ***(State Bank of India and another v. K.S.Vishwanath)***and in Civil Appeal No. 5930 of 2022 (arising out of SLP(C) No.11195 of 2021 ***(The State of Rajasthan and others v. Phool Singh)*** respectively. He has further relied on the decision rendered by the Hon'ble Supreme Court on 29.10.2020 in the ***State of Rajasthan and others v. HeemSingh : Civil Appeal No.3340 of 2020***.

The petitioners' case rests on the contention that the learned Tribunal failed to appreciate that the procedure in a criminal case as compared to a departmental enquiry is separate and distinct. Relying ***on Phool Singh*** (*supra*) and ***Heem Singh*** (*supra*), it is contended in a criminal case, the guilt is to be proved beyond all reasonable doubt and in case of departmental proceeding, the delinquency has to be proved on the basis of preponderance of probabilities. Relying on ***K.S.Vishwanath*** (*supra*) &***Heem Singh*** (*supra*), it is submitted that the learned Tribunal could not have reassessed the evidence presented before the disciplinary authority, who came to the conclusion of holding the employee guilty and as such the order of the disciplinary authority having been passed following due procedure, is to be upheld by interfering with the order passed by the learned Tribunal.

Contentions raised by the learned counsel for opposite party and judgments relied on

5. Per contra, Mr.Routrary, learned counsel for the opposite party supports the conclusion arrived at by the learned Tribunal and the reasoning given by the learned Tribunal are also reiterated. The learned counsel for the opposite party-employee brings to the notice the Railway Board Guideline vide RBE No.54/1995 :

"3. However, if the facts, circumstances and the charges in the Departmental Proceedings are exactly identical to those in the criminal case and the employee is exonerated/acquitted in the criminal case on merit (without benefit of doubt or on technical ground) then the departmental case may be reviewed if the employee concerned makes a representation in this regard."

5.1 It is contended that the enlisted witnesses presented before the Inquiry Officer, I.O. did not support the case of the departmental authority in presenting the allegations. Referring to the statement of Sri N.L.S.V.B. KameswarRao and Sri S.B. Mohapatra, it is contended that the witnesses did not support, which is also indicated in the enquiry report dated 14.08.2008 as rendered by the Inquiry Officer:

"Of course, from the deposition of the so called independent witnesses Sri J.K. Padhy (P.W.1) & Sri Radhakrishna (P.W.II), it is felt that the prosecution could not produce concrete evidence to establish the demand of the illegal gratification by the CO.

5.2 It is further contended by the learned counsel for opposite party that the decision relied upon by the petitioners-Union of India particularly ***K.S.Vishwanath*** (*supra*) is in respect of completely different set of facts and therefore, the ratio is not applicable to the present case.

Learned counsel for the opposite party relies on the decision of the Hon'ble Supreme Court reported in ***G.M. Tank v. State of Gujarat and others: (2006) 5 SCC 446***, particularly paragraph-30 (of SCC) :

"30. The judgments relied on by the learned counsel appearing for the respondents are distinguishable on facts and on law. In this case, the departmental proceedings and the criminal case are based on identical and similar set of facts and the charge in a departmental case against the appellant and the charge before the criminal court are one and the same. It is true that the nature of charge in the departmental proceedings and in the criminal case is grave. The nature of the case launched against the appellant on the basis of evidence and material collected against him during enquiry and investigation and as reflected in the charge-sheet, factors mentioned are one and the same. In other words, charges, evidence, witnesses and circumstances are one and the same. In the present case, criminal and departmental proceedings have already noticed or granted on the same set of facts, namely, raid conducted at the appellant's residence, recovery of articles therefrom. The Investigating Officer Mr V.B. Raval and other departmental witnesses were the only witnesses examined by the enquiry officer who by relying upon their statement came to the conclusion that the charges were established against the appellant. The same witnesses were examined in the criminal case and the criminal court on the examination came to the conclusion that the prosecution has not proved the guilt alleged against the appellant beyond any reasonable doubt and acquitted the appellant by its judicial pronouncement with the finding that the charge has not been proved. It is also to be noticed that the judicial pronouncement was made after a regular trial and on hot contest. Under these circumstances, it would be unjust and unfair and rather oppressive to allow the findings recorded in the departmental proceedings to stand."

5.3 Learned counsel for the opposite party further relies on the judgment rendered by a Single Bench of this Court dated 10.08.2021 in WPC(OAC) No.1052

of 2013 in the case of ***Samir Ranjan Sahoo v. State of Orissa & others : 2021 (II) ILR-CUT-787 regarding inapplicability of K.S.Vishwanath*** (*supra*).

Learned counsel relies on the decision rendered by the Hon'ble Supreme Court in ***The State Financial Corporation and another v. M/s. Jagadamba Oil Mills and Another : AIR 2002 SC 834***, particularly the principle laid down in paragraph-21 of the said decision which is quoted herein :

> *"21.Circumstantial flexibility, one additional or different fact may make a world of difference between conclusion in two cases. Disposal of cases by blindly placing reliance on a decision is not proper."*

Analysis

6. Apparently the Disciplinary Proceeding was initiated on the basis of the complaint lodged before the Central Bureau of Investigation and the subsequent action of the CBI in laying a trap as indicated in the report of the Disciplinary Authority (at internal page-3 :Annexure-2,paragraph-2). The list of documents and witnesses examined by the Disciplinary Authority are indicated by him in paragraph-2 as follows:

> (A) <u>*List of documents examined*</u>*:*
>
> *(i)Complaint dt.30.06.1994 (RUD-1)*
>
> *(ii) Pre Trap memorandum (RUD-2)*
>
> *(iii)Post Trap Memorandum (RUD-3)*
>
> *(iv) G.C. Notes bearing No. 4NE 680438- Rs.50/, 94E 072304-Rs.20/-, 66N402983-Rs.10/-, 08T 784576-Rs.10/- and 99A 965617-Rs.10/-. (RUD-4).*
>
> *(v) CFSL repot vide No.CFSL/E/94 (G/1)- 392/4058 dt.12.08.94 (RUD-5)*
>
> *(vi) Spot map (RUD-6) All these above documents by which the Article of charge framed against the CO proposed to be sustained were taken on record and marked as exhibits RUD-1 to 6. In addition to this, the following documents produced by the CO were also taken on to records and marked as exhibits D1.*
>
> (*1)Copy of SPE department of Personnel Cabinet Secretariat INVOICE No.224 dt.22.09.98 together with copy of CBI letter addressed to the Co; Return of documents seized in RC 48/94 dt.11.04.2000 along with a copy of the typed unsigned letter of Sri KameswaraRao as an enclosure.*
>
> (B) <u>*List of witness examined*</u> :
>
> (*i) Sri J.K. Padhy, the then A.S.O., Mahanadi Coal field Ltd., Dera/Talcher (now Sr. Survey Officer, MCL/Talcher).*
>
> *(ii) Sri M. Radhakrishna, the then AVO, Fertilizer Corporation of India, Talcher (now Retd Sr. Vigilance Officer/FCIL/Ramagundam Unit).*
>
> *(iii) Sri S.K. Dash, the then Inspector, CBI/Bhubaneswar (now officer, B.O.I., Keonjhar Branch).*
>
> *(iv) Sri K.K. Dash, the then HC/CBI/Bhubaneswar (now ASI/ Vigilance Directorate/Cuttack.)'*

(v) Sri K.Rath, the then RSO, CBI/Cuttack (now Sr. TI/Optg.BBS)

(vi) Sri S.K. Mohanty, the then Sr. Clerk O/o DSK (C)/SERly/Talcher (now Sr. Clerk O/o Sr. DOM/KUR).

(vii) Sri D.P. Majumdar, the then Inspector/CBI/Bhubaneswar (now Addl. DCP/Cuttack).

(viii) Sri N.L.S.V.B.KameswaraRao, CA to Dy. COM(P&P) (ex.Sr. Steno, CAO/BBS)

(ix) Sri S.B. Mohapatra, Sr. Steno to Dy.CE/Con/P&P/BBS (ex.Jr. Steno, SPM/ANGL).

During the course of regular hearing, all the prosecution witness at Sl.No.(i) to (vii) were examined on behalf of the prosecution and cross examined by the CO/DC. Further, the two defence witnesses at Sl.No.(Viii) & (ix), cited by the Co, were also examined by CO/DC and cross examined by PO on behalf of prosecution."

6.1 It is further evident from the summary of evidence adduced that the Disciplinary Authority examined the complainant before the CBI and the persons who participated in the operation of the CBI in laying the trap.

It is apparent that the CBI thought it prudent not to proceed further after conducting the trap in accordance with law, by not filing any police report before the competent court, rather it chose to send a 'closure report' after completion of the investigation. The Inspector, CBI, Bhubaneswar was also examined as a witness by the Disciplinary Authority.

6.2 The peculiar facts those have emerged are that there was no complaint by the complainant before the Departmental Authority.The CBI in response to the complaint of the complainant acted by laying a trap but ultimately did not proceed further as per the procedure established by law that is the Prevention of Corruption Act and Code of Criminal Procedure. But the Disciplinary Authority proceeded to analyse the various acts of CBI and the statements of witnesses those were said to have been part of the CBI operation laying trap, to arrive at a conclusion holding the employee guilty.

6.3 As indicated above, article of charges indicate that the enquiry was wholly based on the exercises undertaken by the CBI under the provisions of the Prevention of Corruption Act by laying a trap arranging different witnesses. For the reasons best known to the Investigating Agency, the matter was not proceeded and in fact the records and papers were returned to the Department.

6.4 On perusal of the available materials on record and the pleadings, it is indicated that the findings of the learned Tribunal regarding no departmental proceeding having been initiated as per the complaint of the complainant-Mr.S.K.Mohanty before the departmental authority,remains uncontroverted. Learned counsel for the petitioners was specifically asked to point out the material filed by the petitioners herein/respondents before the learned Tribunal to indicate if any material was presented before the learned Tribunal to show that a complaint was made by the employee, Sri S.K.Mohanty before the authority against the respondent. Learned counsel fairly submitted that he cannot go beyond the pleadings before the

Tribunal and there is no other materials that was placed before the learned Tribunal to show that a departmental proceeding was ever initiated on the basis of a complaint made by the employee.Learned counsel though argued with lot of vehemence and emphasis but had to accept the fact as it remains that in the Disciplinary Proceeding the trap witnesses those were drafted in by the CBI, were examined along with the documents those were examined by the CBI in a proposed case to be initiated under the Prevention of Corruption Act.

The Special Police Establishment,CBI in their letter dated 30.07.1994 annexed to the writ petition marked as Annexure-1 at paragraph-10 (vi) have indicated the following:

> *"vi) Conclusion whether the allegation is:*
>
> *a) Proved against each of the suspect/accused: The allegation against the suspect is proved.*
>
> *b) Doubtful or not fully proved : NIL.*
>
> *c) Not substantiated or proved to be false : NIL."*
>
> *The said communication at paragraph-11 states the following :*
>
> *"Final Recommendations.*
>
> *(i) Prosecution: Nil*
>
> *(ii) R.D.A.*
>
> *Considering the facts and circumstances of the case, R.D.A. Major Penalty is recommended against Sri H.K.Tripathy.*
>
> *(iii) To be referred to the Ministry/Deptt. for such action as may be considered appropriate.*
> *NIL.*
> *(b) To be closed and dropped for lack of proof.*
> *NIL*
> *(c) Taking action against the complainant for making false and malicious allegations.*
> *NIL"*

7. The decisions relied upon by the learned Central Government Counsel are dealing with the issue where the delinquent employee is proceeded against departmentally by initiating departmental proceeding whereas he has been acquitted in the criminal case arising out of the same set of facts. The facts of the present case are different as the investigating/ prosecuting agency after planning and proceeding to lay the trap did not proceed for trial in accordance with law and gave a report to the department for proceeding departmentally,observing that *"the allegation against the suspect is proved"*.

8. The Hon'ble Supreme Court dealt with somewhat similar facts and circumstances as those have emerged in the case at hand in the decision rendered in ***Moni Shankar v. Union of India and another : (2008) 3 SCC 484.*** The relevant paragraphs of the said decision are quoted herein:

> *"8. Mr A.K. Sanghi, learned counsel appearing on behalf of the appellant would submit that:*

1. The High Court committed a serious error insofar as it failed to take into consideration that the Railway Authorities were required to follow Paras 704 and 705 of the Manual scrupulously.

2. The appellant having not examined any defence witness, he should have been examined in terms of Rule 9(21) of the Rules, which being mandatory in nature, non-compliance therewith would vitiate the entire proceeding.

3. The shortage in cash having repaid by the appellant, no charge could have been framed in that behalf.

4. The findings of the High Court that the appellant was found to have been in possession of an excess sum of Rs 5 was beyond record.

9. Dr. R.G. Padia, learned Senior Counsel, appearing on behalf of the respondents, on the other hand, would contend:

1. That finding of fact having been arrived at by the disciplinary authority, the same should not have been interfered with by the Tribunal particularly when some evidences have been led on behalf of the Department.

2. The High Court has rightly opined that Paras 704 and 705 of the Manual pertaining to the manner in which the trap could be laid, contain only administrative instructions and are, thus, not enforceable in a court of law.

3. Since there was sufficient compliance with Rule 9(21), the impugned judgment should not be interfered with.

10. We may at the outset notice that with a view to protect innocent employees from such traps, appropriate safeguards have been provided in the Railway Manual. Paras 704 and 705 thereof read thus:

*"704. Traps.—(i)-(iv)****

(v) When laying a trap, the following important points have to be kept in view:

a) Two or more independent witnesses must hear the conversation, which should establish that the money was being passed as illegal gratification to meet the defence that the money was actually received as a loan or something else, if put up by the accused.

(b) The transaction should be within the sight and hearing of two independent witnesses.

(c) There should be an opportunity to catch the culprit red-handed immediately after passing of the illegal gratification so that the accused may not be able to dispose it of.

(d) The witnesses selected should be responsible witnesses who have not appeared as witnesses in earlier cases of the Department or the police and are men of status, considering the status of the accused. It is safer to take witnesses who are government employees and of other departments.

(e) After satisfying the above conditions, the investigating officer should take the decoy to the SP/SPE and pass on the information to him for necessary action. If the office of the SP, SPE, is not nearby and immediate action is required for laying the trap, the help of the local police may be obtained. It may be noted that the trap can be laid only by an officer not below the rank of Deputy Superintendent of Local Police. After the SPE or local police official have been entrusted with the work, all arrangements for laying the trap and execution of the same should be done by them. All necessary help required by them should be rendered.

*(vi)-(vii)****

705. Departmental traps.—For departmental traps, the following instructions in addition to those contained under Para 704 are to be followed:

(a) The investigating officer/Inspector should arrange two gazetted officers from Railways to act as independent witnesses as far as possible. However, in certain exceptional cases where twogazetted officers are not available immediately, the services of non-gazetted staff can be utilised.

All employees, particularly, gazetted officers, should assist and witness a trap whenever they are approached by any officer or branch. The Head of Branch should detail a suitable person or persons to be present at the scene of trap. Refusal to assist or witness a trap without a justcause/without sufficient reason may be regarded as a breach of duty, making him liable to disciplinary action.

(b) The decoy will present the money which he will give to the defaulting officers/employees as bribe money on demand. A memo should be prepared by the investigating officer/Inspector in the presence of the independent witnesses and the decoy indicating the numbers of the GC notes for legal and illegal transactions. The memo, thus prepared should bear the signature of decoy, independent witnesses and the investigating officer/Inspector. Another memo, for returning the GD notes to the decoy will be prepared for making over the GC notes to the delinquent employee on demand. This memo should also contain signatures of decoy, witnesses and investigating officer/Inspector. The independent witnesses will take up position at such a place wherefrom they can see the transaction and also hear the conversation between the decoy and delinquent, with a view to satisfy themselves that the money was demanded, given and accepted as bribe a fact to which they will be deposing in the departmental proceeding at a later date.

xxx xxx xxx

[Emphasis Supplied)

xxx xxx xxx

14. While we say so we must place on record that this Court in Chief Commercial Manager, South Central Railway v. G. Ratnam [(2007) 8 SCC 212 : (2007) 2 SCC (L&S) 851] opined that non- adherence to the instructions laid down in Paras 704 and 705 of the Vigilance Manual would not invalidate a departmental proceeding, stating : (SCC pp. 220-21, paras 17-18)

"17. We shall now examine whether on the facts and the material available on record, non-adherence of the instructions as laid down in Paras 704 and 705 of the Manual would invalidate the departmental proceedings initiated against the respondents and rendering the consequential orders of penalty imposed upon the respondents by the authorities, as held by the High Court in the impugned order. …. ….

… In the facts and circumstances of the matters, the Tribunal held that the investigations were conducted by the investigating officers in violation of the mandatory instructions contained in Paras 704 and 705 of the Vigilance Manual, 1996, on the basis of which inquiries were held by the enquiry officer which finally resulted in the imposition of penalty upon the respondents by the Railway Authority. The High Court in its impugned judgment has come to the conclusion that the inquiry reports in the absence of joining any independent witnesses in the departmental traps, are found inadequate and where the instructions relating to such departmental trap cases are not fully adhered to, the punishment imposed upon the basis of such defective traps are not sustainable under law. The High Court has observed that in the present cases the service of some RPF constables and railway staff attached to the Vigilance Wing were utilised as decoy passengers and they were also associated as witnesses in the traps. The RPF constables, in no terms, can be said to be independent witnesses and non-association of independent witnesses by the investigating officers in the investigation of the departmental trap cases has caused prejudice to the rights of the respondents in their defence before the enquiry officers. (Emphasis Supplied)

18. We are not inclined to agree that the non-adherence of the mandatory instructions and guidelines contained in Paras 704 and 705 of the Vigilance Manual has vitiated the departmental proceedings initiated against the respondents by the Railway Authority. In our view, such finding and reasoning are wholly unjustified and cannot be sustained."

*15. It has been noticed in that judgment that Paras 704 and 705 cover the procedures and guidelines to be followed by the investigating officers, who are entrusted with the task of investigation of trap cases and departmental trap cases against the railway officials. This Court*proceeded on the premise that the executive orders do not confer any legally enforceable rights on any person and impose no legal obligation on the subordinate authorities for whose guidance they are issued.

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17. The departmental proceeding is a quasi-judicial one. Although the provisions of the Evidence Act are not applicable in the said proceeding, principles of natural justice are required to be complied with. The courts exercising power of judicial review are entitled to consider as to whether while inferring commission of misconduct on the part of a delinquent officer relevant piece of evidence has been taken into consideration and irrelevant facts have been excluded therefrom. Inference on facts must be based on evidence which meet the requirements of legal principles. The Tribunal was, thus, entitled to arrive at its own conclusion on the premise that the evidence adduced by the Department, even if it is taken on its face value to be correct in its entirety, meet the requirements of burden of proof, namely, preponderance of probability. If on such evidences, the test of the doctrine of proportionality has not been satisfied, the Tribunal was within its domain to interfere. We must place on record that the doctrine of unreasonableness is giving way to the doctrine of proportionality. (See State of ***U.P. v. Sheo Shanker Lal Srivastava [(2006) 3 SCC 276 : 2006 SCC (L&S) 521]*** *and* ***Coimbatore District CentralCoop. Bank v. Employees Assn.[92007) 4SCC 669: (2007) 2 SCC (L&S) 68])*** *[Emphasis Supplied]*

18. We must also place on record that on certain aspects even judicial review of fact is permissible. ***(E v. Secy. of State for the Home Deptt. [2004 QB 1044 : (2004) 2 WLR 1351 (CA)]***

xxx xxx xxx

22. The High Court, on the other hand, as indicated hereinbefore, proceeded to opine that the Tribunal committed a serious illegality in entering into the realm of evidence. It is permissible in law to look to the evidence for the purpose of ascertaining as to whether the statutory requirement had been complied with or not.

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24. The High Court unfortunately even without any material on record held that some excess amount was found from the appellant which itself was sufficient to raise a presumption that it had been recovered from the decoy passenger. No such presumption could be raised. In any event there was no material brought on record by the department for drawing the said inference. The High Court itself was exercising the power of judicial review. It could not have drawn any presumption without there being any factual foundation therefor. It could not have taken judicial notice of a fact which did not come within the purview of Section 57 of the Indian Evidence Act. [Emphasis supplied]

xxx xxx xxx

26. The High Court has only noticed paragraph 704 of the Manual and not the paragraph 705 thereof. Paragraph 705 was very relevant and in any event both the provisions were required to be read together. The High Court, thus, committed a serious error in not taking into consideration paragraph 705 of the Manual. The approach of the High Court, in our opinion, was not entirely correct. If the safeguards are provided to avoid false implication of a railway employee, the procedures laid down therein could not have been given a complete go-bye.

> *27. It is the High Court who posed unto itself a wrong question. The onus was not upon the appellant to prove any bias against the RPF, but it was for the department to establish that the charges levelled against the appellant.*
>
> *28. The High Court also committed a serious error in opining that sub- rule (21) of Rule 9 of the Rules was not imperative. The purpose for which the sub-rule has been framed is clear and unambiguous. The railway servant must get an opportunity to explain the circumstances appearing against him. In this case he has been denied from the said opportunity.*
>
> *xxx xxx xxx*
>
> *30. For the aforementioned purpose, the manner in which the enquiry proceeding was conducted was required to be taken into consideration by the High Court. The trap was notconduced interms of the Manual; the Enquiry Officer acted as a Prosecutor and not as an independent quasi-judicial authority; he did not comply with Rule 9(21) of the Rules, evidently, therefore, it was not a case where the order of the Tribunal warranted interference at the hands of the High Court. [Emphasis supplied]*
>
> *31. The impugned judgment, therefore, cannot be sustained. It is set aside accordingly and that of the Tribunal restored. The appeal is allowed with costs. Counsel fee assessed at Rs.25,000/-."*

9. The facts presented in the case at hand are somewhat peculiar to the extent that though the trap was to be laid following paragraph-704 of the Manual by the investigating agency and it is not a departmental trap as further envisaged in paragraph-705, however, the departmental proceeding proceeded on the basis of the report given by the investigating agency.Somehow, compliance with the paragraphs-704 and 705 of the Railway Vigilance Manual is not mentioned in the entire disciplinary proceeding that was undertaken by the departmental authority, i.e., petitioner no.4. As indicated above, the Inquiring Officer has given a finding in inquiry report dated 14.08.2008 Annexure-2 to the writ petition at pages-36 and 37 (internal pages-15 & 16 of the inquiry report), which is quoted herein :

> *"… …Of course, from the deposition of the so called independent witnesses Sri J.K. Padhy (P.W.1) and Sri Radhakrishna (P.W.II), it is felt that the* ***prosecution could not produce concrete evidence to establish the demand of the illegal gratification by the CO. … …"***

10. As laid down in ***[E.v. Secy. of State for the Home Deptt.: 2004 QB 1044: [2004] 2 WLR 1351 (CA)],*** relied on in ***Moni Shankar*** (*supra)*, it has to be held that on certain aspects, judicial review of facts is permissible.The relevant paragraph of the decision rendered by Court of Appeal in ***E.v. Secy of State*** (*supra*) are produced herein (Paragraphs-63, 64 & 66 as reported in the WLR)

> *"63. In our view, the Criminal Injuries Compensation Board case [1999] 2 AC 330 points the way to a separate ground of review, based on the principle of fairness. It is true that Lord Slynn distinguished between "ignorance of fact" and "unfairness" as grounds of review. However, we doubt if there is a real distinction. The decision turned, not on issues of fault or lack of fault on either side; it was sufficient that "objectively" there was unfairness. On analysis, the "unfairness" arose from the combination of five factors : (i) an erroneous impression created by a mistake as to, or ignorance of, a relevant fact (the availability of reliable evidence to support her case); (ii) the fact was "established", in the sense that, if attention had been drawn to the point, the correct position could have been shown by*

objective and uncontentious evidence; (iii) the claimant could not fairly be held responsible for the error; (iv) although there was no duty on the Board itself, or the police, to do the claimant's work of proving her case, all the participants had a shared interest in co-operating to achieve the correct result; (v) the mistaken impression played a material part in the reasoning.

64. If that is the correct analysis, then it provides a convincing explanation of the cases where decisions have been set aside on grounds of mistake of fact. Although planning inquiries are also adversarial, the planning authority has a public interest, shared with the Secretary of State through his inspector, in ensuring that development control is carried out on the correct factual basis. … …

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66. In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. … …" *[Emphasis supplied]*

Conclusions

11. Applying the principles laid down in **Moni Shankar** (*supra*) relying on **E.v. Secy of State** (*supra*), particularly at paragraphs-10, 11, 12, 15, 16 and 17 (of SCC), it has to be held that although the provisions of the Evidence Act are not strictly applicable in the departmental proceeding under challenge, principles of natural justice are required to be complied with.The courts exercising power of judicial review are entitled to consider as to whether while inferring commission of misconduct on the part of a delinquent officer relevant piece of evidence has been taken into consideration and irrelevant facts have been excluded therefrom. Inference on facts must be based on evidence which meet the requirements of legal principles. The Tribunal was, thus, entitled to arrive at its own conclusion on the premise that the evidence adduced by the Department, even if it is taken on its face value to be correct in its entirety, meet the requirements of burden of proof, namely, *preponderance of probability*. If on such evidences, the test of the *doctrine of proportionality* has not been satisfied, the Tribunal was within its domain to interfere.

12. As noted by the Hon'ble Supreme Court in paragraphs-6 & 10 of the decision in ***Moni Shankar*** (supra), Rule-9 (21) of the Railway Servants (Discipline and Appeal) Rules, 1968 and also paragraphs-704 and 705 of the Railway Vigilance Manual, which ensure compliance with principle of natural justice & fairness in action of the authority, have to be substantially complied with which is not the case as presented by the department.

13. In our considered opinion, on the basis of evidence presented by the department in the departmental enquiry the test of *doctrine of proportionality* has not been satisfied and the Tribunal was well within its jurisdiction to interfere with the conclusions. Applying the principles enunciated in ***E.v. Secy of State*** (supra), it has to be held that in the present case, the learned Tribunal was entitled to arrive at its own conclusion on the premise that whether the evidence adduced by the

department even after it is taken at its face value to be correct in its entirety, meet the requirements of burden of proof, i.e., *preponderance of probability*.

The Enquiring Officer after arriving at a conclusion in his enquiry report dated 14.08.2008 that *"from the deposition of the independent witnesses Sri J.K. Padhy (P.W.1) and Sri Radhakrishna (P.W.II), it is felt that the prosecution could not produce concrete evidence to establish the demand of the illegal gratification by the CO..."* could not have proceeded further to hold that *"it could be concluded that there was demand of illegal gratification under 'Preponderance of probability' as there was no hesitation registered for accepting the illegal gratification in this case.",* whereas the witness who offered was decoy and was acting as per the planned trap laid by the investigating agency.

14. The contention raised by the petitioners regarding limited scope of review by the learned Tribunal of the evidence presented by the department is rejected in the facts and circumstances of the present case. The judgment of the learned Tribunal is upheld being just and proper there being no error apparent on the face of the record.

15. During deliberations before this Court, it is noticed that the period of suspension of the opposite party-employee has not been dealt with by the authority while passing the order of dismissal. It is agreed by the learned counsel for the opposite party that having received the subsistence allowance, the opposite party-employee will not lay any further claim qua wages for the said period. In the interest of justice, it is directed that the period of suspension of the opposite party-employee shall be treated to be leave of the kind due, for continuity in service. The notional benefits like benefits of fixation of Pay, D.A. and other allowances as due and admissible to the employee shall be granted to him. As the petitioner has retired from service on attaining age of superannuation in the year about 2012-13, his retiral dues shall be calculated after notionally fixing the last pay drawn. The arrears of differential salary, retiral dues, if any, after notional fixation shall be calculated and paid to the opposite party-employee within three months from the date of communication of this order. In case of any delay, that would be caused in payment of such amount, interest @ 6% per annum shall be payable to the petitioner from the date of this order.

In the result, the writ petition is dismissed being devoid of any merit, the order of the learned Tribunal is upheld with the further directions as indicated above. There shall be no order as to costs.

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2023 (I) ILR – CUT - 688

Dr. B.R.SARANGI, J & MURAHARI SRI RAMAN, J.

STREV NO. 57 OF 2014

M/s. INDIANOIL CORPORATION LTD., CUTTACK .....Petitioner

.V.

STATE OF ORISSA & ANR. .....Opp. Parties

(A) ORISSA SALES TAX ACT, 1947 – Sections 12(4), 12(8) – Whether fresh assessment under section 12(8) of the OST Act is permissible taking into turn over which was subject-matter for consideration in assessment under section 12(4) of the Act ? – Held, No – In the case of 'revision', the revisional authority has no power to re-assess and re-appreciate the evidence unless the statute expressly confers that power.

(B) CHANGE OF OPINION – "Change of opinion" in the context of reassessment – Explained with case laws.

(Paras 10 -14)

Case Laws Relied on and Referred to :

1. AIR 1961 SC 1633 : CIT Vs. Scindia Steam Navigation Co. Ltd.
2. AIR 1959 SC 257 : Maharaj Kumar Kamal Singh Vs. The Commissioner of Income Tax, Bihar and Orissa.
3. (2015) 17 SCC 234 :State of Uttar Pradesh & Ors. Vs. Aryaverth Chawl Udyog & Ors.
4. W.P.(C) No.4440 of 2022 (disposed of date 21.07.2022) : Kalinga Institute of Industrial Technology (KIIT), Bhubaneswar, Vs. Assistant Commissioner of Income Tax Exemption Circle, Bhubaneswar & Ors.
5. 2021 SCC OnLineOri 1769 = (2022) 440 ITR 192 = (2022) 324 CTR 233 : Sri Jagannath Promoters Vs. Deputy Commissioner of Income Tax.
6. (2018) 6 SCC 685 : Income Tax Officer Vs. Techspan India Ltd. & Anr.
7. (2012) 52 VST 137 (Ori) : Bharat Petroleum Corporation Ltd. Vs. Sales Tax Officer.
8. (1979) 4 SCC 248 : Indian & Eastern Newspaper Society, New Delhi Vs. Commissioner of Income Tax, New Delhi.
9. (2010) 2 SCC 723 : Commissioner of Income Tax, Delhi Vs. Kelvinator of India Ltd.
10. (2010) 31 VST 319 (Ori.) : Nava Bharat Ferro Alloys Vs. State of Orissa.
11. (2004) 137 STC 389 (SC): Associated Cement Company Vs. State of Bihar.

For Petitioner : M/s. Satyajit Mohanty,D.P. Sahu & S. Das.

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

JUDGMENT Date of Juidgment :16.03.2023

Dr. B.R. SARANGI,J.

M/s. Indian Oil Corporation Limited, a Government of India Undertaking under the administrative control of the Ministry of Petroleum and Natural Gas, Government of India and incorporated under the provisions of the Section 617 of the Companies Act, 1956, has filed this STREV with a prayer to set aside the order

dated 28.11.2013 passed by the Sales Tax Tribunal (Full Bench), Cuttack passed in S.A. No.633 of 2008-2009 for the Assessment Year 2002-2003 confirming the order dated 11.12.2008 passed by the Assistant Commissioner of Sales Tax, Cuttack-I Range, Cuttack in Appeal No.AA-442/CUIE/2006-07, holding that the petitioner is neither a manufacturing concern nor sold the HSD (High Speed Diesel) or LDO (Light Diesel Oil) as its finished products; manufactured out of any raw materials and consumables, as it has paid entry tax on procurement of HSD and LDO into the State of Odisha, but has not sold any finished goods rather sold the same goods as procured and, thereby, the claim of the petitioner for setting off of the entry tax paid is not admissible.

2. The factual matrix of the case, in brief, is that the petitioner-company, being a registered dealer under the Orissa Sales Tax Act, 1947 ("OST Act, 1947" for short) having Registration Certificate No.CU-IE-683 within the jurisdiction of Sales Tax Officer, Cuttack-I East Circle, Cuttack, was engaged in the business of refining and selling of petroleum products like Motor Spirit (Petrol), HSD, LDO, Superior Kerosene Oil, Furnace Oil, Bitumen, ATF and AV Gas etc. It sold a part of its stock of HSD to the dealers, who had given undertaking in Form-IV in terms of Item No.81 of Schedule/Rate Chart that they would use the HSD in manufacture, processing of goods for sale or in mining or in the generation or distribution of electricity at a concessional rate of tax @ 4% and a part of its stock of HSD to the dealers for resale. Thereby, the petitioner collected tax on sale of HSD @ 4% as per Item No.81 instead of 20% as per Item No.101 of the schedule.

2.1 The petitioner claimed set off of entry tax paid on the HSD against the sales tax payable on sale of HSD in terms of Note 1(b) read with Note 2(ii) of the Notification dated 31.03.2001. During the assessment under Section 12(4) of the OST Act, 1947 for the year 2002-2003, the petitioner produced the books of account with all material facts and particulars before the Assessing Authority-opposite party no.2 for making assessment. The Assessing Authority, being duly satisfied with the books of account maintained by the petitioner, passed assessment order dated 31.01.2006 under Section 12(4) of the OST Act, 1947 allowing set off of entry tax paid on the HSD against the sale tax payable on sale of HSD.

2.2 Opposite party no.2 issued notice dated 17.06.2006 under Section 12(8) of the OST Act for reassessment of the turnover of the petitioner for the year 2002-2003 and vide letter dated 31.10.2006 communicated the reasons for reassessment that for the sale made against Form-IV as per item No.81 of the List-C of the rate chart appended to the OST Act, 1947, the petitioner is not entitled to claim set off of entry tax paid on such goods. Objecting to such allegation, the petitioner by way of written statement submitted that the said notice was issued on a mere change of opinion and the said authority lacked power, competence and jurisdiction to reopen the assessment proceeding under Section 12(8) of the OST Act, 1947.

2.3 Pursuant to above notice, the petitioner submitted its reply on 09.11.2006 contending that there is no restriction under law in claiming set off of entry tax paid on HSD even if the HSD is sold at a concessional rate of tax @4% to the dealers who furnished declaration in Form IV to use the said HSD in manufacturing, processing or mining activities. But the Assessing Officer, on certain conjecture and surmises, without extending any reasonable opportunity of being heard and depriving the benefit of natural justice and without taking into consideration the contentions raised by the petitioner, in exercise of power under Section 12(8) of the OST Act, 1947 passed the reassessment order dated 27.01.2007 for the year 2002-2003 disallowing the claim of set off of entry tax paid on goods which were sold to the dealers for use in manufacturing, processing or mining activities against declaration in Form-IV and determined the tax payable at Rs.1,31,81,725/-.

2.4 Against the said reassessment order dated 27.01.2007 passed by opposite party no.2, the petitioner preferred First Appeal Case No.AA-442/CUIE/2006-2007 under Section 23(1) of the OST Act, 1947 before the Assistant Commissioner of Sales Tax, Cuttack I Range, Cuttack. The First Appellate Authority, vide order dated 11.12.2008, dismissed the said appeal and confirmed the reassessment order dated 27.01.2007.

2.5 Aggrieved by the order dated 11.12.2008 passed by the Assistant Commissioner of Sales Tax, Cuttack I Range, Cuttack, the petitioner preferred Second Appeal No.663/2008-09 before the Odisha Sales Tax Tribunal (Full Bench), Cuttack, along with a stay revision petition before the Commissioner of Sales Tax, Orissa, Cuttack praying for full stay of the demanded amount till disposal of the second appeal. The Tribunal, vide order dated 28.11.2013, confirmed the order passed by the Assistant Commissioner of Sales Tax, Cuttack I Range, Cuttack in the First Appeal for the Assessment Year 2002-2003. Hence, this revision.

3. In the above backdrop of the case, the following questions of law arose for determination in this revision application:-

> (i) Whether fresh assessment under Section 12(8) of the OST Act is permissible taking into same turnover which was subject-matter for consideration in assessment under Section 12(4) and such reassessment is vitiated on account of "change of opinion"?
>
> (ii) Whether the reassessment order as well as appellate orders are correct in disallowing set off of entry tax paid on the goods which were sold to the dealers at concessional rate of tax @ 4% as per Entry 81 of schedule appended to Notification dated 31.03.2001 issued under Section 5(1) of the OST Act?
>
> (iii) Whether the Sales Tax Tribunal, Orissa is justified in concluding that the petitioner company is not entitled for set off of entry tax, even though at Paragraph-9 held that "*though we find admissibility of set off of entry tax paid against the amount of tax payable on sales of goods"?*

4. To answer effectively the questions, as formulated above, it is of relevance to have a glance on the notification dated 31.03.2001 under Annexure-1 issued by

the Government of Odisha in the Finance Department. Item No.81 of the schedule of the said notification, being relevant for the purpose, is extracted hereunder:-

> *"81. Goods of the class or classes other than paper, petrol, diesel oil, air conditioner, furniture, carpet, telephones, India made foreign liquor (IMFL) or any liquor specified in the certificate of registration of the registered dealer purchasing the goods as being intended for use by him in the manufacture or processing of goods for sale or in mining or in the generation or distribution of electricity or any other form of power subject to the production of the true declaration by the purchasing registered dealer or his authorised agent in form - IV.*
>
> *Explanation- This entry is also applicable for purchases through leasing or works contract or hire purchases.*
>
> "*DECLARATION FORM-IV*
> *(see serial 81)*
>
> *I/We ----------hereby declare that the goods purchased by me/us in cash memo/bill NO.----dated the ------from -----shall be used in the manufacturer/processing of goods for sale/in mining/generation or distribution of electricity or any form of power.*
>
> *Dealer/Authorised Agent"*

Similarly,Item No.101 of the schedule of the said notification under Annexure-1 reads as follows:-

101	*Light Diesel Oil and High Speed Diesel*	*Twenty per cent*

5. Note-1 and Note-2 appended to the said notification read as follows:

> "**Note-1.**
>
> a. *The amount of tax payable and respect of good specified in Sl. Nos.1, 11, 12, 13, 14, 17, 28, 30, 56, 58, 65, 68, 69, 76, 87, 97, 107, 119, 127, 134, 136, 138, 156, 180, 181 and 183 shall be reduced by the amount of Orissa Sales Tax paid by him on raw material and consumables subject to tax on purchase turnover and/or tax collected from him by the selling dealer separately on the body of the bill in respect of sale of raw materials and consumable subject to tax on sale turnover directly used in manufacture of such goods.*
>
> *Explanation:-Building materials for construction of Factories and allied construction, Office equipments, Packing materials, vehicle and such other materials which are not directly used in manufacturer shall not be treated as raw material or consumable for the purpose of allowing set of.*
>
> *b. The amount of tax payable in respect of goods specified in part –III of the Schedule to the Orissa Entry Tax Act, 1999 as well as in Sl. Nos. 21, 32, 46, 74, 101, 108 and 155 shall be reduced by the amount of Orissa Entry Tax paid on such goods under Orissa Entry Tax Act, 1999 and the rules made thereunder.*
>
> ***Note 2**.: The set off of tax as provided in Note-1 above shall be regulated subject to the following conditions:*
>
> *i. The amount of set off claimed shall be limited to the OST payable on sale of finished products manufactured out of such raw materials and consumables.*
>
> *ii. The amount of set off claimed against payment of tax under the Orissa Entry Tax Act, 1999 shall be limited to the OST payable on sale of such goods.*

iii. In respect of goods exigible to tax on sale turnover the amount of O.S.T. realized separately from the dealer on the body of the purchase invoice in respect of the purchases from the registered dealers during a particular year shall be eligible for computation of the amount of set off to which the dealer shall be entitled, during the same year. It is the responsibility of the dealer for proper custody of those purchase invoices to facilitate verification by Sales Tax Officer".

6. May it be noted, the exercise of power under 'Revision' is an act of examining again in order to remove any defect or grant relief against the irregular or improper exercise or non-exercise of jurisdiction by a lower court. In a revision the revising authority is not bound to examine the facts for itself but is entitled to give its decision on points of law alone. The High Court can interfere in cases where the Tribunal has:

(i) misunderstood the statutory language;

(ii) its findings are based on no evidence;

(iii) if its findings are inconsistent with the evidence or contradictory to it;

(iv) if it has acted on material partly relevant or partly irrelevant;

(v) where its conclusions drawn are based on imagination, surmises and conjectures;

(vi) if its findings are recorded on non-application of mind;

(vii) its findings are based on no supporting evidence;

(viii) the findings are perverse; and/or they are returned without due consideration of matters relevant; and

(ix) improperly excluded evidence;

In ***CIT Vrs. Scindia Steam Navigation Co. Ltd.,*** AIR 1961 SC 1633 it has been laid down as follows:-

"The result of the above discussion may thus the summed up:

1) when a question is raised before the Tribunal and is dealt with by it, it is clearly one arising out of its order;

2) when a question of law is raised before a tribunal but the Tribunal fails to deal with it, it must be deemed to have been dealt with it, and is therefore, one arising out of its order;

3) when a question is not raised before the Tribunal but the Tribunal deals with it, that will also be a question arising out of its order;

4) When a question of law is neither raised before the Tribunal nor considered by it, it will not be a question arising out of its order notwithstanding that it may arise on the findings given by it."

In the case of 'revision', the revisional authority has no power to reassess and re-appreciate the evidence unless the statute expressly confers on it that power.

7. There is no dispute that the petitioner-company is engaged in sale of petroleum products such as MS,HSD, SKO, Lubricants, Furnace Oil, LDO, Bitumen etc. In addition, it also effects purchase of petrol, diesel and SKO from other marketing companies like Bharat Petroleum Corporation Ltd., Hindustan Petroleum

Corporation. It also operates its business through the different depots inside the State of Odisha like Rourkela, Balasore, Berhampur, Cuttack, Sambalpur, Jatni, Paradeep TMI, Jeypore and Bhubaneswar. On receipt of notice from the assessing authority issued under Section 12(4) of the OST Act, 1947, the petitioner produced the documents for the year 2002-03 and on verification it was found that for the year 2002-03 the petitioner received petroleum products from all sources including purchasing from other marketing companies and filed return to that extent. The petitioner claimed to have effected sale of Petrol, HSD and LDO amounting to Rs.1,31,81,725/- on the concessional rate of 4% as sales tax on the strength of declaration furnished by purchasing manufacturers in Form-IV. It also claimed set off of an amount of Rs.6,63,25,470.00 and on the basis of return filed by the petitioner, it was found that under the Entry Tax Act for the year 2002-03 it had disclosed 387331.119 kl of HSD and 20110.129 kl. Of LDO and out of that it had effected sale of 11146.000 kl. of HSD in course of inter-State trade and commerce and 42504.370 kl. of HSD to other Marketing Companies within the State of Odisha.

8. The petitioner was taxed @ 4% in the assessment order passed by the Assessing Authority under Section 12(4) of the OST Act, 1947. But while making reassessment under Section 12(8), the Assessing Officer changed his opinion and while changing his opinion in reassessment, there must be materials *de hors* the assessment record. The apex Court in ***Maharaj Kumar Kamal Singh v. The Commissioner of Income Tax, Bihar and Orissa***, AIR 1959 SC 257 held that the materials already determined in the original assessment proceeding cannot be further taken up and cannot be a valid reason for reassessment. Therefore, reopening of the assessment under Section 12(8) of the OST Act is an outcome of mere change of opinion and is not based on substantial information. The transaction being a part of the original assessment order passed under Section 12(4) of the OST Act the same could not have been reopened in the name and style 'reassessment under Section 12(8) of the OST Act. It is made clear that Section 12(8) of the OST Act lays down that the jurisdictional condition precedent for re-opening of the assessment is that the formation of the opinion of the Assessing Officer that the turnover has escaped assessment should be on the basis of "any reasons".

9. Perusal of Assessment Order dated 31.01.2006 passed under Section 12(4) of the OST Act reveals that the Assessing Officer had allowed set off of entry tax against the sales tax payable on the turnover of sales subjected to tax at concessional rate of tax as per Entry 81 on the strength of declaration in Form IV. For better appreciation the following is extracted from said Assessment Order:-

> *"*** Out of the taxable turnover of* ***Rs.1,31,81,72,472/- (sale against Form IV) is taxed @ 4%****, Rs.1,07,65,00,465.00 (sale of SKO, FO, etc.) is taxed @ 4%, Rs.13,01,66,451/- (Bitumen) is taxed @ 8%, Rs.24,59,30,963.00 (sale of lubricants and wax) is taxed @ 12% and Rs.6,89,22,68,475 is taxed @ 20%. ***"*

In the re-assessment Order dated 27.01.2007 passed under Section 12(8) of the OST Act it has been determined as follows:

*"*** Accordingly the gross turnover at Rs.13,79,11,93,546.00. After allowing deduction of Rs.1,90,17,42,027.00 towards OSTC/SCC the taxable turnover of the dealer is determined at Rs.9,66,30,38,826.00.* ***OST @ 4% (Form IV on Rs.1,31,81,72,472.00****, @ 4% on Rs.1,07,65,00,465.00, @ 8% on 13,01,66,451.00, @ 12% on 24,59,30,963.00 and @ 20% on 6,89,22,68,475.00 calculates at Rs.1,51,41,65,644.00. Surcharge @ 1% on tax due also calculates at Rs.15,14,16,564.00 and allowed set off towards payment of ET for an amount of Rs.4,44,08,106.00. ***"*

From the aforesaid, it is crystal clear that same turnover which was subject-matter of original assessment under Section 12(4) has been considered in the proceeding under Section 12(8) in the context of set off of entry tax paid against sales tax liability. This being a clear case of "change of opinion" is not permissible under law.

10. A three-Judge Bench of the 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 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. 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)."

11. 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)."

12. In the matter of ***Sri Jagannath Promoters Vrs. Deputy Commissioner of Income Tax***, 2021 SCC On Line Ori 1769 = (2022) 440 ITR 192 = (2022) 324 CTR 233 it has been 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/- on account 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 ofIncome 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.""***

13. The apex 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 non-speaking, 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 re-assessment proceedings."

14. 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."

15. Therefore, taking a cue from the above, it is to be considered whether the petitioner is entitled to set off entry tax paid against tax payable for sale of goods. Both the First Appellate Authority and the Second Appellate Authority have come to the conclusion that the petitioner, having dealt with the item(s) mentioned in Entry No.101 and sold said item(s) against declaration in Form IV at concessional rate of tax, is not entitled to get set off of entry tax paid against the amount of tax payable for sale of goods. The Item No.101 deals with the general provision, so far as HSD and LDO are concerned, and for that the dealer is liable to pay tax @ 20%. There is no dispute on that. But here is a case where the petitioner is carrying on business in HSD and LDO, which is used within the State.

16. There is no iota of doubt that the petitioner claims concessional rate of 4% tax on the strength of Form-IV. The transaction which was done by the petitioner with the others, being on the strength of Form-IV,set off was granted to the petitioner. The assessment order issued by the Assessing Officer under Section 12(4) is very clear to that extent, but reassessment made under Section 12(8) and confirmation thereof made by the First Appellate Authority and the Second Appellate Authority cannot be sustained in the eye of law.

17. In ***Indian & Eastern Newspaper Society, New Delhi v. Commissioner of Income Tax, New Delhi***, (1979) 4 SCC 248 and ***Commissioner of Income Tax, Delhi v. Kelvinator of India Limited***, (2010) 2 SCC 723, the apex Court, considering the meaning of "any reasons", held that "any reasons" implies specific and concrete information from an external source and therefore, it cannot include an audit or other report which is prepared within the Department by the tax authorities. Otherwise it would be possible for the authorities to reopen an assessment on the basis of the change of opinion, in which event the finality of the completed assessment will lose all sanctity and integrity.

Therefore, the reopening of the assessment is based on the investigation report of the tax authorities themselves and is, therefore, founded on nothing but a mere change of opinion. As a consequence thereof, the order passed by the Assessing Authority under Section 12(8) for reassessment has no justification in view of law laid down by the apex Court in ***Kelvinator of India Limited*** (supra) followed by ***Nava Bharat Ferro Alloys v. State of Orissa***, (2010) 31 VST 319 (Ori.). Therefore, the formation of opinion in the reassessment under Section 12(8) of the OST Act cannot have any justification and while forming such opinion, as it appears from the records, no opportunity of hearing to the petitioner was given in compliance of the principles of natural justice.

18. It is also not in dispute that the petitioner- company has paid entry tax on procurement of HSD and LDO into the State of Orissa but has not sold any finished goods rather sold the same goods as procured. On perusal of the assessment order under Section 12(4) of the OST Act, it is made clear that the Assessing Authority has taken note of the fact that HSD and LDO, which have been utilized by different

companies by furnishing the Form-IV, the same has been taken note of and assessment thereon has been made by the Assessing Authority. The goods in question have been sold by the petitioner against declaration in Form-IV furnished by the purchasing manufacturers; however, the concessional rate of tax is not available in respect of such goods, namely, HSD & LDO as they fall within the exclusion clause "other than….. diesel oil" as per Entry- 81 of List-C. Therefore, obviously the petitioner is liable to pay tax @ 20% as per Entry-101, *ibid*. In such eventuality, the petitioner is liable to discharge its liability by availing set off of entry tax paid. The issue of set off being taken into consideration while finalizing assessment under Section 12(4) of the OST Act, on account of "change of opinion" the reassessment under Section 12(8), *ibid*. is not legally tenable.

19. In ***Associated Cement Company v. State of Bihar***, (2004) 137 STC 389 (SC), the apex Court held that on mere change of opinion, set off as claimed by the petitioner is not admissible and is violative of the principles of natural justice. As a consequence thereof, the reassessment made by the Assessing Authority dated 21.01.2007 and relying upon the reasons assigned in the reassessment order, the appellate authority has proceeded with the matter, which cannot also be sustained in the eye of law.

20. The State Government, while enacting and incorporating Note-1(b) of the List C of the Rate Chart by way of notification dated 31.03.2001, made it clear that the claim of set off of entry tax would be available sales tax payable for sale of HSD being covered under Item No.101 of the Schedule/Rate Chart. The legislature has not imposed any restriction/embargo on application of Note-1(b) on the covered items, namely HSD etc. Thereby, while reassessing under Section 12(8), the Assessment Authority, and while confirming the order of reassessment, the First Appellate Authority as well as the Tribunal have not taken note of the fact that Note-1(b) read with Note-2 of the notification dated 31.03.2001 in no uncertain terms, allows set off of entry tax paid on HSD against the sales tax payable. As a consequence thereof, the statutory allowance of set off cannot be denied to the petitioner on the ground that the petitioner had sold a part of its stock of HSD at a concessional rate of 4% against submission of declaration in Form-IV.

21. Undisputedly, HSD is one of the covered goods under Note-1(b) and, thereby, the petitioner is statutorily entitled to claim set off of entry tax against sales tax payable on sale of HSD. As the State Government has not imposed any restriction/limitation on the claim of set off of entry tax on the covered items, the reassessment made by the Assessing Authority under Section 12(8) and confirmation made thereof by the First Appellate Authority and also the Tribunal denying the benefit of set off cannot be sustained in the eye of law. The benefit statutorily permissible,vide notification dated 31.03.2001 issued by the Government, cannot be denied/disallowed without considering such notification in proper perspective. Therefore, the Assessing Officer, the First Appellate Authority and the

Tribunal have not considered the Note-1(b) of the notification dated 31.03.2001 in proper perspective when the dealer is statutorily required to make sales of HSD at the concessional rate against declaration in Form-IV and in such event Note-1(b) of the notification dated 31.03.2001 would be redundant. As such, there cannot be any unreasonable, arbitrary and discriminatory classification made by the authority, which will be hit by Article 14 of the Constitution of India.

22. On the basis of aforesaid analysis, the question no.(i) is answered in the negative, i.e., in favour of the dealer and against the department. So far as question nos.(ii) and (iii) are concerned, they are not specifically answered as this Court holds the re-assessment under Section 12(8) of the OST Act is impermissible in law.

23. As a consequence thereof, the order dated 28.11.2013 passed by the Orissa Sales Tax Tribunal (Full Bench), Cuttack in S.A. No.663/2008-09 under Annexure-6 confirming the order dated 11.12.2008 passed by the Assistant Commissioner of Sales Tax, Cuttack I Range, Cuttack in Appeal No.AA-442/CUIE/2006-07 in Annexure-4 and the reassessment order under Section 12(8) of the OST Act dated 27.01.2007 under Annexure-3 passed by the Assessing Officer disallowing the set off of entry tax to the petitioner, which comes under the purview of the notification dated 31.03.2001, cannot be sustained in the eye of law and, hence, the orders are set aside.

24. As a consequence thereof, this revision is allowed, but there shall be no order as to costs.

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2023 (I) ILR – CUT - 699

Dr. B.R.SARANGI, J & MURAHARI SRI RAMAN, J.

W.P(C) NO. 9304 OF 2015

SINGH RAI MAJHI .....Petitioner

.V.

PRESIDING OFFICER, LABOUR COURT & ANR. .....Opp. Parties

CONSTITUTION OF INDIA, 1950 – Article 226 – Delay or latches in approaching the writ court – Relevant considerations / criteria to be considered while exercising the discretion under Article 226 of the Constitution of India – Explained with reference to case laws.

(Para 8.5 to 8.11)

Case Laws Relied on and Referred to :-

1. AIR 1967 SC 973 : K.V. Raja Lakshmiah Vs. State of Mysore.
2. 2002 Supp (3) SCR 534 : Northern Indian Glass Industries Vs. Jaswant Singh and Ors.

3. (2011) 5 SCC 607: Shankara Co-op. Housing Society Ltd. Vs. M. Prabhakar and Ors.
4. (2008) 10 SCC 115:C. Jacob Vs. Director of Geology and Anr.
5. 1994 Supp. (2) SCC 195:Ex. Capt. Harish Uppal Vs. Union of India.
6. (1995) 4 SCC 683:State of Maharashtra Vs. Digambar.
7. (2014) 4 SCC 108:Chennai Metropolitan Water Supply and Sewerage Board Vs. T.T. Murali Babu.
8. 2018 SCC OnLine Mad 11463:S. Vaidhyanathan Vs. Government of Tamil Nadu.

For Petitioner : M/s. Sidhartha Mishra-I, P. Panda, K. Sahoo & S. Satpathy.

For Opp. Parties : Mr. Sanjay Rath, ASC (O.P.No.1)
M/s. Sarada Prasanna Sarangi, D.K. Das, P.K. Dash, A. Pattnaik & A. Das (O.P.No.2)

JUDGMENT Date of Hearing and Judgment:22.03.2023

MURAHARI SRI RAMAN, J.

1. Assailing the Award dated 04.06.2007 of the Labour Court, Sambalpur in I.D. Case No. 4 of 2003 consequent upon the reference made by the Government of Odisha in Labour and Employment Department under Section 10 and Section 12 of the Industrial Disputes Act, 1947, with respect to the Management of M/s. Tata Sponge Iron Limited, Bileipada in the District of Keonjhar, the petitioner, an ambulance driver, approached this Court for invocation of provisions of Articles 226 and 227 of the Constitution of India with the following prayers:

> *"*** issue rule NISI in the nature of mandamus or any other appropriate writ/writs and call for the records from the court below and after hearing the counsel for the parties allow this writ application by directing the authority of the opposite parties more specifically to the opposite party No.2 to absorb the petitioner in his post with full back wages by setting aside the impugned judgment/order dated 04.06.2007 passed by the learned Tribunal, Sambalpur in ID Case No.04/2003 under Annexure-1;*
>
> *And pass such order/orders, direction/directions to the authority of opposite parties more specifically to the opposite party No.2 by taking into account of the facts and circumstances of the present case as is deemed fit and proper by this Hon'ble Court. ***".*

Facts of the case:

2. Appointed as an ambulance driver on 01.08.1991, while continuing as such in the opposite party No.2-Tata Sponge Iron Ltd., the petitioner was charge-sheeted on the following:

> i. On 06.05.1999 at around 9.00 a.m. the petitioner refused to comply with the instruction of the dispensary staff of the company to carry a patient who was referred to TISCO Hospital at Joda.
>
> ii. Taking ambulance from dispensary to the main gate of the plant, stopped the production by instructing employees working in different sections of the plant of the company over intercom to assemble, thereby caused substantial loss to the company.
>
> iii. He was instrumental in instigating other employees not to attend "C" shift duty.

2.1. It is the plea that since the petitioner tried to pacify dissention between the Management of the company and the workers' union, he was falsely implicated.

2.2. It is stated that domestic enquiry was conducted and as a result of recommendation thereof, the Management of the company-opposite party No.2 terminated the services of the petitioner. On reference by the appropriate Government, the learned Labour Court, Sambalpur has framed the following issues:

> *"i. Whether the domestic enquiry conducted by the management of M/s. Tata Sponge Iron Limited, Joda, Keonjhar is fair and proper?*
>
> *ii. Whether the termination of services of Sri Singh Rai Majhi by the Managing Director, Tata Sponge Iron Ltd., Bileipada, Joda, with effect from 28.11.2000 is legal and justified?*
>
> *iii. What relief, if any, the workman is entitled to?"*

2.3. The learned Labour Court having adjudicated each issue against the petitioner, held *inter alia* that refusal of the petitioner to carry a patient to the referral hospital tantamounts to misconduct and misuse of ambulance for the purpose of Workers' Union being proved, the punishment handed out by the Management of the company is considered to be just and proper. Hence, questioning the veracity of findings of the learned Labour Court, the petitioner is before this Court in the present proceeding under Article 226/227 of the Constitution of India.

Arguments of the counsel for the respective parties:

3. Sri Sidhartha Mishra, counsel for the petitioner has contended that there was serious violation of principles of natural justice and the conclusion arrived at by the learned Labour Court is not in accord with evidence on record. There has been gross error in appreciation of the material notwithstanding the fact being placed that the petitioner was not involved in the incident that alleged to have occurred on 06.05.1999, as such the action of Management of M/s. Tata Sponge Iron Ltd. in terminating the petitioner smacks arbitrariness.Furthermore, the learned Labour Court taking into consideration false evidence of the Management of the company proceeded to accept the enquiry report which could not have been sustained.Therefore, it is urged by Sri Sidhartha Mishra, Advocate that the impugned Award, being illogical, the termination of service of the petitioner is liable to be set aside.

4. *Per contra*, Sri Sarada Prasanna Sarangi, learned advocate for the Management of M/s. Tata Sponge Iron Ltd. with vehemence urged that each of the points agitated by the petitioner has carefully been analysed by the learned Labour Court and came to just conclusion. The learned Labour Court not only took note of domestic enquiry report, but also weighed the oral and documentary evidence adduced by both the sides.

4.1. The learned Labour Court, having taken into consideration the evidence of witnesses examined, found that the petitioner refused to obey the request of the doctor to shift the patient and such turning down of instruction by him caused undue difficulty to the patient. It has been noted that the plea of the petitioner being on leave on the date of occurrence of incidence was also disbelieved by the learned Labour Court on ascertaining the attending circumstances prevailed on that date. The said Court also took note of the fact that such a plea did not form part of pleadings. After threadbare analysis of the evidence available on record it has been concluded that the petitioner refused to shift patient to Joda Hospital.

4.2. So far as second allegation is concerned, unauthorized use of the vehicle by taking it to main gate was proved inasmuch as the plea that the keys of the vehicle was handed over to the doctor was not pleaded; nonetheless, the telephonic communication to workers of different sections of the plant was brought on record by the Management by leading evidence. It is also well put forth by the Management of the company that due to instigation by the petitioner, the workmen could not attend "C" shift duty, as a consequence of which not only there was production loss but also financial loss.

4.3. Sri Sarada Prasanna Sarangi, therefore, submitted that each charge vis-à-vis evidence has been discussed and properly considered by the learned Labour Court while making the Award. The petitioner could not discharge his burden to the effect that the facts found are perverse, thereby material irregularity was committed by the said Court leading to procedural infirmity in arriving at conclusion that the action of the Management of M/s. Tata Sponge Iron Ltd. in terminating the services of the petitioner suffers illegality. Hence, in absence of error in law in affirming the termination of service by the Labour Court, there is no necessity for this Court to interfere with the finding of fact in exercise of extraordinary jurisdiction.

5. Sri Sanjay Rath, learned Additional Standing Counsel for the opposite party No.1 supported the arguments advanced by Sri Sarada Prasanna Sarangi, Advocate for the opposite party No.2 and submitted that the finding of fact returned by the learned Labour Court by taking into consideration oral and documentary evidence adduced by both the sides need not be disturbed at this distance of time, particularly when plausible explanation is lacking with regard to cause for the delay in approaching this Court in instituting writ proceeding. Inordinate delay in filing the writ petition being not sufficiently explained, the petitioner does not deserve benevolence.

Observation:

6. Having heard Sri Sidhartha Mishra, Advocate for the petitioner, Sri Sanjay Rath, Additional Standing Counsel for the opposite party No.1 and Sri Sarada Prasanna Sarangi, Advocate for the opposite party No.2, this Court finds that the learned Labour Court having afforded reasonable opportunity to the parties came to the conclusion that the punishment as handed out by the Management of M/s.

Tata Sponge Iron Ltd. is not disproportionate. Misconduct of the petitioner-driver is supported by evidence that he, while being on duty, refused to shift patient to the Hospital at Joda. On the facts and in the circumstances of the case, the termination of services of the petitioner has correctly been held by the Labour Court to be just and proper.

7. It is transpired from reading of the Award dated 04.06.2007 passed by the learned Labour Court, Sambalpur that the defiant attitude of the petitioner is not only amounted to "misconduct", but also he was indisciplined and found to be insincere. The conclusion of the learned Labour Court in sustaining the decision of the Management of M/s. Tata Sponge Iron Ltd. does not suffer legal infirmity. There is little scope for this writ Court to intermeddle the fact-finding of the competent Court after discussing evidence with reference to charges framed against the petitioner.

Entertainment of writ petition on the objection of delay and laches:

8. The counsel for the opposite parties are correct in raising objection for entertainment of writ petition to show indulgence in the matter since the petitioner failed to apprise this Court with regard to inordinate delay in filing writ petition. Whereas the Award was passed on 04.06.2007, the writ petition has been filed on 11.05.2015. The cause shown by the petitioner that "financial instability" led to the delay in filing writ petition does not appeal to conscience of Court to interfere with the Award. No evidence is placed on record by the petitioner to justify such a contention.

8.1. It may be noted that writs are not a device to restart proceedings after unreasonable and inordinate delay. It is often seen that litigants, who sleep over their right of appeal/revision or any other statutory mode for redressal, decide at a much later time after unreasonable and inordinate time to re-agitate the matter especially against the Government or its functionalities. Such a device seldom requires to be attended to. Invocation of the extraordinary jurisdiction of the High Court by filing writ petition under Article 226 of the Constitution of India craving for direction for consideration of fresh plea or evidence with a hope to re- enliven the proceeding, which had lapsed with the passage of time, is liable to be deprecated. The Hon'ble Supreme Court as also this Court has consistently held that indolent person is not to be protected and delay and laches on part of the litigant disentitle him to any relief.

8.2. In *K.V. Raja Lakshmiah Vrs. State of Mysore, AIR 1967 SC 973*, the Apex Court which held that the High Court in exercise of its discretion does not ordinarily assist the tardy and the indolent or the acquiescent and the lethargic and that the Court may decline to intervene and grant relief in exercise of its writ jurisdiction because it is likely to cause confusion and public inconvenience and bring in its train new injustices.The Court observed that if writ jurisdiction is exercised after unreasonable delay, it may have the effect of inflicting not only hardship and inconvenience but also causing injustice to the third parties.

8.3. Regard may be had to *Northern Indian Glass Industries Vrs. Jaswant Singh and Others, 2002 Supp (3) SCR 534*, wherein the Hon'ble Court cautioned that the High Court cannot ignore the delay and latches in approaching the writ court and there must be satisfactory explanation by the petitioner as to how he could not come to the court well in time.

8.4. It is also well-settled principle of law that 'delay defeats equity'. The principle underlying this rule is that the one who is not vigilant and diligent and does not seek intervention of the Court within reasonable time from the date of accrual of cause of action or alleged violation of constitutional, legal or other right is not entitled to relief under Article 226 of the Constitution. Another reason for the High Court's refusal to entertain belated claim is that during the intervening period rights of third parties may have crystallized and it will be inequitable to disturb those rights at the instance of a person who has approached the Court after long lapse of time and there is no cogent explanation for the delay.

8.5. In *Shankara Co-op. Housing Society Ltd. Vrs. M. Prabhakar and Others, (2011) 5 SCC 607*, the Supreme Court reiterated settled position of law and affirmed the well-established criteria which has to be considered before exercise of discretion under Article 226 of the Constitution of India. The relevant portion is extracted herein below:

> *"53. The relevant considerations, in determining whether delay or laches should be put against a person who approaches the writ court under Article 226 of the Constitution is now well settled. They are:*
>
> *1. there is no inviolable rule of law that whenever there is a delay, the court must necessarily refuse to entertain the petition; it is a rule of practice based on sound and proper exercise of discretion, and each case must be dealt with on its own facts;*
>
> *2. the principle on which the court refuses relief on the ground of laches or delay is that the rights accrued to others by the delay in filing the petition should not be disturbed, unless there is a reasonable explanation for the delay, because court should not harm innocent parties if their rights had emerged by the delay on the part of the Petitioners;*
>
> *3. the satisfactory way of explaining delay in making an application under Article 226 is for the Petitioner to show that he had been seeking relief elsewhere in a manner provided by law. If he runs after a remedy not provided in the Statute or the statutory rules, it is not desirable for the High Court to condone the delay. It is immaterial what the Petitioner chooses to believe in regard to the remedy;*
>
> *4. no hard and fast rule, can be laid down in this regard. Every case shall have to be decided on its own facts;*
>
> *5. that representations would not be adequate explanation to take care of the delay."*

8.6. In *C. Jacob Vrs. Director of Geology and Another, (2008)10 SCC 115*, it has been observed thus:

> *"6. Let us take the hypothetical case of an employee who is terminated from service in 1980. He does not challenge the termination. But nearly two decades later, say in the year 2000, he decides to challenge the termination. He is aware that any such challenge would be rejected*

at the threshold on the ground of delay (if the application is made before Tribunal) or on the ground of delay and laches (if a writ petition is filed before a High Court). Therefore, instead of challenging the termination, he gives a representation requesting that he may be taken back to service. Normally, there will be considerable delay in replying such representations relating to old matters.

Taking advantage of this position, the ex-employee files an application/writ petition before the Tribunal/High Court seeking a direction to the employer to consider and dispose of his representation.The Tribunals/High Courts routinely allow or dispose of such applications/petitions (many a time even without notice to the other side), without examining the matter on merits, with a direction to consider and dispose of the representation.

The courts/tribunals proceed on the assumption, that every citizen deserves a reply to his representation. Secondly they assume that a mere direction to consider and dispose of the representation does not involve any 'decision' on rights and obligations of parties. Little do they realize the consequences of such a direction to 'consider'. If the representation is considered and accepted, the ex-employee gets a relief, which he would not have got on account of the long delay, all by reason of the direction to 'consider'.

If the representation is considered and rejected, the ex-employee files an application/writ petition, not with reference to the original cause of action of 1982, but by treating the rejection of the representation given in 2000, as the cause of action. A prayer is made for quashing the rejection of representation and for grant of the relief claimed in the representation. The Tribunals/High Courts routinely entertain such applications/petitions ignoring the huge delay preceding the representation, and proceed to examine the claim on merits and grant relief. In this manner, the bar of limitation or the laches gets obliterated or ignored."

8.7. At this juncture, it is useful to refer to *Ex. Capt. Harish Uppal Vrs. Union of India, 1994 Supp. (2) SCC 195*, wherein the following was the observation:

"8. The petitioner sought to contend that because of laches on his part, no third party rights have intervened and that by granting relief to the petitioner no other person's rights are going to be affected. He also cited certain decisions to that effect. This plea ignores the fact that the said consideration is only one of the considerations which the court will take into account while determining whether a writ petition suffers from laches. It is not the only consideration. It is a well-settled policy of law that the parties should pursue their rights and remedies promptly and not sleep over their rights. That is the whole policy behind the Limitation Act and other rules of limitation. If they choose to sleep over their rights and remedies for an inordinately long time, the court may well choose to decline to interfere in its discretionary jurisdiction under Article 226 of Constitution of India— and that is what precisely the Delhi-High Court has none. We cannot say that the High Court was not entitled to say so in its discretion."

8.8. The Hon'ble Supreme Court in the case of *State of Maharashtra Vrs. Digambar, (1995) 4 SCC 683* laid down as follows:

"14. How a person who alleges against the State of deprivation of his legal right, can get relief of compensation from the State by invoking writ jurisdiction of the High Court under Article 226 of the Constitution even though, he is guilty of laches or undue delay is difficult to comprehend, when it is well settled by decisions of this Court that no person, be he a citizen or otherwise, is entitled to obtain the equitable relief under Article 226 of the Constitution if his conduct is blameworthy because of laches,undue delay, acquiescence, waiver and the like. Moreover, how a citizen claiming discretionary relief under Article 226

of the Constitution against a State, could be relieved of his obligation to establish his unblameworthy conduct for getting such relief, where the State against which relief is sought is a Welfare State, is also difficult to comprehend. Where the relief sought under Article 226 of the Constitution by a person against the Welfare State is founded on its alleged illegal or wrongful executive action, the need to explain laches or undue delay on his part to obtain such relief, should, if anything, be more stringent than in other cases, for the reason that the State due to laches or undue delay on the part of the person seeking relief, may not be able to show that the executive action complained of was legal or correct for want of records pertaining to the action or for the officers who were responsible for such action not being available later on. Further, where granting of relief is claimed against the State on alleged unwarranted executive action, is bound to result in loss to the public exchequer of the State or in damage to other public interest, the High Court before granting such relief is required to satisfy itself that the delay or laches on the part of a citizen or any other person in approaching for relief under Article 226 of the Constitution on the alleged violation of his legal right, was wholly justified in the facts and circumstances, instead of ignoring the same or leniently considering it. Thus, in our view, persons seeking relief against the State under Article 226 of the Constitution, be they citizens or otherwise, cannot get discretionary relief obtainable thereunder unless they fully satisfy the High Court that the facts and circumstances of the case clearly justified the laches or undue delay on their part in approaching the Court for grant of such discretionary relief. Therefore, where a High Court grants relief to a citizen or any other person under Article 226 of the Constitution against any person including the State without considering his blameworthy conduct, such as laches or undue delay, acquiescence or waiver, the relief so granted becomes unsustainable even if the relief was granted in respect of alleged deprivation of his legal right by the State."

8.9. In *Chennai Metropolitan Water Supply and Sewerage Board Vrs. T.T. Murali Babu reported in (2014) 4 SCC 108*, the Hon'ble Supreme Court held as follows:

"16. Thus, the doctrine of delay and laches should not be lightly brushed aside. A writ court is required to weigh the explanation offered and the acceptability of the same. The court should bear in mind that it is exercising an extraordinary and equitable jurisdiction. As a constitutional court it has a duty to protect the rights of the citizens but simultaneously it is to keep itself alive to the primary principle that when an aggrieved person,without adequate reason, approaches the court at his own leisure or pleasure, the Court would be under legal obligation to scrutinise whether the lis at a belated stage should be entertained or not. Be it noted, delay comes in the way of equity. In certain circumstances delay and laches may not be fatal but in most circumstances inordinate delay would only invite disaster for the litigant who knocks at the doors of the Court. Delay reflects inactivity and inaction on the part of a litigant— a litigant who has forgotten the basic norms, namely, "procrastination is the greatest thief of time" and second, law does not permit one to sleep and rise like a phoenix. Delay does bring in hazard and causes injury to the lis."

8.10. The Madras High Court in the case of *S. Vaidhyanathan Vrs.Government of Tamil Nadu, 2018 SCC OnLine Mad 11463*, held as under:

"13. Though reasonable time is not prescribed in the rules framed under Article 229 of the Constitution of India, the words "reasonable time", as explained in Veerayeeammal Vrs. Seeniammal reported in (2002) 1SCC 134, at Paragraph 13, is extracted hereunder:

"13. The word "reasonable" has in law prima facie meaning of reasonable in regard to those circumstances of which the person concerned is called upon to act reasonably knows or ought to know as to what was reasonable. It may be unreasonable to give an exact definition

of the word "reasonable". The reason varies in its conclusion according to idiosyncrasy of the individual and the time and circumstances in which he thinks. The dictionary meaning of the "reasonable time" is to be so much time as is necessary, under the circumstances, to do conveniently what the contract or duty requires should be done in a particular case. In other words it means, as soon as circumstances permit. In P. Ramanatha Aiyar's The Law Lexicon it is defined to mean:

"A reasonable time, looking at all the circumstances of the case; a reasonable time under ordinary circumstances; as soon as circumstances will permit; so much time as is necessary under the circumstances, conveniently to do what the contract requires should be done; some more protracted space than "directly"; such length of time as may fairly, and properly, and reasonably be allowed or required, having regard to the nature of the act or duty and to the attending circumstances; all these convey more or less the same idea."

14. There is an inordinate delay and laches on the part of the appellant. What is laches is as follows:

"Laches or reasonable time are not defined under any Statute or Rules. "Latches" or "Lashes" is an old french word for slackness or negligence or not doing. In general sense, it means neglect to do what in the law should have been done for an unreasonable or unexplained length of time. What could be the latches in one case might not constitute in another.The latches to non-suit, an aggrieved person person from challenging the acquisition proceedings should be inferred from the conduct of the land owner or an interested person and that there should be a passive inaction for a reasonable length of time. What is reasonable time has not been explained in any of the enactment. Reasonable time depends upon the facts and circumstances of each case."

15. Statement of law has also been summarized in Halsbury's Laws of England, Para 911, pg. 395 as follows:

"In determining whether there has been such delay as to amount to laches, the chief points to be considered are:

(i) acquiescence on the claimant's part; and

(ii) any change of position that has occurred on the defendant's part.

Acquiescence in this sense does not mean standing by while the violation of a right is in progress, but assent after the violation has been completed and the claimant has become aware of it. It is unjust to give the claimant a remedy where, by his conduct, he has done that which might fairly be regarded as equivalent to a waiver of it; or where by his conduct and neglect, though not waiving the remedy, he has put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted. In such cases lapse of time and delay are most material. Upon these considerations rests the doctrine of laches." …"

8.11. Pertinent in the present context to take note of the following observation of the Allahabad High Court *vide Judgment dated 18th March, 2021* rendered in *Ganga Sahay and 2 Others Vrs. Deputy Director of Consolidation and 14 Others, WRIT - B No. 302 of 2021*:

"13. Law has long set its face against delay in approaching the court. The courts have consistently declined to condone the delay and denied relief to litigants who are guilty of laches. Litigants who are in long slumber and not vigilant about their rights are discouraged by the courts. Belated claims are rejected at the threshold. Rip Van Winkles have a place in literature, but not in law.

14. All this is done on the foot of the rule of delay and laches. Statutes of limitation are ordained by the legislature, rule of laches was evolved by the courts. Sources of the law differ but the purpose is congruent. Statutes of limitation and the law of delay and laches are rules of repose.

15. The rule of laches and delay is founded on sound policy and is supported by good authority. The rule of laches and delay is employed by the courts as a tool for efficient administration of justice and a bulwark against abuse of process of courts.

16. Some elements of public policy and realities of administration of justice may now be considered.

17. While indolent litigants revel in inactivity, the cycle of life moves on. New realities come into existence. Oblivious to the claims of the litigants, parties order their lives and institutions their affairs to the new realities. In case claims filed after inordinate delay are entertained by courts, lives and affairs of such individuals and institutions would be in a disarray for no fault of theirs. Their lives and affairs would be clouded with uncertainty and they would face prospects of long and fruitless litigation.

18. The delay would entrench independent third party rights, which cannot be dislodged. The deposit of subsequent events obscures the original claim and alters the cause itself. The refusal to permit agitation of stale claims is based on the principle of acquiescence. In certain situations, the party by its failure to raise the claim in time waives its right to assert it after long delay.

19. The rule of delay and laches by preventing the assertion of belated claims puts to final rest long dormant claims. This policy of litigative repose,creates certainty in legal relations and curtails fruitless litigation. It ensures that the administration of justice is not clogged by pointless litigation."

8.12. Given the position of law as discussed above on the question of exercise of discretion under Article 226/227 of the Constitution of India, it is difficult to ignore the delay and laches on part of the instant petitioner, as it is apparent on record that there is no satisfactory explanation proffered in the writ petition. The explanation for laches is self-serving and lacks credibility. Therefore, the writ petition is barred by delay and laches and is not liable to be entertained.

Conclusion:

9. For the reasons stated above, the writ petition is bound to be dismissed both on the merits as also on the ground of delay. Accordingly, the writ petition is dismissed. However, parties are left to bear respective costs.

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2023 (I) ILR – CUT - 708

ARINDAM SINHA, J.

WP(C) NO. 20399 OF 2016

NATIONAL ALUMINIUM COMPANY LTD. .....Petitioner

.V.

EMPLOYEES' STATE INSURANCE CORPORATION & ORS. .....Opp. Parties

EMPLOYEES' STATE INSURANCE ACT, 1948 – Section 75 (2-B) proviso – Discretion power of insurance Court to waive or reduce amount to be deposited under the sub-section – Whether recording of reason is mandatory while taking a decision as per the "proviso" u/s 75(2-B) – Held,Yes – The Court while refusing to exercise discretionary power vested in it by the proviso, was bound to give reasons. (Para 12)

Case Laws Relied on and Referred to :-

1. (1970) 2 SCC 355 : L.Hirday Narain Vs. I.T.O., Bareilly.
2. (2010) 9 SCC 496 : Kranti Associates (P) Ltd. Vs. Masood Ahmed Khan.
3. (2006) 10 SCC 1 : Reliance Airport Developers (P) Ltd. Vs. Airports Authority of India.
4. 2009 (120) FLR 77: Harshal Paper and Board Mill Ltd. Vs. Union of India.
5. 2007 LLR 750 : M/s. Satyam Glass Works Industries Vs. Employees' State Insurance Kanpur.
6. (1997) 1 SCC 62:Employees' State Insurance Corporation Vs. F. Fibre Bangalore (P) Ltd.

For Petitioner : Ms. Pami Rath.

For Opp. Parties : Mr. A. P. Ray, Mr. N. D. Tripathy

JUDGMENT Date of Hearing & Judgment: 30.01.2023

ARINDAM SINHA, J.

1. Petitioner is a Government company. Employees' State Insurance Corporation raised demand for payment of contribution. Petitioner disputed the demand in the insurance Court. It was required, for maintaining its dispute, to make pre- deposit of 50% of the amount due as demanded by the Corporation. It applied for waiver of the pre-condition. By impugned order dated 14th September, 2016, the application for waiver was rejected. Petitioner has challenged said order.

2. Ms. Rath, learned advocate appears on behalf of petitioner and submits, proviso under sub-section (2-B) in section 75 of Employees' State Insurance Act, 1948 gives discretion to the Court, to exercise, on reasons to be recorded in writing, to waive or reduce amount to be deposited under the sub-section. Impugned order is one, by which the Court refused to exercise discretion, on purported perception and without reason. There should be interference because under the Act her client, as principal employer, is entitled to apply for the waiver. Omission to exercise the discretion provided in the statute must also be on reason given.

3. She relies on judgment of the Supreme Court in **L. Hirday Narain v. I.T.O., Bareilly, reported in (1970) 2 SCC 355**, paragraphs 13 to 15. She also relies on other judgments of said Court, on exercise of discretion to be on reasons for, inter alia, justice being seen to be done and to check arbitrariness. They are **Kranti Associates (P) Ltd. v. Masood Ahmed Khan, reported in (2010) 9 SCC**

496, paragraph 47 and **Reliance Airport Developers (P) Ltd. v. Airports Authority of India,** reported in **(2006) 10 SCC 1**, corrigenda paragraph-29.

4. Mr. Ray, learned advocate appears on behalf of the Corporation and submits, no interference with impugned order is warranted. Petitioner cannot claim hardship and, therefore, for working out scheme of the Act to provide insurance cover to factory workers, it must be compelled to put in the pre-deposit.

5. He relies on view taken by a Division Bench of Madhya Pradesh High Court in **Harshal Paper and Board Mill Ltd. v. Union of India,** reported in **2009 (120) FLR 77**, paragraph 25 to submit that the Bench confirmed requirement by sub-section (2-B) to be intra vires the Constitution, as not offending article 14 therein. He submits, view taken was that the Parliament in its wisdom has provided many measures to curb and control the principal employer and to make them comply with provisions in the Act. Impugned order was duly made in accordance with the provision. He reiterates, there should not be interference.

6. He also relies on view taken by a Division Bench of Allahabad High Court in **M/s. Satyam Glass Works Industries v.Employees'State Insurance, Kanpur**, reported in **2007 LLR 750**, paragraph-5. Passage relied upon in the paragraph is extracted and reproduced below.

> *"5. xx xx xx On the contrary, the proviso categorically says that the Court may, for the reasons to be recorded in writing, waive or reduce the amount to be deposited under this sub-section.* ***Therefore, reasons are compulsory statutory requirement when waiver or reduction is allowed but not when it is rejected****. Therefore, order of rejection is a discretionary power and cannot be said to be substantial question of law. If it is allowed, the weaker section of the people will be affected. Therefore, Court is compelled to provide with reasons of waiver or reduction being statutory requirement otherwise such section of the people Seem to be affected.* ***There is no provision that reasons are also to be given when such prayer is rejected. First part of sub-section (2-B) of section 75 of the Act itself is qualifying section for rejection."*** *(emphasis supplied)*

7. Sub-section (2-B), with the proviso, is reproduced below.

> *"(2-B) No matter which is in dispute between a principal employer and the Corporation in respect of any contribution or any other dues shall be raised by the principal employer in the Employees' Insurance Court unless he has deposited with the Court fifty per cent of the amount due from him as claimed by the Corporation.*
>
> *Provided that the Court may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under this sub-section."*

8. In **Harshal Paper** (supra) view taken was regarding above provision not offending article 14 in the Constitution of India. Contention before the Bench was that upon a demand made and reference of it at first instance to the insurance Court, there cannot be requirement of pre-deposit before first adjudication. In that context, vires of the sub-section was pronounced upon by the view taken.

9. In **L. Hirday Narain** (supra) the Supreme Court declared the law on exercise of discretion and the decision can also be relied upon for the law on refusal to exercise discretion.A passage from paragraph 13 is extracted and reproduced below.

> *"xx xx xx The High Court observed that under Section 35 of the Indian Income-tax Act, 1922, the jurisdiction of the Income-tax Officer is discretionary.* ***If thereby it is intended that the Income-tax Officer has discretion to exercise or not to exercise the power to rectify, the view is in our Judgment erroneous****. Section 35 enacts that the Commissioner or Appellate Assistant Commissioner or the Income-tax Officer may rectify any mistake apparent from the record. If a statute invests a public officer with authority to do an act in a specified set of circumstances,* ***it is imperative upon him to exercise his authority in a manner appropriate to the case when a party interested and having a right to apply moves in that behalf and circumstances for exercise of authority are 'shown to exist. Even if the words used in the statute are prima facie enabling, the Courts will readily infer a duty to exercise power which is invested in aid of enforcement of a right*** *- public or private - of a citizen."* *(emphasis supplied)*

The Act by sub-section (2-B) in section 75 provides for situation arising between the Corporation and principal employers, in respect of insurance cover for the employees. The Parliament providing for these two persons, in this case both being juristic persons since both are corporations,thought fit to insert the proviso regarding waiver or reduction of the amount to be deposited under sub-section (2-B). Hence, following **L. Hirday Narain** (supra) petitioner had right to apply for waiver. Correspondingly the insurance Court having power to adjudicate on the prayer made in the application, had to do it in the manner specified by the sub-section, in the set of circumstances presented by petitioner interested and having the right to apply. As such, the power was invested in aid of enforcement of the right to apply for waiver.

10. It appears from impugned order that contention of petitioner was as would appear from a sentence, extracted therefrom and reproduced below.

> *"It is contended on behalf of the petitioners that the petitioner NALCO being a Government of India owned enterprise having huge assets and making substantial profit every year, there is no chance of escaping from payment in case of losing the litigation."*

On query from Court it could not be shown that the contention was dealt with in the order. Refusal to exercise discretion was stated in the order as reproduced below.

> *"Thus, considering the rival contentions of the parties and the legal position, I am of the considered view that the* ***petitioners being a renowned Government of India Enterprise are liable to make the statutory deposit****. Accordingly, the petitioners are directed to deposit fifty per cent of the amount due from them, as claimed by the ESI Corporation, within a fortnight hence, where after the case will be admitted. In the event, the petitioners fail to deposit the said amount, the case would stand dismissed, which is lingering since 24.12.2012."*
>
> (*emphasis supplied*)

The insurance Court did not advert to contention of petitioner that it would not escape payment in event adjudication went against it, regarding the demand brought to the Court, for adjudication.

11. Contention of petitioner stands recognized in the procedure for suits, by Code of Civil Procedure, 1908. Rule 8-A in Order XXVII is reproduced below.

> *"8-A.* ***No security to be required from Government or a public officer in certain cases****.- No such security as is mentioned in rules 5 and 6 of Order XLI shall be required from the Government or, where the Government has undertaken the defence of the suit, from any public officer sued in respect of an act alleged to be done by him in his official capacity."*
> *(emphasis supplied)*

Rules 5 and 6 in Order XLI provide for security being put in respectively for stay of decree and execution, by the appellate Court. Where Government has suffered decree or has undertaken defence of suit, provisions for putting in security provided by the Code shall not be required from it. A better elucidation regarding requirement of security cannot be had.

12. Reverting back to **Harshal Paper** (supra), the Division Bench of Madhya Pradesh High Court had noticed that the requirement of pre-deposit was at the first instance of seeking adjudication on demand made but took view that it could not be said to be offending article 14 in the Constitution with regard to scheme of the Act. In other words, there was no adjudication on the demand, determined by the authority, yet the requirement of pre-deposit was upheld. The application for waiver of pre-deposit was made in such a situation, on contention that petitioner is a renowned Government of India Enterprise and would not escape payment on adjudication going against it. When there has been adjudication and decree on a claim, followed by appeal preferred against such decree to a superior Court/Forum, there is requirement of security. Under the Act the Corporation can determine and demand. The Supreme Court in **Employees' State Insurance Corporation v. F. Fibre Bangalore (P) Ltd.,** reported in **(1997) 1 SCC 625** had also declared the law regarding, who is to approach the insurance Court on there being a dispute regarding a demand. Petitioner sought to raise a dispute on the demand. It wants adjudication. The proviso allows petitioner to apply for waiver of pre-deposit, for purpose of maintaining the dispute for adjudication. In the circumstances, it was incumbent upon the insurance Court to have dealt with the contention. More so because by **L. Hirday Narain** (supra) the Supreme Court said, it is imperative upon the public officer to exercise his authority. A Court, it follows, must also do so, in exercising the power of discretion judiciously. In refusing to exercise discretionary power vested in it by the proviso, it was bound to give reasons since also, there must be ready inference of a duty to exercise the power. View taken in **M/s. Satyam Glass Works** (supra), in humble opinion of this Bench, runs contrary to **L. Hirday Narain** (supra) and this Bench is bound to follow law declared by the Supreme Court.

13. Impugned order is set aside and quashed. The application is restored to the insurance Court, to be dealt with afresh, expeditiously.

14. The writ petition is allowed and disposed of.

2023 (I) ILR – CUT - 713

ARINDAM SINHA, J & SANJAY KUMAR MISHRA, J.

W.P.(C) NO.19583 OF 2022

MANAGING DIRECTOR/DIRECTORS ..……..Petitioners
M/s. KALINGA MEDIA & ENTERTAINMENT
PVT. LTD. BHUBANESWAR & ANR.

.V.

MOUSUMI MOHANTY …….Opp. Party

(A) INDUSTRIAL DISPUTES ACT, 1947 – Section-25F – Whether compliance of Section 25-F of the Act is required when the employment is contractual or for a specific term – Held, Yes – Section 25-F of the Act being a beneficial legislation it has to be strictly complied with and is a mandatory pre-condition. (Para 15)

(B) CONSTITUTION OF INDIA, 1950 – Art. 226 & 227 – Writ of certiorari – When can be issued – Held, for correcting errors of jurisdiction committed by inferior court or tribunal or in excess of it, or as a result of failure to exercise jurisdiction or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice the writ of certiorari can be issued. (Para 19)

Case Laws Relied on and Referred to :-

1. (2015) 4 SCC 670: K.K. Saksena Vs. International Commission on Irrigation and Drainage
2. (2011) 2 SCC (Labour and Service) 153 : AIR 2011 SC 2532 :Devinder Singh Vs. Municipal Council, Sanapur.
3. AIR 1986 SC 1571 :Central Inland Water Transport Corporation Limited & Ors. Vs. Brojo Nath Ganguly & Ors.
4. AIR 1991 SC 101: Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress & Ors.
5. AIR 1988 SC 329:National Engineering Industries Ltd. Vs. Shri Kishan Bhageria & Ors.
6. (2007) III-LLJ 953:Muralidharan K. Vs. Management of M/s. Circle Freight Intl. India Pvt. Ltd.
7. (1970) 3 SCC 248:Ananda Bazar Patrika (P) Ltd. Vs. Workmen.
8. 1994 3 SCC 510:S.K. Maini Vs. M/s. Carona Sahu Company limited & Ors.
9. 1992 L.I.C. 1813: Chakradhar Tripathy Vs.. State of Orissa & Ors.
10. AIR 1986 SC 1571:Central Inland Water Transport Corporation Vs. Brojo Nath Ganguly & Anr.
11. AIR 1991 SC 101: Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress & Ors.
12. (1985) I-LLJ 315 SC:West Bengal Electricity Board Vs. Desh Bandhu Ghose.
13. LLR-1993-876: Modella Woolens Ltd. Vs. P.O., Labour Court.

14. (1990) 69 CLT 357: Shyam Sundar Rout Vs. Orissa State Road Transport Corporation & Ors.
15. P.W.D. 2021 LLR 920:Ranbir Singh Vs. Executive Engineer.
16. (2014) 7 SCC 177: BSNL Vs. Bhurumal.
17. 2021 LLR 681 : Madhya Bharat Gramin Bank Vs. Panchamlal Yadav.
18. AIR 1964 SC 477 : Syed Yakoob Vs.K.S. Radhakrishnan & Ors.

For Petitioners : Mr. Gopinath Sethi
For Opp. Party : Mr. Susanta Kumar Dash

JUDGMENT Date of Hearing: 08.12.2022 & Date of Judgment:30.01.2023

SANJAY KUMAR MISHRA, J.

1. Being aggrieved by award dated 28.12.2021 passed in I.D. Case No.59 of 2018 by the Labour Court, Bhubaneswar, the petitioners have preferred the writ petition basically on the following grounds.

(i) The findings of the Labour Court are perverse, illegal, arbitrary and whimsical.

(ii) The petitioners were not afforded sufficient opportunity at the time of hearing by the Labour Court to produce evidence and to have their say in the matter as per law and the impugned award is violative of principles of natural justice.

(iii) The District Labour Officer being the Conciliation Officer, no application being made to the Conciliation Officer, such proceeding is not maintainable as per the mandate of law as laid down under Section 2-A(2) of the Industrial Disputes Act, 1947.

(iv) While deciding Issue No. IV, the Labour Court has miserably failed to take into consideration the factums pertaining to the post of opposite party,she having been appointed as 'Anchor Head' and drawing salary of Rs.48,700/-, cannot be regarded as workman as per Section 2 (s) of the Act from its proper perspective.

(v) The Labour Court, while adjudicating Issue No. V as well as while passing the impugned award, has not assigned any valid, cogent and specific reason for granting compensation of Rs.4,50,000/-(rupees four lakhs fifty thousand) and as such, relief granted being without any basis and without any materials, the impugned award is illegal, arbitrary and whimsical and liable to be quashed.

(vi) Engagement of the opposite party being on contractual basis w.e.f. 20.05.2015 for a period of two years only, her service automatically expired on 19.05.2017 and thereafter, she wascontinuing purelyon oral contract basis and her services were terminated with one month salary after meeting the official formalities and clearance from the H.R. cell. The Labour Court, while passing the impugned award, has miserably failed to take into consideration the said factums, from its proper prospective, and thereby has committed gross miscarriage of justice.

2. As it seems from pleadings made in the writ petition, most of the facts pleaded, are beyond pleadings made by the management before the Labour Court and hence, are not germane for adjudication of the present lis. However, it has been pleaded for the first time before this Court that opposite party was engaged as

"Anchor Head" on contractual basis for a period of two years under the petitioner No.1-company vide Order dated 20.05.2015. While working as such, on 01.08.2018 the Chief Editor of the petitioner No.1-Company by his e-mail dated 01.08.2018, asked the opposite party to have her reply on the issue of "arrogance" as shown in the parking place, to which the opposite party by her e-mail dated 02.08.2018 replied that she has every right to react over the situation and her reaction was not harsh. However, on receiving many complaints pertaining to disobedience and not taking responsibility of work assigned to the opposite party,management, having sustained heavy pecuniary loss,was constrained to terminate the service of opposite party by Order dated 18.08.2018. Pursuant to the same, the opposite party raised an industrial dispute before the District Labour Officer, Khurda, by Registered Post on 13.09.2018. As the said dispute could not be resolved amicably during the stipulated period of 45 days, the opposite party preferred I.D.Case No.59 of 2018 before theLabour Court, Bhubaneswar,resorting to provision enshrined under Section 2-A(2) of the Industrial Disputes Act, 1947 (for short 'the Act')seeking, inter alia, for declaring her termination Order dated 18.08.2018 to be illegal and unjustified and with a prayer to reinstate her with full back wages, so also to compensate her for such illegal action taken by the management.

3. Being noticed by the Labour Court, the petitioners-management appeared and filed its written statement challenging the maintainability of the said case on various grounds, such as appropriate Government in respect of the establishment of the management is Central Government, the opposite party is not a workman and has not made an application to the Conciliation Officer relating to her dispute, her appointment being purely on contractual basis valid for two years w.e.f. 20.05.2015 till 19.05.2017, her service expired automatically on 19.05.2017 and thereafter, she was continuing purely on oral contract basis. However, in terms of condition No.11 of letter of engagement, her service was terminated on 18.08.2018 for the interest of the management and there was no necessity for domestic inquiry and hence, there is no illegalityon the part of the management in terminating the service of the opposite party-workman.

4. It is further case of the petitioners-management that based on the pleadings of the parties five issues were settled by the Labour Court, but without giving sufficient opportunity to the petitioners-management ultimately a perverse award was passed on 28.12.2021 erroneously coming to a conclusion that the action of the management in terminating the service of the workman is neither legal nor justified.

5. In addition to the grounds taken in the written statement, the learned Counsel for the petitioners submitted that even if for the sake of argument it is accepted that the termination of the opposite party- workman is illegal and unjustified, the Labour Court lacks power to grant compensation in lieu of the reinstatement and back wages.

Relying on the judgment of the apex Court dated 04.02.2005 in case of **Municipal Committee,Sirsa v.Munshi Ram**,the learned Counsel for the Petitioners also submitted that since it is a case of termination simplicitor, it was not obligatory on the part of the management to comply pre-conditions prescribed under Section 25(F) of the Act or to conduct an enquiry.

6. Learned Counsel for the opposite party-workman submitted that all the grounds agitated in the writ petition were taken note of in the impugned award and the Labour Court, while passing the award, answered all the issues correctly and there being no perversity in the said award dated 28.12.2021, the writ petition is liable to be dismissed with exemplary cost.

He further submitted that before passing the impugned award, the Labour Court gave sufficient opportunity to the Petitioners-employer to have its say,so also to cross-examine the workman witnesses and lead evidence to substantiate its pleadings. But the petitioners-management failed to avail the said opportunity. Learned Counsel for the workman further submitted that the findings of the Labour Court that she is a workman and her engagement is not contractual and rather, the action of the management is punitive and her termination is illegal and unjustified as before terminating her service no domestic inquiry was conducted by the management and thereby no perversity in the impugned award, the writ petition deserves to be dismissed in *limine*.

In response to the judgment cited by the learned Counsel for the Petitioners, he submitted that the said judgment of the apex Court in **Municipal Committee,Sirsa** (supra) is not applicable to the present case as in the said case, the Respondent, who was appointed on probation basis as "Octroi Moharrir", was discharged from his duty during the period of probation with a noting that his services are no more required by the Municipal Committee and the facts and circumstances of the said case are different than the case of the present opposite party-workman.

To substantiate his argument, Mr. Dash, learned Counsel for the opposite party relied on the judgments of the apex Courts in case of **K.K. Saksena vs. International Commission on Irrigation and Drainage**, reported in (2015) 4 SCC 670, **Devinder Singh vs. Municipal Council, Sanapur**, reported in (2011) 2 SCC (Labour and Service) 153 : AIR 2011 SC 2532, **Central Inland Water Transport Corporation Limited and Others vs. Brojo Nath Ganguly and others**, reported in AIR 1986 SC1571,**Delhi Transport Corporation vs. D.T.C.Mazdoor Congress and others**, reported in AIR 1991 SC 101, **Chakradhar Tripathy vs. State of Orissa and others**, decided by a Division Bench of this Court on 6.08.1991.

7. As to the ground of violation of principles of natural justice, as is revealed from the order-sheet in I.D. Case No.59 of 2018 appended to the writ petition, the

same well demonstrates that though the petitioners-management filed its written statement on 27.08.2019 and thereafter issues were settled on 11.09.2019, w.e.f. 30.11.2019 the management either remained absent or sent petitions for time. Finally, on the prayer of the opposite party-workman, on filing of requisites, on 09.12.2020 the Labour Court ordered to issue notice to the management fixing the matter to 21.01.2021 for examination of W.W. No.1. Though on being so noticed, the management No.2, who is the authorized representative of management No.1, remained present on 21.01.2021, but did not take any steps. However, in view of the accommodation sought for by the Labour Law Lawyers Association, matter got adjourned to 23.02.2021 and again to 23.03.2021, on which dates the management No.2 attended the Court. However, from 15.04.2021 onwards, though the opposite party-workman remained present, none appeared for the management and no steps were taken on behalf of the management. Finally, on 26.11.2021, the opposite party-workman, who deposed as W.W. No.1, was urther examined on recall and documents were marked as exhibits and the case got adjourned to 04.12.2021 for evidence from the side of management. However, as on 04.12.2021 the management was found absent on repeated calls, evidence from the side of management was closed and the case was posted to 21.12.2021 for argument. Finally, the impugned award was passed on 28.12.2021 and the original copy of the said award along with one spare copy was sent to the Government in Labour & ESI Department for publication. Though a plea has been taken in the writ petition as to violation of principles of natural justice, no cogent reason has been assigned in the writ petition as to non-appearance of the management before the Labour Court beyond 15.04.2021. Further, though it has been averred in the writ petition that the impugned award is an ex-parte award, admittedly no step was taken by the petitioners to recall the alleged ex-parte award before approaching this Court in form of present writ petition.

8. So far as the maintainability of the complaint made under Section 2-A(2) of the Act, taking into consideration the pleadings made by the Parties, so also documentary evidences on record, the Labour Court, while answering Issue No.III, observed as follows:

> "To fortify the above assertion, the second party laid much emphasis on Ext.3 to Ext.3/b. On perusal of Ext.3, the Xerox copy of complaint petition of the second party addressed to DLO, Khurda at Bhubaneswar, it reveals that with regard to her termination she made such complaint before concerned DLO. On perusal of the materials available on the case record, it is found that though the second party has filed the Xerox copy of postal receipts showing sending of Ext.3, but the same has not been exhibited on her behalf as the same is a Xerox copy. However, taking on judicial notice, it is found that Ext.3 has been sent to DLO, Unit-3, Bhubaneswar. Further, from Ext.3/b, it denotes that Ext.3 has been delivered on 15.09.2018. In the case at hand, the second party has filed the presence case before this Court on 24.11.2018 i.e. more than 45 days on receipt of her complaint petition by the concerned authority. From the discussions as made hereinabove, it is held that the instance case is maintainable."

9. So far as the issue of workman is concerned, admittedly excepting filing of the written statement, the petitioners-management did not laid any evidence (both oral and documentary). To the contrary, the opposite party- workman specifically pleaded in her claim statement as to her nature of job, which is reproduced below.

> "That the 2nd party was appointed to work as full time employee vide letter of appointment Ref No. KMEPL/HR/174/TV DT.20.5.15 issued by the M.D. of the 1st party management and was designed as a "Anchor Head" under the 1st party Management with an initial salary of Rs.47,000/- and she was deployed to work at Bhubaneswar under the control and supervision of M.D. of 1st party. **Although 2nd party was designated as Anchor Head for name sake, but her primary, basic and dominant nature of duties were manual technical and operational in nature in the field ofAnchoring different programmes of the Kalinga Tv**." (Emphasis supplied)

10. Though in response to the claim statement the petitioners-management filed its written statement, there was no specific denial to the said averments made in paragraph-3of the claim statement filed by the opposite party-workman excepting to the effect that the opposite party was not a workman and EPF and ESI number were not assigned to her. So far as the nature of job is concerned, which is the decisive factor to bring a disputant under the purview of Section 2(s) of the Act, which defines "Workman", neither there is any denial in response to averments made in paragraph-3 of the claim statement nor it has been specifically pleaded by the petitioners- management as to the nature of jobs performed by the opposite party-workman to be supervisory or managerial. Rather, contrary to the stand taken in paragraph-5 of the written statement filed by the Management, the opposite party-workman exhibited document as Exhibit-4 to demonstrate that her EPF UAN number was 100232124810 pertaining to her coverage under Employees Provident Fund in terms of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952. Accordingly, the Labour Court, with regard to Issue No.IV, observed as follows:

> "WW No.1 during her evidence categorically stated that though she was appointed as Anchor-Head, she was deployed to work under the control and supervision of M.D. of first party. **She further testified that although she was designated as 'Anchor Head' for name sake, but her primary, basic and dominant nature of duties were manual, technical and operational in nature in the field of Anchoring different programmes of the Kalinga TV and preparing the manual work of scheduling the programmes**." (Emphasis supplied)

11. That apart, referring to various judgments of the apex Court in **National Engineering Industries Ltd. v. Shri Kishan Bhageria and others**, reported in AIR 1988 SC 329, **Muralidharan K. v. Management of M/s. Circle Freight Intl. India Pvt. Ltd**, reported in (2007) III-LLJ 953, **Ananda Bazar Patrika (P) Ltd. v. Workmen**, reported in (1970) 3 SCC 248, and **S.K. Maini v. M/s. Carona Sahu Company limited and others**, reported in 1994 3 SCC 510, the Labour Court answered the said issues as follows:

> "In the case in hand the second party was serving under the managements as Anchor-Head.**The managements who are supposed to prove the supervisory, managerial or administrative nature of duties, if any, performed by the second party have not substantiated the same through evidence adduced before this Court. Besides, the joint written statement is silent about the work discharged by the second party. The evidence of the second party on that score remained unchallenged**. In absence of any evidence that the second party being an Anchor-Head was doing supervisory, managerial or administrative nature of duties, it is held that the second party is a 'workman'
>
> In view of the discussions made above, the case is held to be maintainable. Issue No.3 is answered accordingly." (Emphasis supplied)

12. So far as the ground with regard to contractual engagement of the opposite party for a fixed tenure and termination of service of the opposite party in terms of Clause-11of her letterof appointment dated 20.05.2015, taking into consideration the pleadings made by the parties, so also judgments of various Courts and Apex Court, in cases of **Chakradhar Tripathy v. State of Orissa and others**,reported in 1992 L.I.C.1813,**Central Inland Water Transport Corporation v. Brojo Nath Ganguly and another**,reported in AIR 1986 SC 1571, **Delhi Transport Corporation v. D.T.C. Mazdoor Congress and others**, reported in AIR1991 SC 101, **West Bengal Electricity Board v. Desh Bandhu Ghose**, reported in (1985) I-LLJ-315 SC, the Labour Court came to a conclusion, which is reproduced below.

> "So, in view of the principle of law laid down by the Hon'ble Apex Court, this Court is of the opinion that the stipulation contained in Clause-11 of Ext.1 is against the law of the land and as such void. Rather, this Court is of the opinion that the termination of second party by the first party falls within the ambit of definition of 'retrenchment' as enumerated in sec.2(oo) of the Act. Further if the management intends to terminate the service of second party, then it must have to follow the provisions of Sec.25-F of the Industrial Disputes Act, 1947."

Further, with regard to compliance of Section 25-F of the Act, the Labour Court held as follows:

> "**But not a single scrap of paper has been produced from the side of managements evidencing that the second party workman has been given one month's prior notice in writing indicating the reason of retrenchment or has been paid on 18.08.2018 in lieu of such notice and paid the compensation as required under Sec.25-F of the Industrial Disputes Act, 1947**.
>
> In view of the discussion made above, the conclusion is inevitable that in spite of rendering continuous service of more than 240 days under the first party managements, the service of the second party workman has been terminated in clear contravention of the provisions of the Industrial Disputes Act, 1947. Reliance is placed on the reported decision of the Hon'ble High Court in the case of **Executive Engineer, Badanala Irrigation Division, Kenduguda, Dist.: Rayagada Vrs. Sri Ratnakar Sahoo and another [2011 (Supp.1) OLR 556**]. Accordingly, this Court holds that the action of the first party managements to be neither legal nor justified."
>
> (Emphasis supplied)

Though it was never pleaded so before the Labour Court by the management, it is well evident from the pleadings made in the Writ Petition, so also the Order of discharge, marked as Exhibite-2, the action of the management in discharging the opposite party from service is punitive. Hence, the judgment of the apex Court in case of **Municipal Committee Sirsa** (supra) cited by the learned counsel for the petitioners is not applicable to the facts and circumstances of the present case.

13. The averments made in the written statement that the services of the petitioner were contractual and for a specific period were disputed by the opposite party-workman.Hence, it is to be examined by this Court, as to whether the petitioners-management can take shelter under Section 2(oo)(bb) of the Act. Section 2(oo)(bb) of the Act reads as follows:

> "(oo) "retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include-
>
> (a) xx xx xx
>
> (b) xx xx xx
>
> (bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein."

This provision definitely has no application to the case at hand as the services of the opposite party-workman has not been terminated as a result of non-renewal of contract nor it has been terminated under a stipulation in that behalf as the Order of termination dated 18th August, 2018 does not demonstrate so. Law is well settled that the Order of retrenchment/termination itself must show that the employer had resorted to Section 2(oo)(bb) of the Act. The protection under Section 2(oo)(bb) of the Act is not available to the petitioners-employer as it has taken a stand before the Labour Court that opposite party is not a workman. Since the very applicability of the Industrial Disputes Act was disputed by the management before the Labour Court, it cannot and should not be permitted to demonstrate its action in terminating services of the workman to be covered under Section 2(oo)(bb) of the Act. Moreover, the termination Order, which was marked as Exhibit-2 in I.D. Case No.59 of 2018, and has also been annexed as Annexure-4 to the Writ Petition, well demonstrates that the opposite party's services were brought to an end making certain allegations as to receiving many complaints with regard to her disobedience and not taking responsibility of work assigned to her, for which the management allegedly sustained heavy pecuniary loss. Hence, relying on the judgment in case of **Modella Woolens Ltd. v. P.O., Labour Court**, reported in LLR-1993-876, the Labour Court held as follows:

> "Admittedly, no enquiry was conducted by the managements against the workman for the above allegations owing to the fact that the engagement of the claimant was being fully contractual and terminable in the interest of the organization, there was no need to conduct any enquiry against her. In this connection, it is useful to refer the

> decision of the Hon'ble Punjab and Haryana High Court in the case of **Modella Woolens Ltd. v. P.O., Labour Court, reported in LLR-1993-876** wherein it has been held that "No termination is permissible on the ground of misconduct unless proper enquiry is held according to principles of natural justice." In the premises, the action of the managements viewing from any angle cannot be sustained.
>
> Hence, this issue is answered in favour of the second party workman."

14. Further, though Clause-11 of the letter of engagement dated 25.05.2015 provides that contract of engagement may be terminated by the employer in its interest by giving prior notice of one month and similarly, the opposite party may terminate the contract of engagement in her interest by giving one month's notice and there is no stipulation in the said terms and conditions as to "payment of one month salary **in lieu of the notice period**", though there is a mention as to payment of one month salary to the opposite party-workman vide order of relieve dated 18.08.2018, admittedly neither there was one month's prior notice giving nor one month's salary was paid to her at the time of issuance of the relieve order dated 18.08.2018, which well demonstrates that she was rather intimated that in terms of the conditions of her service agreement she will be paid one month's salary after meeting the official formalities and clearance from the H.R. cell. Further, no where it has been averred in the written statement that pursuant to such communication, she was paid one month's salary in lieu of the notice period, even though there is no such stipulation in clause-11 of her offer of engagement as to paying salary of one month in lieu of the notice period. Rather, Clause-11 of her offer of engagement only stipulates as to giving one month's prior notice before disengaging the workman from service, which is extracted below for ready reference.

> "11. The contract of engagement may be terminated by the Employer in its interest by **giving prior notice of one month**. Similarly you may terminate this contract of engagement in your interest by giving one month's notice." (Emphasis supplied)

15. The law is well settled that if employer wants to disengage a workman, in terms of Section 25-F of the Act, it is obligatory on the part of the employer to give one month's prior notice or pay in lieu of the notice period, so also retrenchment compensation for each completed year of service and the said payment has to be made simultaneously at the time of retrenchment of the workman. A coordinate Bench of this Court in **Shyam Sundar Rout v. Orissa State Road Transport Corporation and others**, reported in (1990) 69 CLT 357, held that the payment should be made simultaneously along with the order of retrenchment in order to constitute a single transaction. It was further held that compliance of Section 25-F of the Act is required even if employment is contractual or for a specific term. Relevant paragraphs of the said judgment are reproduced below:

> "12. The settled position of law is, section 25-F of the Act being a beneficial legislation it has to be strictly complied with and is a mandatory pre- condition. **The negative form adopted by the provision, coupled with the use of the work 'until' which introduces the condition, indicates that the conditions must be first satisfied before retrenchment can**

> **be validly effected. Non-compliance of section 25-F of the Act renders the order of retrenchment void ab initio**. Taking into account all the provisions of law in A.I.R. 1976 S.C.1111, The State Bank of India, v. Shri N. Sundara Money, their Lordships have laid down the dictum that the payment of retrenchment benefits as required under section 25-F(2) of the Act is mandatory and pre-condition to the order of retrenchment. In absence of such compliance it has to be held that the workman continued in service **though the order of appointment was for a specific period**. Few of the other decision which have laid down this principle are 1960(1) L.L.J.251, State of Bombay and others v. Mazdoor Sabha and others, 1964 (1) L.L.J. 351, Bombay Union of Journalists and others v. State of Bombay and another (S.C.), 1967 (2) L.L.J. 23, National Iron and Steel Company Ltd. and others v. State of West Bengal and another : A.I.R. 1967 S.C. 1206, 1983 (1) L.L.J.30, Hute haiah v. Karnataka State Road Transport Corporation. **It is no more res integra that acceptance of retrenchment benefit by the employee subsequent to the order of retrenchment will not stop the workman employee to challenge the validity of the retrenchment order on the ground of non-compliance of mandatory provisions of section 25-F of the Act.**
>
> 17. After giving anxious consideration to the mandatory provisions of law and considering the dictum laid down in the above case, in our opinion, **when the payment of wages in lieu of notice and retrenchment compensation and retrenchment order can be regarded as constituting a single transaction, then the retrenchment order will not be invalid in the eye of law**. One has to see whether there is such co-relation between various steps as to constitute them into a single transaction or whether the time- lag and intervening circumstances are such as to make it difficult to find out a connection. **The compliance of section 25-F(b) of the Act will be there if the payments are made simultaneously along with the order of retrenchment**. The bona fide endeavour on the part of the employer to pay the compensation amount and one month's wages in lieu of notice along with the retrenchment order should be taken as due compliance where the workman avoids acceptance of compensation with a view to invalidate the order of retrenchment. The tender must be bona fide and within time." (Emphasis supplied)

16. So far as the contention of the learned Counsel for the petitioners that the Labour Court, even if comes to conclusion that the action of employer in terminating services of the opposite party-workman to be illegal and unjustified, lacks power to grant lump sum compensation in lieu of reinstatement and back wages, law is well settled in the said regard.

17. The apex Court in the case of **Ranbir Singh v. Executive Engineer, P.W.D**. reported in 2021 LLR 920, referring to the judgment in the case of **BSNL v. Bhurumal** reported in (2014) 7 SCC 177, held as follows:

> "6. ……. **In such circumstances, we think that the principle, which is enunciated by this Court, in the decision, which is referred to in Raj Kumar (supra), which we have referred to, would be more appropriate to follow. In other words, we find that reinstatement cannot be automatic, and the transgression of Section 25F being established, suitable compensation would be the appropriate remedy."**
>
> (Emphasis supplied)

Similarly, in case of **Madhya Bharat Gramin Bank v.Panchamlal Yadav** reported in 2021 LLR 681, vide paragraph-6, the Apex Court held as follows:

> "6. Having considered the submissions made on behalf of the parties, we are of the view that the Respondent is not entitled for reinstatement in view of the law settled by this Court. **The judgments relied upon by Mr. Kapur are clear to the effect that violation of Section 25F of the Industrial Disputes Act, 1947, would not automatically entail in the reinstatement with full back wages. The relief to be granted depends on the fact of individual cases**." (Emphasis supplied)

18. It may not be out of place to indicate that the Labour Court, while answering Issue No.V as to what relief the opposite party is entitled to, assigned sufficient reason to award lump sum compensation in lieu of reinstatement and back wages, which is reproduced below:

> "**The second party workman stated that she has several awards to her credit by working in Media field, but her career and reputation and image in public are seriously damaged due to the malafide and unfair action of the management by such abrupt termination of service w.e.f. 18.08.2018 and her such untimely termination of service destroyed all her future career and expectations and completely devastated her social and financial backbone. That apart, she further stated that after her termination w.e.f. 18.08.2018, she was not gainfully employed in any establishment for more than one year and she was also not paid her salary for her last 18 working days, for which she was facing a lot of difficulty to sustain her livelihood during the said period. It is the contention of the second party that under duress she joined another establishment in the month of April, 2019 for her survival as well as for her family members. In view of the assertion of the second party that she had joined another establishment in April, 29019, it would be improper to grant her the relief of reinstatement in service rather it would beappropriateto grant lump sum compensation in lieu of reinstatement and back wages up to April, 2019** which will meet the ends of justice. But it is difficult to lay down any law in the absolute terms as to how the amount of compensation should be computed as it depends on various factors such as experience, age of the employee, mitigation of harassment and loss sustained due to termination etc. There is no dispute that the last drawn salary of the second party is Rs.48,700/- per month. However, as the action of the first party managements in terminating the service of second party being found illegal and unjustified and taking into consideration the length of her employment under the first party, her last drawn salary and her period of unemployment after her termination, a compensation of Rs.4,50,000/- (Rupees Four lakh Fifty Thousand) only in my considered view, would be the just and proper relief to be awarded in favour of the second party." (Emphasis supplied)

19. Law is well settled that a writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior court or tribunal: these cases where orders are passed by inferior court or tribunal without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. A writ can, similarly, be issued where in exercise of jurisdiction conferred on it,the court or tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is not entitled to act as an appellate Court. This limitation necessarily means that findings of fact reached by the inferior Court

or Tribunal as a result of the appreciation of evidence cannot be reopened or questioned in writ proceeding. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be 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 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.

20. In this regard it is apt to refer to the case of **Syed Yakoob v. K.S. Radhakrishnan and Ors.**, reported in AIR 1964 SC477,wherein the Constitution Bench of the apex Court held as follows:

> 7. The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Art. 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior courts or tribunals; these are cases where orders are passed by inferior courts or tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdictions. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is not entitled to act as an appellate Court. This limitation necessarily means that findings of fact reached by the inferior Court or Tribunal as a result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of tact, however grave it may appear to be. 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. In dealing with this category of cases, however, we must always bear in mind 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 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. It is within these limits that the jurisdiction conferred on the High Courts under Art. 226 to issue a writ of certiorari can be legitimately exercised (vide Hari Vishnu Kamath v. Ahmed Ishaque, 1955 1 SCR 1104 : ((S) AIR 1955 SC 233); Nagendra Nath v. Commissioner of Hills Division, 1958 SCR 1240: (AIR 1958 SC 398) and Kaushalya Devi v. Bachittar Singh, AIR 1960 S.C. 1168.

> 8. It is, of course, not easy to define or adequately describe what an error of law apparent on the face of the record means. What can be corrected by a writ has to be an error of law; but it must be such an error of law as can be regarded as one which is apparent on the face of the record. Where it is manliest or clear that the conclusion of law recorded by an inferior Court or Tribunal is based on an obvious mis-interpretation of the relevant statutory provision, or sometimes in ignorance of it, or may be, even in disregard of it, or is expressly founded on reasons which are wrong in law, the said conclusion can be corrected by a writ of certiorari. In all these cases, the impugned conclusion should be so plainly inconsistent with the relevant statutory provision that no difficulty is experienced by the High Court in holding that the said error of law is apparent on the face of the record. It may also be that in some cases, the impugned error of law may not be obvious or patent on the face of the record as such and the Court may need an argument to discover the said error; but there can be no doubt that what can be corrected by a writ of certiorari is an error of law and the said error must, on the whole, be of such a character as would satisfy the test that it is an error of law apparent on the face of the record. If a statutory provision is reasonably capable of two constructions and one onstruction has been adopted by the inferior Court or Tribunal, its conclusion may not necessarily or always be open to correction by a writ of certiorari. In our opinion, it is neither possible nor desirable to attempt either to define or to describe adequately all cases of errors which can be appropriately described as errors of law apparent on the face of the record. Whether or not an impugned error is an error of law and an error of law which is apparent on the face of the record,must always depend upon the facts and circumstances of each case and upon the nature and scope of the legal provision which is alleged to have been misconstrued or contravened."

21. In view of the discussions made above, there being no perversity and infirmity in the impugned award dated 18.12.2021, this Court is not inclined to interfere with the award passed in I.D. Case No.59 of 2018.

22. Accordingly, the writ petition stands dismissed. No Order as to cost.

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2023 (I) ILR – CUT - 725

D.DASH, J.

R.S.A. NO. 310 OF 2019

M/s. RIDHI SIDHI TRADE & SERVICES PVT. LTD. .....Appellant

.V.

SANJAY KUMAR SINGH & ANR. .....Respondents

TRANSFER OF PROPERTY ACT, 1882 – Section 54 – Whether on the basis of an un-registered sale document, the title would pass, particularly in absence of specific evidence with regard to delivery of possession – Held, No – Since the plaintiff have not pleaded and

proved that, right from the day of the vendor parted with possession of the suit land in favour of the grand father of the Plaintiffs which then likewise continued to be in the hands of the father of the Plaintiffs and with the Plaintiffs by tendering clear, cogent and acceptable evidence on that score no title would pass to him. (Para 8)

For Appellant : M/s. Nirod Ku. Sahu, P.K. Samantaray, B. Swain, S.K. Nayak

For Respondents : M/s.R.K. Mohanty, Sr. Adv, S.K. Patnaik, S.S. Padhy, A.S. Mohanty, B. Bhuyan.

JUDGMENT Date of Hearing: 01.12.2022: Date of Judgment: 23.12.2022

D.DASH, J.

1. These Appellant, in filing this Appeal under section-100 of the Code of Civil Procedure1908 (for short,'theCode'),assails the judgment and decree dated 01.02.2018 &13.02.2018 respectively passed by the learned First Additional District Judge, Rourkela in RFA No. 26 of 2016.

By the same, the Appeal filed by the unsuccessful Plaintiff in Civil Suit No.27 of 2015 of the learned Court of learned Civil Judge (Senior Division), Rourkela under section-96 of the Code has been allowed. The Trial Court having dismissed the suit filed by the Respondents (Plaintiffs), the First Appellate Court has decreed the suit declaring that the Plaintiffs have the right, title, interest and possession over the suit land and confirmed their possession in further holding that the registered sale-deed dated 13.10.2009 is not binding on the Respondents (Plaintiffs); and therefore the Appellant (Defendant No.2) has been injuncted from entering upon the suit land.

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

3. Plaintiffs case is that the suit land belongs to Jaga Puran. He had sold away the suit land to the grandfather of the Plaintiffs for a sum of Rs.95/- on 13.05.1949 by a unregistered sale-deed prepared by one Soma Oram on the request of said Jaga Puran. It is stated that after the death of Jaga Puran, the grandfather of the Plaintiffs performed his obsequies and possessed the suit land till his death and after his death, the father of the Plaintiffs possessed the same and went on paying the rent. The father of the Plaintiffs during then had attempted to record the suit land in his name in the current settlement but as the unregistered document dated 13.05.1949 could not be traced out and produced before the Settlement Authority, the suit land stood recorded in the name of Jaga Puran with a note of forcible possession in the name of the grandfather of the Plaintiffs. It is further stated that in the year, 2002, one Sambhu Bhumij encroached a portion of the land for which the Plaintiffs had filed Title Suit No.37 of 2002 where a compromise was entered into and the suit

stood decreed declaring the right, title and interest of the Plaintiffs over the suit land. It is further stated that some time in the month of July, 2014, the Plaintiffs came to know that Defendant No.1 has sold away the suit land in favour of the Defendant No.2 vide registered sale-deed dated 13.10.2009. The Plaintiffs claim that the Defendant No.1 has no relation with the original owner Jaga Puran and he has not inherited property from him. The sale-deed executed by him thus is said to be fraudulent one and it is stated that the Defendant No.2 has not derived any right, title and interest over the suit land. The Plaintiffs claim is that w.e.f. 13.05.1949, the suit land has been under the possession of their ancestors and they have never been dispossess by anybody.

The Defendant did not file any written statement.

4. The Trial Court on going through the evidence of the Plaintiff No.1 (P.W.1) as well as the documents admitted in evidence and marked Exts. 1 to 10 on behalf of the Plaintiffs came to a conclusion that the Plaintiffs have failed to prove their case as laid in the plaint and as such are not entitled to the reliefs claimed. The suit was therefore stood dismissed.

The Plaintiffs thus being non-suited carried the First appeal. The First Appellate Court after hearing and on going through the evidence on record has set aside the order of dismissal of the suit passed by the Trial Court and decreed the same as stated above.

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

> Whether on the basis of an unregistered sale document, the title would pass, particularly in absence of specific evidence with regard to delivery of possession?

6. Learned Counsel for the Appellant submitted that when the evidence on record is not there to prove that pursuant to that transaction, which is said to have taken place between the Jaga Puran and the grandfather of the Plaintiffs on 13.05.1949, there had been delivery of possession of the suit land by Jaga Puran to the grandfather of the Plaintiffs, the so called transaction places the Plaintiffs nowhere in saying that by that they acquired title over the suit land. He further submitted that when the Plaintiffs here base their claim upon the purchase of the said suit land by their grandfather from Jaga Puran, the original owner and thus are seeking a declaration of their right, title interest and possession; the same is not cognizable in the eye of law. He, therefore, submitted that the First Appellate Court has committed grave error in setting aside the dismissal of the suit as ordered by the Trial Court and is not right in decreeing the suit granting all the reliefs as prayed for.

7. Learned Counsel for the Respondents submits all in favour of the findings returned by the First Appellate Court. According to him, the Defendant having not denied the case of the Plaintiffs set out in the plaint, the First Appellate Court has

rightly decreed the suit finding the Plaintiffs to be in possession of the property in question for quite a long period. He further submitted that even if, it is held that the sale transaction of the year 1949 has not been proved, the evidence of the Plaintiff No.1 examined as P.W.1 coupled with the documentary evidence being clear that the land in suit is in the possession of the Plaintiffs from the time of their grandfather; the suit had been rightly decreed by the First Appellate Court.

8. Keeping in view the submissions made, I have carefully read the judgments passed by the Courts below. I have also read the plaint and written statements have perused evidence.

The provisions of law contained in Section-54 of the Transfer of Property Act is clear that in cases of sales of immovable property, when the property in question is valued at less than Rs.100/-, the same can be effected either by registered instrument or by delivery of possession of the same land involved in the transaction by the vendor to the vendee.

The very claim of the Plaintiffs is that, their grandfather namely, Dhanjay Singh had purchased the suit land from one Jaga Puran for consideration of Rs.95/- by a unregistered sale-deed which had been executed by Jaga Pradhan setting out the terms and conditions with the grandfather of the Plaintiffs who thus became the owner of the suit property. There is absolutely no pleading that pursuant to the sale which is said to have been by way of execution of the unregistered sale-deed, there had been delivery of possession of property by Jaga Puran in favour of so called vendee, Dhanajay Singh. It is not seen that either of the grandfather of the Plaintiffs or their father or they had ever taken any steps to record the suit land in their favour. When it is stated that in the current settlement although Plaintiffs had attempted to get the suit land recorded in their name, but for the non-availability of the unregistered sale-deed, that did not so happen yet no such contemporaneous documents have been proved. The Plaintiffs having based their case/claim upon purchase of the land by their grandfather for consideration of Rs.95/-, which is below a sum of Rs.100/- since have not pleaded and proved that right from that day Jaga Puran parted with possession of the suit land in favour of the grandfather of the Plaintiffs which then likewise continued to be in the hands of the father of the Plaintiffs and with the Plaintiffs by tendering clear, cogent and acceptable evidence on that score. The First Appellate Court in the above state of affairs, in my considered view thus is not right in decreeing the suit. The substantial question of law is accordingly answered that the judgment and decree passed by the First Appellate Court cannot be sustained.

9. In the result, the Appeal stands allowed. The judgment and decree passed by the Trial Court in non-suiting the Plaintiffs is hereby restored.No order as to cost.

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2023 (I) ILR – CUT - 729

D.DASH, J & Dr. S. K. PANIGRAHI, J.

CRLA NO. 320 OF 2017

NIRAKAR PUJARI .....Appellant

.V.

STATE OF ODISHA .....Respondent

CRIMINAL TRIAL – The appellant with three other accused were charged for commission of offence under sections 147, 148 and 302 of IPC – When all other accused are acquitted from the charges under section 147,148,149 & 302, whether one can be convicted for the substantive offence under section 302 of the IPC without being separately charged on that score – Held, in such case in order to judge whether failure of justice has been occasioned or not, it would be relevant to examine whether the accused was aware of the basic ingredient of the offence for which he has been convicted and whether the main facts sought to be established against him were explained to him and whether he got a fair chance to defend himself. (Para 11)

Case Laws Relied on and Referred to :-

1. AIR 1955 SC 274 : Nanak Chand Vs. State of Punjab.
2. (1993) 3 SCC 32 : Sourav & Ors Vs. State of Kerala.
3. 2006 2 SCC 450 : Radha Mohan Singh @ Lal Saheb & Ors. Vs. State of U.P.

For Appellant : Mr. T. Mishra, B.K. Mishra

For Respondent : Mr. S.S. Kanungo (A.G.A)

JUDGMENT Date of Hearing : 10.02.2023 : Date of Judgment: 14.03.2023

BY THE BENCH

1. The Appellant, by filing this Appeal, has challenged the judgment of conviction and order of sentence dated 22.04.2017, passed by the learned Sessions Judge, Nabarangpur in Criminal Trial No.75 of 2011 arising out of G.R Case No.456 of 2011 of the Court of the learned S.D.J.M., Nabarangpur.

By the same, the appellant (accused) has been convicted for committing the offence undersection 302 of the Indian Penal Code (in short, 'IPC') and accordingly, he has been sentenced to undergo imprisonment for life and pay fine of Rs.10,000/- (Rupees Ten Thousand) in default to undergo rigorous imprisonment for 1 (one) year.

2. The prosecution case:

On 22.07.2011, around 8 a.m., Ramesh Pujari (deceased) was cutting the ridge on the land of Dharmu Pujari. It was at that time, this accused with his mother,

brother, brother's wife, namely, Sari, Suryapal and Buduri arrived there being armed with deadly weapons like lathi, tangi, iron rod etc. It is the further case that this accused Nirakar dealt the blows upon the deceased on his head by means of a Kodiki (Spade). The deceased receiving such grievous injuries died at the spot instantaneously. This accused with others then are said to have escaped from the spot throwing the spade there. Some persons present nearby had arrived at the spot and the informant (P.W.13) also arrived at the spot after the incident. She having found her husband lying dead went to Badambada Police Out Post and lodged a written report. The Sub-Inspector (S.I.) of Police (P.W.7) attached to the Police Out Post having entered the said facts in the station diary book maintained at the Outpost sent the FIR to Kosagumuda Police station for registration of the case at Kotguda Police Station and took up investigation. Then the case was registered and the Sub-Inspector of police attached to Outpost was directed to continue with the investigation. He in course of investigation, examined the informant and other witnesses and visited the spot. He had held inquest over the dead body of the deceased and sent the same for post mortem examination by issuing required requisition. From the spot, one Kodiki (spade) stained with blood was seized with one iron bolt. He having collected the sample earth and blood stained earth had seized those under the seizure list. The wearing apparels of the accused and those of the deceased were also seized. The Kodiki (spade) which the Investigating Officer had seized from the spot was sent to Medical Officer for his opinion with regard to the user of the same in inflicting the injury upon the deceased. The incriminating articles were also sent for chemical examination through Court. On completion of investigation, Final Form was submitted placing this accused with his mother, brother and brother's wife to face the trial for commission of offence under section 147/148/302 read with section 149 of the IPC.

3. The learned S.D.J.M., Nabarangpur, having received the Final Form as above, took cognizance of the said offences and after observing formalities, committed the case to the Court of Sessions. That is how the trial commenced against the accused and three others by framing the charges.

4. Before the Trial Court, the prosecution has examined in total 17 witnesses. The wife of the deceased, who is the informant and had lodged the FIR (Ext.15) is P.W.13. The Prosecution in the case has relied upon the version of P.W.3, 10, 11, 14, 15 & 16, who are citing them as the ocular witnesses then being at the places near to the place where actually the occurrence took place i.e. near ridge of the paddy field of Dharmu Pujari. The Doctor, who had conducted autopsy over the dead body of the deceased is P.W.2 and the Investigating Officer of the case has come at the end as P.W.17. The other witnesses are the witnesses to the seizures of incriminating materials at different point of time in course of investigation.

5. The plea of the accused is the denial to the happening of the incident in the manner as stated by the prosecution. It is his specific case that in course of the

quarrel between himself on one hand and the deceased on the other, the deceased when attempted to inflict fatal blow upon him; he having snatched away that spade from the deceased in order to save himself had brandized the same and, thereafter he had no control. He has further stated he had not intentionally caused the fatal injury on the head of the deceased by means of that spade. In support of the defence case three (3) witnesses have also been examined who are D.W.1 to 3.

6. Prosecution besides leading the evidence by examining the above witnesses, has also proved several documents which have been admitted in evidence and marked Ext.1 to 20. The spade, iron bolt, wearing apparels of the deceased and accused which had been seized in course of investigation have also been produced during trial and those have been marked as material objects M.O.-I to M.O.-VI. The Trial Court on going through the evidence of P.W.3, 4, 10, 11, 13, 15 and 16 as well as the evidence of P.W.17 and the Doctor (P.W.2) who had conducted Post Mortem Examination over the dead body of the deceased as well as his report (Ext.2), has arrived at a conclusion that the death of the deceased was homicidal in nature. In fact, this aspect of the case was not under challenge before the Trial Court and that has also been the situation before us.

We, find from the evidence of the Doctor (P.W.2) that he had noticed two cut injuries on the scalp bone of the deceased and a laceration on the back of the hand. These injuries, according to him, have caused the death. He has also noticed the corresponding internal injury on opening the scalp. His positive evidence is that the nature of the death was homicidal. In view of such positive evidence of P.W.2, when other witnesses as above noted have also stated the deceased to have received head injuries which too has been seen by the Investigating Officer P.W.17 and noted in his report (Ext.10); we find absolutely no difficulty in concurring with the finding of the Trial Court that the death of Ramesh was homicidal.

7. Learned counsel for the Appellant, first of all submitted that this accused when has faced the trial standing charged for commission of offence under section 147/148/302 read with section 149 of the IPC; his conviction for commission of offence under section 302 of the IPC cannot be sustained. He further submitted that this accused not was separately charged for commission of offence under section 302 of the IPC and as he being charged for the offences under section 147/148/302 read with section 149 of the IPC with other accused persons, since the Trial Court has acquitted other accused persons, namely Suryapal, Sari and Buduri holding that they were not the members of the unlawful assembly and have not committed the offence of rioting with deadly weapon and in prosecution of the common object of said unlawful assembly have not committed the murder of Ramesh Pujari by intentionally causing his death, this accused Nirakar ought not to have been convicted for the offence under section 302 of the IPC. It was submitted that here the accused being not charged for the offence under section 302 of the IPC when was not called upon to defend the said charge as to his individual criminal liability,

the Trial Court having acquitted this accused for commission of offence under section 147/148 of the IPC, no conviction could have been recorded under section 302 of the IPC as against this accused Nirakar.

He then submitted that as per the evidence of P.W.2 and his report, deceased had sustained three external injuries and out of those, one is laceration on the back of the hand which is not fatal and two other external injuries which are cut; one is said to be fatal since in respect of the 3rd injury, there is no mention of the dimension so as to hold it to be fatal. He submitted that it is the evidence of P.W.3 that the deceased at the relevant point of time was working in the land and was cutting the ridge with the help of spade when the accused persons including this accused, assaulted him with lathi and it is said that this accused after snatching away the spade from the deceased assaulted him on his head causing bleeding injuries resulting his fall. But lateron he having stated that when he arrived at the spot, Ramesh was lying dead and he arrived there, whereafter all the assailants left the spot and thereafter, P.Ws.15, 16 and others have arrived. He, thus, submitted that the evidence of P.W.3 is full of suspicious feature and although she claims herself to be an eye witness, features are surfacing in evidence to entertain suspicion as to his presence near the spot. He next submitted that the evidence of P.W.10 is also not acceptable, since he had not stated in his previous statement before the police recorded in course of investigation as to have seen the incident. According to him, the P.W.10 has tried to improve the case during trial and the evidence on that score has been completely demolished through the circumstances which have been elicited from during cross-examination. He, therefore, submitted that the evidence of P.W.10 is of no avail to the prosecution case. It was further stated that the evidence of P.W.15, 16 when read with the evidence of P.W.17, it would be clear that the prosecution case as laid is wholly doubtful. He, therefore, submitted that even if his first submission that this accused could not have been convicted under section 302 of the IPC without separate charge being framed for the same, with the evidence available on record, the prosecution case cannot be said to have also been proved beyond reasonable doubt in establishing that this accused is the author of the fatal blow/blows on the head of the deceased leading to his death.

8. Learned counsel for the State submitted all in favour of the conviction recorded against this accused for committing the offence under section 302 of the IPC.He, however, submitted that the State has not preferred any Appeal as against the acquittal of the other persons who stood charged with this accused. It was submitted that in the present case, even though there was no specific charge against this accused for the offence under section 302 of the IPC alleging no such specific overtact on his part to have caused the death; there being evidence on record that he had inflicted the fatal blow by spade and said evidence having been brought to the notice of the accused during his examination under section 313 Cr.P.C., it cannot be said to be a total surprise to the accused as regards overtacts played by him for

which he has faced the trial. He under the circumstance, submitted that here on the above score, the prejudiced is not writ large and there being no failure of justice, the Trial Court has rightly proceeded to hold this accused guilty for commission of the offence under section 302 of the IPC in view of the clear, cogent and acceptable evidence on that score running against him. He, therefore, submitted that despite the acquittal of other persons, who are the mother, brother and brother's wife of this accused of the charges under section 147/148/302/149 of the IPC as also the acquittal of this accused for the offences under section 147/148/302 read with section 149 of the IPC, the Trial Court has rightly held the accused liable for commission of offence under section 302 of the IPC.

He next submitted that the evidence of all the eye witnesses i.e. P.W.3, 10, 11, 15 and 16 fully stand to the judicial scrutiny and there being no infirmity in the said evidence as regards the happening of the incident, the overtact played by this accused in causing the fatal injuries on the head of the deceased; the conviction recorded by the Trial Court holding the accused guilty for commission of offence under section 302 of the IPC has to be confirmed.

9. Addressing the first submission, the record being examined, We find that this accused with three others was charged for commission of offence under section 147 of the IPC; 148 IPC and section 302 with the aid of section 149 of the IPC. No separate charge for the offence under section 302 of the IPC attributing specific overtact to this accused in intentionally causing the death of Dharmu has been framed against this accused.

10. "In case of *Nanak Chand –V- State of Punjab; AIR 1955 SC 274* (cited by the learned counsel for the accused), accused Nanak Chand with others stood charged under section 148 and section 302 read with section 149 of the IPC. The Trial Court held that the charge of rioting was not proved and accordingly, found accused Nanak Chand and three others guilty for offences under section 302 of the IPC read with section 34 of the IPC whereas other accused persons numbering three were acquitted. On an Appeal being filed by the convicts, the High court convicted accused Nanak Chand alone under section 302 of the IPC and altered, the conviction of other accused persons from section 302 read with 34 of the IPC to section 323 IPC.The Apex Court referring to several judgments and in the facts and circumstances as obtained from the prosecution evidence found that not only said accused Nanak Chand was not called upon to meet the charge under section 302 of the IPC so that in his defence in that event he may have considered it necessary to concentrate on that part of the prosecution case; thus came to hold that he has been mislead in his defence. It wasalso held upon discussion of evidence that the evidence on record are not enough in the circumstances of the case to say that said accused Nanak Chand was not prejudiced by non-framing of the charge under section 302 of the IPC against him.

"In case of *Sourav and others V. State of Kerala; (1993) 3 SCC 32*, six accused persons had been put to trial for commission of offence under section 302/324/323/241/148 read with section 149 of the IPC. It was the prosecution case that all those were armed with deadly weapons and all the accused persons except one and that one caused the injuries with weapons upon the deceased and that one accused having caught hold the deceased by collar inflicted injuries on his hands, arms and legs with chopper. That was said to be in view of the enmity between the two groups. Upon discussion of medical evidence, the Court arrived at a conclusion that none of the injuries by itself was sufficient in ordinary course of nature to cause death and the death was on account of the cumulative effect of the multiple injuries. The Court said that in view of the evidence, it cannot be said that anyone of the four accused, who alone stood convicted by the High Court had inflicted injuries indenting."

11. The specific question, We are to answer here is that when the accused persons are charged for commission of offence under section 148 and 302 of the IPC read with section 149 and all are acquitted of the charge under section 148 of the IPC as well as 302 read with section 149 of the IPC, if one can be convicted for the substantive offence under section 302 of the IPC without being separately charged on that score.

It would be apposite at this juncture to place the case of *Radha Mohan Singh @ Lal Saheb and others Vrs. State of U.P.; 2006 2 SCC 450*. In that case, the accused persons were charged under section 302 and 149 of the IPC and all three were convicted for offence under section 147/148/323/324 and 302 read with section 149 of the IPC. The Apex Court ultimately convicted one accused for the offence under section 302 of the IPC and the other accused persons were convicted for offence under section 326 read with section 149 of the IPC.

The Court held that in such case in order to judge whether failure of justice has been occasioned or not, it would be relevant to examine whether the accused was aware of the basic ingredient of the offence for which he has been convicted and whether the main facts sought to be established against him were explained to him and whether he got a fair chance to defend himself. In that case based on evidence the accused was found guilty for the substantive offences under section 302 of the IPC. In that case, it was also noted that said accused was made aware of the basic ingredients of the offences and the main facts sought to be established had been placed for his explanation during his examination under section 313 Cr.P.C.

12. Testing the facts of the given case with the position of law set out in case of *Radha Mohan Singh @ Lal Saheb* (supra); We find that the Trial Court in view of the version of the witnesses that this accused assaulted the deceased on his head by a spade, which is a heavy sharp cutting weapon; during examination of the accused under section 313 Cr.P.C. has put the followings specifically to the accused to explain. The explanation sought for is as under:-

> "Q. No.27. It further reveals from his evidence that all of you went to the said land and you assaulted the deceased by means of a spade on his head causing his death at the spot. What have you got to say?"

In addition to the above, the Doctor has stated that the injury on the head caused by sharp cutting weapon has led to the death of the deceased. In view of all these, the submission of the learned counsel for the accused that since other accused persons have been acquitted for the offences under section 147/148 and section 302 of IPC and read with section 149 IPC and when the present accused has also not been convicted for all those offences, the Trial Court could not have convicted him under section 302 of the IPC cannot be countenanced with.

13. Now coming to ascertain as to if the evidence on record let in by the prosecution are sufficient enough to hold that the prosecution has established its case against the accused under section 302 IPC or not; let us straight way proceed to scrutinize the evidence of the prosecution witnesses.

P.W.2 is the Doctor whose evidence is that the deceased has received head injury being caused by sharp with the weapon. It has also been proved by examining the said Doctor P.W.2 that the death was on account of such injury.So, the prosecution has proved that Dharmu died on account of the injury inflicted on his head by means of a sharp cutting weapon like spade. P.W.3 has stated that when deceased Ramesh was working in the field and cutting the ridges with the help of spade, all the accused persons assaulted him with lathi and this accused having snatched away the spade from the deceased, assaulted him on his head. This witness has admitted that the record of right in respect of the land over the incident took place was standing joint and a Civil Suit was by then going on. During cross-examination, this P.W.3 has stated that at the relevant time he was answering call of nature in the nearby field and by the time he arrived at the spot, Ramesh was lying dead and on his arrival accused persons left the spot. Under the circumstance this witness to have seen the occurrence that too the specific role played by this accused in causing the head injury upon the deceased by spade in presence of other accused persons who too were then assaulting the deceased does not inspire confidence, when it has not been stated by him that at what distance, he was sitting to attend the call of nature and it took how much time for him to reach the exact place of occurrence. It has been stated by P.W.4 that on that day, he had seen the accused persons coming hurriedly towards his village but then he has not stated that accused persons are coming with any weapon. P.W.10 has also stated in the same light that he had been to attend the call of nature and then Dharmu was working in the field and all the accused persons assaulted him. Although, it has been stated by him that accused Nirakar assaulted the deceased, Ramesh with spade on his head, this witness had stated before police to have learnt about the occurrence from Dharmu Pujari. This has been proved through the I.O. i.e. P.W.17. So it shows that during the trial, the witness has claimed himself to be an ocular witness. When it has been stated by the witness in his previous statement that he learnt about

the occurrence from Dharmu, he is coming to say that he had seen the incident which is certainly a material contradiction touching his credibility and trustworthiness. P.W.11 is a witness who has stated to have seen the incident of assault upon the deceased Ramesh on his head, neck, right ear with spade by this accused-Nirakar and on her return to have reported the matter to Tanka (P.W.15) and other villagers, P.W.15 has stated that at the relevant time of occurrence he was going to the field with tea and saw this accused-Nirakar assaulting by spade on the head and other parts of the body of the deceased and accused Sisupal (since acquitted) then assaulted deceased with iron rod. He is not stating even about the presence of other accused persons; much less attributing any such overtact to them. In his previous statement, he has however not stated to have gone there taking tea and to have seen the incident and it was stated by him that then he was grazing cattle, he had seen the occurrence. It had also not been stated by the witness that accused-Sisupal (since acquitted) assaulted deceased by means of iron rod on his neck. P.W.15 is stating to have seen the incident from the tank but then also there is no evidence as to what was the distance between the tank where he then was then and the place where the deceased was cutting the ridge where the incident took place. He simply says that it was nearer. This witness (P.W.15) says that Samaru (P.W.16) was present with him andwitnessed the incident.More importantly, he is not attributing accused-Nirakar to have assaulted on the head of the deceased by a spade. When this P.W.15 says to have seen the incident, he does not say that accused-Nirakar dealt spade blow on the head of the deceased. In that circumstance, the evidence of P.W.4 and 11 that they had seen this accused Nirakar giving spade blow on the head of the deceased are becoming doubtful as to the specific role of accused Nirakar and that is the reason why P.W.4 is seen to have stated that he told this P.W.15 about the incident which rather displaces his position as an ocular witness.

P.W.16 when says to have seen accused-Nirakar assaulting by spade on the dead of the deceased, he is not stating that other accused persons also had assaulted the deceased, although he states that they were present. This witness again says that he was then with P.W.15 and keeping in view of the evidence P.W.4, his presence is also now doubtful. When he says that he was with P.W.15; his previous statement is not on that score as proved through P.W.17 after being confronted and proved that he had also then stated that he was ploughing the land with P.W.15 which that P.W.15 is not saying. Thus, the prosecution evidence as to the role of this accused as laid are not acceptable.

In the wake of aforesaid, We are of the considered view that the judgment of conviction and order of sentence holding this accused Nirakar guilty for commission of offence under section 302 of IPC cannot be sustained.

14. In the result, the Appeal stands allowed. The judgment of conviction and order of sentence dated 22.04.2017 passed by the learned Sessions Judge,

Nabarangpur in Criminal Trial No.75 of 2011 are hereby set aside. The Appellant (accused), namely, Nirakar Pujari, who is in jail custody, be set at liberty forthwith, if his detention is not required in connection with any other case.

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2023 (I) ILR – CUT- 737

BISWANATH RATH, J.

W.P.(C) NO.11506 OF 2006

NIGAR BEGUM .....Petitioner

.V.

STATE OF ORISSA & ORS. .....Opp. Parties

COMPENSATION – On the premises of taking away life of an innocent by none-else than a Police personnel, loss of the deceased, loss to family, the mother filed the writ petition claiming adequate compensation and also claimed for an independent and impartial enquiry into the incident – Held, the deceased was an engineer and working in a reputed private company, loss to a mother for losing her child at such age keeping in view that this is not to be treated as compensation but the amount is to be paid as a token of respect to the bereaved family, so also to the society – This Court directs the State Govt. to make whole payment of ₹50,00,000/- – Since a sum of ₹1.00 lakh has already been paid to petitioner, balance of ₹49,00,000/- alongwith ₹1,00,000/- towards litigation expenses also be paid through a draft in the name of the petitioner and be handed over in her residence. (Para 13)

Case Laws Relied on and Referred to :-

1. (1998) 9 SCC 351 : Malkiat Singh Vs. State of U.P.
2. (2013) 14 SCC 290 : Rohtash Kumar Vs. State of Haryana & Ors.
3. AIR 2007 Ori 94 : Kalpana Mandal and Ors Vs. State of Orissa and Ors.
4. 2006 (3) CTC 689 : State of Tamil Nadu, rep. by Secretary to Government, & Ors. Vs. S. Sivagami.
5. AIR 1990 SC 512 : Saheli, a Women's Resources Centre through Ms. Nalini Bhanot & Ors. Vs. The Commissioner of Police, Delhi.
6. 1998 (9) SCC 351 : Malkiat Singh Vs.State of U.P.

For Petitioner : Mr. Sk. Zakir Hussain

For Opp. Parties : Mr.S.P.Panda, AGA
Mr.P.K.Mohanty

JUDGMENT Date of Hearing & Judgment : 20.02.2023

BISWANATH RATH, J.

1. The Writ Petition involves a claim of compensation on a serious allegation of death of an innocent civilian and an Engineer involving an illegal act by Police Personnel. This Court here records that this is an unfortunate case pending here for such long time.

2. Factual involvement runs as follows :-

Deceased Sayed Mamtaj Ali, the eldest son of the Petitioner (mother) was serving as Supervisor (Mechanical) and was employed on contractual basis with the Hindustan Construction Company Ltd. since 8.11.2004 in their "Chandikhol-Paradeep Port Trust Road Project" and at the time of death, he was drawing a sum of Rs.5095/- per month. Deceased held diploma in Mechanical Engineering having qualified himself from the NVJ Polytechnic, Bangalore. Involving some incidence, one Jayanta Kumar Das working as Diesel Genset Operator at the Mahanadi Bridge site of Hindustan Construction Company Ltd. was forcibly taken away from the site in the midnight of 28/29.11.2005 by O.P.4, ASI Muralidhar Sahoo, who was then also the Officer-in-Charge of the Chakradharpur Outpost. On the direction of the site in-charge, some of his co-employees including the deceased went to Chakradharpur Outpost to enquire into the reason of taking away of said Jayanta Das. It is alleged that the ASI sitting in the Outpost in an inebriated condition started abusing one Nihar Roy also accompanied the team including the deceased, deceased attempted to pacify said Muralidhar Sahoo, the Officer-in-Charge but he suddenly brought out his revolver and opened fire, as a result the deceased lost his life there itself. Deceased for material establishment got two bullet shots on him; one at his chest and the other at his waist leading to his death at the spot. There was no immediate registering of the case except there is communication of lodging of a report on 9.12.2005.Subsequently, an F.I.R. was drawn, vide P.S. Case No.267/2005 against the persons involved under the provisions of Sections 147, 148, 452, 341, 332, 307, 294, 427/149 IPC read with Section 7 of the Criminal Law Amendment Act. This was followed with an administrative enquiry on the direction of Hon'ble Chief Minister as he then was though the R.D.C.(Central), Cuttack. Post-mortem was conducted by the C.D.M.O., Jagatsinghpur clearly revealed two bullet injuries sustained by the deceased and reason of death as opined was due to irreversible hemorrhagic shock with recovery of two bullets also. On the premises of taking away life of an innocent by none else than an S.I. of Police, loss to the deceased, loss to family, the mother filing the Writ Petition while claiming adequate compensation also claimed for an independent and impartial enquiry into the incident.

3. Answering the Respondent filing counter through the Assistant Collector, Judicial, Jagatsinghpur after twelve years of filing of Writ Petition while attempting to give a different colour to the incident taking place submitted that the said Jayanta Das was arrested involving a theft and while attempting to control a mob of 30

persons involving the son of the Petitioner while this Party attempting to take way said Jayanta forcibly from the Police custody, it is claimed, the S.I. remained undone for the unlawful act of the Mob and the S.I. accordingly fired two rounds from his service revolver. Finding the Mob remained uncontrollable, the S.I. opened with three rounds fire to disperse the unlawful Mob in order to save his life. O.P.2 brought to the notice of this Court different Police F.I.R. attempted to justify the firing taking place in an attempt to save life of a public servant the S.I. of Police. Through Sub-Paragraph of Paragraph-5 of the counter affidavit of O.P.2, it is claimed that the R.D.C. report following the direction of the Home Department dated 5.12.2005 was awaited and there has been payment of Rs.1.00 lakh to the next kin, vide letter dated 29.11.2005. It is unfortunate to note here that the affidavit of responsible Officer was filed on 11.1.2018 after thirteen years of R.D.C. report submitted on 29.11.2005 clearly observing that there is illegal killing of an innocent life thereby while directing to initiate proceeding against the erring officer also directed for considering adequate ex-gratia and the O.Ps. even in 2018 claim awaiting the report of the R.D.C.

4. Keeping in view the position of Parties involved herein, this Court finds, considering the seriousness in the incident and a lawful response required to be given to the bereaved family as well as the citizens of the State for a law and order situation in the State and the turmoil faced in the State Assembly, it appears, there was direction by the then Chief Minister of the State for undertaking an enquiry exercise by the Revenue Divisional Commissioner, Central Division, Cuttack, who appears to have submitted his report filed herein as Annexure-A/2 since 1.2.2006. For the State Authority sitting over such matter even in spite of the report favouring the bereaved family member, the Applicant herein (mother of the deceased brought the Writ Petition with the following prayer :-

> "Under the circumstances the petitioner therefore prays that this Hon'ble Court may be pleased to admit this writ petition for hearing, issue notice of Rule Nisi, calling upon the opposite parties to show cause as to why a direction shall not be given to an independent and impartial agency to conduct an investigation into the circumstances leading to the death of the petitioner's son by treating annexure-1 as an FIR.
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> And to further show cause as to why the petitioner shall not be suitably compensated by the State Government for the untimely death of her son caused by a public servant acting in excess of his powers.
>
> And upon the opposite parties not showing cause or showing insufficient cause the rule be made absolute as against them and a writ of Mandamus or any other appropriate writ be issued directing investigation into the circumstances leading to the death of the petitioner's son and suitable compensation be directed to be paid by the State Government to the petitioner for her son's death having been caused by a public servant acting in excess of his power.
>
> And to grant such other relief/reliefs as may be deemed fit and proper…"

5. There have been several hearings of the matter recording that there has been direction for enquiry by none else than the Hon'ble Chief Minister of the State,

further recording there has been payment of a sum of Rs.1.00 lakh to the bereaved family by way of interim compensation, further also observing a direction to the State Government for producing the report, if any. As a consequence, this Court finds, an enquiry report has been filed by way of additional affidavit by O.P.2, Deputy Collector, Collectorate Jagatsinghpur, vide Annexure-A/2 dated 14.2.2023. This Court finds strange, through Pararaph-4 the Deponent claiming there has been direction for administrative enquiry by the R.D.C. and his report is awaited even while filing the report on enquiry by the R.D.C. dated 1.2.2006.

6. This Court keeping in view the submission of the respective Counsel and the pleadings herein finds, the undisputed fact remains to be in the night of 28/29.11.2005 in a police firing at Chakradharpur Outpost in the district of Jagatsinghpur, one Mumtaz Ali, S/o.Dr.Manwar Ali of Dhyansahi, Salipur, Cuttack died at the spot. There was lot of hue and cry and law and order situation involving such incident. Being apprised and considering the sensitive issue involved therein, the then Hon'ble Chief Minister on 29.11.2005 had announced ex-gratia of Rs.1.00 lakh for the next of kin of the deceased Mumtaz Ali, who was killed in police firing at Lock Outpost, Chakradharpur. There was hue and cry on the floor of the State Legislative Assemble where Hon'ble Chief Minister, as he was then, also made an announcement for an enquiry to the incident through the R.D.C.,Central Division, Cuttack and submitting his report. It appears, soon after the enquiry and based on the commitment of the Hon'ble Chief Minister, the R.D.C. took up preliminary enquiry in presence of the D.I.G.(C.R.),District Magistrate and S.P.also involved discussions with the Project Manager, Personal Officer of H.C. even involved oral evidence of all of them. There has been also involvement of evidence of outsiders. There is also involvement of some outsiders of the Lock Outpost taking oral evidence from a private driver, a Sentry Constable, a Constable in presence of the D.I.G. of Police. There is involvement of an affidavit of several persons, namely, Sanatan Sethi, Bhagabat Muduli, Pradeep Kumar Lenka, Ramesh Malik and Babaji Choudhuri involved therein private individual as well as police personnel. After a threadbare enquiry examining on the issue of sequence of event leading firing, the R.D.C., Cuttack came to the following observations :-

> "It is undoubtedly an established fact that Industrial and construction workers have strong unity which forms a bond. If one is taken away or assaulted or attacked by anybody, they defend unitedly. This happened in the case of arrest of Sri Jayant Kumar Das. During his arrest he was physically assaulted along with Sri Anshuman Samal, who protested. The others witnessed the incident. Then all of them unitedly moved to the Police outpost, Chakradharpur to rescue the victim from the clutch of the drunken Police Officer. They (numbering about a dozen or a few more) reached the Police outpost in a tipper. Sri Muralidhar Sahoo, by that time, was sitting there in the outpost wearing lungi, having covered his body with a chadar. Hearing the noise, Sri Muralidhar Sahoo opened the door and faced the group of people who were unarmed. Undoubtedly there was hot exchange of words for the release of Sri Das. But there is no evidence of any attack. The situation could have been tackled.

> In the meanwhile Sri Muralidhar Sahoo, S.I. went to the side room and brought his loaded revolver. He also threatened the people to open fire if they do not disperse. The he opened fire, killing Mumtaz Ali on the spot and grievously injuring Sri Nilamadhab Siya. The cold winter night could not have been darker.
>
> The Memo of Arrest of Sri Jayant Kumar Das reveals that the date and time of arrest was on 29.11.2005 at 1.00 AM and the time of preparation of arrest memo was at 1.05 AM. Sri Kalipada Pattnaik has signed as the witness. This Kalipada Pattnaik is an employee of the Hindustan Construction Company, who has stated in his affidavit that his signature was obtained under duress. Significantly, the report of the Superintendent of Police states that at about 11.00 AM, SI, Sri Muralidhar Sahoo arrested Sri Jayant Kumar Das and brought him to the outpost at about 1.15 AM. At about 1.30 AM, the agitators came. By his own affidavit, Sri Kalipada Pattnaik came along with the group. Did he come and sign the Memo of Arest at the outpost in the presence of his agitated colleagues when his ostensible mission was to free him ? On the contrary, the signature of Sri Kalipada Pattnaik appears to have been obtained after he was taken into custody after the incident of firing."

On the aspect whether the firing was justified and proper proceedings were followed before resorting to firing deciding through Chapter No.III, the R.D.C. came to observe as follows :-

> "The Collector & District Magistrate, Jagatsinghpur in his report dated 14/15.12.2005 has stated that the Sub-Inspector of Police, Sri Muralidhar Sahoo opened 5(five) rounds of fire from his service revolver, as a result of which two members of the gathering identified as umtaz Ali, S/o.Manwar Ali of Village-Dhuansahi, P.S.-Salipur, District-Cuttack and Sri Nilamadhab Siya sustained injuries and they were shifted to the hospital for treatment. Mumtaz Ali died of bullet injuries and the other injured Sri Nilamadhab Siya was shifted to Kujang P.H.C. and subsequently, to S.C.B. Medical College and Hospital, Cuttack for further treatment.
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> The Collector & District Magistrate further reports that there may be justification, but no procedures appears to have been followed by the S.I. before resorting to firing. Had the S.I. declared the acts of Mob unlawful and commanded for the dispersal of the assembly before the firing, perhaps there would have been no occasion for opening fire.
>
> I do agree with the above statement of the Collector & District Magistrate, Jagatsinghpur and conclude that neither the firing was justified nor proper procedure was followed before resorting to firing. The fatal wound appears to have been caused by the bullet that has entered the thoracic cavity, passed through the left lungs and lodged at the right clavicle. The firing has been done to kill, and not to deter, because it has not been aimed low, at deceased Mumtaz Ali, Sri Muralidhar Sahoo, the SI of Police, has pumped another bullet into the pelvic cavity of the deceased, which proves that the firing was indiscriminate. In any case, an engineer working on a National Highway Project is an unlikely ringleader of a mob."

7. From the above, this Court finds that neither the firing was justified nor proper proceeding was followed before resorting to firing and the fatal wound appears to have been caused by the bullet that has entered the thoracic cavity, passed through the left lungs and lodged at the right clavicle. The firing has been done to kill and not to deter because it has not been aimed to low, at the deceased. It is also observed, Muralidhar Sahoo, the S.I. of Police has pumped another bullet into the pelvic cavity of the deceased, which proves that there has been indiscriminate firing on an Engineer working in an important Project.

8. In Chapter-IV, the R.D.C. considering the measures taken and the quantum of force used in anticipating preventing and handling situation were adequate or in excess of requirement and the responsibility for such act of commission or omission, the Commissioner has come to observe as follows :-

> "In view of the aforesaid circumstance the above averment of the Superintendent of Police, Jagatsinghpur seems incongruous. Measures taken by the Police Officer in handling the situation were neither appropriate nor adequate. The S.I. of Police failed miserably in his anticipation, intelligence, handling of the situation and above all in his duty and discipline as a responsible police officer.
>
> Due procedures were not observed at the time of arrest of Sri Jayant Kumar Das. Besides, I am surprised to find that the IIC, Paradeep Police Station vide his letter dated 05.12.2005; has filed affidavits of the persons named below which smacks of an attempt to justify an unjust deed.
>
> 1. Sri Babaji Choudhury, a betel shop-keeper of Bhutmundei Bazar.
> 2. Sri Ramesh Mallick, a resident of Bhutmundei (Who is working as a Home Guard).
> 3. Sri Sanatan Sethi, sells fish at Paradeep.
>
> For general circulation it was notified in daily Samaj and Sambad dated 12.12.2005, that persons who have direct knowledge of the incident may submit their affidavit in person or by registered post before my Secretary on any working day between 10.00 M and 5.00 PM till 19.12.2005. All unsolicited affidavit filed before 12/12/2005 have no evidentiary value.
>
> It is interesting to find that one witnesses namely, Sri Sanatan Sethi has stated before me that on the direction of IIC, Paradeep he had signed in the affidavit and he did not read it entirely. The informant, Sri Ramesh Mallik, is a home guard. He has stated in his affidavit that on 27.11.2005 evening, when he was in Bhutmundei bazar, S.I., Sri Sahoo had asked him to be alert about the thief of the wielding transformer of the Hindustan Construction Company. He has stated in his affidavit that he came to know about the involvement of Sri Jayant Kumar Das of the same company ON THE NEXT DAY. But in his deposition before me, Sri Mallik has stated that he overheard Sri Jayant Kumar Das discussing the deal about the stolen wielding transformer with an unknown person at Bhutmundei Bazar on 27.11.2005 at 8.00 PM and informed thana babu at 9.00 PM the same night. If Sri Mallik had been tutored to parrot this theory, he had not been tutored well. The contradiction is glaring and severely erodes his credibility. It cannot be relied upon."

Above goes to make it clear that there has been serious negligence. There has been also no fallowing of proper procedures and directly entangling the irresponsible behavior and the law and order Authority including the S.I., Muralidhar Sahoo involved.

9. Coming to examine Chapter-V, any other matter connected with or incidental thereto as the Enquiring Authority may consider appropriately including any suggestion to such matter. The Commissioner came to observe as follows :-

> "From my visit of the site of incident, affidavits filed by different persons and my enquiry, I am inclined to believe that the police Officer in charge of Chakradharpur outpost has miserably failed in discharging his duty as a Police Officer. Being mentally unsteady he has exhibited his gross non-application of mind, his intelligence and commonsense in handling a small but sensitive issue like this. In the sudden rush of anger Sri Sahoo caused the death of an innocent person named Mr.Mumtaz Ali by firing from his service revolver. He has grievously injured another person, Sri Nilamadhab Siya.

> I am further inclined to believe that S.I. of Police Sri Sahoo after the incident has tried to paint the act of killing as an act of self defence. This appears to me to be more dangerous than the incident itself.
>
> Therefore, I suggest penal action be taken against the S.I. of Police, Sri Muralidhar Sahoo as envisaged under the relevant sections of the I.P.C. The Superintendent of Police has reported that on the report of the mother of the deceased alleging murder of her son by S.I., Sri Muralidhar Sahoo, Paradeep P.S. Case No.273 dated 07.12.2005 u/s 302 IPC has been registered against S.I., Sri Muralidhar SAhoo and is under investigation. The case should be handed over to the Crime Branch and investigation should be completed within three months.
>
> I further recommend to Government that due to merciless act of S.I. of Police the precious life of Sri Mamtaz Ali an engineer was lost. He was a young person and a long life was lying before him. The misery and sorrow of Mamtaz Ali's living parents can no way be compensated. But however, like a drop in the ocean, I recommend to Government to suitably increase the ex-gratia grant."

Through the above Chapter, the Commission while observing the Police Officer in-charge of Chakradharpur Outpost miserably failed in discharging his duty as a Police Officer excepting his gross non-application of mind, failure in exercise of intelligence and commonsense in handling a small but sensitive issue involved therein, the Commissioner has also observed, there is sudden rush of anger by Sri Muralidhar Sahoo, the S.I. causing the death of an innocent person by indiscriminate firing by the S.I. from his service revolver, also grievously injuring another person, Nilamadhab Siya. It reveals that the R.D.C. has believed that the S.I., Sri Sahoo after the incident tried to paint the act of killing as self defence thereby the S.I. did not remain truthful in his service. Thus while suggesting finally for penal action against the S.I., Sri Muralidhar Sahoo in suggesting appropriate action through the Crime Branch, further also recommending the Government to compensate appropriately and while observing the grant of ex-gratia absolutely insufficient, the Commissioner recommended the Government to consider appropriate compensation keeping in view the death of the victim involving an illegal act of the State while also keeping in view there is loss of life of a young Engineer.

10. With the aforesaid observations, the findings of the Authority and the observations of this Court herein above, this Court finds, it is unfortunate to note that even though such a report was given by the Competent Authority, the Enquiry Authority being appointed by the State on the declaration in the floor of State Legislative Assembly since 1.2.2006 and there was no timely attempt to compensate the bereaved family even on the coming of this litigation in the year 2006 by the widow-mother of the victim, an Engineer, bringing the litigation at her age of 53 years at the time of filing of this Writ Petition and already 70 years old by now. State Government instead of volunteering adequate compensation in the given circumstance is fighting such litigation under some plea or other since 2006. The case has also already seen as many as thirteen postings without any commitment from the State in the matter of actual grant of compensation even already a report of the Enquiry Authority being appointed by the State Authority and the report

submitted since 2006. This Court keeping in view the age of the Petitioner already in her 70 years of age after losing her young and able-bodied son, who was an Engineer at the time of death and almost seventeen years have passed in the meantime, finds itself to be a mute spectator to the action of the State and still there is no effective response of the State. From the counter and the additional affidavit of the State-O.P., this Court in spite of enclosing the report dated 1.2.2006 finds, State did not remain truthful to its citizen. There has been false oath even claiming State is awaiting for such report.

11. A mother losing her son at such age only can understand her suffering and no amount of money can bring back her star son. Undisputedly despite their status in the Society was an Engineer and an employee in an important Establishment. A brilliant son of the soil must have dreamt a lot coming to such position in his life here ends his life for no reason of him and a Civil Society has no right to sacrifice such a youth for his unable to control the law and order situation. There is even clear finding in the report involved on the S.I. killing the youth attempting to repaint the incident. State even though in its counter attempted to repaint and giving a different colour to the incident in spite of clear observation of the Commission.

It is also not understood when Government on the basis of same report initiates the departmental proceeding against the S.I. killed the deceased in part compliance of the very same report at the same time remaining a mute spectator in respect of observations/recommendations of the Commission for considering grant of appropriate ex-gratia.

It is also beyond imagination to realise the loss of mother having lost such a useful child. Compensation ought to take into account the status of the family so that the amount of ex-gratia does not make the mother losing any of her expectations through such able-bodied son. For the opinion of this Court, no amount of ex-gratia can bring back her son.

12. This Court here takes down some of legal pronouncements by Hon'ble apex Court as well as this Court read as follows :-

> ***Malkiat Singh v. State of U.P.*** **:, (1998) 9 SCC 351**
>
> **2.** In view of the report of ACJM this Court on 7-5-1996 passed the following order:
>
> "Mr R.S. Sodhi the learned counsel for the petitioner, states that though the learned ACJM found on the basis of photographs that the petitioner's son Talvinder Singh is one of the persons who died in the incident involving firing by the U.P. Police, the CBI has not accepted the said finding regarding the death of Talvinder Singh. It is obvious that if he is found dead, the writ petition be only confined to the question of the entitlement of the petitioner to compensation. If the said Talvinder Singh is alive then he be produced by the police.
>
> Issue notice."
>
> **3.** It is now an accepted position that Talvinder Singh died in the incident which took place on 13-7-1991. All attempts to find his body have proved futile. But from the photograph

identified by the father and the grandfather of Talvinder Singh, it is established that he is dead, because the police had taken photographs of all those who were killed in those two encounters. Therefore, the only question which now survives in this petition is what amount of compensation should be paid to the petitioner to compensate him for the death of his son.

4. In a similar case i.e. in Writ Petition No. 632 of 1992 this Court awarded Rs 5 lakhs as compensation. We think that the ends of justice would be met if the respondent-State is directed to pay Rs 5 lakhs to the petitioner by way of compensation for the death of Talvinder Singh. The State shall pay this amount within 8 weeks. The learned counsel for the State states that the State will take out a draft in the name of the petitioner and will deposit the same with the Registrar of this Court. The Registrar shall hand over the draft to the petitioner after proper identification by Mr R.S. Sodhi, learned counsel for the petitioner. The writ petition is disposed of accordingly.

***Rohtash Kumar v. State of Haryana and others*, (2013) 14 SCC 290**

8. After carefully perusing the inquiry report dated 17-11-2008 submitted by the Tahsildar, Narnaul and the inquiry report dated 7-1-2011 submitted by the Additional Deputy Commissioner and other relevant record, we are inclined to agree with the learned counsel for the appellant and the learned amicus curiae that Sunil appears to have died in a fake encounter. The post-mortem notes of Sunil state that the bullets were fired from a distance of about 3-8 ft from the body. They further state that blackening and tattooing were present around the entry wounds caused by the bullets. This indicates that the shots were fired from a very short distance. There was entry wound on the back. The entry wounds are also seen on the chest. The location and nature of wounds are not consistent with the theory of genuine encounter. If the police party wanted to merely prevent Sunil from running away, they could have fired on the non-vital parts of his body. If the police version that Sunil was aggressive, that he and his companion wanted to kill the policemen to deter them from doing their duty and, therefore, Sunil fired at the police party was true, at least one member of the police party would have got injured. Significantly, no one from the police party was injured. There is also no formal record of any recovery of firearms from the body of Sunil. It is significant to note that Umesh who was riding the motorcycle at the time of encounter, was arrested and tried for offences under Sections 332, 353, 307 read with Section 34 IPC inter alia for using criminal force to deter public servants from discharge of their duty. The Sessions Court acquitted Umesh. The acquittal of Umesh makes a dent in the prosecution case that Sunil fired at the police when the police asked him and Umesh to stop.

14. Once we come to a conclusion that Sunil is killed in an encounter, which appears to be fake, it is necessary to direct an independent investigating agency to conduct the investigation so that those who are found to be involved in the commission of crime can be tried and convicted. But, as rightly pointed out by the learned amicus curiae directing an investigation, at this distant point of time, will be an exercise in futility. We are informed that witnesses would not be available. It would be difficult to trace the record of the case from the two police stations. Handing over investigation to an independent agency and starting a fresh investigation would be of no use at this stage. Reliance placed by the learned counsel for the appellant on *Rubabbuddin Sheikh* [*Rubabbuddin Sheikh* v. *State of Gujarat*, (2010) 2 SCC 200 : (2010) 2 SCC (Cri) 1006] and *Narmada Bai* [*Narmada Bai* v. *State of Gujarat*, (2011) 5 SCC 79 : (2011) 2 SCC (Cri) 526] is misplaced. Those cases arose out of different fact situations. No parallel can be drawn from them.

15. We share the pain and anguish of the appellant, who has lost his son in what appears to be a fake encounter. He has conveyed to us that he is not interested in money but he wants a fresh investigation to be conducted. While we respect the feelings of the appellant, we are unable to direct fresh investigation for the reasons which we have already noted. In such

situation, we turn to *Nilabati Behera* [*Nilabati Behera* v. *State of Orissa*, (1993) 2 SCC 746 : 1993 SCC (Cri) 527] , wherein the appellant's son had died in custody of the police. While noting that custodial death is a clear violation of the prisoner's rights under Article 21 of the Constitution of India, this Court moulded the relief by granting compensation to the appellant.

16. In the circumstances of the case we set aside the impugned judgment and order dated 13-9-2010 [*Rohtash Kumar* v. *State of Haryana*, CRM-M No. 2063 of 2009, decided on 13-9-2010 (P&H)] and in light of *Nilabati Behera* [*Nilabati Behera* v. *State of Orissa*, (1993) 2 SCC 746 : 1993 SCC (Cri) 527] , we direct Respondent 1 State of Haryana to pay a sum of Rs 20 lakhs to the appellant as compensation for the pain and suffering undergone by him on account of the loss of his son Sunil. The payment be made by demand draft drawn in favour of the appellant "Rohtash Kumar" within a period of one month from the date of the receipt of this order. The appeal is disposed of accordingly.

Kalpana Mandal and Ors vs State of Orissa and Ors, AIR 2007 Ori 94

2. An F. I. R. was lodged at Simulia Police Station on 7-2-2002 at about 9 a. m. alleging therein that the bus, namely, 'Dolphine' Dynamic', in which Sunil Mandal was travelling on 6-2-2002, while crossing Simulia Police Station, the Police personnel waived the bus to stop, but the driver instead of stopping it, sped away. The Police van which was chasing the bus started firing at the bus and it was found that the passenger sitting towards the left of the driver was instantly killed in the police firing. After receiving the aforesaid information, a case was registered under Section 304, I. P. C. against some police personnel of Simulia Police Station. Accordingly, charge-sheet was submitted and as stated by the learned counsel for the petitioners, all the charge-sheeted accused persons have been acquitted. The passenger who died in the police firing was none other than the said Sunil Mandal. After post-mortem was conducted on the body of the deceased, the doctor opined that the death was due to shock and haemorrhage following the injury caused to the left Lung and Heart due to gunshot wound over anterior chest wall and the age of the injuries were within 24 hours from the time of post-mortem examination.

3. It is worthwhile to mention here that a sum of Rs. 1.00 lakh from the Chief Minister's Relief Fund was paid to petitioner No.1 on 21-3-2002. On being noticed, a counter-affidavit has been filed on behalf of O. Ps. 3 and 4 sworn to by the Officer-in-charge, Simulia Police Station, confirming the allegation of the petitioners that the deceased, Sunil Mandal expired in the police firing while travelling in the bus, on N. H. 5 near village Dhobagadia Crossing under Simulia Police Station and in this connection P. S. Case No. 12 was registered. While narrating the details of the incident in paragraph-6 of the counter-affidavit, the deponent has stated that on 7-2-2002 at about 3 p. m. while the Sales Tax Officer along with Vigilance Officer were checking the buses for collection of penalty due to loading of heavy luggage, the 'Dolphin' bus bearing Regn. No. ORD-5525 on the plea of parking the vehicle, avoided the detention and sped towards Bhadrak. O. Ps. 3 and 4 have not disputed the fact of death of late Sunil Mandal in police firing when he was travelling as a passenger in the bus in question. Further a stand has been taken by the said O. Ps. that the compensation of Rs. 1.00 lakh paid to the petitioners from the Chief Minister's Relief Fund being adequate, the petitioners are not entitled to receive any further amount of compensation.

7. The only question, therefore, is that this Court should assess just and proper compensation to which the petitioners will be entitled to. In this regard, learned counsel for the petitioners has submitted that the deceased-Sunil Mandal was aged about 35 years on the date of his death and he was an able bodied youth, who was earning his livelihood by working in an Ice Factory at Paradeep. It is also submitted by the learned counsel for the petitioners that in similar cases, there are instances where the State Government has paid mounts of Rs. 5.00

lakhs to the dependents of persons dying in police firing. Considering all aspects of the matter, we are of the view that an amount of Rs.5,00,000/- (rupees five lakhs) would be the just and proper compensation payable to the writ petitioners. Since an amount of Rs. 2,50,000/- has already been paid to them by the State, we dispose of this writ petition directing the O. Ps. to pay the balance amount of Rs. 2,50,000/- (rupees two lakhs and fifty thousand) to the petitioners within a period of three months from today. On payment of the same, an amount of Rs. 1,00,000/- (rupees one lakh) shall be kept in Fixed Deposit in any nationalized bank in the name of petitioner No. 1 Kalpana Mandal and an amount of Rs.50,000/- (rupees fifty thousand) each in the names of petitioner Nos. 2, 3 and 4, Maitry Mandal, Gayatri Mandal and Pranab Mandal respectively for a period of five years with quarterly interest accrued on the respective amounts being payable to them.

State of Tamil Nadu, rep. by Secretary to Government, others Vs. S. Sivagami, 2006 (3) CTC 689

15. We shall now consider the above points in the light of the various decisions of the Supreme Court and High Courts in the matter of payment of compensation in cases of this kind.

(i) The decision of the Supreme Court in the case of **Saheli, a Women's Resources Centre through Ms. Nalini Bhanot & Others v. The Commissioner of Police, Delhi,** AIR 1990 SC 512, in which it is held as: (paragraphs 10 and 11)

"It is now apparent from the report dated 5.12.1987 of the Inspector of the Crime Branch, Delhi as well as the counter affidavit of the Deputy Commissioner of Police, Delhi on behalf of the Commissioner of Police, Delhi and also from the fact that the prosecution has been launched in connection with the death of Naresh, son of Kamlesh Kumari showing that Naresh was done to death on account of the beating and assault by the agency of the sovereign power acting in violation and excess of the power vested in such agency. The mother of the child, Kamlesh Kumari, in our considered opinion, is so entitled to get compensation for the death of her son from the respondent No. 2, Delhi Administration.

An action for damages lies for bodily harm which includes battery, assault, false imprisonment, physical injuries and death. In cases of assault, batter and false imprisonment, the damages are at large and represent a solatium for the mental pain, distress, indignity, loss of liberty and death. As we have held hereinbefore that the son of Kamlesh Kumari aged 9 years died due to beating and assault by the S.H.O., Lal Singh and as such, she is entitled to get the damages for the death of her son. It is well settled now that the State is responsible for the tortious acts of its employees. The respondent No. 2, Delhi Administration is liable for payment of compensation to Smt. Kamlesh Kumari for the death of her son due to beating by the S.H.O. of Anand Parbat Police Station, Shri Lai Singh."

(iv) The judgment of the Supreme Court in the case of **Malkiat Singh v. State of U.P.**, 1998 (9) SCC 351, has held as under: (Paragraphs 2 & 3)

"In view of the report of ACJM, this Court on 7.5.1996 passed the following order:

"Mr. R.S. Sodhi the learned counsel for the petitioner states that though the learned ACJM found on the basis of photographs that the petitioner's son Talvinder Singh is one of the persons who died in the incident involving firing by the U.P. Police, the CBI has not accepted the said finding regarding the death of Talvinder Singh. It is obvious that if he is found dead, the Writ Petition be only confined to the question of the entitlement of the petitioner to compensation. If the said Talvinder Singh is alive then he be produced by the police. Issue notice."

It is now an accepted position that Talvinder Singh died in the incident which took place on 13.7.1991. All attempts to find his body have proved futile. But from the photograph identified by the father and the grandfather of Talvinder Singh, it is established that he is dead, because the police had taken photographs of all those who were killed in those two encounters. Therefore, the only question which now survives in this petition is what amount of compensation should be paid to the petitioner to compensate him for the death of his son."

(v) The judgment of this Court in the case of **R. Dhanalakshmi v. Government of Tamil Nadu, represented by its Chief Secretary. Fort St. George. Madras - 9 and others,** 2004 WLR 346, in which it is held as: (Paragraphs 4, 5, 7 and 13)

"From the above, it is clear that as far as the Government is concerned, the deceased Rajmohan died only due to torture and inhuman treatment at the hands of Mr. Eswaran, the then Sub Inspector of Police, Karur Police Station. On the above facts, it must be first concluded that the deceased Rajmohan died while he was in police custody and that too, due to harassment at the hands of the Sub Inspector of Police, Karur Police Station.

In the matter of custodial death, the Supreme Court in more than one case has upheld the power of this Court under Article 226 of the Constitution of India to award just and reasonable compensation. In fact, even when the custody is taken, the procedure to be followed by the Investigating

Agency are enumerated by the Apex Court in the judgment in Shri D.K. Basu v. State of West Bengal, 1996 (4) Crimes 233 (SC).

Coming to the question of quantum, it must be noted that the deceased was 29 years age on the date when he died in police custody. This fact has not been disputed by the respondents in the counter affidavit. Further, the fact that the deceased left at the time of his death, the petitioner, wife of the deceased aged about 27 years two minor sons by name Gowthaman aged 7 years and Saravanan aged 5 years apart from his mother Anjalaiammal aged 55 years, has not been disputed by the respondent in the counter affidavit. In fact, in para 4 of the counter affidavit, the respondents have stated as follows:

"The Writ Petitioner submitted that she is the legal heir of the deceased Rajmohan as the deceased's wife. Records of enquiry revealed that the age of the deceased is 32/95…"

In view of the above, the next question to be considered is, as to the actual amount of compensation to which the petitioner is entitled. There is absolutely no difficulty in determining the quantum of compensation when once the monthly income of the deceased is arrived at Rs. 6,000 and the age of the deceased as 29 at the time of death. The Apex Court in the judgment in Grewal Ms. & another v. Deep Chand Sood & others, 2002 (1) LW 491, has broad lined the guidelines to be adopted by the Courts in determining the just and reasonable compensation. The Apex Court has approved the multiplier adopted in the Motor Vehicle cases for the purpose of determining the compensation in the case of custodial torture. Hence, the multiplier method adopted in the case of Motor Accidents is adopted for determining the just and reasonable compensation in this case."

vii. Also yet another decision of this Court in the case of **P. Ranganayagi & others v. State of Tamil Nadu represented by Secretary, Home Department & others**, 2000 (1) LW (Crl.) 96, in which it is held as: (Para 11)

"The case on hand is in no way different from the facts and circumstances of the cases of custodial deaths referred to above as admittedly it is found by this Court that the said Dorairaj died when he was in police custody. Therefore, following the ratios laid down by the Apex Court and this Court, I am obliged to direct the first respondent-State to pay a sum of Rs. 5,00,000 to the petitioners herein by way of compensation for the custodial death of Dorairaj."

13. While condemning the action of the State it's sitting over such sensitive matter for such length of time and finding no purpose in directing the State Government to think on appropriate compensation by way of ex-gratia and to see that there is no further loss of time, while finding payment of a sum of Rs.1.00 lakh towards ex-gratia is completely inadequate and rightly observed by the Commissioner, this payment is a drop of water in an ocean and there is a clear fact-finding report against the State. Recommendation of the Enquiry Authority given in 2006 for considering adequate compensation, while also keeping in view the deceased was an Engineer and working in an important private company, loss to a mother for losing her child at such age while also keeping in view that here there is no compensation but the amount is paid as a token of respect to the bereaved family, so also to the Society, this Court directs the State Government to make whole payment of a sum of Rs.50,00,000/- (rupees fifty lakh). Since a sum of Rs.1.00 lakh has already been paid to the Petitioner towards compensation, a draft for a sum of Rs.49,00,000/- (rupees forty-nine lakh) in the name of the victim, the Petitioner herein, be made and handed over to the Petitioner at her residence at least within seven days from the date of communication of this judgment. For forcing the Petitioner to bring a litigation to get such order even in spite of a recommendation by the Enquiry Authority since 2005, this Court finds, there has been unnecessary burdening the Petitioner to get her real compensation through this litigation and as such, this Court quantifies a sum of Rs.1,00,000/- (rupees one lakh) towards litigation expenses also be paid to the Petitioner within same time. This Court makes it clear, in the event the compensation, as directed above, is not handed over to the Petitioner within seven days of communication of this judgment, the Petitioner will be entitled to interest @ 7% on the compensation from the date of submission of the enquiry report suggesting adequate compensation.

14. Before parting with the judgment, this Court directs the State Government through its Chief Secretary to see that there should not be recurring of such non-compliance in future. This Court makes it clear that the award of ex-gratia is made herein keeping in view the worst situation taking place herein and not taking a decision at appropriate level in releasing appropriate ex-gratia in spite of a report of the Commission being submitted since February, 2006 and the award of compensation/ex-gratia herein shall not be treated as a precedent in any other case.

15. The Writ Petition succeeds with award of cost as above.

16. A free copy of this judgment be supplied to the learned Additional Government Advocate for the State.

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2023 (I) ILR – CUT- 750

BISWANATH RATH, J.

W.P. (C) NO. 32397 OF 2022

SANTOSH KUMAR MALIK ……Petitioner

.V.

ELECTION OFFICER CUM B.D.O, CUTTACK & ORS. ……Opp. Parties

CONSTITUTION OF INDIA, 1950 – Article 226 and 227 – Petitioner filed an application before the Civil Judge Jr. Division, Salipur to call for ballot box of all used and non-used ballot papers along with all documents relating to an election dispute – The Election Tribunal rejected the same on the ground that there is no specific information attending to the basic requirement in calling for documents as well as recounting of votes – Effect of – Held, Considering the specific pleading in Para 5 and 6 of the petition, directs the Election Tribunal at least call for and peruse the counting sheet in respect of each booth, result sheet, counting folio with counter signature of both agents, Superintendent of booth nos.1 to 3, documents disclosing at least number of votes obtained by Petitioner and Opposite Party No.2 in the declaration of result involving the counting of votes dated 27.02.2022.

Case Laws Relied on and Referred to :-

1. AIR AIR 2013 ORI. 115 : Ananda Chandra Ojha Vs. Ashok Saho.
2. AIR 1970 (SC) 276 : Jitendra Bahadur Singh Vs. Krishna Behari & Ors.
3. AIR 2004 (SC) 541 : M. Chinnasamy Vs. K.C. Palanisamy & Ors.
4. AIR 2004 (SC) 2036 : Chandrika Prasad Yadav Vs. State of Bihar & Ors.
5. AIR 2005 (SC) 2441 : Kailash Vs. Nanhku and Ors.
6. AIR 2008 (SC) 2724 : Sudarsha Avasthi Vs. Shiv Pal Singh.
7. AIR 2015 Orissa 110 : Anubhav Patnaik Vs. Soumya Ranjan Patnaik.
8. AIR 2016 MP 132 : Rani Marskole Vs. State of M.P. & Ors.
9. AIR 2014 SC 1290 : Arikala Narasa Reddy Vs.Venkata Ram Reddy Reddygari & Anr.
10. (1975) 4 SCC 822 : Suresh Prasad Yadav Vs. Jai Prakash Mishra & Ors.
11. AIR 1966 (S.C.) 773 : Dr.Jagjit Singh Vs. Giani Kartar Singh & Ors.
12. 1976 (1) SCC 687 : Bhabhi Vs. Sheo Govind.
13. (1989)1SCC 526-Para-11: P.K.K. Shamsudeen Vs. K.A.M. Mappillai Mohindeen.
14. (1999) 9 SCC 420 : Mahant Ram Prakash Dass Vs. Ramesh Chandra.
15. (1999)9 SCC 386 : Jeet Mahinder Singh Vs. Harmindar Singh Jasi.
16. (1999) 9 SCC 420 : Mahant Ram Prakash Dass Vs. Ramesh Chandra.
17. (2020) 12 SCC 70 (Para 15 & 17) : Chandeswar Saw Vs. Brij Bhushan Prasad &Ors.
18. W.P.(C) No.3735 of 2023 : Rabinarayan Das Vs. State of Orissa & Ors.
19. AIR 1972 SC 1251 – 1972 SCR (2) 177 : Shri Shashi Bhushan Vs. Prof. Balraj Madhok & Ors.

For Petitioner : Mr. B.K. Bal

For Opp. Part : Mr. S. Mishra, Addl. Standing Counsel
M/s. B. Bhuyan, S. Sahoo, S. Mohapatra,
A.K. Rout, M.K. Behera

JUDGMENT Date of Hearing : 03.02.2023: Date of Judgment : 22.02.2023

BISWANATH RATH, J.

1. This writ petition involves a challenge to the order dated 11.11.2022 passed by the Civil Judge (Jr.Divn.), Salipur in Election Petition No.1 of 2022 at Annexure-5 in rejection of a recounting request.

2. Background involved in this case is; Opposite Party No.1 notified the election procedure of three tiers Panchayat Election, 2022 which included election for the post of Sarpanch of Katarapada Grama Panchayat involved. Petitioner and Opposite Party Nos.2 to 4 were all candidates with different symbols to each of them. Election procedure involved was conducted accordingly. On 17.1.2022 the Petitioner submitted his nomination paper and the same was scrutinized on 22.01.2022. Counting of votes took place on 27.02.2022. It is claimed by the Petitioner that there was filing of application for recounting of votes by the election agent of Petitioner which got rejected. Finally Election Officer, Nischintakoili Block declared that the Petitioner (Santosh Kumar Malik) obtained 1197 votes and his contestant Opposite Party No.2 obtained 1193 votes and accordingly declared the Petitioner to have been elected as Sarpanch of Katarapada Gram Panchayat by margin of four votes. Here it is alleged that Petitioner from Newspaper of next morning on 28.02.2022 came to know that he has been defeated by margin of two votes only. Petitioner claims, he had an application for recounting of votes, which had been illegally manipulated and rejected involving illegal rejection of the same votes of the symbol "KHOLA CHHATA" and such votes have been added to the symbol of 'SUN' belonging to Opposite Party No.2 and there has been even a declaration that Petitioner has got 1191 votes instead of 1197 earlier mentioned wrongly and votes of Opposite Party No.2 remained as 1193 giving Opposite Party No.2 edge over Petitioner by two votes, compelling the Petitioner to bring Election Dispute registered as Election Petition No.1 of 2022.

3. In the pendency of the election dispute Petitioner keeping in view his allegations in the election dispute brought an application on 30.06.2022 to call for ballot box of all used and non-used ballot papers along with all documents preserved relating to Election Petition No.1 to 2022 involving election for the post of Sarpanch of Katarapada Grama Panchayat as appearing at Annexure-2. Opposite Party No.2 filed objection to such application on the premises that there is no specific information involved therein attending to the basic requirement in calling for documents as well as recounting of votes vide Annexure-3. This application has been considered and rejected by the trial court in its order dated 30.06.2022 vide Annexure-4 thereby giving rise to filing of the present writ petition.

4. Challenging the impugned order at Annexure-5 Mr.Bal, learned counsel for Petitioner on reading of the petition involved at Annexure-2 (series) as well as the relevant paragraphs in the Election Petition at Annexure-1 particularly paragraph nos.5 & 6 therein submitted that there has been no consideration of the specific allegation of the Petitioner and in such contingency the observation of the trial court that Petitioner does not have the specific allegation on which votes have been take out from his counts and added to the votes of Opposite Party No.2 is not a corrected one. It is claimed that the petition clearly involves an allegation that on the date of counting there was clear declaration through loudspeaker that Petitioner had secured 1197 votes whereas Opposite Party No.2 had secured 1193 votes, but surprisingly on the next date from the newspaper Petitioner came to know that Petitioner had secured 1191 votes and Opposite Party No.2 secured 1193 votes. Mr.Bal, learned counsel for Petitioner further also assails the impugned order on the premises that there is wrong appreciation of the facts, pleadings as well as the evidence by the trial court. Further there is also wrong reliance of the decisions taken note therein. Petitioner also assails the impugned order on the premises that considering that there is hardly difference of two votes polled by the Petitioner and Opposite Party No.2, such serious aspect should have been seriously viewed as even tracing of one vote in favour of the Petitioner would have resulted otherwise.

5. To support his case Mr.Bal, learned counsel for Petitioner took support of the following decisions to the case at hand:-

> **(1)** In the case of ***Ananda Chandra Ojha Vrs. Ashok Saho***: AIR AIR 2013 ORI. 115, **(2)** In the case of ***Jitendra Bahadur Singh Vrs. Krishna Behari &Ors***. : AIR 1970 (SC) 276, **(3)** In the case of ***M. Chinnasamy Vrs. K.C. Palanisamy & Ors.*** : AIR 2004 (SC) 541, **(4)** In the case of ***Chandrika Prasad Yadav Vrs. State of Bihar &Ors.*** : AIR 2004 (SC) 2036, **(5)** In the case of ***KailashVrs. Nanhku and Ors.*** : AIR 2005 (SC) 2441, **(6)** In the case ***of Sudarsha Avasthi Vrs. Shiv Pal Singh*** : AIR 2008 (SC) 2724.

6. Mr.Bhuyan, learned counsel for contesting Opposite Party No.2, however, in his attempt to justify the decision in the impugned order contended that even assuming that Petitioner has allegation that there requires recounting, but there should have been specific allegation on how many valid votes from his side taken away and how many invalid votes involving Opposite Party No.2 have been included by giving detail particulars therein. Mr.Bhuyan, learned counsel for Opposite Party No.2 further also taking this Court to the pleadings in the election dispute as well as the application seeking production of documents, contended that neither specific plea nor allegation was made by the Petitioner at the relevant point of time for the said purpose. Further looking to the timing of moving of such application Mr.Bhuyan, learned counsel for Opposite Party No.2 contended that this application was moved only after closure of evidence. It is specifically alleged that even in the evidence there is no specific allegation on how many votes taken away from Petitioner's side and how many votes illegally included in Opposite Party No.2

side. Mr.Bhuyan, learned counsel then contended, in the circumstances there is no requirement of attention to such application.

7. Taking this Court to the decisions vide (1) in the case of ***Ananda Chandra Ojha Vrs. Ashok Sahoo***:AIR 2013 Orissa 115, (2) in the case of ***Anubhav PatnaikVrs. Soumya Ranjan Patnaik***: AIR 2015 Orissa 110, (3) in the case of ***Rani Marskole Vrs. State of M.P. &Ors.*** : AIR 2016 MP 132, (4) in the case of ***Arikala Narasa Reddy Vrs. Venkata Ram Reddy Reddygari &Anr***. : AIR 2014 SC 1290, (5) in the case of ***Suresh Prasad Yadav Vrs. Jai Prakash Mishra &Ors***. : (1975) 4 SCC 822, Mr. Bhuyan, learned counsel contended that for the settled position of law one is required to bring positive information and/or clear information to satisfy in the matter of illegal rejection or illegal inclusion of votes in filing the petition and for the petition did not involve the basic requirement, was otherwise bad in law. It is, at this stage of the matter, taking this Court to the discussions of the Election Tribunal in the impugned order Mr.Bhuyan, learned counsel for Opposite Party No.2 attempted to justify the impugned order.

8. Considering the rival contentions of the parties, keeping in view the allegations involved and looking to the relevancy in filing such application, this Court here finds, there is allegation of taking out some votes from Petitioner's side and inclusion of some illegal votes in Opposite Party No.2's side being the basis of an attempt for recounting of votes. Further there was already declaration of result declaring the Petitioner succeeding the Election by margin of four votes. To examine the foundation in the above allegations through the pleadings and evidence of the Petitioner, this Court takes down here the specific plea in the Election Dispute at Annexure-1 and through paragraph nos.5 & 6 therein the Petitioner has made the following:-

> "5. That the G.P. Election officer declared the symbol of the candidates in the notice board and election procedure conducted therein. On 17.01.2022 the petitioner submits nomination paper and the same is scrutinized on dtd 22.01.2022 and the parties are obtain symbol accordingly. And the election started and the No.s of the voters casted their votes. On 18.02.2022 counting started at PanchayatPrahallad College Nischintakoili on the guidance of OP party no.1 and on dtd 27.02.2022 at about 10.30PM, the counting officers and counting booth center superintendent are created disturbances and with ill intention they are rejected some votes of the petitioner and did not give emphasis to receive any objection of the Election Agent and that after the Election Agent submit application before the Election Officer at about 10.55 PM to recount the rejected votes of Ward no. 1 to 13 but the Election Officer rejects the application and procedure by showing high handedness. The Election Officer of Nischintakoili Block declare that Santosh Kumar Mallik obtain 1197 votes and his contestant OP Party No.2 obtain 1193 votes and the petitioner declare as elected Sarpanch for the Katarapada G.P., by the margin of 4 votes at about 11 PM. And after the Election counting Agent and other peoples are left the counting center, on dtd 28.02.2022 the petitioner came to know that he became defeated by margin of 2 votes from the daily newspaper.
>
> 6. The petitioner inform to the Election Officer-cum-BDO Nischintakoili to recount the vote which has been illegally manipulated and rejected some valid votes of KHOLA

> CHHATA belongs to the petitioner and added some reject votes in the bunch of symbol of SUN belongs to OP No.2 and illegally declare that the OP Party No.2 is a winning candidate. And mention that wrongly mention that the petitioner obtain 1191 votes instead of 1197 votes and similarly the votesofOP no.2 remain constant. So that the petitioner appends that his valid votes are rejected and some rejected votes of OP party no.2 added in their favour."

9. Similarly the application for production of ballot box involving used and non-used ballots vide Annexure-2 filed on 30.06.2022 had also the following prayer in the above regard:-

> "It is therefore prayed that your Honour would graciously be pleased to allow the Election Petition.
>
> And give direction to O.P.No.1 to produce ballot box with used and non-used ballot papers and result sheet of Sarapanch for the Katarapada G.P. for recounting of the total votes and declared the result.
>
> And for this act of your kindness the Petitioner as in duty bound shall ever pray."

10. From paragraph nos.4 & 5 it appears, the party in opposition appears to have filed his objection vide Annexure-3 in October, 2022 specifically denying the allegations and objecting the entertainability of such application.

11. Undisputedly the Election Petitioner brought his affidavit by way of evidence bringing in the followings:-

> "6. That on dated 17.01.2022 the I submit nomination paper and the same is scrutinized on dtd 22.01.2022 and the parties are obtain symbols accordingly. And the election procedure started and the No.s of the voters casted their votes. On 18.02.2022 counting started at PanchayatPrahallad College Nischintakoili on the guidance of OP party no.1 and on dtd 27.02.2022 at about 10.30PM,the counting officers and counting booth center superintendent are created disturbances and with ill intention they are rejected some votes of the petitioner and did not give emphasis to receive any objection of the Election Agent and that after the Election Agent submit application before the Election Officer at about 10.55 PM to recount the rejected votes of Ward no.1 to 13 but the Election Officer rejects the application and procedure by showing high handedness. The Election Officer of Nischintakoili Block declare that Santosh Kumar Mallik obtain 1197 votes and his contestant OP Party No.2 obtain 1193 votes and the petitioner declare as elected Sarpanch for the Katarapada G.P. by the margin of 4 votes at about 11 PM. And after the Election counting Agent and other peoples are left the counting center, on dtd 28.02.2022, I came to know that I became defeated by margin of 2 votes from the daily news paper.
>
> 7. The I inform to the Election Officer-cum-BDO Nischintakoili to recount the vote which has been illegally manipulated and rejected some valid votes of KHOLA CHHATA belongs to me and added some reject votes in the bunch of symbol of SUN belongs to OP No.2 and illegally declare that the OP Party No.2 is a winning candidate. And wrongly mentioned that I obtain 1191 votes instead of 1197 votes and similarly the votes of OP no.2 remain constant. So that I appends my valid votes are rejected and some rejected votes of OP party no.2 added in their favour."

12. Now considering the claim and counter claim involving the application calling for ballot box and ballot details, the Election Tribunal came to observe as follows:-

"In view of the above aspect and after going through the case record as well as the submission of both side counsels it is seen that the present petitioner has filed Election Petition no.1/2022 with a prayer to recounting the votes of Katarapada G.P. and set aside the declaration of Opposite party no.2 as Sarapanch of Katarapada G.P. and declared that the petitioner is the elected Sarapanch of Katarapada G.P. under Nischntikoili Panchayat Samiti. It is further seen that the present petition also filed by the petitioner after closure of evidence from his side but the same is taken up for hearing by this court after closure of evidences from both the sides. In the present petition the petitioner prays to direct the opposite party no.1 for production of ballot box with used and non-used ballot papers and result sheet of Sarapanch for the Katarapada G.P. for recounting of total votes and declared the result. On perusal of the case record it is seen that the petitioner as well as the opposite party no.2 to 4 are contesting candidates for the post of Sarapanch of Katarapada G.P. under NischintikoiliPanchayatSamiti in Three Tire Panchayat Election- 2022 and the petitioner has been allotted the symbol of "KholaChhata", opp. Party no.2 is allotted the symbol of "Sun" and Opp. Party no.3 allotted the symbol of Kholabahi, opp.party no.4 is allotted the symbol of "Machha". But in the present case the petitioner has not cleared either in his pleadings or in the evidence the total votes polled stand in that Katarpada G.P. and out of which how many votes were secured by the opposite party no.3 and opposite party no.4 and the number of rejected votes. It is seen that the petitioner simply averred that on the day of counting the OP no.1 has declared through loudspeaker that "KholaChhata" (i.e. the symbol of petitioner) has secured 1197 votes and "Sun" (i.e. the symbol of OP-2) has secured 1193 votes and the petitioner is the returned Sarapanch candidate of Katarapada G.P. and he wined with a margin of 4(four) votes. But, on the next date of that declaration the petitioner came to know from the newspaper that the opp. Party no.2 is declared as returned candidate of Katarapada G.P. as the OP no.2 has secured 1193 votes and the petitioner has secured 1191 votes and the OP has wined with a margin of 2 (two) number of votes, for which the petitioner appends that his valid votes are rejected and some rejected votes also added in favour of Opposite party no.2. However, the petitioner has not provided the said allegation by any documentary or oral evidence and it is further seen that the petitioner is not sure about how many of his valid votes has been rejected and how many rejected votes were counted in favour of opposite party no.2. It is further seen that the petitioner also not examined his counting agents in this case. The Hon'ble Apex Court in (1975) 4 SCC 822 has held that an order for inspection and recount of the ballot papers cannot be made as a matter of the course. The reason is two-fold. Firstly such an order affects the secrecy of the ballot which under the law is not to be lightly disturbed. Secondly, the Rules provide an elaborate procedure for counting of ballot papers. It also pointed out that the Court would be justified in ordering a recount of the ballot papers only where: (1) the electionpetition contains an adequate statement of all the material facts on which the allegations of irregularity or illegality in counting are founded; (2) on the basis of evidence adduced such allegations are prima facie established, affording a good ground for believing that there has been a mistake in counting, and (3) the court trying the petition is prima facie satisfied that the making of such an order is imperatively necessary to decide the dispute and to do complete and effectual justice between the parties. " In **Kattinokkula Murali Krishna vs Veeramalla Koteswara Rao & Ors on 23 November, 2009**, it has been pointed out by the Hon'ble Court that Re-count of votes could be ordered very rarely and on specific allegation in the pleadings in the election petition that illegality or irregularity was committed while counting. The petitioner who seeks re-count should allege and prove that there was improper acceptance of invalid votes or improper rejection of valid votes. If only the court is satisfied about the truthfulness of the above allegations, it can order re-count of votes. Secrecy of ballot has always been considered sacrosanct in a democratic process of election and it cannot be disturbed lightly by bare allegations of illegality or irregularity in counting. It is further seen that **Hon'ble Orissa High Court in AIR 2013 (Orissa) 115** has held that 'the case of illegally accepting or rejecting the ballots has to be pleaded

giving the serial number of ballots and the source of information. Merely saying that petitioner's agent had told him was not enough. The name of the agent, who had furnished such information was to be disclosed in the election petition itself, note book on the basis of which such details had been furnished must be produced." In this case Hon'ble Court has also referred the decisions AIR 1970 SC 276, AIR 2004 SC 542 and AIR 2004 SC 2036. Considering the above aspect as well as the dictum of the Hon'ble Courts it is of the opinion that the present petitioner is not entitled to recounting of the votes and the present petition is liable to be rejected without any merits as because the petitioner has not come with cleaned hand before this court and he has not mentioned either in his pleading or in his evidence about the total votes polled stand in that Katarpada G.P. and out of which how many votes were secured by the opposite party no.3 and opposite party no.4 and the number of rejected votes. The petitioner has also filed to prove that how many his valid votes have been rejected by the op no.1 and also filed to prove the illegality and irregularity from the side of OP no.1. The petitioner also not examined his counting as well as voting agents in this case. Hence for the interest of justice the present petition is rejected. Put up on 17.11.2022 for argument of the Case.".

13. It is here observed that when the Petitioner claims, he has pleadings necessitating recounting through paragraph nos.5 & 6 and laid evidence in paragraph nos.6 & 7, whereas learned Counsel for Opposite Party No.2 objects to such claim on the premises that there is no fulfilment of requirement of ingredients to call for recounting of votes. This Court while keeping in view the pleadings and evidence of the person seeking recounting taken note herein in paragraph nos.8, 9 & 11, now proceeds to find the Law on such aspect already pronounced, which runs as follows:-

(**1) Dr. Jagjit Singh vs Giani Kartar Singh** and others : AIR 1966 (S.C.) 773 here the Hon'ble apex Court attending to the scope of Tribunal in case of recounting observed as follows:

"33. The true legal position in this matter is no longer in doubt. Section 92 of the Act which defines the powers of the Tribunal, in terms, confers on it, by Cl. (a), the powers which are vested in a Court under the Code of Civil Procedure when trying a suit, inter alia, in respect of discovery and inspection. Therefore, in a proper case, the Tribunal can order the inspection of the ballot boxes and may proceed to examine the objections raised by the parties in relation to the improper acceptance or rejection of the voting papers. But in exercising this power, the Tribunal has to bear in mind certain important considerations. Section 83 (1) (a) of the Act requires that an election petition shall contain a concise statement of the material facts on which the petitioner relies; and in every case, where a prayer is made by a petitioner for the inspection of the ballot boxes, the Tribunal must enquire whether the application made by the petitioner in that behalf contains a concise statement of the material facts on which he relies. Vague or general allegations that valid votes were improperly rejected, or invalid votes were improperly accepted, would not serve the purpose which S. 83(1)(a) has in mind. An application made for the inspection of ballot boxes must give material facts which would enable the Tribunal to consider whether in the interests of justice, the ballot boxes should be inspected or not. In dealing with this question, the importance of the secrecy of the ballot papers cannot be ignored, and it is always to be borne in mind that the statutory rules framed under the Act are intended to provide adequate safeguard for the examination of the validity or invalidity of votes and for their proper counting. It may be that in some cases, the ends of justice would make it necessary for the Tribunal to allow a party to inspect the ballot boxes and consider his objections about the improper acceptance or improper rejection of votes

tendered by voters at any given election; but in considering the requirements of justice, care must be taken to see that election petitioners do not get a chance to make a roving or fishing enquiry in the ballot boxes so as to justify their claim that the returned candidate's election is void. We do not propose to lay down any hard and fast rule in this matter; indeed, to attempt to lay down such a rule would be inexpedient and unreasonable."

(2) In **Bhabhi v. SheoGovind :** 1976 (1) SCC 687- Para-15, here the Hon'ble apex Court in the case of claim for recounting has formulated grounds as follows:-

"15. Thus on a close and careful consideration of the various authorities of this Court from time to time it is manifest that the following conditions are imperative before a court can grant inspection, or for that matter sample inspection, of the ballot papers:

(1) That it is important to maintain the secrecy of the ballot which is sacrosanct and should not be allowed to be violated on frivolous, vague and indefinite allegations;

(2) That before inspection is allowed, the allegations made against the elected candidate must be clear and specific and must be supported by adequate statements of material facts;

(3) The Court must be prima facie satisfied on the materials produced before the Court regarding the truth of the allegations made for a recount;

(4) That the Court must come to the conclusion that in order to grant prayer for inspection it is necessary and imperative to do full justice between the parties;

(5) That the discretion conferred on the Court should not be exercised in such a way so as to enable the applicant to indulge in a roving inquiry with a view to fish materials for declaring the election to be void; and

(6) That on the special facts of a given case sample inspection may be ordered to lend further assurance to the prima facie satisfaction of the Court regarding the truth of the allegations made for a recount, and not for the purpose of fishing out materials."

If all these circumstances enter into the mind of the Judge and he is satisfied that these conditions are fulfilled in a given case, the exercise of the discretion would undoubtedly be proper."

(3) ***In P.K.K. Shamsudeen v. K.A.M.MappillaiMohindeen*** : (1989) 1 SCC 526-Para-11

11. In *Ram SewakYadav v. Hussain Kamil Kidwai* [AIR 1964 SC 1249 : (1964) 6 SCR 238 : 26 ELR 14] this Court has set out the circumstances when an order for inspection of ballot papers can be ordered in the following terms: (SCR pp. 244-45)

"An order for inspection may not be granted as a matter of course: having regard to the insistence upon the secrecy of the ballot papers, the court would be justified in granting an order for inspection provided two conditions are fulfilled: (i) that the petition for setting aside an election contains an adequate statement of the material facts on which the petitioner relies in support of his case; and (ii) The Tribunal is prima facie satisfied that in order to decide the dispute and to do complete justice between the parties inspection of the ballot papers is necessary."

But an order for inspection of ballot papers cannot be granted to support vague pleas made in the petition not supported by material facts or to fish out evidence to support such pleas. The case of the petitioner must be set out with precision supported by averments of material facts. To establish a case so pleaded an order for inspection may undoubtedly, if the interests of justice require, be granted. But a mere allegation that the petitioner suspects or believes that there has been an improper reception, refusal or rejection of votes will not be sufficient to support an order for inspection."

(4) Mahant Ram Prakash Dass v. Ramesh Chandra : *(1999) 9 SCC 420 – Considering irregularity in vote process Supreme Court held in para-13*

"13. A candidate or his agent has an opportunity to ask for re-count at two stages: the first, before election result is finally declared, and the second, by way of election petition before the High Court. An application under Rule 63(2) of the Conduct of Elections Rules is to be given immediately after the votes secured by each of the candidates is announced under Rule 63(1), but such an application cannot be given after the candidate is declared elected under Rule 64. If an application is made under Rule 63(2) the Returning Officer shall decide the matter either by allowing the application in whole or in part or may reject it in its entirety, if it appears to him to be frivolous or unreasonable. The decision shall be in writing containing reasons therefor. The application for recount should contain valid precise grounds on which the re-count is asked for. When the rules provide for enough opportunity to a candidate or his agent to watch the counting process before the result is declared and if an objection is raised as to the validity of any ballot paper and if such objection is rejected improperly, it would afford a basis for re-count in an election petition. The secrecy of the vote has to be maintained and demand for re-count should not ordinarily be granted unless the election petitioner makes out a prima facie case with regard to error in counting of such magnitude that the result of the election of the returned candidate may be affected. Smallness of the victory margin by itself may not be a sufficient ground for re-count. However, if a prima facie case is made out as to error in counting, a small margin by which the returned candidate succeeded in the election assumes significance, inviting re-count."

(5) *In* ***JeetMahinder Singh Vrs. Harmindar Singh Jasi*** (1999) 9 SCC 386, the success of a candidate who has won an election should not be lightly interfered with. Any person seeking such interference must strictly confirm to the requirements of the law.

(6) In Chandeswar Saw Vrs. BrijBhushan Prasad &Ors. : (2020) 12 SCC 70 (Para 15 & 17)

"15. The question is: whether material facts to justify an order of recount of votes has been clearly pleaded and the same have been proved by the appellant / election petitioner in the present case? That issue has been analysed by the Election Tribunal extensively, as is evident from the analysis made by it, which commenced to the learned single Judge. Since the appellant had substantiated the allegation made in the election petition and the Election Tribunal being convinced about the said claim proceeded to issue order of recount. No fault can be found with that approach of the Election Tribunal nor it is possible to suggest that the Election Tribunal or the learned single Judge was not conscious about the necessity to substantiate the allegation about the serious irregularities committed by the officials during the counting.

17. A *priori*, we have no hesitation in concluding that the Division Bench has interfered with the well-reasoned judgment and order passed by the Election Tribunal, which was justly upheld by the learned single Judge, directing recount of votes. It appears that after the recount, the appellant / election petitioner has secured 95 excess valid votes, more than the valid votes secured by respondent No. 1. That has reinforced the challenge set up by the appellant that the officials had committed serious irregularities bordering on intentional manipulation of the valid votes secured by the appellant. As a result, we have no hesitation in upholding the order of recount of votes, as passed by the Election Tribunal (dated 11.10.2018) and justly upheld by the learned single Judge (vide order dated 6.3.2019), in the facts of the present case."

(7) ***Ananda Chandra OjhaVrs. Ashok Saho*** *: AIR 2013 ORI 115 :-*

6. Law is well settled that before an Election Tribunal can permit scrutiny of ballot papers and order re-count, two basic requirements are necessary, viz. (i) the election petition seeking

re-counting of the ballot papers must contain an adequate statement of all the material facts on which the allegations of irregularity or illegality in counting are founded, and (ii) on the basis of evidence adduced in support of the allegations, the Tribunal must be, prima facie, satisfied that in order to decide the dispute and to do complete and effectual justice between the parties, making of such an order is imperatively necessary, are satisfied. In an election petition, the issues are to be decided differently and the order for recounting of votes may not be a final relief.

9. It is solemn duty of the appellant to plead material facts. The case of illegally accepting or rejecting the ballots has to be pleaded giving the serial number of ballots and the source of information. Merely saying that petitioner's agent had told him was not enough. The name of the agent, who had furnished such information was to be disclosed in the election petition itself, note book on the basis of which such details had been furnished must be produced (Vide JitendraBhadur Singh v. Krishna Behari, AIR 1970 SC 276, M. Chinnasamy v. K. C. Palanisamy and others, AIR 2004 SC 541, and Chandrika Prasad Yadav v. State of Bihar and others, AIR 2004 SC 2036)."

This Court here also takes into account the support of a recent decision of this Court in the case of ***Rabinarayan Das Vrs. State of Orissa &Ors***. in W.P.(C) No.3735 of 2023 decided on 17.02.2023.

14. Keeping in view that there is at least some pleadings to support the case of the Petitioner requiring at least scrutiny of documents to find support to his claim in para-5, 6 of the election petition for recounting of entire votes, this Court here finds, the Hon'ble apex Court here laid down the position of law as follows:-

(1) ***Shri Shashi Bhushanvs Prof. Balraj Madhok and others*** : AIR 1972 SC 1251 – 1972 SCR (2) 177

"18.The next question is whether it is necessary to inspect all the ballot papers as has been ordered by the trial Judge. We think that a general inspection should not be permitted, until there is satisfactory proof in support of those allegations. For finding out whether there is any basis for those allegations, it would be sufficient if some ballot papers say about 600 out of those polled by each of the returned candidates are selected from different bundles or tins in such a way as to get a true picture. He may also select about 200 ballot papers cast in favour of the election petitioners for comparison. All the selected ballot papers at the first instance be examined by the learned Judge with the assistance of the Counsel for the parties as well as the parties. If the learned Judge comes to the conclusion that the matter should be further probed into, he may take evidence on the points in issue including evidence of expert witnesses. Thereafter it is open to him to direct or not to direct a general inspection of the ballot papers. But in doing so he will take care to maintain the secrecy of the ballot."

(2) ***Suresh Prasad Yadavvs Jai Prakash Mishra and others*** :AIR 1975 SC 376

"5.Before dealing with these contentions, we may recall, what this Court has repeatedly said, that an order for inspection and recount of the ballot papers cannot be made as a matter of course. The reason is twofold. Firstly such an order affects the secrecy of the ballot which under the law is not to be lightly disturbed. Secondly, the Rules provide an elaborate procedure for counting of ballot papers. This procedure contains so many statutory checks and effective safeguards against trickery, mistakes and fraud in counting, that it can be called almost foolproof. Although no hard and fast rule can be laid down, yet the broad guidelines, as discernible from the decisions of this Court may be indicated thus : The Court would be justified in ordering a recount of the ballot papers, only where :

(1) the election-petition contains an adequate statement of all the material facts on which the allegations of irregularity or illegality in counting are founded;

(2) On the basis of evidence adduced such allegations are prima facie established, affording a good ground SC378 for believing that there has been a mistake in counting; and

(3) The Court trying the petition is prima facie satisfied that the making of such an order is imperatively necessary to decide the dispute and to do complete and effectual justice between the parties.

27.Any other interpretation of Rule 93 and its acope would make it difficult, if not altogether impossible, for the Returning Officer to perform the various functions and duties enjoined by the rules at the stage of Counting. This will be clear from a reference to the other Rules. Take for instance R. 56 which requires that the ballot papers shall first be taken out from the boxes used in a constituency and mixed together and then arranged in convenient bundles and scrutinised. Sub-rule (2) of Rule 56 further requires inter alia that if a ballot paper does not bear any mark at all or does not bear both the mark or the signature which it should have borne under the provisions of sub-rule (1) of Rule 38, it shall be rejected by the Returning Officer. To perform this duty, it would be absolutely necessary for the Returning Officer to inspect such ballot papers. Indeed, in the present case, an objection was raised that fifty unused ballot papers in the packet did not bear the mark or signature required by Rule 38 (l).

The Returning Officer was therefore, fully competent to open the packet and inspect and count the ballot papers found therein.

29. In the light of the above discussion, the conclusion is inescapable that tile act of the Returning Officer in opening the packet, and in inspecting and counting the unused ballot-papers found therein, far from amounting to an illegality, was necessary for the due performance of the duty enjoined on him by the Rules."

15. Considering the pleadings in para-5 & 6 of the Election dispute specifically alleging that on the date of counting the Petitioner was declared elected by securing 197 number of votes and Opposite Party No.2 secured 193 number of votes, even assuming that there is no other specific allegation but the Petitioner for recounting at least could have been allowed to the extent verifying the counting sheet, result sheet /counting folio with counter signature of both agents, superintendents of booth nos.1 to 3, documents disclosing at least number of votes obtained by Petitioner and Opposite Party No.2 and disclosing the result declared by the Election Officer, to ascertain the actual votes polled by each of the candidates here in contest.

16. This Court in the consideration process also considered the citations cited at Bar.

17. Perused the findings of the Election Tribunal in the impugned order. This Court finds, even though the Tribunal has made endeavor to drive through the decision of the Hon'ble apex Court as well as this High Court, but failed in appreciating the decisions keeping in view the allegation to the extent at paragraph nos.5 & 6 in pleadings and paragraph nos. 6 & 7 in his evidence discussed hereinabove in paragraph nos.8 & 10 to consider the request of the Petitioner limited to at least scrutinizing the counting folio signed by the Election agents along with the Superintendents taking part in counting papers prepared by the Election Officer

before declaring result and booth wise counting sheets of votes of Katarapada Gram Panchayat held on 27.02.2022 and proceeded accordingly.

18. In the above circumstance, interfering in the impugned order and setting aside the orders at Annexure-5, this Court in partial allowing of the application of the Petitioner at Annexure-2(series), directs the Election Tribunal to at least call for and peruse the counting sheet in respect of each booth, result sheet, counting folio with counter signature of both agents, Superintendent of booth nos.1 to 3, documents disclosing at least number of votes obtained by Petitioner and Opposite Party No.2 in the declaration of result involving the counting of votes dated 27.02.2022 involving Katarapada Gram Panchayat to find support, if any, to the allegation of the Petitioner in para nos.5 & 6 in the Election Petition and if necessary in the involvement of counsel for both parties appearing therein and proceed further as per his observation in terms of above direction. Let the Election Tribunal complete the above exercise at least within a period of seven working days of pronouncement of this judgment.To avoid loss of further time, looking to the nature of dispute involved herein this Court directs Opposite Party No.1 and/or the custodian of Ballot Boxes and its related papers including declaration of result, to cause production of documents indicated in details in para 18 for the election of Sarpanch of Katarapada Gram panchayat within a period of four working days hereafter and to assist the Election Tribunal for his discharging duty in terms of the above direction.

19. Let a free copy of this order be handed over to the State Counsel for immediate forwarding of copy of this judgment to Opposite Party No.1 for timely action at his end.

20. This Writ Petition succeeds, but to the extent indicated hereinabove. There is, however, no order as to costs.

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2023 (I) ILR - CUT – 761

S.K. SAHOO, J.

I.A. NO.1623 OF 2022

(Arising out of CRLA No.548 of 2022
disposed of on 05.09.2022)

SUDHANSU SETHI .....Appellant

.V.

1. STATE OF ODISHA
2. MANAS KUMAR JENA .....Respondents

THE SCHEDULED CASTES AND THE SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT, 1989 – Section 15A (3) – Notice to Victim or their dependants – Whether it is mandatory or not? – Held, it is mandatory.

Case Law Relied on and Referred to :-
1. A.I.R 2021 SC 5610: Hariram Bhambhi .Vs. Satyanarayan & Anr.

For Appellant : Mr. Ashok Jena
For Respondents : Mr. Arupananda Das, AGA (Respondent no.1)
Mr. Soura Ch. Mohapatra (Respondent no.2)

ORDER Date of Hearing: 13.12.2022 :Date of Order: 15.12.2022

S.K. SAHOO, J.

1. This interim application has been filed by respondent no.2 Manas Kumar Jena, who is the informant in Mahanga P.S. Case No. 236 of 2018 corresponding to C.T. Case No. 158 of 2018 pending in the Court of learned Presiding Officer, Special Court under S.C. & S.T. (PoA) Act, Cuttack for recalling the order dated 05.09.2022 passed in CRLA No. 548 of 2022 in which this Court has been pleased to direct release of the appellant Sudhansu Sethi on bail.

2. CRLA No. 548 of 2022 filed by the appellant was taken up for the first time on 16.08.2022 for orders and taking into account the fact that one of the offences alleged is under section 3 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereafter in short, '1989 Act'), this Court directed the learned counsel for the appellant to serve an extra copy of the appeal memo along with enclosures on the learned counsel for the State by 17.08.2022 for onward transmission to the Inspector in-charge of Mahanga police station (hereinafter in short, 'I.I.C.') for its service on the respondent no.2 and to intimate him that if he so likes, he can engage a counsel to oppose the prayer for bail and a written proof regarding service of notice was directed to be obtained from the respondent no.2. Learned counsel for the State was also asked to obtain the case diary and instruction with regard to the criminal antecedents, if any, against the appellant. The matter was then taken up 05.09.2022 and the learned counsel for the State submitted that notice on the informant was sent to the I.I.C., who reported that neither the informant (respondent no.2) nor any of his family members was present in village Nrutanga as per the address given in the F.I.R. Then this Court after hearing the learned counsel for the appellant so also the learned counsel for the State and taking into account the nature of accusation against the appellant, absence of any overt act against him and his period of detention in judicial custody so also release of the co-accused on bail, directed the appellant to be released on bail with certain terms and conditions.

3. In the interim application, it has been urged, inter alia, that the report that has been furnished by the I.I.C. that the respondent no.2 and his family

members were not available in the village Nrutanga is wrong and the respondent no.2 is residing in Bhubaneswar and he is a Government servant working as Section Officer in the office of the Director of Secondary Education, Bhubaneswar and he used to visit his village on holidays and also on alternate Saturdays and Sundays.

On such submission being made on 02.11.2022 by the learned counsel for the respondent no.2, the I.I.C. of Mahanga police station was directed to file an affidavit on the interim application and he was also directed to remain present in person on the next date. The matter was taken up on 06.12.2022 and on that date, an affidavit was filed by the I.I.C. wherein it is mentioned, inter alia, that he received the copy of the order dated 16.08.2022 as per the letter dated 17.08.2022 of the office of the learned Advocate General on 21.08.2022 and after receiving the same, he visited the village Nrutanga to serve the notice on the respondent no.2, but found him absent and the house was also locked and on local enquiry, he ascertained that the respondent no.2 is not residing in village Nrutanga and accordingly, compliance report was submitted to the office of the learned Advocate General. It is further stated in the affidavit that immediate steps have been taken to serve the notice on the respondent no.2 as per the address furnished in the cause title of the CRLA, which is also the address given in the F.I.R., but it could not be done due to the absence of the respondent no.2. The other allegations which have been made in the interim application have been denied by the I.I.C. in his affidavit. Copy of the affidavit filed by the I.I.C.was served on thelearned counsel for the respondent no.2, who took time to file objection to such affidavit. Accordingly, the case was posted to 13.12.2022 and the I.I.C. was directed to remain present on that date.

The respondent no.2 has filed his objection to the affidavit filed by the I.I.C. wherein it is stated that the respondent no.2 is serving in the State Secretariat, Bhubaneswar and staying at Bhubaneswar. It is further stated that the I.I.C. has filed an affidavit in the connected CRLA No. 338 of 2021 which was filed by co-accused Manas Ranjan Pani for bail in which after grant of bail, interim application was filed for recall of the bail order and in that affidavit, the I.I.C. has mentioned that during his attempt to serve the notice on the informant, from the local enquiry, it came to his knowledge that the respondent no.2 is residing at Bhubaneswar and therefore, steps could have been taken to serve the notice on the respondent no.2 in his Bhubaneswar address. It is further submitted that since no sincere attempt has been made by the I.I.C. to serve the notice on the respondent no.2 and sub-section (3) and (5) of 15-A of 1989 Act confers a valuable right on the victim or his dependent to a reasonable, accurate and timely notice of any Court proceeding including bail proceeding and also right of hearing during such proceeding and the same has been flouted in the case, the order dated 05.09.2022 needs to be recalled and the matter is to be heard afresh.

4. Mr. Soura Ch. Mohapatra, learned counsel appearing for the respondent no.2 emphatically contended that that there are ample evidence on record against the

petitioner relating to his involvement in the ghastly crime and the statements of eye witnesses get corroboration from the medical evidence and the prayer for bail of co-accused persons has been rejected and all the materials could have been placed to oppose the prayer for bail, but on the basis of a false report submitted by the I.I.C.,the informant could not get a chance to oppose the prayer for bail for which the bail order should be recalled. He highlighted that the facts of the case, the nature of allegations, gravity of offences and role attributed against the appellant have not been properly placed by the learned counsel for the State. Reliance was placed on the decision of the Hon'ble Supreme Court in the case of **Hariram Bhambhi -Vrs.- Satyanarayan and another reported in A.I.R 2021 Supreme Court 5610**.

5. Mr. Arupananda Das,learned Additional Government Advocate on the other hand submitted that there was no negligence on the part of the I.I.C. in making attempts to serve the notice on the respondent no.2 as per the order of this Court dated 16.08.2022 and in that respect, he placed the station dairy/general diary entries dated 21.08.2022,22.08.2022 and 24.08.2022 of Mahanga police station from which it reveals that on 21.08.2022, the I.I.C. received the order of this Court through the letter issued from the office of the learned Advocate General and on 22.08.2022 so also on 24.08.2022, attempts were made by the I.I.C. to visit the village Nrutanga to serve the appeal notice on the respondent no.2, but it was found that his house was locked from outside and after due enquiry in the locality, it came to light that neither the respondent no.2 nor any of his family members was residing in his native village at Nrutanga. He objected to the submission made by the learned counsel for the respondent no.2 that there was laches from the side of the State to oppose the application for bail.

6. The report which was furnished by the I.I.C. dated 26.08.2022 to the office of the learned Advocate General indicates that he along with his other police staff had been to village Nrutanga to serve the notice on the respondent no.2, but unfortunately it could not be served as neither the respondent no.2 nor any of his family members was residing at village Nrutanga and from the local confidential enquiry,it was also ascertained that the informant is not residing in his native village.

7. In the case of **Hariram Bhambhi**(supra), it has been held as follows :

> "13. Section 15A of the SC/ST Act contains important provisions that safeguard the rights of the victims of caste-based atrocities and witnesses. Sub-sections (3) and (5) of Section 15A specifically make the victim or their dependent an active stakeholder in the criminal proceedings. These provisions enable a member of the marginalized caste to effectively pursue a case and counteract the effects of defective investigations...
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> 14. Sub-section (3) of Section 15A confers a statutory right on the victim or their dependents to reasonable,accurate, and timely notice of any court proceeding including a bail proceeding. In addition, sub-section (3) requires a Special Public Prosecutor or the State Government to inform the victim about any proceeding

> under the Act. Sub-section (3) confers a right to a prior notice, this being evident from the use of the expression "reasonable, accurate, and timely notice of any court proceeding including any bail proceeding". Sub-section (5) provides for a right to be heard to the victim or to a dependent.
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> The provisions of sub-section (3) which stipulate the requirement of notice and of sub-section (5) which confers a right to be heard must be construed harmoniously. The requirement of issuing a notice facilitates the right to be heard.
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> 17. The finding of the Gujarat High Court that the requirement of issuing notice of a court proceeding to a victim or a dependent Under Section 15A(3), in order to provide them an opportunity of being heard, is mandatory, finds echo in multiple High Court decisions including a decision of the Rajasthan High Court. We find ourselves in agreement with the proposition and hold that sub-sections (3) and (5) of Section15A are mandatory in nature.
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> 20. Atrocities against members of the Scheduled Castes and Scheduled Tribes are not a thing of the past. They continue to be a reality in our society even today. Hence the statutory provisions which have been enacted by Parliament as a measure of protecting the constitutional rights of persons belonging to the Scheduled Castes and Scheduled Tribes must be complied with and enforced conscientiously....
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> 21. We also emphasize that sub-section (3) of Section 15A provides that a reasonable and timely notice must be issued to the victim or their dependent. This would entail that the notice is served upon victims or their dependents at the first or earliest possible instance. If undue delay is caused in the issuance of notice, the victim,or as the case may be, their dependents, would remain uninformed of the progress made in the case and it would prejudice their rights to effectively oppose the defence of the Accused. It would also ultimately delay the bail proceedings or the trial, affecting the rights of the Accused as well."

In the aforesaid case, no notice was issued to the informant under the provisions of section 15A of the 1989 Act and bail was granted to the accused, which was set aside by the Hon'ble Supreme Court.

8. In the case in hand, it does not fall within the factual category as in the case of **Hariram Bhambhi** (supra) inasmuch as not only on 16.08.2022 there was a direction to serve the copy of the appeal memo along with enclosures on the respondent no.2 but also to apprise him about the date when the CRLA would be taken up and to intimate him if he so likes, he can engage a counsel to oppose the prayer for bail. The materials produced before this Court, particularly, the station diary/general diary entry, which reveals that on two dates i.e. on 22.08.2022 and 24.08.2022, the I.I.C. along with other police staff had been to village Nrutanga, which is the village of the respondent no.2 for serving notice on him, but the house was locked and nobody was residing in the native village of the respondent no.2 and from the local enquiry, it was also ascertained that neither the respondent no.2 nor

his family members was residing in village Nrutanga. Therefore, intimation which has been provided by I.I.C. on 26.08.2022 to the office of the learned Advocate General is found to be correct and the contents of such intimation are getting corroboration from the station diary/general diary entries.

In that view of the matter, the submission of the learned counsel for the respondent no.2 that a false report has been submitted by the I.I.C. regarding the absence of respondent no.2 and his family members in village Nrutanga cannot be accepted. When the informant has not given his present address in the F.I.R. nor communicated the same to the I.O./I.I.C. of Mahanga police station and nobody could able to give his exact address though from the local enquiry, it came to the knowledge of the I.I.C. that the respondent no.2 was residing at Bhubaneswar, I do not find any flaw in the report submitted by the I.I.C. to the office of the learned Advocate General on 26.08.2022.

9. There is no dispute that in terms of sub-section (3) and (5) of section 15-A(1) of the 1989 Act, the victim or his dependent has a right to reasonable, accurate and timely notice of any Court proceeding including any bail proceeding pending in any Court and also a right to oppose the application for bail if he so likes, but the bail application of an accused who is in jail custody cannot be kept pending for a long period in spite of sincere attempt being made to serve the notice on the victim or his dependent in the known address. A duty is cast on the informant/victim also to communicate to the I.O./I.I.C. of the concerned police station his present address,in case he changes his address or resides at another place for his avocation or for some other reason other than the address furnished in the F.I.R. It is also the duty of the prosecuting agency to collect the contact number/e-mail/whatsApp number of the victim or his dependent, if available to make communication with them in case the situation so demands either for service of notice in abail application filed by the accused or for service of summons during trial.If the prosecuting agency deliberately submits a false report regarding absence of the victim or his dependent in the address given in the F.I.R.or makes no sincere attempt for service of the notice/summons of the proceeding at different stages, then a valuable right, which has been conferred under the statute to the victim or his dependent would be frustrated. Strict action can be taken against the erring officials, who fail to comply the provisions under sub-section (3) of section 15-A of the 1989 Act and submit a false report. While submitting the report to the Court regarding non-availability of the victim or his dependent in the known address, necessary documents/proof substantiating the attempts made for service of the notice are also to be placed before the Court, so that the Court would be in a position to proceed further to adjudicate the bail application of an accused to prevent further delay.

10. During the course of hearing of the interim application, learned counsel for the State on query being made by this Court,on verification of the case records submitted that there is no criminal antecedent against the appellant. He further

submitted that there is no material on record that after being enlarged on bail by this Court as per order dated 05.09.2022,there was any misutilization of the liberty by the appellant.

Learned counsel for the appellant submitted that in the meantime, in the learned trial Court out of forty charge sheet witnesses, nine witnesses have been examined including the informant as P.W.4 and two injured eye witnesses, namely, Paresh Kumar Jena as P.W.2 and Chandramani Jena as P.W.3 and they have stated in an omnibus manner against the appellant. He further submitted that at this stage, when there is no chance of tampering with the evidence and the appellant after being released on bail has not misutilised his liberty, the bail order should not be recalled.

11. Considering the submissions made by the learned counsel for the respondent no.2, learned counsel for the State as well as the learned counsel for the appellant and after going through the affidavits filed by the I.I.C. along with the documents so also the objection filed by the respondent no.2, I am not inclined to recall the order dated 05.09.2022. Accordingly, the I.A. stands dismissed.

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2023 (I) ILR - CUT - 767

S.K. SAHOO, J.

JCRLA NO. 53 OF 2019

PRADEEP KUMAR ORAM .....Appellant

.V.

STATE OF ODISHA .....Respondent

INDIAN PENAL CODE, 1860 – Section 376 r/w Section 4 of the POCSO Act – Statutory rape – Meaning – Held, if the woman is under 18 years of age, then sexual intercourse with her with or without consent is rape – This is commonly referred to as statutory rape in which the willingness or consent of a woman below the age of 18 years for having sexual intercourse is rendered irrelevant and inconsequential. (Para 9)

Case Law Relied on and Referred to :-

1. (2017) 10 SCC 800 : Independent Thought Vs. Union of India.

For Appellant : Miss Manaswini Rout, Amicus Curiae

For Respondent : Mr. Rajesh Tripathy, Addl. Standing Counsel

JUDGMENT Date of Hearing & Judgment: 15.03.2023

S.K. SAHOO, J.

The appellant Pradeep Kumar Oram faced trial in the Court of learned Additional Sessions Judge -cum- Special Judge, Keonjhar in Special Case No.77/02

of 2016 for commission of offences punishable under sections 363/376(2)(i) of the Indian Penal Code and section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereafter referred to as 'POCSO Act') on the accusation that on 05.01.2016 at about 7.00 p.m., he kidnapped the victim, who was a minor girl aged about fifteen years from TISCO Colony, Bamebari and committed rape on her on that day night at TISCO Camp, Joda.

The learned trial Court vide impugned judgment and order dated 23.02.2019 though acquitted the appellant of the charge under section 363 of the Indian Penal Code, but found him guilty under section 376(2)(i) of the Indian Penal Code so also section 4 of the POCSO Act and sentenced him to undergo R.I. for a period of ten years and to pay a fine of Rs.5,000/- (rupees five thousand), in default, to undergo further R.I. for one year for the offence under section 376(2)(i) of the Indian Penal Code and no separate sentence was awarded for the offence under section 4 of the POCSO Act in view of the section 42 of the said Act.

2. P.W.1 Anjali Patra, the mother of the victim lodged the first information report on 06.01.2016 before the Inspector in-charge of Bamebari police station and on the basis of such report, Bamebari P.S. Case No.04 of 2016 was registered under section 363 of the Indian Penal Code against the appellant. It is stated in the first information report that on 05.01.2016 at about 7.00 p.m., the victim, who was aged about fourteen years left the house and gone somewhere and the informant suspected that the appellant had kidnapped her. It is further indicated that while leaving the house, the victim had taken some money with her. The Inspector in-charge of Bamebari police station entrusted P.W.9 Prativa Manjari Sahoo, the S.I. of Police attached to Bamebari police station to investigate the matter.

During course of investigation, the Investigating Officer examined the informant and other witnesses, visited the spot, prepared the spot map (Ext.11) and on the same day i.e. on 06.01.2016, the victim was rescued so also the appellant was apprehended at Keonjhar bus stand. The statement of the victim was recorded and the appellant was arrested for committing the offences under sections 363/376(2)(i) of the Indian Penal Code and section 4 of the POCSO Act. The victim as well as the appellant was sent for medical examination. The biological samples of the appellant so also the victim, which were collected by the Medical Officer were seized and prayer was made by the I.O. for recording the 164 Cr.P.C. statement of the victim girl and on 07.01.2016, the same was recorded. The school admission register of the victim was seized by the Investigating Officer on 09.01.2016 from the Headmaster of the school which indicated the date of birth of the victim to be 04.03.2001.The school admission register was given in zima of the Headmaster as per zimanama (Ext.6).After receipt of the medical examination reports, the Investigating Officer made a prayer to the Court to send the exhibits to S.F.S.L.,Rasulgarh,Bhubaneswar for Chemical Examination and she also received the Chemical Examination Report vide Ext.21 and on completion of investigation, P.W.9 submitted the charge sheet

against the appellant under sections 363/376(2)(i) of the Indian Penal Code and section 4 of the POCSO Act.

3. After submission of charge sheet, the learned trial Court framed charges against the appellant and since the appellant refuted the charges, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prosecute him and establish his guilt.

4. During course of trial, in order to prove its case, the prosecution has examined as many as nine witnesses.

P.W.1 Anjali Patra is the informant in the case and the mother of the victim and she stated that on the date of occurrence, she went to the market with her son and after returning from market to home, she found that the victim was not present in the house and the front door and back door of the house were opened and she searched the victim but could not trace her out for which she went to Bamebari police station and reported the matter. She further stated that on 06.01.2016, when police intimated her that they have rescued her daughter from Keonjhar bus stand, she along with her mother went to police station and on being asked, the victim narrated the incident of commission of rape on her by the appellant. She stated that the victim was fourteen to fifteen years of age at the time of occurrence and was studying in Class-X.

P.W.2 Swati Patra is the elder sister of the victim, who stated that during the occurrence period, she was studying at Joda and staying in hostel and on 06.01.2016, when she received a phone call from her mother (P.W.1), she came home on the same day and on her return, P.W.1 disclosed the entire incident. She further stated that at the time of occurrence, the victim was aged about fourteen years.

P.W.3 is the victim. She supported the prosecution case and stated about the commission of rape on her by the appellant. She further stated that her date of birth is 04.03.2001 as per her H.S.C. certificate.

P.W.4 Naresh Chandra Mohanta was the Headmaster of Saraswati Sishu Mandir, who produced the school admission register before the Investigating Officer wherein the date of birth of the victim was reflected as 04.03.2001. He stated about the seizure of such register and later on the same was given in his zima.

P.W.5 Rajmani Munda is an independent witness, who did not support the prosecution case for which he was declared hostile by the prosecution and cross-examined.

P.W.6 Dr. Jagdish Prasad Sahoo, who was working as Medical Officer in-charge, C.H.C., Joda, examined the appellant on police requisition on 07.01.2016 and proved his report marked as Ext.9.

P.W.7 Khageswar Patra is the father of the victim and also the husband of P.W.1. He stated that on the date of occurrence, he was in his duty and after finishing his duty, he came home at 10.30 p.m. and P.W.1 disclosed that her daughter was missing and he went for searching but could not trace her out and P.W.1 went to the police station and lodged the F.I.R. He further stated that at the time of occurrence, the victim was aged about fifteen years.

P.W.8 Dr. Nibedita Nayak, who was working as Medical Officer, D.H.H., Keonjhar, examined the victim on police requisition on 07.01.2016 and proved her report marked as Ext.10.

P.W.9 Prativa Manjari Sahoo was the S.I. of Police, Bamebari police station and she is the Investigating Officer of the case.

The prosecution exhibited twenty one numbers of documents. Ext.1 is the F.I.R., Ext.2 is the H.S.C.Certificate of the victim, Ext.3 is the 164 Cr.P.C. statement of the victim, Ext.4 is the seizure list of wearing apparels of the victim, Ext.5 is the seizure list of school admission register, Ext.6 is the zimanama, Ext.7 is the admission register having certificate, Ext.7/1 is the relevant entry in respect of date of birth of the victim,Ext.8 is the transfer certificate of the victim,Ext.9 is the medical examination report of the appellant, Ext.10 is the medical examination report of the victim, Ext.11 is the spot map, Ext.12 is the medical requisition of the victim, Ext.13 is the medical requisition in favour of the appellant, Ext.14 is the seizure list of biological samples of the appellant, Ext.15 is the seizure list of wearing apparels of the appellant, Ext.16 is the seizure list of biological samples of the victim, Ext.17 is the prayer made for recording 164 Cr.P.C. statement of the victim, Ext.18 is the prayer for sending the seized exhibits, Ext.19 is the office copy of forwarding letter to S.F.S.L., Bhubaneswar for Chemical Examination, Ext.20 is the copy of order passed by the Special Court and Ext.21 is the Chemical Examination Report.

No witness has been examined on behalf of the defence.

5. The defence plea of the appellant is that he was working as a driver in the house of the victim and as per the instruction given by the victim, he brought her to Keonjhar but the police apprehended him and also took the victim from Keonjhar bus stand.

6. The learned trial Court after analyzing the oral and documentary evidence on record came to hold that there is no discrepancy between the date of birth of the victim as mentioned in the H.S.C. Certificate and the date as mentioned in the school admission register filed before the Court.It was further held that the most authenticated document which has been proved before the Court without objection i.e. the H.S.C. Certificate of the victim wherein the date of birth has been mentioned as 04.03.2001 and therefore, the victim was minor as on the date of occurrence and

less than eighteen years. The learned trial Court further held that nothing has come out from the mouth of P.W.1 and P.W.3 (victim) that the appellant had forcibly taken the victim from the house from the lawful guardianship of her parents and therefore, the prosecution has failed to prove its case against the appellant for the offence under section 363 of the Indian Penal Code. It was further held that from the conjoint reading of the evidence of the victim and other witnesses coupled with the S.F.S.L. report (Ext.3), the prosecution has well proved its case that the victim was ravished by the appellant and she was less than sixteen years at the time of occurrence.Accordingly, the learned trial Court found the appellant guilty of the offences under section 376(2)(i) of the Indian Penal Code so also section 4 of the POCSO Act.

7. Miss Manaswini Rout, learned Amicus Curiae appearing for the appellant contended that there is doubt about the age of the victim and the finding of the learned trial Court that the victim was less than eighteen years at the time of occurrence is not acceptable. She further submitted that the victim was medically examined by P.W.8, who did not find any bodily injury suggestive of forcible sexual intercourse and there was no sign and symptom of sexual intercourse and therefore, the evidence of the victim that the appellant kept sexual relationship with her many times in the Hindi Medium School, Joda on the occurrence night and it was the first sexual experience is not acceptable, particularly, when it has been brought out on the cross-examination of the doctor that the vaginal canal admitted two fingers and the signs suggested that the victim was accustomed to regular sexual intercourse. It is highlighted that though according to the victim, the place of occurrence was a Hindi Medium School located at TISCO Camp, Joda, but no one from the said school has been examined and the Investigating Officer has not made spot visit of the school compound, which is a serious lacuna in the prosecution case and therefore, it is a fit case where benefit of doubt should be extended in favour of the appellant.

Mr. Rajesh Tripathy, learned Additional Standing Counsel appearing for the State of Odisha, on the other hand, supported the impugned judgment and contended that when the date of birth as mentioned in the H.S.C. Certificate tallies to the date of birth as mentioned in the school admission register and the date of birth of the victim in both the documents have been mentioned as 04.03.2001 and the occurrence in question took place on 05.01.2016, therefore, the learned trial Court has rightly came to the conclusion that the victim was less than eighteen years at the time of occurrence. Learned counsel for the State submitted that though the victim appears to be a consenting party, but in view of the clause 'Sixthly' of section 375 of the Indian Penal Code, wherein it is stated that a man is said to commit 'rape', if he commits any of the act as mentioned under (a), (b), (c) and (d) against a lady with or without her consent when she is under eighteen years of age, the plea of consent is not available to the appellant. Learned counsel for the State further highlighted that the doctor (P.W.8) has categorically stated that sexual intercourse

with the victim cannot be ruled out and though the Investigating Officer has not visited the school compound where the occurrence in question took place, but for the laches of the Investigating Officer, the evidence of the victim cannot be discarded, which is otherwise believable and appears to be truthful. Learned counsel further submitted that the Chemical Examination Report would indicate that the red colour brief of the appellant so also the navy blue colour panty of the victim were found to be having semen stain and it contained 'B' and 'O' group of specific substances, which is another clinching evidence against the appellant and therefore, the appeal should be dismissed.

Age of the victim:

8. Specific charge has been framed against the appellant for commission of offences under section 376(2)(i) of the Indian Penal Code so also section 4 of the POCSO Act on the accusation that rape was committed on the victim, who was aged about fifteen years at the time of occurrence. The school admission register of the victim marked as Ext.7 was produced by none else than P.W.4, who was the Headmaster of the school wherein the date of birth of the victim is mentioned to be 04.03.2001 as per entry vide Ext.7/1. During course of evidence, the victim (P.W.3) stated that her date of birth is 04.03.2001 as per her H.S.C. Certificate. The H.S.C. Certificate has been marked as Ext.2, which has been proved by P.W.1, the mother of the victim, who has also stated that the date of birth of the victim is 04.03.2001. The victim has been suggested by the learned defence counsel in the cross-examination that she was aged about twenty years to which she denied. Suggestion has also been given to P.W.1 that the victim was aged about nineteen years on the date of occurrence to which she has denied. P.W.1 has specifically stated that her three children have no birth certificates and the dates of birth of her children were mentioned in the school admission register as per her say. She further stated that her daughter was born when they were residing at Jaribar and no Anganwadi centre was there at Jaribar. Therefore, when not only the oral evidence but also the documentary evidence in the form of H.S.C.certificate and school admission register is consistent that the date of birth of the victim was 04.03.2001 and nothing has been brought out in the cross-examination of either P.W.1 or P.W.3 to disbelieve the same nor any rebuttal evidence has been adduced by the defence that the date of birth as mentioned in the documents is not correct, therefore, this Court is of the view that the date of birth of the victim was 04.03.2001.When according to the prosecution case, the occurrence in question took place on 05.01.2016, therefore, the learned trial Court is quite justified in holding that the victim was a minor girl and she was less than eighteen years at the time of occurrence. The victim was 14 years 10 months at the time of occurrence.

Rape on the victim:

9. The victim being examined as P.W.3 stated that on 05.01.2016 at about 6.30 p.m., while she was studying in her house, the appellant came to her house and told

her that her mother is at Joda market and had sent him to bring her to Joda with money and he further told her to bring some money. At first, the victim denied to accompany the appellant but the appellant told her that her mother would got angry with her for which she left the house and went with the appellant by bus to Joda and they got down at Joda and at Joda, when she asked about the whereabouts of her mother, the appellant disclosed before her that her mother was not present rather he had brought her as he was in love with her. When the victim cried, the appellant threatened her to kill her and her family members and asked her to accompany him. The evidence of the victim further indicates that the appellant took her to a Hindi Medium School located at TISCO Camp, Joda where she was kept in the night and mentally tortured and the appellant kept physical relationship with her against her will and consent. The victim further stated that on the next day in the dawn hour, the appellant told her that there is chance of nabbing for which he took her to the jungle by foot and kept her in the jungle throughout the day, but he could not commit any rape there and in the dusk hour, he took her to Joda through an unknown path from the jungle and brought her to Keonjhar by bus and in Keonjhar bus stand, while they were boarding the bus to proceed to Rourkela, the police arrived and rescued her. The victim further stated about recording of her statement by the Magistrate, her medical examination and seizure of her wearing apparels. In the cross-examination, the victim has stated that she was alone in the house when the appellant came and took her with him and she did not lock the house but bolted the door from outside as because her father was supposed to return from his duty. She further stated that she did not intimate any of her neighbours when she left the house. She further stated that she reached Joda market with the appellant by 7.00 p.m. where there were 200 shops and it was a very busy market during the evening hours. She further stated that when she was taken to Keonjhar by bus, she was in a frightened state for which she did not raise any hulla or shout and did not draw the attention of other people at Keonjhar bus stand even though she was standing near the ticket counter and the place was lighted and there were three to four buses standing to proceed to different places. The victim further stated that the appellant kept physical relationship with her for many times in the Hindi Medium School at Joda on the occurrence night and it was her first sexual experience. It has been confronted to the victim about her previous statement recorded under section 161 Cr.P.C. and proved through the Investigating Officer (P.W.9) that she did not state before her that the appellant came to her house, told her that her mother told to bring her with him with some money and that she did not agree to go with him for which he told that her mother might got angry with her and she went with the appellant to Joda for that reason and at Joda, the appellant threatened her to kill or to abduct her and that the appellant showed her knife when she tried to escape. Her statement under section 164 Cr.P.C. was also confronted to her wherein she stated that she committed wrong by keeping sexual relationship with the appellant.

Even though there are some discrepancies in the statement of the victim in comparison to her previous statement recorded under section 161 Cr.P.C. as well as section 164 Cr.P.C.,but there are no such discrepancies relating to the commission of keeping physical relationship with the victim by the appellant in the Hindi Medium School in the night of occurrence. The victim has also disclosed before her mother (P.W.1) on being asked that the appellant took her to Joda by bus where he kept her in a school and gave her water to drink and committed rape on her and they spent the entire winter night in the school.

The Investigating Officer (P.W.9) stated that during course of investigation, she visited the spot and prepared the spot map (Ext.11) but Ext.11 indicates that the spot is the house of the informant. The I.O. has not stated at all to have visited Hindi Medium School located at TISCO Camp, Joda where the occurrence has taken place. In a case of this nature, when the statement of the victim indicated that the commission of rape took place in the Hindi Medium School located at TISCO Camp, Joda, the Investigating Officer should have visited the school premises and verified whether there was any security guard in the school posted during night time or not, whether there was any person residing within the school complex in the night in question or not, whether anybody in the vicinity of the school had seen the appellant and the victim together in the night of occurrence and whether any incriminating articles were there at the spot to corroborate the statement of the victim relating to commission of rape. These are serious laches on the part of the I.O., but the question comes for consideration as to whether for such laches, the entire prosecution case including the statement of the victim and other witnesses are to be discarded.

Law is well settled that laches on the part of the Investigating Officer cannot be fatal to the prosecution case where ocular testimony is found credible and cogent. The Investigating agency is expected to be fair and efficient but any lapse on its part cannot per se be a ground to throw out the prosecution case when there is over whelming evidence to prove the offence. Investigation is not the solitary area for judicial scrutiny in a criminal trial. There is legal obligation on the part of the Court to examine the prosecution evidence de hors the lapses carefully to find out whether the said evidence is reliable or not and whether such lapses affected the object of finding out the truth.

The victim was examined on 07.01.2016 by P.W.8, who was stated that there was no external bodily injury found suggestive of forcible sexual intercourse, there was no sign and symptoms of recent sexual intercourse as there was no bleeding, no pain, no tenderness on her private part, however, she stated that sexual intercourse cannot be ruled out. In the cross-examination, the doctor has stated that there was some old tear at 7 O' clock and 3 O' clock in the hymen and the vaginal canal admitted two fingers and the signs suggested that the victim was accustomed to regular sexual intercourse. The doctor further stated that the version of the victim

was recorded in the history of the case and she disclosed before her that she was in love with the appellant and she had consensual sex with the appellant.

From the surrounding circumstances, particularly in view of the conduct of the victim in leaving with the appellant alone giving no intimation to the neighbours, raising no objection while proceeding to Joda in a bus with the appellant, making no complain before others, accompanying the appellant to the school and staying there throughout the night and in view of her statement before the doctor (P.W.8) that she was in love with the appellant and consensual sex with the appellant, I am of the view that the victim (P.W.3) was a consenting party and sexual relationship of her with the appellant which took place inside the school compound in the night of occurrence was with the consent of the victim. The question now crops up for consideration is whether in view of the age of the victim at the time of occurrence, which has already been held to be 14 years 10 months, the appellant is to be exonerated of the charge under section 376(2)(i) of the Indian Penal Code and section 4 of the POCSO Act.

Section 375 of the Indian Penal Code defines 'rape' and clause 'Sixthly' of section 376 of I.P.C. makes it very clear that if the woman is under 18 years of age, then sexual intercourse with her with or without her consent is rape. This is commonly referred to as 'statutory rape' in which the willingness or consent of a woman below the age of 18 years for having sexual intercourse is rendered irrelevant and inconsequential. (Ref: **Independent Thought -Vrs.- Union of India, (2017) 10 Supreme Court Cases 800**)

Section 376(2)(i) of the Indian Penal Code states that whoever commits rape on a woman when she is under sixteen years of age shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life. Section 376(2)(i) of the Indian Penal Code was omitted by Act 22 of 2018 w.e.f. 21.04.2018 and sub-section (3) was inserted by the same Act which deals with the punishment for commission of rape of a woman under sixteen years of age.

Section 4 of the POCSO Act prescribes punishment for 'penetrative sexual assault' and 'penetrative sexual assault' on a child has been defined under section 3 of the said Act. As per the definition of child in section 2(d), a 'child' means any person below the age of eighteen years. Therefore, in view of the age of the victim at the time of occurrence i.e. fifteen years, the plea of consent is not available to the appellant. Therefore, even the consensual sex of the appellant with the victim (P.W.3) would attract the ingredients of the offences under section 376(2)(i) of the Indian Penal Code as well as section 4 of the POCSO Act.

In view of the foregoing discussions, in my humble view, the learned trial Court has rightly found the appellant guilty under section 376(2)(i) of the Indian Penal Code read with section 4 of the POCSO Act. Since the minimum substantive

sentence as provided for section 376(2)(i) of the Indian Penal Code has been awarded to the appellant i.e. for ten years, no interference is called for to such sentence, however, so far as the default sentence of one year for non-payment of fine amount as awarded by the trial Court is reduced from one year to one month in view of the poor financial condition of the appellant.

10. It appears from the impugned judgment that direction has been given to pay compensation to the victim under the Odisha Victim Compensation Scheme, 2012. It is not clear whether the victim has received any compensation. If she has not received any such compensation, immediate steps shall be taken in that respect by the District Legal Services Authority, Keonjhar.

With the aforesaid modification in sentence of imprisonment in default of fine, the Jail Criminal Appeal stands dismissed.

Let a copy of the judgment be sent to the District Legal Services Authority, Keonjhar for compliance.

Trial Court records with a copy of this judgment be communicated to the concerned Court forthwith for information and necessary action.

Before parting with the case, I would like to put on record my appreciation to Miss Manaswini Rout, the learned Amicus Curiae for rendering her valuable help and assistance towards arriving at the decision above mentioned. The learned Amicus Curiae shall be entitled to her professional fees which is fixed at Rs.7,500/- (rupees seven thousand five hundred only).

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2023 (I) ILR – CUT- 776

S.K. SAHOO, J.

BLAPL NO. 5982 OF 2022

PRASAN KUMAR PATRA .....Petitioner

.V.

STATE OF ODISHA .....Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 439 – Offence under sections 467, 468, 471, 420, 406 r/w section 120-B of the I.P.C – Economic offences – Subsequent Bail in cases where earlier applications have been rejected – Duty of court while entertaining such subsequent bail application – Enumerated with reference to the case laws. (Para 6)

Case Laws Relied on and Referred to :-
1. (2001)7 SCC 673 : State of M.P. Vs. Kajad.
2. A.I.R. 1989 S.C. 2292 : State of Maharashtra Vs. Captain Buddhikota Subha Rao.
3. (2005) 30 OCR (SC) 455 : Kalyan Chandra Sarkar and Ors. Vs. Rajesh Ranjan.
4. A.I.R. 1987 S.C. 1321 : State of Gujarat Vs. Mohanlal Jitamalji Porwal.

For Petitioner : M/s. Ashwini Kumar Das, Sonali Das
For Opp. Party : Mr. J. P. Patra

JUDGMENT Date of Hearing:14.03.2023: Date of Order:17.03.2023

S.K. SAHOO, J.

1. The petitioner Prasan Kumar Patra has approached this Court for the fourth time seeking for bail under section 439 of Code of Criminal Procedure in connection with E.O.W., Odisha, Bhubaneswar P.S. Case No.17 of 2018 corresponding to C.T. Case No.14 of 2018 pending on the file of Presiding Officer, Designated Court, O.P.I.D. Act, Cuttack for offences punishable under sections 467, 468, 471, 420, 406 read with section 120-B of the Indian Penal Code and section 6 of the Odisha Protection of Interests of Depositors (in Financial Establishments) Act, 2011 (hereafter 'O.P.I.D. Act').

2. On 30.07.2018 one Manoranjan Mishra of Kanan Vihar, Phase-II, P.S.-Chandrasekharpur,Bhubaneswar lodged the first information report before the Superintendent of Police, E.O.W., Odisha, Bhubaneswar alleging therein that during November 2012 after going through the advertisement of M/s. Z- Infra Construction Pvt. Ltd. (hereafter 'the company') about availability of plots under Jatani Tahasil near IIT relatively at a lower price in the Pragyan Vihar Project, he contacted the petitioner who was the Managing Director of the company at his office located at IRC Village, Nayapalli to purchase a plot measuring an area of 2400 sq. ft. in the project. The petitioner along with his officials showed the project site to the informant and assured him to give absolute right and title of the land after conversion and making boundary wall around the plot with approachable road to the plot. They also told the informant that the total project area has been purchased by them.The cost of the plot was Rs.3,60,000/- and they charged Rs.35,000/- for conversion of the land and Rs.60,000/- for constructing boundary wall around the plot.The informant paid an amount of Rs.10,000/- (rupees ten thousand only) on 11.08.2012 as booking amount and obtained a receipt from the company. It is the further case of the informant that on 05.11.2012 he paid another sum of Rs.3,50,000/- (rupees three lakh fifty thousand only) and obtained a receipt whereafter the petitioner registered the land on 06.11.2012 in favour of the informant by way of a registered sale deed. The land corresponds to Mouza- Kansapada, P.S.-Jatani, Khata No.76, Plot No.154, Sub Plot Nos.441 and 442, Area-Ac.0.055 dec. out of Ac.0.730 decimals. Thereafter, the informant paid a sum of Rs.95,000/- (rupees ninety five thousand only) on different dates for conversion and boundary wall of the plot. It is the further case of the informant that though the registration of the plot was made in November 2012 but there was no approach road to the said plot and the petitioner and others of his company falsely told the informant that they have right and title over entire Pragyan Vihar Project. They had the knowledge that they were

not having right, title over the area and in spite of that they had received the payment from the informant with an intention to deceive him and thus in spite of registration of the land in favour of the informant, the same served no purpose. It is stated that the petitioner and other officers of the company deceived the informant an amount of Rs.4,55,000/- on the basis of false and fabricated documents. It is stated that in spite of repeated approach by the informant to the petitioner and other officials of the company, they did not construct the boundary wall around the plot as promised even though they received the amount since last six years. It is further stated that the petitioner as the Managing Director and others have cheated about five hundred persons and misappropriated an amount of rupees twenty crores. In some cases, registration of a plot has been done but there is no approach road and in some cases, registration has not been made even though payment has been received and in some cases, a particular plot has been sold to number of persons creating problems in mutation of land. The accused persons after misappropriating the amount absconded by closing their office.

3. On the basis of such first information report, E.O.W., Odisha, Bhubaneswar P.S. Case No.17 of 2018 was registered under sections 420, 406, 467, 468, 471 read with section 120-B of the Indian Penal Code and section 6 of the O.P.I.D. Act against the petitioner and Soumendra Narayan Dalabehera, Chief General Manager and others.

During course of investigation, it was found that the company was registered under the Companies Act by ROC, Odisha, Cuttack on 07.05.2009 having registered office at Plot No.209, Saheed Nagar, Bhubaneswar. One Smt. Rasmita Patra was the Director and the petitioner who is her husband was the Managing Director of the Company. During November 2012, the company made wide publicity about the availability of plots near IIT under Jatani Tahasil in lower price. Being induced by the advertisement of the Company, the informant contacted the petitioner to purchase a plot in the project. The Directors of the Company along with their officials showed the project site to the informant and assured him to give absolute right and title over the land after conversion and making boundary wall around the plot with approachable road. The informant paid Rs.4,55,000/- to the Company and the petitioner registered land on 06.11.2012 in favour of the informant knowing very well that the company had not purchased the land which was required for construction of approach road to the plot. It was found that in some cases, registration of a plot has been made even though there was no approach road, in some cases registration was not made even though payment had been received and in some cases, excess lands were sold in a plot to many persons creating problems in mutation of land. The petitioner and other accused persons absconded by closing their office after misappropriating the amount.

Investigation further revealed that in the similar fashion, the petitioner and others of the company cheated about six hundred persons and misappropriated an amount more than twelve crores. The documents/registers seized from the petitioner showed that the company had collected cash of Rs.12,27,31564/- from six hundred sixty two investors. The documents such as brochures, money receipts, sale deeds, agreement etc. were seized from the witnesses. The office of petitioner located at Nayapalli was

searched and many incriminating documents, investors entry registers were seized. Investigation further revealed that the petitioner was sixty percent share holder in the company whereas his wife Smt. Rashmita Patra was forty percent share holder in the company.

It was also found during investigation that the company represented through the petitioner and Director Smt. Rasmita Patra with an intention to defraud the investors, collected more than rupees twelve crores from them in a pre- planned manner under false assurance to provide plotted land in Bhubaneswar area at a reasonable rate with boundary and approaching road under different schemes but subsequently cheated them by not providing the same as promised.

It was also found during investigation that petitioner as Managing Director of the company and others have collected huge amount from the prospective buyers and executed sale deeds of plots over which the company had no right, title, interest or possession. In some cases, they had not registered any plot in favour of the investors. In this process, the Directors of the company have defaulted to return the deposits and also failed to render service for which the deposits were made and as such the petitioner and other Directors of the Company being responsible for the management of the affairs of the financial establishment were also liable for prosecution under section 6 of O.P.I.D. Act, 2011.

During course investigation, on scrutiny of bank account statements in favour of the company and its Directors, it was found that cash of Rs.8,42,10,203/- had been entered in the accounts of the petitioner and cash of Rs.6,66,748/- have been entered in the account of Rasmita Patra during this period. Cash of Rs.3,38,000/- had also been transferred from the company's account to the account of Rasmita Patra.

During investigation, it further revealed that the money receipts, agreements etc. issued by the company in favour of the investors were fake and fabricated and the same were prepared in order to cheat the investors. The petitioner along with others had collected more than rupees twelve crores from the informant as well as other investors.

The investigating officer came to hold that the company represented through the petitioner and others, with an intention to defraud the investors, collected crores of rupees from them in a pre-planned manner under the false assurance to provide plots with boundary wall and approachable road at Kansapada area at reasonable rate under different schemes but subsequently cheated them by not providing the same as promised. The petitioner and others connived with each other, created fake documents and issued fake agreement, money receipts to the investors by not giving them plot with boundary wall and approach road at Kansapada area.

The investigating officer found prima facie evidence against the petitioner and others under sections 467, 468, 471,406 read with section 120-B of the Indian Penal Code and section 6 of the O.P.I.D. Act and accordingly, he submitted charge sheet on 29.11.2018 against them keeping further investigation open under section 173(8) of Cr.P.C. to trace out movable and immovable properties of the company so also its

Directors and associates, for scrutinisation of the bank accounts, to ascertain the money trailing and to collect the certified copies of sale deeds pertaining to the landed property standing in the name of the company and its Directors and to examine many more witnesses.

4. The petitioner approached this Court first time in BLAPL No.439 of 2019 and vide order dated 06.03.2019, the prayer for bail was rejected on the ground that the petitioner was the Managing Director of the company and as prima facie it appeared that the petitioner along with his wife and others had collected huge amount of deposits in a pre-planned and organized manner in the name of providing developed plots to the depositors and then cheated them and misappropriated more than twelve crores of rupees and that the money receipts, agreements etc. issued by the company were found to be fake and fabricated during investigation. This Court also took into account the manner in which the offence has been committed, the nature and gravity of the accusation, the nature of supporting evidence, the severity of punishment in case of conviction, the manner in which the innocent poor persons were cheated of their hard earned money, availability of documentary evidence relating to money trailing from the company's accounts to the accounts of the petitioner and his wife, reasonable apprehension of tampering with the evidence and the fact that further investigation on some important aspects was under progress and accordingly, in the larger interest of public and State, rejected the bail application.

The petitioner again approached this Court in BLAPL No. 5727 of 2019 for interim bail on the ground of his ailment, but vide order dated 28.08.2019, after going through the medical documents as well as the reports produced, this Court held that there was no allegation of any negligence relating to the treatment of the petitioner. While rejecting the prayer for bail, this Court directed the Senior Superintendent of Circle Jail, Cuttack at Choudwar to take steps for treatment of the petitioner as was taken earlier in case any health complication is reported.

Challenging the aforesaid order dated 28.08.2019 passed by this Court in BLAPL No. 5727 of 2019, the petitioner moved the Hon'ble Supreme Court of India in Special Leave to Appeal (Crl.) No.9116 of 2019, but the same was dismissed as the petitioner withdrew the same with liberty to move this Court for regular bail.

Then the petitioner approached this Court for the third time in BLAPL No.8813 of 2019. During pendency of the said application, the petitioner moved an interim application bearing I.A. No. 840 of 2020 for interim bail on the ground of attending the obsequies ceremony of his deceased mother and this Court vide order dated 14.09.2020, granted him interim bail for the period from 15th September 2020 to 28th September 2020 with certain terms and conditions. When the matter came up on 11.12.2020, it was submitted on behalf of the petitioner that due to order of the Division Bench of this Court extending the interim orders at different times on account of the situation arising out of Covid-19 pandemic, the petitioner did not surrender on the date fixed. Since the petitioner did not surrender on the date fixed, this Court as per order dated 11.12.2020 called for a report from the trial Court as to

what steps have been taken to arrest the petitioner. Challenging the said order dated 11.12.2020, the petitioner again moved the Hon'ble Supreme Court of India in Special Leave to Appeal (Crl.) No.1349 of 2021 and vide order dated 10.03.2021, while setting aside the portion of the order calling for the report from the learned trial Court regarding the steps taken for the arrest of the petitioner, disposed of the Special Leave Petition requesting this Court for early disposal of the bail application. However, the petitioner surrendered before the learned trial Court on 18.02.2021. Finally, this Court vide order dated 23.08.2021 disposed of BLAPL No.8813 of 2019 rejecting the prayer for bail of the petitioner.

Challenging the said order dated 23.08.2021 passed in BLAPL No.8813 of 2019, the petitioner moved the Hon'ble Supreme Court of India in Special Leave to Appeal (Crl.) No.8858 of 2021 and the Hon'ble Supreme Court of India vide order dated 15.12.2021, while dismissing the Special Leave Petition, directed the learned trial Court to complete the trial within a period of six months from that date and granted liberty to the petitioner to renew his application for bail in case the trial is not completed within the said period.

Since the trial could not be completed within the time stipulated, the petitioner moved the learned trial Court for bail and the learned trial Court vide order dated 24.06.2022 rejected the bail application. Against the said order, the petitioner moved this Court in the present bail application and this Court vide order dated 02.09.2022 taking into account the period of detention of the petitioner in judicial custody for more than four years and slow progress of trial and non-compliance of the order of the Hon'ble Supreme Court to conclude the trial within the time stipulated, this Court while disposing of the bail application, granted interim bail to the petitioner for a period of three months.

Challenging the said order dated 02.09.2022 passed in the present bail application, the petitioner moved the Hon'ble Supreme Court of India in Criminal Appeal No.201 of 2023 (SLP (Crl.) No.10422 of 2022) and vide order dated 24.01.2023, the Hon'ble Supreme Court while allowing the appeal, made the following observation:-

> "xx xx xx xx xx xx xx xx
>
> Having gone through the record, we find that the application was made for grant of regular bail and thus it was incumbent upon the High Court to have considered the same on merits but the High Court after granting an interim bail, disposed of the bail application itself. In our considered opinion, the regular bail application of the appellant is required to be considered on merits by the High Court.
>
> Considering the aforesaid facts and circumstances, we dispose of this appeal by directing that the bail application of the appellant shall be restored to its original number before the High Court and heard and decided in accordance with law on merits as expeditiously as possible. The interim protection granted by this Court shall continue to remain in operation till the disposal of the bail application by the High Court."

5. Mr. Ashwini Kumar Das, learned counsel appearing for the petitioner contended that the petitioner was taken into judicial custody since 7th August 2018

and the charge was framed on 06.01.2020 and till now, only ten witnesses have been examined out of sixty eight charge sheet witnesses and their evidence is also not complete and the trial of the case has been stalled by the order of the Hon'ble Supreme Court and the petitioner is now on bail in view of the order passed by the Hon'ble Supreme Court on 24.01.2023 and since there is no chance of absconding of the petitioner or tampering with the evidence and the petitioner has not misutilised his liberty while on interim bail, on the ground of delayed trial, his bail application may be favourably considered.

Mr. J. P. Patra, learned Special Counsel appearing for the State of Odisha in OPID Act matters on the other hand vehemently opposed the prayer for bail and contended that the bail application of the petitioner has been rejected on merit earlier and there is no change in the circumstances and since the trial of the case has been stayed, no fault can be found with the trial Court and the petitioner has enjoyed liberty for sufficient period by interim orders passed by this Court and by the Hon'ble Supreme Court and the petitioner is a white-collar offender and crores of rupees have been cheated from the poor investors and the petitioner's key role in the commission of economic offence is prima facie apparent and there was deep rooted criminal conspiracy to cheat public with an eye on personal profit, large number of innocent depositors have been duped of their hard- earned money and important witnesses are yet to be examined in the trial Court and at this stage, if the petitioner is enlarged on bail, there is every likelihood of tampering with the evidence and therefore, the bail application should be rejected.

6. In the case of **State of M.P. -Vrs.- Kajad reported in (2001)7 Supreme Court Cases 673**, it is held that successive bail applications are permissible under the changed circumstances, but without the change in the circumstances, the second application would be deemed to be seeking review of the earlier judgment which is not permissible under criminal Taw. In the case of **State of Maharashtra -Vrs.- Captain Buddhikota Subha Rao reported in A.I.R. 1989 S.C. 2292**, it is held that once the bail application is rejected, there is no question of granting similar prayer. That is virtually overruling the earlier decision without there being a change in the fact-situation and the change means a substantial one which has a direct impact on the earlier decision and not merely cosmetic changes which are of little or no consequence. In the case of **Kalyan Chandra Sarkar and Ors. -Vrs.- Rajesh Ranjan reported in (2005) 30 Orissa Criminal Reports (SC) 455**, it is held that even though there is room for filing a subsequent bail application in cases where earlier applications have been rejected, the same can be done if there is a change in the fact situation or in law which requires the earlier view being interfered with or where the earlier finding has become obsolete. This is the limited area in which an accused who has been denied bail earlier, can move a subsequent application.

Thus an accused has a right to make successive applications for grant of bail under the changed circumstances and such change must, be substantial one having direct impact on the earlier decision and not merely cosmetic changes which are of little or no consequence. Without the change in the circumstances, the subsequent bail application would be deemed to be seeking review of the earlier rejection order which is not permissible under criminal law. While entertaining such subsequent bail applications, the Court has a duty to consider the reasons and grounds on which the earlier bail applications were rejected and what are the fresh grounds which persuade it warranting the evaluation and consideration of the bail application afresh and to take a view different from the one taken in the earlier applications. There must be change in the fact situation or in law which requires the earlier view being interfered with or where the earlier finding has become obsolete. This is the limited area in which the application for bail of an accused that has been rejected earlier can be reconsidered.

In the case in hand, there is no change in the circumstances after rejection of the earlier bail application on merit except that the trial could not be completed within stipulated period as fixed by the Hon'ble Supreme Court. It appears from the status report submitted by the learned trial Court that the Hon'ble Supreme Court vide order dated 15.12.2021 in SLP (Crl) No.8858 of 2021 was pleased to direct to complete the trial within a period of six months from the date of order. The Hon'ble Supreme Court vide order dated 27.07.2022 passed in Misc. Application No. 1167 of 2022 in SLP (Crl) No.8858 of 2021 extended the period to four months and ten witnesses have been examined and on account of the stay order dated 20.07.2022 passed by the Hon'ble Supreme Court in SLP (Crl) No. 4910 of 2022, trial is not progressing.

It is a case of economic offence. Economic offences are always considered as grave offences as it affects the economy of the country as a whole and such offences having deep rooted conspiracy and involving huge loss of public fund are to be viewed seriously. Economic offences are committed with cool calculation and deliberate design solely with an eye on personal profit regardless of the consequence to the community. In such type of offences, while granting bail, the Court has to keep in mind, inter alia, the larger interest of public and State. The nature and seriousness of an economic offence and its impact on the society are always important considerations in such a case and those aspects must squarely be dealt with by the Court while passing an order on bail applications.

In the case of **State of Gujarat -Vrs.- Mohanlal Jitamalji Porwal reported in A.I.R. 1987 S.C. 1321**, it is held as follows:

> "5.....The mere fact that six years had elapsed, for which time-lag the prosecution was in no way responsible, was no good ground for refusing to act in order to promote the interests of justice in an age when delays in the Court have become a part of life and the order of the day.....The entire community is aggrieved if the economic offenders who ruin

> the economy of the State are not brought to books.....A disregard for the interest of the community can be manifested only at the cost of forfeiting the trust and faith of the community in the system to administer justice in an even handed manner without fear of criticism from the quarters which view white collar crimes with a permissive eye unmindful of the damage done to the National Economy and National Interest."

Therefore, in my humble view, in the facts and circumstances, without any change in the circumstances, merely on ground of the period of detention particularly when the petitioner has enjoyed interim bail for a long time on different occasion and even though the right of speedy trial is a fundamental right under Article 21 of the Constitution of India and denial of this right corrodes the public confidence in the justice delivery system, but when the trial of the case could not progress on account of stay order passed by the Hon'ble Supreme Court, taking into account the manner in which the offence has been committed and the innocent poor persons were cheated of their hard earned money, availability of documentary evidence relating to money trailing from the company's accounts to the accounts of the petitioner and his wife and in the larger interest of public and State, I am not inclined to release the petitioner on bail.

Accordingly, the bail application sans merit and hence stands rejected. I.A. No.219 of 2023 filed by the petitioner to extend the interim bail order granted by the Hon'ble Supreme Court in case of rejection of the bail application also stands dismissed. The petitioner shall surrender before the learned trial Court within one week from today failing which coercive step shall be taken against the petitioner for his arrest by the trial Court. A copy of the order be communicated to the learned trial Court.

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2023 (I) ILR - CUT - 784

KRUSHNA RAM MOHAPATRA, J.

CMP NO. 1024 OF 2022

PUSPALATA DAS .....Petitioner

.V.

NABIN KUMAR DEY & ANR. .....Opp. Parties

CODE OF CIVIL PROCEDURE, 1908 – Order XXXIX Rules(1) & (2) – The petitioner challenges the order of 1st appellate court where the order passed by the trial court restraining the Opp. Parties from dispossessing of the plaintiff/Petitioner from schedule property has been set aside – Order of the Appellate court challenged – Held, when the learned court scrutinizing the materials on record come to

conclusion that no prima facie case was made in favour of the plaintiff/ petitioner and balance of convenience leans in favour of Opp. Parties, this court is of the considered opinion that learned appellate court has committed no error in allowing the appeal by dismissing the application under XXXIX Rules 1 and 2.

Case Laws Relied on and Referred to :-

1. 1998 (I) OLR 199 : Gangadhar Raut Vs. Bindo Bihari Nayak.
2. 2017 (II) OLR 412 : Sasmita Nayak Vs. Dinesh Chandra Pattanaik (dead) represented by substituted legal heirs, Sri Amita Pattanaik & Ors.

For Petitioner : Mr. Swarup Kumar Patnaik
For Opp. Parties : Mr. Dwarika Prasad Mohanty (For Caveator/Opp. No.1)

JUDGMENT Date of Judgment:27.01.2023

KRUSHNA RAM MOHAPATRA,J.

1. This matter is taken up through Hybrid mode.

2. Judgment dated 17th August, 2022 (Annexure-7) passed by learned 3rd Additional District Judge, Balasore in FAO No.61 of 2021 is under challenge in this CMP, whereby setting aside the order dated 11th October, 2021 (Annexure-6) passed by learned Senior Civil Judge, Balasore in IA No.48 of 2019 (arising out of CS No.96/126 of 2019) learned appellate Court allowed the appeal filed by the Opposite Parties.

3. Mr. Patnaik, learned counsel for the Petitioner submits that Petitioner herein being the Plaintiff has filed the Suit bearing CS No.96/126 of 2019 for permanent injunction. When the Defendants/Opposite Parties made an attempt to dispossess the Petitioner forcibly and to alienate the property by creating fake deed and avoided to register sale deed in favour of the Plaintiff, the suit was filed. Along with the plaint, the Petitioner filed an application under Order XXXIX Rules 1 and 2 CPC in IA No.48 of 2019 with a prayer to restrain the Opposite Parties from dispossessing the Plaintiff-Petitioner, alienating as well as changing nature and character of the suit property. The said application in IA No.48 of 2019 was allowed vide order dated 11th October, 2021 (Annexure-6) restraining Opposite Parties from alienating the IA schedule property to any 3rd party till disposal of the suit. Assailing the same, Opposite Parties filed FAO No.61 of 2021 and the impugned order has been passed setting aside the order passed in the IA under Annexure-6.

3.1 It is his submission that husband of the Petitioner was the Proprietor of M/s Durga Enterprises and was a tenant under Opposite Parties. An agreement for sale was also executed between the Opposite Party No.1 and the Petitioner and accordingly,Opposite Parties received Rs.45.00 lakh towards part consideration money. Though the suit has been filed for a decree of permanent injunction, but inadvertently the prayer for specific performance of contract could not be made in

the suit. Accordingly, an application under Order VI Rule 17 CPC has been filed, which is pending for consideration.Learned trial Court,taking this fact into consideration, restrained the Opposite Parties from alienating the suit property. However,learned appellate Court failed to appreciate that the Petitioner is in possession over the suit land and she has *prima facie* case in her favour, as an agreement for sale has been executed in between her and Opposite Party No.1. The correctness/veracity of such agreement along with signature of Opposite Party No.1 thereon can be adjudicated at the time of hearing of the suit, but *prima facie*, there is an agreement for sale between the parties.Learned appellate Court, misconstruing the fact that there is a dispute with regard to possession of the Petitioner over the suit land held that balance of convenience leans in favour of Opposite Parties and the Petitioner will not suffer any irreparable loss, if no order of injunction is passed and loss, if any, can be compensated in terms of money. Such a finding is not sustainable in the eye of law.

4. Mr. Patnaik, learned counsel for the Petitioner, in support of his case placed reliance on a decision of this Court in the case of ***Gangadhar Raut Vs. Bindo Bihari Nayak***, reported in 1998 (I) OLR 199, wherein this Court at para-3 observed as under:-

> *"3. In matters relating to injunction, the court is not required to give finding regarding the maintainability of the suit itself. The observation of the lower appellate court that the present suit was not maintainable by applying the principles of res judicata and Order 2, Rue 2 CPC is wholly uncalled for and there was no necessity at this stage for giving such a finding. In such matters a prima facie case is to be found out and emphasis is always on the question of possession and that too only prima facie opinion on the matter is required to be formed. Of course the courts are also required to consider about irreparable loss and balance of convenience. It is apparent that the appellate court has misdirected itself in the matter. As such, I consider it a fit case where the matter should be remanded to the lower appellate court for fresh disposal....."*

Hence, he prays for setting aside of the impugned order.

5. Taking into consideration the contentions of the parties, this Court, vide order dated 9th December, 2022, directed the Petitioner to take instruction with regard to mode of payment of Rs.45.00 lakh to the Opposite Party No.1, as alleged by the Petitioner. In compliance of such direction, the Petitioner files an affidavit along with certain documents including the income tax return of the husband of the Petitioner for the years 2017-18, 2018-19 and 2019-20 and balance sheet of the respective years of the firm, namely, M/s Durga Enterprises. Petitioner also filed a copy of the tenancy agreement (annexure-2 to the affidavit dated 25th January, 2023) to establish that she is in possession over the suit property.

6. Mr. Mohanty, learned counsel for the Opposite Party No.1 vehemently objecting to the above contends that those documents filed along with the affidavit were never produced before learned trial as well as appellate Court. Further, IT returns and balance sheet does not disclose that a sum of Rs.45.00 lakh was

made over to the Opposite Party No.1 towards part payment of the consideration money pursuant to alleged agreement for sale. The alleged rent agreement was also not produced either before learned trial Court or before learned appellate Court for consideration. The signature of Opposite Party No.1 appearing therein does not tally with the signature in the alleged agreement for sale. It appears that the rent agreement is an afterthought and has been prepared to be produced before the Court. It is further alleged that the entire averments in the plaint has been made for specific performance of contract. But no such prayer has been made in the plaint.Thus, learned appellate Court has committed no error in coming to conclusion that there is dispute with regard to possession of the Petitioner over the suit property. A bald statement in the alleged agreement for sale to the effect that the Petitioner is continuing as a tenant over the suit property does not *ipso facto* establishes that the Petitioner is in possession over the suit land. It is his submission that admittedly the Opposite Parties are recorded tenants over the suit property and loss, if any, occurred to the Petitioner can be compensated in terms of money, as his claim is completely based on an alleged rent agreement for sale. He has also placed reliance upon the decision in the case of ***Sasmita Nayak Vs. Dinesh Chandra Pattanaik (dead) represented by substituted legal heirs,Sri Amita Pattanaik and two others***, reported in 2017 (II) OLR 412 in which, it is held that when learned Courts scrutinizing the materials on record come to definite conclusion with regard to possession, this Court in exercise of power under Article 227 of the Constitution should not interfere with the same.

7. Considering the rival contentions of learned counsel for the parties and on perusal of record, this Court finds that admittedly suit property stands recorded in the name of the Opposite Parties, but the Petitioner alleged that there is a rent agreement between her deceased husband and Opposite Party No.1 under Annexure-2 to the affidavit dated 25th January, 2023. Said rent agreement was neither produced before learned trial Court nor before learned appellate Court. The IT returns and balance sheet does not disclose that sum of Rs.45.00 lakh was ever made over to Opposite Parties towards part payment consideration amount pursuant to the alleged agreement for sale. Except said agreement, there is no material available on record to show that in fact the Petitioner had made over a substantial amount of Rs.45.00 lakh to Opposite Parties. This Court considering the same, vide order dated 9th December, 2022, directed the Petitioner to produce document with regard to mode of payment of Rs.45.00 lakh to Opposite Parties pursuant to the alleged agreement for sale. But, no document to that effect has been filed by the Petitioner. *Prima facie*, no reliance can be placed on the alleged agreement for sale to consider the application under Order XXXIX Rules 1 and 2 CPC, as the Petitioner failed to establish that either she or her husband had in fact made over a sum of Rs.45.00 lakh to Opposite Parties towards part payment of consideration. Perusal of the order passed in IA No.48 of 2019, it appears that learned trial Court was swayed away by the recitals of the agreement for sale, which is seriously disputed by the Opposite

Parties. However, Mr. Patnaik, learned counsel for the Petitioner submits that Opposite Parties have not yet filed written statement in the suit. But in the objection to the IA they have raised such objection, which was not properly considered by learned trial Court. Except a bald statement in the said alleged agreement for sale that the Petitioner is a tenant in the said premises, there is nothing on record to show that the Petitioner is in possession over the suit property. The same cannot be taken into consideration at this stage, in view of the discussion made herein above. Since the Opposite Parties are admittedly the recorded tenants, balance of convenience leans in their favour. Loss, if any, to the Petitioner can be compensated in terms of money as the case of the Petitioner completely based upon the alleged agreement for sale.

8. Further, the case law cited by Mr. Patnaik, learned counsel in ***Gangadhar Raut*** (supra) has no application to the case of the Petitioner, as there is no material to form a *prima facie* opinion that the Petitioner is in possession over the suit land and an amount of Rs.45.00 lakh was, in fact, paid to the Opposite Parties towards part payment of the consideration amount.

9. In that view of the matter, this Court is of the considered opinion that learned appellate Court has committed no error in allowing the appeal by dismissing the application under Order XXXIX Rules 1 and 2 CPC.

10. Accordingly, the CMP stands dismissed for being devoid of any merit.

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2023 (I) ILR - CUT - 788

KRUSHNA RAM MOHAPATRA, J.

C.M.P NO. 756 OF 2022

SUDAM CHARAN SAHU .....Petitioner

.V.

SASMITA SAHOO & ORS. .....Opp. Parties

CODE OF CIVIL PROCEDURE, 1908 – Jurisdiction of the Court – An application under Order VII Rule 10 CPC was filed when an interim order of stay of further proceeding was in vague – Whether the Court was denuded of the jurisdiction to entertain an application under Order VII Rule 10 CPC when further proceeding of the suit has been stayed by a superior Court – Held, Yes – Case law discussed. (Para 11-12)

Case Laws Relied on and Referred to :-

1. AIR 1967 SC 1386 : Mulraj Vs. Murti Raghonathji Maharaj.
2. (2010) 11 SCC 557 : Manohar Lal (dead) by LRs. Vs. Ugrasen (dead) by LRs. & Ors.

3. (2010) 4 SCC 498 : Maya Mathew Vs. State of Kerala & Ors.
4. 64 (1987) CLT 540 : Bijay Kumar Agarwalla & Ors. Vs. Ramakanta Das.
5. (2019) 13 SCC 403 : TVS Motor Company Ltd. Vs. State of Tamil Nadu & Ors.
6. AIR 1931 PC 149 : Secretary of State for India in Council Vs. Hindustan. Co-operative Insurance Society Ltd.
7. CMP No.127 of 2017: Basanta Manjari Samal Vs. Rupakanta Sahoo & Ors.

For Petitioner : Mr. Bidesh Ranjan Behera
For Opp. Parties : Mr. Susanta Kumar Dash

JUDGMENT Date of Judgment:31.01.2023

KRUSHNA RAM MOHAPATRA, J.

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

2. Order dated 12th July, 2022 (Annexure-5) passed by learned Senior Civil Judge, Angul in CS No.24 of 2004 is under challenge in this CMP, whereby an application filed by the Petitioner under Order VII Rule 10 CPC has been rejected.

3. As would reveal from the averments made in the CMP, Opposite Party Nos.1 to 3 filed an application under Section 276 of the Indian Succession Act, 1925 (hereinafter referred to as 'the Act of 1925') before learned District Judge, Dhenkanal for grant of probate of Will,which was registered as Test Case No.14/20 of 2003. Subsequently, after filing of the written statement therein, the probate proceeding became contentious and was transferred to the Court of learned Senior Civil Judge, Angul and registered as CS No.24 of 2004. The Petitioner has been arrayed as Opposite Party No.2 in the said proceeding. Needless to mention here that the present Petitioner along with predecessor of Opposite Party Nos.6 to 9, namely, late Sudhir Kumar Sahu have already filed their respective written statements opposing the probate.

4. Partition Suit in CS No.99 of 2002 is also pending between the parties to the probate proceeding before learned Senior Civil Judge, Angul. After death of the Plaintiff in the suit for partition, the Petitioner filed an application to be transposed as Plaintiff in the said suit. He also filed an application to club up both the suits, i.e., CS No.24 of 2004 and CS No.99 of 2002. Both the applications were dismissed by learned Senior Civil Judge, Angul, vide order dated 29th April, 2022. Assailing the same, the Petitioner filed CMP No.526 of 2022 and by order dated 21st June, 2022, this Court directed stay of further proceedings of CS No.24 of 2004. When the interim order was continuing, the Petitioner filed an application under Order VII Rule 10 CPC with a prayer to return the plaint to the Opposite Party Nos.1 to 3 (Petitioners therein) to be filed before the competent Court, i.e., learned District Judge, Angul.Learned Senior Civil Judge, without taking into consideration that interim order staying further proceeding of C.S. No.24 of 2004 was in vogue, took

up and rejected the petition under Order VII Rule 10 CPC on the same day of filing, i.e., 12th July, 2022 (Annexure-5).

5. Learned counsel for the Petitioner, Mr. Behera, assails the order under Annexure-5 on two counts. *Firstly*, learned Senior Civil Judge, Angul could not have taken up the petition under Order VII Rule 10 CPC for adjudication when an interim order of stay of further proceeding of CS No.24 of 2004 was in vogue. *Secondly*, learned Senior Civil Judge, Angul lacks jurisdiction to entertain a contentious probate proceeding filed (CS No.24 of 2004) under Section 276 of the Act of 1925. Mr. Behera, learned counsel for the Petitioner submitted that the direction in the interim order dated 21st June, 2022 was not addressed to the parties to the proceeding, but to the Court to arrest further proceeding of CS No.24 of 2004. Thus, even if an application under Order VII Rule 10 CPC was moved by the present Petitioner, it was the duty of the Court to restrain itself from passing any judicial order thereon. It should have waited till either vacation of the interim order or disposal of CMP to entertain the application. In support of his case, Mr. Behera, learned counsel relied upon the case of ***Mulraj Vs. Murti Raghonathji Maharaj***; reported in AIR 1967 SC 1386, wherein at para-8, it is held as under:-

> *"8. We are of opinion that the view taken in Bessesswari Chowdhurany case [(1896-97) 1 CWN 226] is the correct one. An order of stay in an execution matter is in our opinion in the nature of a prohibitory order and is addressed to the court that is carrying out execution. It is not of the same nature as an order allowing an appeal and quashing execution proceedings. That kind of order takes effect immediately it is passed, for such an order takes away the very jurisdiction of the court executing the decree as there is nothing left to execute thereafter. But a mere order of stay of execution does not take away the jurisdiction of the court. All that it does is to prohibit the court from proceeding with the execution further, and the court unless it knows of the order cannot be expected to carry it out. Therefore, till the order comes to the knowledge of the court its jurisdiction to carry on execution is not affected by a stay order which must in the very nature of things be treated to be a prohibitory order directing the executing court which continues to have jurisdiction to stay its hand till further orders. It is clear that as soon as a stay order is withdrawn, the executing court is entitled to carry on execution and there is no question of fresh conferment of jurisdiction by the fact that the stay order has been withdrawn. The jurisdiction of the court is there all along. The only effect of the stay order is to prohibit the executing court from proceeding further and that can only take effect when the executing court has knowledge of the order. The executing court may have knowledge of the order on the order being communicated to it by the court passing the stay order or the executing court may be informed of the order by one party or the other with an affidavit in support of the information or in any other way. As soon therefore as the executing court has come to know of the order either by communication from the court passing the stay order or by an affidavit from one party or the other or in any other way the executing court cannot proceed further and if it does so it acts illegally. There can be no doubt that no action for contempt can be taken against an executing court, if it carries on execution in ignorance of the order of stay and this shows the necessity of the knowledge of the executing court before its jurisdiction can be affected by the order. In effect therefore a stay order is more or less in the same position as an order of injunction with one difference. An order of injunction is generally issued to a party and it is forbidden from doing certain acts. It is well settled that in such a case the party must have knowledge of the injunction order before it*

> *could be penalised for disobeying it. Further it is equally well settled that the injunction order not being addressed to the court, if the court proceeds in contravention of the injunction order, the proceedings are not a nullity. In the case of a stay order, as it is addressed to the court and prohibits it from proceeding further, as soon as the court has knowledge of the order it is bound to obey it and if it does not, it acts illegally, and all proceedings taken after the knowledge of the order would be a nullity. That in our opinion is the only difference between an order of injunction to a party and an order of stay to a court. In both cases knowledge of the party concerned or of the court is necessary before the prohibition takes effect. Take the case where a stay order has been passed but it is never brought to the notice of the court, and the court carries on proceedings ignorance thereof. It can hardly be said that the court has lost jurisdiction because of some order of which has no knowledge. This to our mind clearly follows from the words of Order 41 Rule 5 of the Code of Civil Procedure which clearly lays down that mere filling of an appeal does not operate as stay of proceedings in execution, but the appellate court has the power to stay the execution. Obviously when the appellate court orders the stay of execution the order can have affect only when it is made known to the executing court. We cannot agree that an order staying execution is similar to an order allowing an appeal and quashing execution proceedings. In the case where the execution proceeding is quashed, the order takes effect immediately and there is nothing left to execute. But where a stay order is passed, execution still stands and can go on unless the court executing the decree has knowledge of the stay order. It is only when the executing court has knowledge of the stay order that the court must stay its hands and anything it does thereafter would be a nullity so long as the stay order is in force." (emphasis supplied)*

6. It is contended that the interim order passed by this Court in CMP No.526 of 2022 was produced before the Court of learned Senior Civil Judge, Angul, which was reflected in the order dated 26th June, 2022. Thus, learned trial Court had knowledge of the interim order passed by this Court when it entertained the application under Order VII Rule 10 CPC and rejected it. He further relied upon the case of ***Manohar Lal (dead) by LRs. Vs. Ugrasen (dead) by LRs.and others***, reported in (2010) 11 SCC 557, wherein it is held as under:-

> *"29. In view of the above, it is evident that any order passed by any authority in spite of the knowledge of the interim order of the court is of no consequence as it remains a nullity."*

He, therefore, submits that the impugned order is a nullity as it was passed during subsistence of the interim order staying further proceeding of the suit in CMP No.526 of 2022.

7. The next contention raised by Mr. Behera, learned counsel for the Petitioner was that when a subsequent special law is repugnant to or inconsistent with an earlier general law, the special law will prevail over the general law. Referring to the Bengal, Agra and Assam Civil Courts Act, 1887 (herein after referred to as 'the Act of 1887'), is a general law and Act of 1925 is a special law. Section 286 read with Section 288 of the Act 1925 specifically prohibits the district delegates not to grant any probate in a contentious probate proceeding.The aforesaid provision of the Act 1925 is repugnant to and is inconsistent with Section 23 of the Act 1887, which empowers the High Court to authorize the District Judge to transfer and dispose of proceedings under the Indian Succession Act including contentious

cases as regards the grant of probate and/or letter of administration. The Act of 1925 being the subsequent special law has an overriding effect over the provisions of the Act 1887. In support of his submission, he relied upon para-12 of the case of ***Maya Mathew Vs. State of Kerala and others***, reported in (2010) 4 SCC 498. He, therefore, submitted that in view of the aforesaid case law, the provision of Section 23 of the Act of 1887 becomes inoperative, otiose and redundant insofar as it relates to adjudication of contentious probate proceeding .

7.1 He further submitted that the impugned order under Annexure-5 is cryptic and non-speaking. As such, the same is not sustainable and is liable to be set aside.

8. Mr. Dash, learned counsel for Opposite Parties refuted the contentions raised by Mr. Behera, learned counsel for the Petitioner. It was his contention that undisputedly the application under Section 276 of the Act of 1925 was presented before Court of learned District Judge, Dhenkanal, under whose administrative control, the Court of learned Senior Civil Judge, Angul was functioning then. When the proceeding became contentious, it was transferred to the Court of learned Senior Civil Judge,Angul. The Petitioner being aggrieved by order dated 29th April, 2022, filed CMP No.526 of 2022 in which this Court by its interim order dated 21st June, 2022, stayed further proceedings of CS No.24 of 2004 till the next date. He also contended that the interim order was in vogue when the impugned order under Annexure-5 was passed. But the interim order does not in any way affect the validity of the impugned order under Annexure-5. He emphatically argued that during subsistence of the interim order staying further proceedings of the suit, power of the Court is not restricted to entertain an application, which does not affect the proceedings of the suit. He relied upon the case of ***Bijay Kumar Agarwalla and others Vs. Ramakanta Das***, reported in 64 (1987) CLT 540, wherein it is observed that the stay of the proceedings of the suit implies that the Court should not touch the trial of the suit. Adjudicating an application under Order VII Rule 10 CPC does not affect the trial of the suit more particularly when it is rejected. The Petitioner having moved the application under Order VII Rule 10 CPC is estopped to raise the issue touching the jurisdiction of the Court to entertain such an application. He further submitted that in the meantime, CMP No.526 of 2022 has already been disposed of vide order dated 18th July, 2022 setting aside the order dated 29th April, 2022. Thus, by the time the present CMP was moved the CMP No. 526 of 2022, in which the interim order was passed, had already been disposed of. He, therefore, submitted that learned Senior Civil Judge, Angul has committed no error in rejecting the application under Order VII Rule 10 CPC during subsistence of the interim order staying further proceeding of the CS No.24 of 2004.

9. He further submitted that Sections 265, 286 and 288 of the Act of 1925 leave no room of doubt that whenever there is contention in an application under Section 276 of the said Act, the district delegate loses jurisdiction to proceed with the matter and he should return the application to the applicant to be presented before the

concerned District Judge. It appears that the Petitioner has confusion in his mind to the effect that learned Senior Civil Judge, Angul holds the position of a district delegate under the Act, 1925. In fact, Section 265 of the Act, 1925 provides for appointment of Judicial Officer by the High Court (those which are not established by Royal Charter) to act for the District Judge as delegate with previous sanction of the State Government. Explanation to Section 18 of the Odisha Civil Courts Act, 1984 (hereinafter referred to as 'the Act, 1984') reiterates the same. In the instant case, the application under Section 276 of the Act, 1925 was not presented before the district delegate, but it was presented in the Court of learned District Judge, Dhenkanal,which is certainly not a district delegate. The said application became contentious subsequently.Accordingly, learned District Judge, Dhenkanal in exercise of power under Section 18 (3) of the Act, 1984 transferred the proceeding to the Court of learned Senior Civil Judge, Angul, as it was under his administrative control at the relevant time. A transferee Court is denuded of the power to entertain an application under Order VII Rule 10 CPC to return the application.

9.1 He further submitted that Act of 1887 was applicable to the State of Odisha which was repealed by Act, 1984. Sub-section (2) of Section 25 of the Act of 1984 clearly states that all such notifications, jurisdictions and power conferred under the Act, 1887 deemed to have been issued/conferred and published under the Act of 1984. It is his submission that no district delegate has yet been appointed in the State of Odisha. Thus, learned District Judge was well within its power to transfer the instant contentious probate proceeding to Senior Civil Judge, Angul in terms of the Notification No.159A dated 22nd November, 1961. It being a notification under Section 23 of the Act of 1887, the same is deemed to have been made under Section 18 of the Act of 1984. As such, learned Senior Civil Judge, Angul has jurisdiction to entertain a contentious application under Section 276 of the Act of 1925. He further submitted that Indian Succession Act, 1865 was repealed by Act of 1925, but the same is inconsequential with regard to validity of the notification of this Court as stated above. In support of his submission, he referred to the case of ***TVS Motor Company Ltd. Vs. State of Tamil Nadu and others***, reported in (2019) 13 SCC 403 in which reliance was placed on a decision reported in ***Secretary of State for India in Council -Vs- Hindustan Cooperative Insurance Society Ltd***, reported in AIR 1931 PC 149. Further, the impugned order is not cryptic and non- speaking, as alleged. Learned trial Court referring to the provision under Section 18(3) of the Act, 1984, dismissed the application, which is legal and justified.

10. The issue with regard to power of the Court to entertain an application in the nature of Order VII Rule 10 CPC during subsistence of an interim order of stay of this Court requires to be answered first, as it involves the competence of learned trial Court to entertain the application in the situation, as aforesaid during continuance of the interim order passed by this Court. If it is answered in favour of the Petitioner then this Court should not delve into next issue in the instant CMP.

11. Admittedly, this Court, vide order dated 21st June, 2022 in CMP No.526 of 2022, while issuing notice in the matter, directed that there shall be stay of further proceedings in CS No.24 of 2004 till the next date. The matter was next posted on 12th July, 2022. Admittedly, the impugned order was passed when the aforesaid interim order of stay was in vogue. Further, it appears that learned trial Court had knowledge of the aforesaid interim order passed by this Court, when it entertained the application under Order VII Rule 10 CPC, as would reveal from the order sheet of CS No.24 of 2004. Vide order No.299 dated 27th June, 2022, learned trial Court recorded as under:-

> *"….. Advocate for the Defendant files memo along with CC of orders dated 21.06.2022 passed in CMP 526/22/IA No.598/22. In IA 598/22, Hon'ble High Court has directed that there shall be stay of further proceeding in CS 24/2004 till the next date, i.e., 12.07.2022.Hence, in view of the order dated 21.06.2022 in CMP 526/22, the case CS 24/04 is stayed. Put up on 29.06.22 awaiting intimation & hearing on pet."*

Thus, the question that arises for consideration is as to whether the Court was denuded of the jurisdiction to entertain an application under Order VII Rule 10 CPC when further proceeding of the suit has been stayed. The position of law is no more res integra in view of the ratio in the case of ***Sri Bijay Kumar Agarwalla*** (supra). While discussing the legal position, this Court held as under:-

> *"4. The solution to the controversy regarding maintainability centres round the question what is the meaning and import of the order of stay further proceedings in the suit passed by the revisional Court. If the order is construed to mean stay of all further proceedings in the suit no matter whether it relates to hearing of the suit or any other collateral matter, then it has to be held that the learned Subordinate Judge took the correct view in the matter. If on the other hand, the order of stay means only stay of hearing of the suit and does not affect jurisdiction of the trial Court which is in seisin of the suit to pass orders in collateral matters, then the application under Order 38, Rule 5 filed by the petitioners before the Court below was maintainable. The point has been considered by different Hugh Courts and there seems to be divergence of opinion amongst them. While the Madras High Court in the case of Chidambaram v. Subramanian [A.I.R. 1953 Mad.492.], Madhya Pradesh High Court in the case of Madanlal Agarwal v. Smt. Kamlesh Nigam [A.I.R. 1975 M.P. 132.] , Mysore High Court in the case of Saburao Vithalrao Sulunke v. Madarappa Presappa Debbennavar [A.I.R. 1974 Mysore 63.], and the Bombay High Court in the case of Khemraj Ratanlal Sancheti v. Vasant Madhaose Vyavhare [1981 Mh. L.J. 200.] , have taken the view that the trial Court retains its jurisdiction to pass interlocutory orders for the purpose of keeping the proceedings alive or for preserving the subject-matter of the dispute or the for protecting the interest of the parties to the suit during pendency of the stay order passed by the appellate or revisional Court, the Patna High Court in the case of Motiram Roshanlal Coal Co. (P) Ltd. v. District Committee, Dhanbad [A.I.R. 1962 Pat. 357.] , held that an order of stay passed by a superior Court becomes effective immediately after it is passed and it has the effect of suspending the power of the lower Court to continue the proceedings in the case. Any order passed by the lower Court in spite of the order of stay of further proceedings is without jurisdiction. It is necessary to point out here that in the case before the Patna High Court the order passed by the lower Court in contravention of the order of stay of further proceedings was one appointing a commissioner. As such, the order directly related to hearing of the suit and was not one relating to a collateral matter. On the other hand, the cases considered by the Madhya Pradesh and Mysore High Courts arose*

directly out of applications made under Order 38, Rule 5 of the Code as in the present case. In the case of Chidambaram v. Subramanian [A.I.R. 1953 Mad.492.], the Division Bench of the Madras High Court considered the question whether it was open to the trial Court to make a reference to arbitration in the suit during pendency of the order of stay of further proceedings granted by the superior Court. Justice Venkatarama Aiyar speaking for the Court answered the question in the affirmative. I have carefully perused all the decisions referred to above. With respect, I would agree with the view taken by the learned Judges of the Madras, Mysore, Madhya Pradesh and Bombay High Courts holding that the lower Court retains its jurisdiction to consider and pass orders in matters which are collateral or which may be protective or which would be for the purpose of keeping the lis alive, even during subsistence of the order of the superior Court directing stay of further proceedings in the suit.But the Court should take care to ascertain that the subject matter in the petition does not touch the trial of the suit which has been stayed by the superior Court. To hold otherwise may in many cases work out injustice inasmuch as for every collateral matter the parties will be compelled to approach the appellate or revisional Court though such a matter may not be within the ambit and scope of appeal or revision pending before the superior Court. To give an instance, when an appeal or revision is filed against an interlocutory order, the matter dealt with in that order is the subject matter in appeal or revision as the case may be. The application relating to the collateral matter may have ho connection with the appeal or revision. In such cases also the party will be compelled to approach the appellate or revisional Court if it is held that in view of the stay order the trial Court is denuded of his jurisdiction to piss any order in the suit. On the aforesaid analysis, I would hold that the learned Subordinate Judge was not right in holding that in view of the order of this Court directing stay of further proceedings in the suit the petitioners' application under Order 38, Rule 5 of the Code filed before him was not maintainable."

(emphasis supplied)

12. On a close reading of the observation made by this Court in ***Sri Bijay Kumar Agarwalla*** (supra), it appears that this Court discussing divergent views of different High Courts accepted the view of Madras High Court, Madhya Pradesh High Court, Mysore High Court and Bombay High Court while disagreeing with the view taken by the Patna High Court. It is in no unambiguous terms held by this Court that trial Court retains its jurisdiction to consider and pass orders in matters which are collateral or which may be protective or which would be for the purpose of keeping the lis alive even during subsistence of the order of the superior Court directing stay of the proceedings in the suit. But the Court should take care to ascertain that the subject matter in the petition does not touch trial of the suit, which has been stayed by the superior Court. The said view has been reiterated by this Court in case of ***Basanta Manjari Samal Vs. Rupakanta Sahoo and others*** in CMP No.127 of 2017 decided on 28th February, 2017.

12.1 Further, in the case of ***Mulraj*** (supra), Hon'ble Supreme Court held that an order of stay of further proceeding is addressed to the Court and prohibits it from proceeding further, as soon as the order comes to its knowledge. It is bound to obey it and if it does not, it acts illegally, and all proceedings taken after the knowledge of the order would be a nullity.

12.2 In view of the ratio in ***Sri Bijay Kumar Agarwalla (supra), Basanta Manjari Samal (supra) and Mulraj (supra)***, it is clear that adjudication of a petition, which

is likely to affect trial of the suit or to take away the jurisdiction of the Court to try the suit, cannot be entertained when further proceeding of the suit is stayed. Mr. Dash, learned counsel for the Opposite Parties vehemently argued that when further proceedings of the suit is stayed, the Court should stay its hands in the matter of trial of the suit only. Such a contention is not sustainable as by entertaining such an application, learned trial Court has ventured to delve into the maintainability of the suit/ proceeding and its continuance before the said Court when further proceeding of the suit was stayed. Mr. Dash, learned counsel further argued that when the application filed by the Petitioner under Order VII Rule 10 CPC has been rejected, it neither affects further proceeding nor is it in violation of the interim order of this Court. Such a contention is equally unsustainable, inasmuch as, learned trial Court is denudedof the power to entertain such an application which involves maintainability of the suit before the said Court, when an interim order of stay of the suit was operating. If it does so, then all proceedings taken after the knowledge of the order would be a nullity as held in ***Mulraj (supra***). As such, learned trial Court has committed an error in entertaining an application under Order VII Rule 10 CPC when an interim order of stay of further proceeding of the suit was in operation. True it is that, the application under Order VII Rule 10 CPC was filed during subsistence of the aforesaid interim order, but in all fairness learned trial Court should have waited to entertain such application after the interim order is either vacated or exhausted.Thus,the impugned order under Annexure-5 is a nullity.

13. In view of the observation made herein above, I am of the considered opinion that the issue with regard to merit of the petition under Order VII Rule 10 CPC should not be gone into in this CMP keeping it open to be decided by learned trial Court, if moved.

14. As submitted by Mr.Dash, learned counsel for contesting Opposite Parties that CMP No.526 of 2022 has already been disposed of in the meantime; thus the interim order passed therein is no more in force. As such, there is no impediment on the part of the learned trial Court to entertain the application filed by the Petitioner under Order VII Rule 10 CPC afresh in accordance with law.

15. Accordingly, the impugned order 12th July, 2022 (Annexure-5) passed in CS No.24 of 2004 is set aside and the CMP is allowed to the aforesaid extent with an observation that if moved by the Petitioner, learned trial Court shall do well to consider and dispose of the petition under Order VII Rule 10 CPC afresh in accordance with law giving opportunity of hearing to the parties concerned. In the circumstances, there shall be no order as to costs.

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2023 (I) ILR – CUT - 797

B.P. ROUTRAY, J.

CRLMC NO.1887 OF 2022

RABINDRA KUMAR JENA …….Petitioner

.V.

REPUBLIC OF INDIA (CBI) ……Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Inherent Power – Duty of Court – Held, the power under 482 Cr. P.C are though very wide and undefined, but great caution is required in its exercise – Before forming an opinion to quash a criminal proceeding particularly in a case like economic offences, the court must evaluate the materials surfaced in course of investigation.

Case Law Relied on and Referred to :-

1. (1992) Supp 1 SCC 335 : State of Haryana Vs. Bhajan Lal.

For Petitioner : Mr.A.Lekhi, Sr. Adv.

For Opp. Party : Mr.S.Nayak, (CBI)

JUDGMENT Date of Judgment:06.02.2023

B.P. ROUTRAY,J.

1. The Petitioner, accused of commission of offences under Section 120-B, 409, 420 of the Indian Penal Code (IPC) and Section 4,5 & 6 of the Prize Chits and Money Circulation Schemes(Banning)Act,1978 (hereinafter referred as '1978 Act'), has prayed for quashing of the criminal proceeding initiated against him in C.B.I., SPE,EOB-VII,Bhubaneswar Case No.RC.49(S)/2014-Kolkata dated 15th June 2014, as well as the charge-sheet dated 2nd March, 2021 indicting him for aforesaid offences in the court of the learned Special Judge, C.B.I.-1, Bhubaneswar and the issuance of process against him.

2. The Petitioner was a Member of Parliament elected from Balasore constituency in the State of Odisha.

3. Initially, different cases relating to chit fund scam were registered at different local police stations in Odisha against the principal accused Prashant Kumar Dash and Seashore Group of Companies, which were subsequently taken over by the CBI pursuant to direction dated 9th May,2014 of the Supreme Court of India passed in W.P.(Civil) No.401 of 2013 and W.P.(Civil) No.413 of 2013. The offences registered against Prashant Kumar Dash andSeashore Group of Companies are under Sections 420, 468, 471, 406, 467, 417, 418, 422 and 120-B/34 of the Indian Penal Code (IPC) and Section 4,5,6 of the 1978 Act. The allegations against Prashant Kumar Dash and his Seashore Group of Companies are that, they

misappropriated huge amounts from general public dishonestly and fraudulently by alluring common public depositors through various schemes with false promise of higher rate of interest. They collected money from general public by way of illegal deposits and duped them without any refund as promised to them.

4. Initially,charge-sheet dated 7th March, 2015 was submitted against eighteen accused persons including Prashant Kumar Dash and different Seashore Group of Companies.A supplementary charge-sheet was filed on 12th January naming six more accused persons. The name of present Petitioner did not find place therein. Again, further supplementary charge-sheet dated 2nd March, 2021 was submitted by the CBI, wherein the name of present Petitioner-Shri Rabindra Kumar Jena was arraigned. It is alleged that the Petitioner and Prashant Kumar Dash hatched a conspiracy along with others to influence general public for making such deposits leading to subsequent misappropriation. It is also alleged that a sum of Rs.1.75 Crores was diverted to the Petitioner unauthorizedly during the period from 3rd September to 29th October 2011, out of the money received through such public deposits by Prashant Kumar Dash and Seashore Group of Companies. The Petitioner was neither a member of M/s Seashore Multipurpose Cooperative Limited nor any other Cooperatives of Seashore Group of Companies at any point of time and such transfer of funds in favour of the Petitioner is in violation of the Odisha Self-help Cooperative Act, 2001 and against the Memorandum of Associations. The materials reflect that said amount was paid by Seashore Group to the Petitioner for extending local support for unhindered running of illegal business of Money Circulation Schemes of Seashore Group.

5. Petitioner's case is that, the supplementary charge-sheet dated 2nd March, 2021 has been submitted after seven years from the date of registration of F.I.R. by the CBI and after six years from submission of the initial charge-sheet dated 7th March, 2015. The only evidence gathered against him during those subsequent years after submission of the first charge-sheet is the statements dated 15th November, 2016 of three witnesses, namely, Jaykishore Mohapatra, Jalendra Sahoo and Nabakishore Acharya, who were the employees of Seashore Group, recorded under Section 161 of the Cr.P.C. It is explained by the Petitioner that Rs.1.75 Crores, allegedly received by him from Seashore Group to garner local support for unhindered activities of Seashore Group of Companies, is without any basis and material.The Petitioner borrowed Rs.1.75 Crores from Seashore Groupof Companies during the year 2011-12 in order to meet his personal expenses and against the same, Seashore Group of Companies availed loan of Rs.1.855 Crores from Petitioner's Group of Companies and the transactions have been duly reflected in the documents submitted to IncomeTax Department.The prosecution has attempted to attribute undue criminality in the transaction through imaginary and concocted stories and as per the observations made by this Court in ABLAPL No.823 of 2017, while releasing the Petitioner on anticipatory bail, the Petitioner is to get additional Rs.10

lakhs from Seashore Group of Companies. According to the Petitioner, before December 2013 he was never a member of any political party and not even remotely associated with any political party, and for the first time he was elected as the Member of Parliament in the year 2014. Prior to that, he never had hold any position either in the Government or in any Public Authority and therefore, the question of providing any political patronage or support or influence on the public in favour of Seashore Group to collect deposits does not arise.

The Petitioner initially was working in Balasore Alloys Limited as a Graduate Engineer. On 11th November, 2011 he left the employment as Managing Director of Balasore Alloys Limited in order to look after his own business, i.e. his companies in the name and style of M/s Supratik Estates Pvt. Ltd. (renamed as 'Supratik Infra Ventures Pvt. Ltd.), Supratik Stocks and Securities Pvt. Ltd., Jai Matadi Exports Pvt. Ltd. and Kripalu Trade Link Pvt. Ltd. Between the period from 3rd September, 2011 to 29th November, 2011, due to crunch of liquid funds in his company, he availed personal loan to the tune of Rs.1.75 Crores from Seashore Group of Companies including its other entities like Seashore Multipurpose Cooperative Ltd. and Sanket Investment and Marketing Ltd. in ten tranches. This loan amount was utilized to bear educational expenses of his children and other ancillary requirements. Subsequently, this loan amount was adjusted in the form of loan advanced to Seashore Group of Companies from the companies owned by the petitioner and his family members, i.e. Kripalu Trade Link Pvt. Ltd. and Jai Matadi Exports Pvt. Ltd. on different dates in between 25th November, 2011 to 30th March, 2012 with additional sum of Rs.10 lakhs, and there are several business transactions including transfer and retransfer of funds between Petitioner's Group of Companies and Seashore Group of Companies. Even after adjustment of Rs.1.75 Crores, the Seashore Group of Companies is still required to pay back a further sum of Rs.11.89 lakhs to Petitioner's Group of Companies.All those business transactions were held prior to joining of the Petitioner in the political party and elected as Member of Parliament. During the year 2011-12, when such money transactions took place between two groups of companies, neither any criminal case was registered against Seashore Group of Companies nor any allegations of duping the public was there against Prashant Kumar Dash. So all such allegations leveled against the Petitioner in the charge-sheet, particularly when he was neither a member of any political party nor was holding any position either in Government or politically, the question of influencing general public does not arise and the only material alleged through the statements of those witnesses recorded under Section 161 Cr.P.C. are intended to damage the reputation and image of the Petitioner as a member of the political party as well as a gentleman of the locality to settle certain political vendetta.

6. Mr. Lekhi, learned Senior Counsel for the Petitioner urged that, the only purported evidence available against the Petitioner is the statements of those three

witnesses,namely, Jaykishore Mohapatra, Jalendra Sahoo and Nabakishore Acharya, which is even accepted as truthful, still no offence can be made out against the Petitioner either under the IPC or under the 1978 Act since no material is there to reveal how and when local support was garnered by the Petitioner and no positive assertions is there about the meeting of minds or agreement between the Petitioner and Prashant Kumar Dash to commit such illegal act of collection of deposits from public. Mr. Lekhi further submits that the subsequent charge-sheet submitted against the Petitioner is without any material worth credence, symbolizing any nexus between the Petitioner and alleged commission of offences by Prashant Kumar Dash or Seashore Group of Companies and the charge-sheet is a desperate attempt to malign the Petitioner for political purpose. When the Petitioner has been dropped from indiction under Sections 468, 471, 406, 467, 417, 418, 422 and 34, IPC, the attempt of prosecution to arraign him for rest of offences with the aid of criminal conspiracy is also unsubstantiated in absence of any specific material to show any semblance of connection either to induce any gullible investor or general public to make the deposit or any fraudulent/dishonest intention. It is also submitted that the offences under Sections 409 and 420 of the IPC cannot co-exist simultaneously simply because of their required ingredients. And so far as the offences under the 1978 Act are concerned, the very ingredient for the same, i.e. the materials relating to promotion of illegal Money Circulation Schemes or Prize Chits is completely absent. In other words,the statements of the witnesses are not only lacking satisfaction of required ingredients but also are without any supporting material fact relating to promotion of alleged schemes.

7. Mr.Nayak, learned counsel for the CBI submits that the Petitioner by criminal conspiracy with Prashant Kumar Dash has received Rs.1.75 Crores in his personal savings bank account from Seashore Group of Companies, i.e. M/s Sanket Investment and Marketing Limited,M/s Seashore Multipurpose Cooperative Limited and M/s Seashore Ganjam Multipurpose Cooperative Limited out of the public deposits collected unauthorizedly and illegally for local support and smooth running of such illegal money circulation schemes in Balasore area. The Petitioner was/is an influential person in that local area with his political background, and ample materials are there to reveal so.Mr. Nayak further submits that even accepting for a moment that the Petitioner did not have any political position, the same does not mean that he did not have any influence on local public at Balasore in as much as he belongs to the family of former Speaker of Odisha Legislative Assembly. It also does not mean that a person would not be influential without a political background. When the offences like cheating and misappropriation of money with criminal conspiracy are there and bank transactions are clear to reveal transfer of money, then nothing more remains in the contention of the Petitioner than to face criminal prosecution for the offences alleged against him.

8. A number of decisions are cited from both sides in support of their respective contentions and all of them are not required to be discussed here. Bu t the

fundamental principles, as set out in the case of ***State of Haryana vs- Bhajan Lal, (1992) Supp 1 SCC 335***, are relevant to be reproduced here. They are as follows:

> "102. (1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.
>
> (2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.
>
> (3) Where the 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.
>
> (4) Where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.
>
> (5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.
>
> (6) Where there is an express legal bar engrafted in any of the provisions of the Code or the Act concerned (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the Act concerned, providing efficacious redress for the grievance of the aggrieved party.
>
> (7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

9. In the case at hand the receipt of amount to the tune of Rs.1.75 Crores by the Petitioner as hand loan amount from Seashore Group of Companies is not disputed. The detailed transactions are to the effect that, he received Rs.90,00,000/- from M/s Seashore Multipurpose Cooperative Limited, Rs.65,00,000/- from M/s Seashore Ganjam Multipurpose Cooperative Limited and Rs.20,00,000/- from M/s Sanket Investments and Marketing Limited in his personal S.B. Account. It is the contention of the Petitioner that a sum of Rs.1.855 Crores were given back against such loan amounts taken by the Petitioner to different companies of Seashore Group from his Group of Companies. This contention of the Petitioner of course requires a thorough examination in course of the trial. Because, repayment of such amount as contended by the Petitioner are not that clear through materials collected during investigation. As per the allegations, receipt of the amount by the Petitioner is without any document or agreement and he was not eligible to receive such amount from the Cooperatives without being a member of any of the Cooperatives. It is even alleged that the Petitioner was not associated with M/s Jai Matadi Exports Ltd. and M/s.Krupalu Trade Link Pvt. Ltd. at any point of time through which the refund transactions were made with Seashore Group of Companies. It is again a matter of appreciation in course of trial.

10. Secondly, it is alleged that the Petitioner received such huge amount of money from Seashore Group of Companies for providing local support and protection for unhindered running of those companies in Balasore area by collecting deposits from general public illegally, as a consequence of criminal conspiracy between him and the principal accused Prashant Kumar Dash. It is true that Prashant Kumar Dash and his Seashore Group of Companies have been accused of commission of offences under Sections 420/468/471/406/467/417/418/422/120-B/34 IPC and Section 4,5,6 of the 1978 Act. To attract the offence of criminal conspiracy read with cheating and other offences, circumstantial evidences, apart from the statements of witnesses, are relevant factors. As per the Petitioner, he joined in the local political party in December, 2013 and elected as Member of Parliament in May,2014 and prior to that he served as Managing Director of Balasore Alloys till November, 2011. In between November, 2011 to December, 2013 he worked for his own Group of Companies. Here the Petitioner does not explain what relationship he had with Prashant Kumar Dash or his Group of Companies that prompted Seashore Group of Companies to give such huge amount of loan to the Petitioner personally. So, the receipt of money by the Petitioner gives prima facie presumption against him that he had a close relationship with Prashant Kumar Dash. This may be a business relationship or otherwise. But no document could be surfaced during investigation to reveal the nature of business between the Petitioner with Seashore Group of Companies. It is not that the money was received through the companies owned by the Petitioner, but by him personally. So the otherwise inference is that he must have a close nexus with Prashant Kumar Dash, the principal accused. If the relationship is not purely business or official, then it must be for any suspicious purpose and this needs to be examined in course of trial. Therefore all such contentions put forth by the Petitioner that no material has been brought against him in course of investigation to reveal his association with Prashant Kumar Dash to influence general public for smooth collection of deposits are without merit.

11. So far as the commission of offences under 1978 Act is concerned, it is submitted on behalf of the Petitioner that neither any material regarding promotional activities is there against him nor any other activities are alleged against him. This contention of the Petitioner is again found without substance. As stated above, if he has a close nexus with Prashant Kumar Dash for which such a huge amount has been given to him by Prashant Kumar Dash through his companies, which still remains unexplained, then the presumption would be that it is for the illegal money circulation business in Balasore area. Besides, it is also revealing from the allegations that the Petitioner had attended public meetings with other accused persons.

12. It is well settled that the power under section 482 Cr.P.C. has to be exercised by the High Court, inter alia, either to prevent the abuse of process of law or otherwise to secure the ends of justice. The power under section 482 Cr.P.C. are

though very wide and undefined, but great caution is required in its exercise. Before forming an opinion to quash a criminal proceeding, more particularly in a case like the present one involving economic offences, this court must evaluate the materials surfaced in course of investigation whether the ends of justice would justify the exercise of inherent power. As discussed in earlier paragraphs,when a prima facie case is found made out against the petitioner much less economic offences, I do not see any reason in favour of the petitioner to warrant interference for quashing of the criminal proceeding or the charge-sheet submitted by the prosecution.

13. Resultantly, the CRLMC is dismissed.

14. It is made clear that all such observations made above in this judgment regarding merits of the case are for the limited purpose of this application and the trial court shall not be influenced by any such observation while proceeding in trial.

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2023 (I) ILR – CUT - 803

B.P. ROUTRAY, J.

MACA NO. 717 OF 2016

SANJAY KUMAR MOHANTA & ANR. .....Appellants

.V.

NABAKISHORE MOHANTA & ANR. .....Respondents

MOTOR ACCIDENT – Claim of Compensation – Duty of the tribunal – Held, the claimants required to establish their case on the touchstone of Preponderance of Probability and standard of proof beyond reasonable doubt cannot be applied by the Tribunal while dealing with motor accident cases. (Para 14,15)

Case Laws Relied on and Referred to :-

1. (2013) 14 SCC 345 : Bimla Devi & Ors. Vs. Satbir Singh & Ors.
2. (2020) 13 SCC 486 : Sunita & Ors. Vs. Rajasthan State Road Transport Corporation & Ors.

For Appellants : Mr. R.K. Rout

For Respondents : Mr. P.K. Mahali on behalf of Mr. S.S. Kanungo, (counsel for Respondent No.2)
Mr. B.B. Singh (for Respondent No.1)

JUDGMENT Date of Judgment:28.02.2023

B.P. ROUTRAY, J.

1. The matter is taken up through hybrid mode.

2. Heard Mr. R.K. Rout, learned counsel for the claimant – Appellants, Mr. P.K.Mahalion behalf of Mr. S.S. Kanungo, learned counsel for insurer – Respondent No.2 and Mr. B. Singh, learned counsel for owner – Respondent No.1.

3. Present appeal by the claimants is against the impugned judgment dated 29th March, 2016 of learned 1st MACT, Mayurbhanj, Baripada passed in MAC No.34 of 2015, wherein the tribunal has passed nil award.

4. The facts of the case are that deceased Arati Mohanta died on 4th April, 2014 at SCB Medical College and Hospital, Cuttack for injuries sustained by her in the motor vehicular accident dated 27th March, 2014 while she was going in the motor cycle bearing registration number OR 04M 4592 being driven by one Dusmanta Mohanta at Kadadiha under Karanjia P.S. Upon death of the deceased at SCB Medical College, Mangalabag UD PS Case No.484 dated 4th April, 2014 was registered. Subsequently,on the report lodged by the husband of Arati (the deceased) namely, Sanjaya Kumar Mohanta (P.W.1), Karanjia P.S. Case No.103 dated 14th August, 2014 was registered and the enquiry report of the UD case merged in the same. The police upon completion of investigation submitted charge-sheet in Karanjia P.S. Case No.103 of 2014 under Section 279/304-A of the I.P.C. against the accused driver namely Dusmanta Mohanta.

5. In course of enquiry in the Mangalabag UD PS case, the inquest of the dead body was held under Ext.A in which P.W.1, the husband of the deceased put his signature as a witness. According to column 9 of the said inquest report under Ext.A, the reason of death is recorded as follows:-

> "On 27.3.2014 at about 7 P.M. his wife Arati Mohanta after finishing school work while returning to house, near Kadadiha, an Indica Car bearing Regn. No. OR-02-AS-8715 being driven in a rash and negligent manner dashed against her from behind as a result of which she fell down on the road sustaining severe head injury and soon thereafter, she was taken by him to Karanjia Govt. hospital for treatment and as her condition became serious, she was referred to S.C.B. Medical College, Cuttack and while undergoing treatment, she died in the morning of 4.4.14."

6. But in the claim application, according to the claimants, when the deceased was going as a pillion rider in the motor cycle, the same dashed against a street dog, as a result of which she fell down and sustained injuries leading to her death. P.W.1, 2 and 3, the eye witnesses, examined on behalf of the claimants have stated in the same line. Apart from the oral evidence of those witnesses, other documentary evidence including the F.I.R., charge-sheet, etc. were also adduced from the side of the claimants.

7. The insurance company though did not examine any witness on their behalf, but adduced the certified copy of the inquest report, seizure list and Zimanama as Ext.A, Ext.B and Ext.C respectively on their behalf.

8. The tribunal on analysis of evidence adduced from both sides, placed reliance on the endorsement made at column 9 under Ext.A and disbelieved the case of the claimants regarding death of the deceased by fall from the motor cycle without involvement of the car. The tribunal further held that the involvement of the Indica car to cause the accident is established on record and therefore, negligence on the part of the driver of motor cycle bearing registration number OR 04M 4592 is unbelievable, which has been implanted to manage compensation. Resultantly, the tribunal refused to grant any compensation.

9. It needs to be mentioned at the outset that the tribunal though has framed four issues regarding maintainabilityof the claim application, negligence and involvement of the offending motor cycle in the accident, and the entitlement of the claimants to get compensation, but did not answer all those issues except the negligence aspect. The tribunal has finally opined that the claimants are not entitled to get any compensation since they have implanted the motor cycle bearing registration number OR 04M 4592 in the accident.

10. Upon perusal of the analysis made by the Tribunal under issue number 2 and 3, it is seen that the tribunal has disbelieved such oral evidence and submission of charge-sheet by police mainly on the ground that P.W.1, the husband of the deceased is a teacher and therefore, what is mentioned at column 9 of the inquest report is within his knowledge, which he is subsequently trying to avoid. On analysis of such reasons given by the tribunal to disbelieve the case of the claimants, this court is unable agree with the conclusion of the tribunal. It is for the reasons discussed below.

11. First of all, admittedly, the endorsement made at column 9 of Ext.A, the inquest report is not in the hand-writing of P.W.1. It is not known who has made such endorsement in the inquest report. While cross-examining this P.W.1, the insurer has not asked any question to him to suggest anything that the endorsement at column 9 is in his hand writing.

12. Secondly, this inquest report under Ext.A was prepared in course of enquiry of Mangalabag UD PS case. Neither the author of this inquest report, i.e. Enquiry Officer in the UD Case, nor the investigating officer in Karanjia P.S. Case No.103 of 2014 has been examined by the insurer to prove the contents of Ext.A. Admission of a document does not make its contents proved automatically. Section 61 of the Indian Evidence Act prescribes the manner in which a primary evidence is to be led in respect of a document. This is not followed in the case at hand and therefore, the contents of Ext.A, particularly at column 9, cannot be said to have proved on record.

13. Thirdly, it is the consistent case of the claimants that the deceased sustained such injuries due to fall from the motor cycle while going as a pillion rider as the same hit against a street dog. P.W.2 and P.W.3, both are eye witnesses to the

occurrence who have categorically stated that the deceased was going as a pillion rider in the motor cycle driven by Dusmanta Kumar Mohanta at the time of accident and fell down from the same.Their evidences remain unassailed in cross-examination. So, in absence of any rebuttal evidence to the oral evidence of direct witnesses, they cannot be disbelieved.

14. The other ground mentioned by the tribunal that the delay in lodging the F.I.R. has not been explained by the claimant – P.W.1, is not a material ground to disbelieve the F.I.R. story.The standard of evidence and its appreciation in accident compensation cases is different from the standard of proof required in any other case. The Hon'ble Supreme Court in the case of ***Bimla Devi and others vs- Satbir Singh and others, (2013) 14 SCC 345***, have observed that, "*in Claim Case, it is difficult to get witnesses, much less eye witness, thus extremely strict proof of facts in accordance with provision of Indian Evidence Act may not be adhered to religiously. Some amount of flexibility has to be given to those cases, but it may not be construed that a complete go-by is to be given to the Indian Evidence Act."*

15. Further, in the case of ***Sunita & Ors vs- Rajasthan State Road Transport Corporation & Ors, (2020) 13 SCC 486***, the Supreme court have restated the legal position that the claimants were merely to establish their case on the touchstone of preponderance of probability and standard of proof beyond reasonable doubt cannot be applied by the Tribunal while dealing with the motor accident cases. It is held that,

> *"22. It is thus well settled that in motor accident claim cases, once the foundational fact, namely, the actual occurrence of the accident, has been established, then the Tribunal's role would be to calculate the quantum of just compensation if the accident had taken place by reason of negligence of the driver of a motor vehicle and, while doing so, the Tribunal would not be strictly bound by the pleadings of the parties. Notably, while deciding cases arising out of motor vehicle accidents, the standard of proof to be borne in mind must be of preponderance of probability and not the strict standard of proof beyond all reasonable doubt which is followed in criminal cases."*

16. Thus in the instant case, on analysis of the materials in its entirety, this court being not agreeing with the finding of the tribunal, the impugned judgment is set side. Since the tribunal has not determined the computation of compensation it is felt appropriate to remand back the matter to the tribunal for fresh adjudication.

17. In view of the discussions made above, it is held that the deceased Arati Mohanta died due to the injuries sustained in the motor vehicular accident dated 27th March, 2014 involving the motor cycle bearing registration number OR 04M 4592 being driven by the accused driver Dusmanta Mohanta. Accordingly issue number 2 and 3 as framed by the tribunal are answered by this court. The matter is remitted back to the tribunal to give its finding on issue number 1 and 4 for the said purpose.The tribunal is directed to conclude the adjudication within two months from the date of appearance of the parties. The parties are directed to appear before the tribunal on 20th March, 2023 along with a certified copy of this order.

18. The copies of depositions and other documents as filed by Mr. Rout in course of hearing are kept on record.

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

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2023 (I) ILR – CUT - 807

Dr. S.K.PANIGRAHI, J.

W.P.(C) NO. 7956 OF 2022

Dr. STHITAPRAGYAN MISHRA .....Petitioner

.V.

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

SERVICE LAW – Appointment – Change in the criteria/rule of appointment after the selection process is commenced – Whether permissible? – Held, Not permissible for the employer to change the rule of the game after the selection process is commenced.

(Para 28-29)

Case Laws Relied on and Referred to :-

1. AIR 2010 SC 3714 : Ramesh Kumar Vs. High Court of Delhi & Anr.
2. AIR1987 SC 2267 : Shri Durgacharan Misra Vs. State of Orissa & Ors.
3. AIR 1981 SC 561 : B.S. Yadav & Ors. Vs. State of Haryana & Ors.
4. AIR 1984 SC 541 : P.K. Ramachandra Iyer & Ors. Vs. Union of India & Ors.
5. AIR 1985 SC 1351 : Umesh Chandra Shukla Vs. Union of India & Ors.
6. AIR 2008 SC 1470 : K. Manjusree Vs. State of A.P.
7. AIR 2008 SC 2103 : Himani Malhotra Vs. High Court of Delhi.

For Petitioner : Mr. Bishnu Prasad Pradhan

For Opp. Parties : Mr. G.R. Mohapatra, ASC (for O.P.1)
Mr. R.C. Mohanty (for O.Ps.2 & 3)
Mr. K.K. Swain (for O.P.4)

JUDGMENT Date of Hearing : 11.10.2022 : Date of Judgment: 31.01.2023

Dr. S.K.PANIGRAHI, J.

1. The Petitioner in the aforementioned Writ Petition has challenged the order of posting of contractual Asst. Professor (Biochemistry) dated 22.03.2022 issued by the Director of Medical Education & Training, Odisha, (DMET) and final merit list of Assistant Professor (Biochemistry) dated 21.03.2022, *inter alia*, on the ground that the Opp. Party No.4 is not having one year teaching experience as TUTOR and therefore she is not at all eligible to hold the post of Asst. Professor (Biochemistry).

I. FACTUAL MATRIX OF THE CASE:

2. Bereft of unnecessary details, the brief facts giving rise to the present writ application is that the present petitioner is serving as Tutor at SCB Medical College

& Hospital, Cuttack. Opp. Party No.2 issued an advertisement dated 13.12.2021 for filling of vacancies for the posts of Assistant Professor in Government Medical colleges of the State. Eligible candidates were invited to attend the walk-in interview for the post of Assistant Professor in all Govt. medical colleges of the State on contractual/deputation basis in view of MCI/NM Curgency. Pursuant to Advertisement dated 13.12.2021 the present petitioner applied for the post of Asst. Professor(Biochemistry).Similarly,four other applicants submitted their applications for the post of Asst. Professor (Biochemistry).

3. As per the eligibility criteria fixed by the Opp. Party No.2 in the advertisement dated 13.12.2021, a candidate must be a citizen of India and he must possessed MD/MS/ DNB/DM/MCh or equivalent degree in the concerned discipline from any MCI/NMC approved recognized permitted medical colleges or any other academic qualification with such additional teaching experience in the subject as may prescribed by the MCI/NMC as per Teachers Eligibility Qualifications 1998 (latest amendments) of MCI / NMC, in force and OMES Rules, 2021. Candidates having DM/M Ch/DNB / equivalent to DM/M Ch, are not required any teaching experience. Further, the candidates having M Sc (Medical Subjects) in Anatomy, Physiology, Biochemistry, subjects will be considered if sufficient candidate with PG decree / DNB are not available and subject to the limitations as may be prescribed by MCI/NMC from time to time. For the post of Asst. Professor, a candidate must have possessed one year teaching experience as per the Minimum Qualifications for Teachers in Medical Institutions (Amendment) Regulations, 2019. In view of Regulations, 2019 issued by the Medical Council of India, one year teaching experience as SR/TUTOR in concerned subject is mandatory. As per eligibility criteria fixed in the Advertisement dated 13.12.2021, applicant must be a citizen of India. He must possess MD/MS/ DNB / DM / M Ch or equivalent degree in the concerned discipline.Further also he must one year teaching experience in the concerned subject.All candidates/Applicants were directed to submit the documents withregardto "Teaching Experience" certificate from the competent authority. Teaching experience of one year is mandatory for the post of Asst. Professor.

4. After submissions of applications for the post of Asst.Professor (Biochemistry), scrutiny was made. After scrutiny, draft provisional merit list was prepared and the same was published on 24.01.2022. From the said draft provisional merit list dated 24.01.2022, it is evident that there were all together five candidates for the post of Asst. Professor (Biochemistry). Out of five candidates, present petitioner had secured total 69.22 marks and her serial Number was at serial No.1 and the name of Opp. Party No.4 was at Serial No-5 even though she had secured total 72.37 marks. Selection Committee had observed in the remark column of serial No-5 that she is not eligible because she is in the post PG Bond. Though the Serial No-5 (Opp. Party No.4) had secured mark i.e. 72.37 marks but she was found not

eligible as she is in PG Bond. Amongst rest four of the candidates, petitioner had secured highest mark i.e. 69.22 marks.

5. As per the "procedure of selection" fixed in the advertisement dated 13.12.2021, selection will be strictly on the basis of merit list prepared on basis of career marks.Since the petitioner had secured highest marks amongst four candidates, she was hopeful that she would be selected as Asst.Professor (Biochemistry) by the Selection Committee.

6. The Opp. Party No.2 found that some candidates have procured Experience certificates from the Govt. medical colleges and have furnished the same for selection of Asst. Professor pursuant to Advertisement dated 13.12.2021. Therefore, Opp. Party No.2 relying Government Resolution No-11943/H dated 24.01.2021 and immediately wrote a letter to the Dean and Principals of all three Government Medical colleges indicating that "as the post PG Bond service period is two years, a certificate for a part period of the Bond service shall not be issued. Further, it was indicated that as per Govt. Resolution No-11943/H dated 21.04.2021 and notified that post PG Bond Doctors in specialty are entitled for experience certificate as Sr. Resident/Tutors as the case may be for a period of one year in their respective specialties after completion of two years Bond period. Accordingly, Opp. Party No.2 requested for revocation of experience certificate issued in favour of Post PG Bond service Doctors.

7. While matter stood thus, the Opp. Party No.3 instead of issuing final merit list, had issued another provisional merit list on 15.03.2022. In the said 2nd provisional merit list dated 15.03.2022, the Sl. No.5 candidate who was placed in the 1st provisional merit list was declared as not eligible, her name was declared as Sl. No.1. Name of the petitioner was at Sl. No.2. All the candidates were requested to go through the provisional merit list dated 15.03.2022 and submit their grievance (if any on or before 18.03.2022 before 5 P.M. by email). Petitioner was surprised and shocked to ascertain that the Opp. Party No.4 who was declared as not eligible, has become Sl. No.1. Finding no other alternatives, present petitioner immediately submitted her grievance before the Opp. Party No.2 on 17.03.2022 by e-mail and requested him to consider her grievance petition in accordance with law.

8. A detailed grievance petition was submitted before the Opp.Party No.2 on 17.03.2022 however, the authority without considering the same has issued final merit list on 21.03.2022. From the final merit list dated 21.03.2022, it is evident that the 2nd provisional merit list and final merit list are the same. There is no change in Final Merit List. On being aggrieved of the same, the petitioner has filed this writ petition.

II. PETITIONER'S SUBMISSIONS:

9. Learned counsel for the Petitioner earnestly made the following submissions in support of her contentions:

10. The approach of the Opp. Party No.2 is not only illegal but also contrary to settle position of law. Law is well settled that submission of grievance petition is not an empty formality.Once grievance petition is filed, the competent authority should have dealt with all the points raised in the said grievance petition before publication of the final merit list. In the present case at hand, the petitioner had specifically indicated in her grievance petition that the Opp. Party No.4 is not at all eligible for the post of Asst. Professor due to lack of one year teaching experience. Admittedly, the Opp. Party No.4 is continuing as Tutor in post PG Bond and has not completed two years.Therefore, she is not entitled to get one year teaching experience certificate as SR/TUTOR. As per Regulation, 2019, a candidate must have one year teaching experience for the post of Asst. Professor. Prior to the present selection, the candidates who were under post PG Bond, experience certificate were not being issued to them before completion of two years. In the present case, during scrutiny the selection committee relying upon the Govt. Resolution dated 21.04.2021, found that the Opp. Party No.4 is not eligible as she is continuing in post PG Bond. Reasons best known to the same authority, under what circumstances the Opp. Party No.4 was declared as suitable/eligible for the post of Asst. Professor. Opp. Party Nos.2 and 3 have ignored the Government Resolution dated 21.04.2021 and have illegally selected the Opp. Party No.4 for the post of Asst. professor.

11. Furthermore, only to accommodate the Opp. Party No.4, the DMET, Odisha (Opp. Party No-2) has issued Notice on 17.03.2022 indicating therein that the post PG Bond service of two years shall be counted towards the teaching experience of two years as SR. Though the said notice was issued by the Opp. Party No.2 on 17.03.2022, but the Opp. Party No.3 much prior to said notice has placed the name of Opp. party No.4 as at Serial No-1 in the second provisional merit list dated 15.03.2022. In the first provisional merit list, it was indicated that the Opp. Party No.4 is not eligible but in the second provisional merit list, the name of the Opp. party No.4 was at Serial No.1. Nothing was indicated in the remark column of second provisional list dtd.15.03.2022. Just only to accommodate the Opp. Party No.4, notice dated 17.03.2022 was issued. On this ground alone publication of 2nd provisional merit list as well as final merit list are not sustainable in the eyes of law. Further it is submitted that prior to the notice dated 17.03.2022 all the post PG Bond Doctors before completion of two years were not eligible to get one year experience certificate. For the first time and just only to debar the petitioner from selection process of Asst. Professor, the DMET, Odisha (Opp. Party No.2) has issued Notice on 17.03.2022 indicating therein that post PG Bond candidates are eligible to get teaching experience of two years as SR. Such approach of the Opp. Party No.2 is not only illegal but also malafide and contrary to law.

12. The law is well settled that Rule of game cannot be changed after commencement of the game. In the present case, there was no provision for issuance of one year experience certificate before completion of post PG Bond

period. Advertisement was issued on 13.12.2021. By the time advertisement was issued, there was no Govt. circular/Notification/Resolution for issuance of experience certificate before completion of two years as post PG Bond Doctors. For the first time on 17.03.2022, the DMET, Odisha (Opp. Party No.2), just only to accommodate the Opp. Party No.4 has issued Notice indicating that post PG Bond Doctors are eligible to get two years teaching experience as SR. From the aforesaid facts,it is very clear that the Opp. Party No.2 has bypassed all the Government Notification/Circular/Resolution and has the Opp. Party No.4 as an Asst. Professor who is not at all eligible for the said post. That apart, Notice dated 17.03.2022 is prospective in nature and said notice is not applicable to the present selection. Therefore, procedure adopted by the Opp. Parties are totally illegal and contrary to settle position of law.

13. Moreover, no opportunity of personal hearing has been provided to the petitioner before issuance of final merit list. Admittedly, present petitioner submitted a grievance petition on 17.03.2022 within the time limit fixed by the Opp. Party No.2. Without considering the grievance petition dtd.17.03.2022 in its proper prospective and without giving an opportunity of personal hearing to the petitioner, has issued the order of posting of Asst. Professor (Biochemistry) on 22.03.2022. After publication of final merit list, the present petitioner had approached the Opp. Party No.2 to reconsider her case once again in terms of Government Notification dated 21.04.2021. However, the Opp. Party No.2 without considering the same has hurriedly issued the order of posting dated 22.03.2021. In such view of the matter procedure adopted by the Opp. Party No.2 in selecting the Opp. Party No.4 as Asst. Professor is totally illegal, arbitrary, and malafide in the eyes of law.

III. SUBMISSIONS OF OPPOSITE PARTY NO.4:

14. *Per contra*, learned counsel for the Opp. Party No.4 intently made the following submissions:

15. The writ application filed by the petitioner is not maintainable in this as she had already participated in the selection process and when she was not selected she had filed this writ application challenging the selection and appointment of opposite party No.4, which is not permissible in law as per the decision of the Apex Court. Therefore, on that score alone the present writ application filed by the petitioner is not maintainable and is liable to be dismissed. Besides that since the petitioner has suppressed material facts and has not approached this Court with clean hands she is not entitled to get any relief.

16. The opposite party No.4 has fulfilled the eligibility conditions enumerated in the said advertisement dated 13.12.2021 and as she was serving as a Tutor being a direct candidate in the Department of Biochemistry in S.C.B. Medical College and Hospital, Cuttack with effect from 03.11.2020, she produced experience certificate for the purpose of applying for the post of Assistant Professor (Biochemistry).

17. When the provisional merit list was published on 24.01.2022, the opposite party No.4 stood at Sl. No.1 in the said selection test secured 72.37 marks whereas the petitioner has secured 69.22 marks. Due to post P.G. Bond the opposite party No.4 was not found eligible to be appointed as an Assistant Professor (Biochemistry) which is evident from the remarks made in the extreme right hand column of the provisional merit list. The opposite party No.4 being aggrieved by such remarks, made a representation through online wherein she relied upon the resolution dated 09.12.2021 issued by the Government of Odisha, Health and Family Welfare Department which was in vogue at the relevant time as the said resolution dated 09.12.2021 has superseded all resolutions/orders/ executive instructions/guidelines issued for the purpose. The said resolution dated 09.12.2021 was very much in force at the time of issuance of the advertisement which was made on 13.12.2021. As per the said resolution dated 09.12.2021 more particularly as per Clause-1 (f) wherein it has been categorically provided that participation in selection process for residency/contractual/regular faculties for Medical Colleges inside the State of Odisha under the State Government or PSU shall be allowed and the certificates shall be released. Clause-1 (g) of the resolution dated 09.12.2021. Further, it provides that any service or training after PG (Senior Resident/Tutor/Faculty in Medical Colleges/Medical Officer in PSUs or other departments) inside State under the State Government shall be counted towards post PG Bond service. Since the aforesaid resolution dated 09.12.2021 was subsisting at the time of issuance of the advertisement dated 13.12.2021, the post P.G. Bond Service of the opposite party No.4 has been counted towards service and for that purpose Experience Certificate was issued in her favour on 23.12.2021 by the Dean and Principal of S.C.B. Medical College and Hospital, Cuttack, which is evident from Annexure-C/4.

18. After notification of second provisional merit list, the Director, Medical Education and Training, Odisha, Bhubaneswar invited the objections from the candidates. Accordingly, the present petitioner filed her objection on 17.03.2022 under Annexure-6 of writ application. After going through the objections/grievances received to the provisional merit list dated15.03.2022, the Grievances were examined by the Committee. It is relevant to mention here that the objections/ grievances petition dated 17.03.2022 of the petitioner was also examined by the Committee and at last the final merit list was published on 21.03.2022, wherein the present Opp. Party No.4 stood first in Biochemistry Department as total career mark and on the other hand the name of 5 she secured 72.37% present petitioner was found place at Serial No.2 in the said final merit list as she secured 69.22% of marks which is less percentage of mark than the Opp. Party No.4. Accordingly the appointment letter was issued on 22.03.2022 in favour of the present Opp. Party No.4 along with other selected candidates of different Departments.

19. Admittedly, when the opposite party No.4 stood first in the selection test having secured 72.37 marks and in terms of resolution dated 09.12.2021 issued by

the Government of Odisha in Health and Family Welfare Department, her post P.G. Bond service was taken into account, there is no illegality in her selection and rightly shewas selected and given appointment as Assistant Professor (Biochemistry) in S.C.B.Medical College and Hospital, Cuttack and she has already joined the said post on 25.03.2022.

IV. COURT'S REASONING AND ANALYSIS:

20. Heard the parties and after perusing the documents it is clear that the entire case of the Opp. Party No.4 is that her P.G. Bond Service period has been counted towards teaching experience as S.R. and this fact has been disputed by the petitioner.

21. The Opp. Party No.4 joined in her Post P.G. Bond Service as Tutor in the Department of Biochemistry, S.C.B. Medical College & Hospital, Cuttack on 03.11.2020. As per Government Resolution dated 09.12.2021 (Annexure-E/4), post PG Bond service is for two years.

22. Clause 1 (c) of Government Notification dated 09.12.2021 provides that after completion of PG, candidates shall have to serve in any health institution of the State for two years. Clause 1 (d) provides that after completion of two years of service as per bond provision, the direct as well as in service doctors will be released from Bond condition.Clause (1) of said Notification provides that candidates leaving the course before completion of the course leading to lapse of a seat shall be liable for monetary penalty of Rs,10 lakhs and the amount of stipend/salary received by the date of such leaving the course. Clause-2(d)of the said Notification provides that after completion of course the copy of Bond shall be transmitted to DHS and DMET, Odisha for reference during placement.

23. From the aforesaid clauses, it is very clear that the period of post PG Bond service is two years. Resolution dated 09.12.2021 does not suggest about issuance of teaching experience as S.R. However, as rightly contended by the petitioner, there is no circular or guidelines for issuance of Teaching Experience Certificate before completion of two years PG Bond service. The Opp. Party No.4 is relying upon clause 1 (f) & 1 (g) of Govt. Resolution dated 09.12.2021. She has contended that the PG Bond service period should be counted towards teaching experience. As she has not completed two years in post PG Bond Service period, she is not entitled to get teaching experience as S.R for two years or one year.

24. The Opp. Party No.4 is relying upon certificate dated 23.12.2021 issued by the Dean & Principal, S.C.B., Medical College & Hospital, Cuttack. The petitioner has contended that Certificate dated 23.12.2021 issued by the Dean -Cum-Principal,S.C.B.,Medical College is acontinuity certificate and said certificate cannot be treated as Teaching Experience Certificate as S.R. No.4 joined as Tutor in the Department of Biochemistry,S.C.B, Medical College & Hospital, Cuttack on 03.11.2020. A bare reading of certificate dated 23.12.2021 reveals that Opp.

Party No.4 was working as Tutor since dated 03.11.2020. Therefore, the said certificate cannot be considered and treated as Teaching Experience Certificate as S.R.

25. Additionally, the said certificate was issued for the purpose of applying for the post of Asst. Professor in respect of OPSC Advertisement No-19/2021-22. Teaching Experience Certificate has not been issued by the Dean & Principal S.C.B Medical College & Hospital, Cuttack for the purpose of applying for the post of Asst. Professor in respect of Advertisement dated 13.12.2021 which is mandatory as per Clause-6 (f) (ix) of the Advertisement. In the present case at hand, the Opp. Party No.4 has not submitted Teaching Experience Certificate as SR interns of Clause 6 (f) (ix) of the Advertisement.

26. In the present case at hand, advertisement for selection to the post of Asst. Professor was issued on 13.12.2021. During the midst of selection, the Director Medical Education & Training, Odisha, has issued notice dated 17.03.2022 indicating that Govt.Notification dated09.12.2021 shall be applicable retrospectively from the year 2017. Further it was indicated that the post PG Bond service of two years shall be counted towards the teaching experience of two years as S.R. Opp.Party Nos.1 & 2 have taken specific stand that in terms of Resolution dated 09.12.2021 and Notice dated 17.03.2022, Opp. Party No.4 has been selected as Asst. Professor (Biochemistry).

27. The Notice dated 17.03.2022 issued by the DMET reveals that after completion of Post PG Bond service of two years, candidates are entitled to get teaching experience of two years as S.R. Neither notice dated 17.03.2022 nor Government Resolution dated 09.12.2021 indicate that before completion of two years in post PG Bond service, candidates are entitled to get Teaching Experience Certificate as S.R. However, this kind of notice in the midst of the selection process is not permissible.

28. It has been well established by a catena of judgements that it was not permissible for the employer to change the rule of the game after the selection process is commenced even if the employer is entitled for prescribing a higher qualification or a stringent test than prescribed under the rules. The Supreme Court has considered the issue involved herein in great detail in ***Ramesh Kumar v. High Court of Delhi & Anr.***[1], and held as under:

> *"**11**. In **Shri Durgacharan Misra v. State of Orissa & Ors.**[2], this Court considered the Orissa Judicial Service Rules which did not provide for prescribing the minimum cut-off marks in interview for the purpose of selection. This Court held that in absence of the enabling provision for fixation of minimum marks in interview would amount to amending the Rules itself. While deciding the said case, the Court placed reliance upon its earlier judgments in **B.S. Yadav & Ors. v. State of Haryana & Ors.**[3], **P.K. Ramachandra Iyer & Ors. v. Union of India & Ors.**[4] and **Umesh Chandra Shukla v. Union of India & Ors.**[5] wherein it had been held that there was no "inherent*

1. AIR 2010 SC 3714 **2.** AIR1987 SC 2267 **3.** AIR 1981 SC 561 **4.** AIR 1984 SC 541 **5.** AIR 1985 SC 1351

jurisdiction" of the Selection Committee/Authority to lay down such norms for selection in addition to the procedure prescribed by the Rules. Selection is to be made giving strict adherence to the statutory provisions and if such power i.e. "inherent jurisdiction" is claimed, it has to be explicit and cannot be read by necessary implication for the obvious reason that such deviation from the Rules is likely to cause irreparable and irreversible harm.

12. Similarly, in ***K. Manjusree v. State of A.P.***[6]*,this Court held that selection criteria has to be adopted and declared at the time of commencement of the recruitment process. The rules of the game cannot be changed after the game is over. The competent authority, if the statutory rules do not restrain, is fully competent to prescribe the minimum qualifying marks for written examination as well as for interview. But such prescription must be done at the time of initiation of selection process.Change of criteria of selection in the midst of selection process is not permissible.*

13. Thus, the law on the issue can be summarised to the effect that in case the statutory rules prescribe a particular mode of selection, it has to be given strict adherence accordingly. In case, no procedure is prescribed by the rules and there is no other impediment in law, the competent authority while laying down the norms for selection may prescribe for the tests and further specify the minimum benchmarks for written test as well as for viva voce."

29. In ***Himani Malhotra v. High Court of Delhi***[7], the Supreme Court has held that it was not permissible for the employer to change the criteria of selection in the midst of selection process. The Supreme Court held as follows:

"9. From the proposition of law laid down by this Court in the above mentioned case it is evident that previous procedure was not to have any minimum marks for vive-voce. Therefore, prescribing minimum marks for vive-voce was not permissible at all after written test was conducted. There is no manner of doubt that the authority making rules regulating the selection can prescribe by rules the minimum marks both for written examination and vive-voce, but if minimum marks are not prescribed for vive-voce before the commencement of selection process, the authority concerned, cannot either during the selection process or after the selection process add an additional requirement/qualification that the candidate should also secure minimum marks in the interview. Therefore, this Court is of the opinion that prescription of minimum marks by the respondent at viva-voce, test was illegal."

30. In light of the aforesaid discussion and having regard to the present position of law, this Court is of the opinion that order of posting of contractual Asst. Professor (Biochemistry) dtd.22.03.2022 issued by the Director of Medical Education & Training, Odisha, (DMET) and final merit list of Assistant Professor (Biochemistry) dated 21.03.2022 should be quashed. This Writ Petition is hereby allowed.

31. The Writ Petition is disposed of being allowed.

6. AIR 2008 SC 1470 7. AIR 2008 SC 2103

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2023 (I) ILR – CUT - 816

Dr. S.K. PANIGRAHI, J.

ARBA NO.1 OF 2006

MAHANADI COALFIELDS LTD. & ANR. .....Appellants

.V.

SRI RAM CONSTRUCTION, PHULARITAND, KHARKHAREE, DHANBAD,JHARKHAND .....Respondent

(A) ARBITRATION AND CONCILIATION ACT, 1996 – Section 16 – Power of Sole Arbitrator – Explained with doctrine of kompetenz-kompetenz case law.

(B) ARBITRATION AND CONCILIATION ACT, 1996 – Section 37– Scope of interference – Held, very narrow,unless the error of facts and law leads to perversity, there is no scope to upset an arbitral award.

(Para 32-37)

(C) ARBITRAL AGREEMENT – Whether the supplementary agreement can be read as a part of the main agreement – Held, Yes.

Case Laws Relied on and Referred to :-

1. (2020) 2 SCC 455: Uttarakhand Purv Sainik Kalyan Nigam Ltd. Vs. Northern Coal Field Ltd.
2. (2021) 2 SCC 1: Vidya Drolia Vs. Durga Trading Corpn.
3. 2019 SCC OnLine Del 9591 : Glencore International AG Vs. Indian Potash Ltd.
4. O.M.P.(T) (COMM.) 32/2020 : Shri Pankaj Arora Vs. AVV Hospitality.
5. (2007) 5 SCC 295: Maharshi Dayanand University Vs. Anand Coop. L/C Society Ltd.
6. 2012 SCC OnLine Del 4300: Shakti Bhog Foods Limited Vs. Kola Shipping Ltd.
7. 2009 SCC OnLine Del 293 : Roshan Lal Gupta Vs. Shri. Parasram Holding Pvt. Ltd.
8. (2007) 5 SCC 719: Jagdish Chander Vs. Ramesh Chander.
9. (1998) 3 SCC 573: K.K. Modi Vs. K.N. Modi.
10. (1999) 2 SCC 166: Bharat Bhushan Bansal Vs. U.P. Small Industries Corpn. Ltd.
11. (2003) 7 SCC 418: Bihar State Mineral Development Corpn Vs. Encon Builders (I) (P) Ltd.
12. (1996) 2 SCC 216 : State of Orissa Vs. Damodar Das.
13. (2019) 15 SCC 131: Ssangyong Engg. & Construction Co. Ltd. Vs. NHAI.
14. 2016 SCC OnLine Ori 1039: State of Orissa Vs. Bhagyadhar Dash.
15. (2012) 1 SCC 594: P.R. Shah Shares & Stock Broker (P) Ltd. Vs. B.H.H. Securities (P) Ltd.
16. (2020) 12 SCC 539 : K. Sugumar Vs. Hindustan Petroleum Corpn. Ltd.
17. (2022) 3 SCC 237 : Haryana Tourism Ltd. Vs. Kandhari Beverages Ltd.
18. Civil Appeal No. 6832 of 2021, Order dated 30.6.2021 : Punjab State Civil Supplies Corporation Ltd. Vs. Ramesh Kumar and Company.
19. (2014) 9 SCC 263: Oil & Natural Gas Corporation Ltd. Vs. Western Geco International Ltd.
20. (2015) 3 SCC 49: Associate Builders Vs. Delhi Development Authority.
21. 2021 SCC On line Del 3428 : M/s. Pragya Electronics Pvt. Ltd. Vs. M/s Cosmo Ferrites Ltd.

22. (2015) 5 SCC 739 : Swan Gold Mining Ltd. Vs. Hindustan Copper Ltd.
23. (2018) 2 SCC 519 : Inox Wind Ltd. Vs. Thermocables Ltd.
24. (1992) 57 BLR (CA) : Aughton Ltd. Vs. M.F. Kent Services Ltd.
25. (2007) 1Loyd's Rep 280 : Sea Trade Maritime Corpn. Vs. . Hellenic Mutual War Risks Assn. (Bermuda) Ltd.
26. 2010 EWHC 29 (Comm) : Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS Vs. Sometal SAL.
27. (2009) 7 SCC 696 : M.R. Engineers & Contractors (P) Ltd. Vs. Som Datt Builders Ltd.
28. 2007 SCC On Line Ori 63 : Mahanadi Coalfields Ltd. Vs. Rawani Constructions and Anr.

For Appellants : Mr. Sanjit Mohanty, Sr. Adv. & Mr. S.Nanda.

For Respondent : Mr.D.Panda, Sr. Adv. & Mr. S.Panda

JUDGMENT Date of Hearing : 06.12.2022: Date of Judgment: 02.02.2023

Dr. S.K.PANIGRAHI, J.

1. The present Appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "A & C Act") has been filed seeking setting aside the final judgment dated 24.09.2005 passed by the Learned District Judge, Sambalpur in Arbitration Petition No.5 of 2004 arising out of arbitral award dated 31.03.2004 passed by the learned sole Arbitrator.

I. FACTUAL MATRIX OF THE CASE:

2. The present Appellants i.e. Mahanadi Coalfields Ltd., which is an undertaking of the Government of India (hereinafter referred to as "MCL") vide Tender Notice dated 30.08.1996 invited tenders for construction of 336 "A" Type Quarters at Lingaraj Township in Talcher, Odisha. The tender was floated in two packages for construction of 168 Quarters each. After negotiations, the present Respondent i.e. Sri Ram Construction (hereinafter referred to as "Sri Ram") was awarded a combined work order for both packages for an aggregate amount of Rs.7,13,43,281.28/- vide letter dated 30.09.1997.

3. The letter awarding work in Clause-7 stated *"All the terms and conditions of original tender shall be applicable for this work". Furthermore, Clause 8 stated "that matters relating to any dispute or difference arising out of this tender, work order and subsequent contract agreement entered into, based on this tender and work order shall be subject to the jurisdiction of District Court, Sambalpur (Orissa) only."* The work order further provided that the work was to be completed within a period of 18 months to be calculated from the 10th days of issue of the work order or from the actual date of handing over of the site whichever is later. A formal agreement was entered into between the parties on 22.12.1997.A subsequent agreement dated 09.02.1998 was also entered into between the Dy. Chief Engineer of MCL and Sri Ram which referred to the main agreement dated 22.12.1997 in its Preamble.

4. The formal agreement dated 22.12.1997 contains a very detailed arbitration clause which appears to have been struck off by hand. The subsequent agreement dated 09.02.1998 also contains an arbitration clause which subsists.

5. Disputes arose between the parties due to alleged delay in handing over the work site; presence of high tension electricity lines that ran over the work sites; delay in paying mobilisation advance; delay in providing drawings, etc. After various representations and discussions, Sri Ram sent a notice invoking arbitration clause on 01.11.1999 to MCL. Another letter was sent by Sri Ram on 18.12.1999 to MCL seeking appointment of a sole arbitrator when no reply was received for its previous letter. MCL responded vide letter dated 19.05.2000 stating that the contract executed between the parties does not provide an arbitration clause and therefore, Sri Ram's representations do not merit any consideration. MCL vide letter dated 25.05.2000 closed the contract which was later modified by letter dated 12.09.2000, whereby the contract was terminated by MCL.

6. Sri Ram Construction filed an application under Section 11 of the A & C Act before this Court vide MJC No.326 of 2000, wherein vide order dated 16.05.2001, the said matter was referred to the learned Sole Arbitrator. MCL filed Misc. Case No.99 of 2001 seeking review and cancellation of the aforesaid order, but vide order dated 30.08.2001, the petition for review was rejected. It appears from the record that MCL filed OJC No.4031 of 2002 challenging the order dated 30.08.2001 before this Court, but the same was also dismissed on 29.04.2002.

7. The parties participated in the arbitration proceedings and it appears that MCL contested the arbitration proceedings primarily on the ground of absence of an arbitration clause in the agreement. No statement of defence was filed to the various items of claims preferred by Sri Ram Construction. Keeping the contentious nature of the preliminary question of maintainability of the arbitration proceeding in mind, 8 issues were framed by the learned Sole Arbitrator. The same are reproduced hereinbelow:

> *"1. Whether the claim of the claimants for the adjudication of disputes through arbitration is maintainable?*
>
> *2. Whether the Arbitrator has the jurisdiction to give the award in the matter?*
>
> *3. Whether the deletion of arbitration clause was made in the tender document before or after the sale of the same and whether the same has been made before or after the execution of the Agreement (Ext.6)?*
>
> *4. Whether the supplementary Agreement dated 9.02.1998 (Ext.8) was executed by officers of M.C.L. having authority to execute the same?*
>
> *5. Whether the respondents have ratified the supplementary Agreement?*
>
> *6. Whether the supplementary Agreement relates to the main Agreement?*
>
> *7. Whether the claimants are entitled to any other relief on the claims raised?*
>
> *8. Whether the claimants are entitled to any other relief?"*

As it is evidently clear from the above, the first 6 issues directly or indirectly relate to the existence and validity of arbitration between the parties and thereafter, whether the Arbitrator has jurisdiction to decide the present matter. These 6 issues were considered together and decided preliminarily by the learned Sole Arbitrator after weighing the evidence available on record.

8. After returning a positive finding and assuming jurisdiction, the learned Sole Arbitrator passed the final award in favour of Sri Ram, the Claimant therein. Vide award dated 31.03.2004, the learned Sole Arbitrator awarded Sri Ram Construction a sum of Rs.3,93,72,100/- including interest and future interest at the rate of 17% per annum from the date of award till the date of payment.

9. The MCL preferred an appeal against the said award under Section 34 of the A & C Act before the Court of the learned District Judge, Sambalpur vide ARBP No.5 of 2004. The learned District Judge, Sambalpur vide order dated 24.09.2005 dismissed the said arbitration petition and confirmed the award of the learned Sole Arbitrator, leading to the present Appeal.

10. Now the facts leading to the filing the instant Appeal has been laid down, this Court shall endeavour to summarise the contentions of the Parties and the grounds which they put forth for consideration of this Court in exercise of this Court's limited jurisdiction available under Section 37 of the A & C Act.

II. APPELLANTS' SUBMISSIONS

11. The Learned Counsel for MCL assails the arbitral award mainly on the question of jurisdiction of the learned Arbitrator. It is their contention that the learned Arbitrator did not give a finding on the pleas of the appellants over his jurisdiction prior to entering into the merits of the matter and on this ground alone, the arbitral award is liable to be set aside as it has caused grave miscarriage of justice. More so, for this non-consideration of the plea of jurisdiction first, the MCL was denied its opportunity to file a statement of defence against all other claims of Sri Ram which is in violation of the rules of natural justice.

12. Furthermore, the finding of the learned Arbitrator (which was confirmed by the learned District Judge) that Clause 14 which provides for arbitration in the agreement dated 22.12.1997 had not been struck off by the time the agreement was signed is perverse, unreasonable and liable to be set aside.

13. It is also earnestly contended that the agreement dated 09.02.1998 was executed by unauthorized persons and could not be held to be binding on MCL, therefore, the arbitration clause contained in this agreement would not be binding on MCL.

14. It is further submitted that the learned Arbitrator was appointed *ex parte* by this Court and as such, MCL was not given opportunity to bring to the notice of this Court that there was no arbitration clause in the contract.

III. **RESPONDENT'S SUBMISSIONS**

15. *Per contra*, Learned Counsel for Sri Ram stated that scope of interference for this Court under Section 37 of the A & C Act is extremely narrow and the Appellants' case does not fall within any of the grounds for setting aside of the arbitral award.

16. On the question of the decision of the arbitrator on the plea of maintainability of the arbitration, it was submitted that the parties consented to the Arbitrator deciding the same along with all other issues as has been recorded in the award. The order dated 14.04.2002 of the learned Arbitrator also clearly reflects that the parties agreed that the learned Arbitrator would adjudicate the pleas under Section 16 along with the main claim. Any allegation which is contrary to the same is an afterthought and has no foundation in fact. It is baseless and false.

17. Learned Counsel for Sri Ram submitted that it is not true that the arbitration clause in the agreement dated 22.12.1997 was struck off at the time of signing the agreement.The same was done unilaterally behind the back of the concerned officials of Sri Ram. The original agreement was in the custody of the officers of MCL and therefore, in the absence of any date put below the signature on the scored off portion, the officers of MCL attempted to blindside Sri Ram. It is further submitted that after appreciating all the evidence put forth by the parties, the learned Sole Arbitrator has applied his mind and come to the conclusion that the arbitration clause was scored off illegally and as such is not binding on Sri Ram.

18. With regards to the supplementary agreement, the learned Counsel for Sri Ram submits that the supplementary agreement was a part of the main agreement and has to be essentially incorporated by reference. There is no doubt of the fact that the terms of the supplementary agreement were acted upon by both parties and as such whether or not any officer of the Corporation had authority to execute the contract is no more a live dispute between the parties.

19. Moreover, the order appointing the sole arbitrator under Section 11 of the A & C Act was assailed by MCL who moved this Court for review of the said order. This Court applied its mind not once but twice to the said appointment and MCL had ample opportunity to put forth its assertions, no matter how misconceived they were.

IV. ISSUES FOR CONSIDERATION

20. Having heard the Learned Counsels for the parties and perused the materials available on record, this Court here has identified the following issues to be determined:

A. Whether the learned Sole Arbitrator has incorrectly exercised his powers under Section 16 of the A & C Act?

B. What is the scope of this Court's power under Section 37 of the A & C Act and whether the arbitral award is patently illegal as alleged?

C. Whether the supplementary agreement can be read as a part of the main agreement?

V. ISSUE A: WHETHER THE LEARNED SOLE ARBITRATOR HAS INCORRECTLY EXERCISED HIS POWERS UNDER SECTION 16 OF THE A & C ACT?

21. Section 16 of the A & C Act has been framed in accordance with Article 16 of the UNCITRAL Model law, which embodies elemental jurisprudential doctrine i.e., "Kompetenz - Kompetenz". This doctrine empowers the court or an Arbitral Tribunal to rule upon its 'own' jurisdiction, brought forth by one of the parties to the dispute. Section 16 (1) of the A & C Act states that an arbitral tribunal may rule on its own jurisdiction, including ruling on any objection with respect to the existence or validity of the arbitration agreement.

22. The doctrine of *kompetenz-kompetenz* implies that the Arbitral Tribunal has the competence to determine and rule on its own jurisdiction, including objections with respect to the existence, validity, and scope of the arbitration agreement, in the first instance, which is subject to judicial scrutiny by the courts at a later stage of the proceedings. Under the A & CAct, the challenge before the Court is maintainable only after the final award is passed as provided by sub-section (6) of Section16. The stage at which the order of the tribunal regarding its jurisdiction is amenable to judicial review, varies from jurisdiction to jurisdiction. The doctrine of *kompetenz-kompetenz* has purposefully evolved to minimise judicial intervention at the pre-reference stage, and reduce unmeritorious challenges raised on the issue of jurisdiction of the Arbitral Tribunal.

23. The Supreme Court of India in ***Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd.***[1] discussed the application of the doctrine of kompetenz-kompetenz in the Indian legislation, and observed :

> *"7.10. In view of the legislative mandate contained in Section 11(6-A), the Court is now required only to examine the existence of the arbitration agreement. All other preliminary or threshold issues are left to be decided by the arbitrator under Section 16, which enshrines the kompetenz-kompetenz principle.*
>
> *7.11. The doctrine of"kompetenz-kompetenz", also referred to as "compétence-compétence", or "compétence de la recognized", implies that the Arbitral Tribunal is empowered and has the competence to rule on its own jurisdiction, including determining all jurisdictional issues, and the existence or validity of the arbitration agreement. This doctrine is intended to minimise judicial intervention,so that the arbitral process is not thwarted a the threshold, when a preliminary objection is raised by one of the parties. The doctrine of kompetenz-kompetenz is, however, subject to the exception i.e. when the arbitration agreement itself is impeached as being procured by fraud or deception. This exception would also apply to cases where the parties in the process of negotiation, may have entered into a draft agreement as an antecedent step prior to executing the final contract. The draft agreement would be a mere proposal to arbitrate, and not an unequivocal acceptance of the terms of the agreement. Section 7 of the Contract Act, 1872 requires the acceptance of a contract to be absolute and unqualified [Dresser Rand S.A. v. Bindal Agro Chem Ltd. [Dresser Rand S.A. v. Bindal Agro Chem Ltd., (2006) 1 SCC 751] See also BSNL v. Telephone Cables Ltd. [BSNL v. Telephone Cables Ltd., (2010) 5 SCC 213 : (2010) 2 SCC (Civ) 352] Refer to PSA Mumbai*

1. (2020) 2 SCC 455

Investments Pte. Ltd. v. Jawaharlal Nehru Port Trust [PSA Mumbai Investments Pte. Ltd. v. Jawaharlal Nehru Port Trust, (2018) 10 SCC 525: (2019) 1 SCC (Civ) 1]]. If an arbitration agreement is not valid or non-existent, the Arbitral Tribunal cannot assume jurisdiction to adjudicate upon the disputes. Appointment of an arbitrator may be refused if the arbitration agreement is not in writing, or the disputes are beyond the scope of the arbitration agreement. Article V(1)(a) of the New York Convention states that recognition and enforcement of an award may be refused if the arbitration agreement 'is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made'.

7.13. In view of the provisions of Section 16, and the legislative policy to restrict judicial intervention at the pre-reference stage, the issue of limitation would require to be decided by the arbitrator. Sub-section (1) of Section 16 provides that the Arbitral Tribunal may rule on its own jurisdiction, "including any objections" with respect to the existence or validity of the arbitration agreement. Section 16 is as an inclusive provision, which would comprehend all preliminary issues touching upon the jurisdiction of the Arbitral Tribunal. The issue of limitation is a jurisdictional issue, which would be required to be decided by the arbitrator under Section 16, and not the High Court at the pre-reference stage under Section 11 of the Act. Once the existence of the arbitration agreement is not disputed, all issues, including jurisdictional objections are to be decided by the arbitrator."

24. Recently, the ***Apex Court in Vidya Drolia v. Durga Trading Corpn.***[2] has held that:

"130. Section 16(1) of the Arbitration Act accepts and empowers the Arbitral Tribunal to rule on its own jurisdiction including a ruling on the objections, with respect to all aspects of non- arbitrability including validity of the arbitration agreement. A party opposing arbitration, as per sub-section (2), should raise the objection to jurisdiction of the tribunal before theArbitral Tribunal, not later than the submission of statement of defence. However, participation in the appointment procedure or appointing an arbitrator would not preclude and prejudice any party from raising an objection to the jurisdiction. Obviously, the intent is to curtail delay and expedite appointment of the Arbitral Tribunal. The clause also indirectly accepts that appointment of an arbitrator is different from the issue and question of jurisdiction and non- arbitrability. As per sub-section (3), any objection that the Arbitral Tribunal is exceeding the scope of its authority should be raised as soon as the matter arises. However, the Arbitral Tribunal, as per sub-section (4), is empowered to admit a plea regarding lack of jurisdiction beyond the periods specified in sub-sections (2) and (3) if it considers that the delay is justified. As per the mandate of sub-section (5) when objections to the jurisdiction under sub-sections (2) and (3) are rejected, the Arbitral Tribunal can continue with the proceedings and pass the arbitration award. A party aggrieved is at liberty to file an application for setting aside such arbitral award under Section 34 of the Arbitration Act. Sub-section (3) to Section 8 in specific terms permits an Arbitral Tribunal to continue with the arbitration proceeding and make an award, even when an application under sub-section (1) to Section 8 is pending consideration of the court/forum. Therefore, pendency of the judicial proceedings even before the court is not by itself a bar for the Arbitral Tribunal to proceed and make an award. Whether the court should stay arbitral proceedings or appropriate deference by the Arbitral Tribunal are distinctly different aspects and not for us to elaborate in the present reference.

131. Section 34 of the Act is applicable at the third stage post the award when an application is filed for setting aside the award. Under Section 34, an award can be set aside : (i) if the arbitration agreement is not valid as per law to which the party is subject; (ii) if the award deals with the disputes not contemplated by or not falling within the submission to

2. (2021) 2 SCC 1

> *arbitration, or contains a decision on the matter beyond the scope of submission to arbitration; and (iii) when the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force. Thus, the competence- competence principle, in its negative effect, leaves the door open for the parties to challenge the findings of the Arbitral Tribunal on the three issues. The negative effect does not provide absolute authority, but only a priority to the Arbitral Tribunal to rule the jurisdiction on the three issues. The courts have a "second look" on the three aspects under Section 34 of the Arbitration Act. [The nature and extent of power of judicial review under Section 34 has not been examined and answered in this reference.]"*

25. Under Section 16 of the A & C Act, the outcomes that are contemplated under the Act are where the objection as to maintainability is upheld by the Tribunal or whereby the Tribunal rejects the plea and continues with the arbitral proceedings. In the former, when the plea is accepted by the Tribunal under Section 16(2) or 16(3) of the A & C Act, an appeal would lie under Section 37 of the A & C Act. If the plea is either rejected or no ruling is rendered by the Tribunal, the proceedings would continue and the challenge, if any, would be only after the final award is passed under Section 34 of the A & C Act.

26. Learned Counsel for the Appellants alleged that it is patently illegal and fundamentally against the policy of Indian law that the learned Sole Arbitrator did not decide the issue of his jurisdiction first and thereafter deprived them from filing a Statement of Defence with respect to other claims. In this regard, it is pertinent to note that it is not necessary that in every case, a jurisdiction issue has to be decided at the very threshold. In ***Glencore International AG v. Indian Potash Limited***[3] , the learned Single Judge was of the opinion that:

> *"61. There is, contrary to the assertion made on behalf of IPL, no such fundamental policy in Indian law that adjudicating authorities should mandatorily render decision on jurisdictional issues before hearing the matter on merits. The discretion in this behalf lies with the adjudicating authority. In case the adjudicating authority hears the matter both withregard to jurisdictional issues as well as on merits together, it would logically not give its views on merits if it were to sustain an objection ousting its jurisdiction in the matter."*

27. The same view was reiterated by the Delhi High Court in ***Shri Pankaj Arora v. AVV Hospitality***[4] where the Court held that the Arbitrator had the option of keeping open the issue of jurisdiction to be decided after recording evidence and after hearing final arguments. The decision of the arbitral tribunal to enunciate its view concerning the jurisdictional issue along with its view on the merits of the matter in the final award aligns with Indian public policy as reflected in ***Maharshi Dayanand University v.Anand Coop. L/C Society Ltd.***[5]***, Shakti Bhog Foods Limited v. Kola Shipping Limited***[6] and ***Roshan Lal Gupta v. Shri. Parasram Holding Pvt. Ltd.***[7].

28. Furthermore, the Appellants' present Petition itself refers to and reproduced the learned Sole Arbitrator's order dated 14.04.2002. It appears that the learned Arbitrator directed the present Appellants to file their statement of defence after it was agreed that evidence would be necessary to decide the plea of maintainability

3. 2019 SCC OnLine Del 9591 **4.** O.M.P.(T) (COMM.) 32/2020 **5.** (2007) 5 SCC 295 4300
6. 2012 SCC OnLine Del **7**. 2009 SCC OnLine Del 293

and the same is a question which has to be decided along with the main claim since the questions are intricately connected. The parties having consented to the plea of maintainability being decided with the main claim during the arbitration proceedings and not at the threshold, cannot now turnaround and challenge the same. The Appellants had not at this point filed their Statement of Defence, and now upon being fully aware that the issues would be decided together, chose to still not include their defence to the claims and focused just on the maintainability aspect. It is, therefore, not true that no opportunity was awarded to them, but that they squandered away the opportunity for reasons best known to them.

29. In light of the position of law as discussed above and keeping in mind the facts as they have transpired, this Court is of the view that the learned Sole Arbitrator did not exercise his power under Section 16 of the A & C Act improperly or incorrectly.There is no bar to the learned Arbitrator deciding the plea of maintainability at a belated stage due to the need to examine evidence as long as the plea is decided first amongst all claims. Moreover, the Appellants were not refused any opportunity to file their statement of defence, being fully aware prior to filing the same that all the claims and pleas would be heard and decided together given the nature of the dispute.

30. In ***Jagdish Chanderv.Ramesh Chander***[8], a two-judge bench of the Supreme Court, while relying upon the earlier decisions in ***K.K. Modi v. K.N. Modi***[9]***, Bharat Bhushan Bansal v.U.P.Small Industries Corpn. Ltd.***[10]***,Bihar State Mineral Development Corpnv.Encon Builders (I)(P) Ltd.***[11]***, and State of Orissa v. Damodar Das***[12], enumerated the principles governing what constitutes an arbitration agreement. Justice R V Raveendran, speaking on behalf of the Hon'ble Bench, held that the words used in an arbitration agreement should disclose a determination and obligation on behalf of parties to refer disputes to arbitration.

31. It was a contentious issue between the parties as to whether or not the Arbitration Clause in the main agreement was struck off prior to signing of the agreement. The learned Arbitrator after examining the witnesses and the materials produced on record by both parties, thoroughly examined the issue and rendered a in favour of the Claimant- Sri Ram Construction. It was the finding of the learned Arbitrator that mere striking off of the arbitration clause in the main agreement is not determinative of whether or not the same was done before or at the time of signing the agreement. The learned District Judge agrees and also highlighted the same points of evidence that the learned Arbitrator has in his award. It is evident that the authorized person for Sri Ram Construction has signed on all pages of the agreement but the G.M.(C) of MCL has only signed on the two pages which contain the arbitration clause. If the same was done in the presence of the official from Sri Ram Construction, it would have been independently ratified as having been struck off as is the standard practice. The date also would have been inserted below the

8. (2007) 5 SCC 719 **9**. (1998) 3 SCC 573 **10**. (1999) 2 SCC 166 **11**. (2003) 7 SCC 418 **12**. (1996) 2 SCC 216

signature. There is nothing before this Court to set at naught this finding. Moreover, this Court does not sit in appeal over such fact-finding exercises and is not permitted to re-appreciate facts. What this Court must be convinced of is that the learned Arbitrator reasonably and judiciously applied his mind and there is the possibility that he could have arrived at his finding. The Supreme Court in ***Ssangyong Engg. & Construction Co. Ltd. v. NHAI***[13] has held that re- appreciation of evidence, cannot be permitted under the ground of patent illegality appearing on the face of the award. A perusal of the award dated 31.03.2004 clearly demonstrates the anxious consideration of the learned Arbitrator and a clear reasoning as to why he has arrived at his finding based on the evidence that was presented by the parties in the course of the arbitral proceedings. The Court is not to attempt to form a view in order to substitute the same with the view of the learned Arbitrator if the view taken by the learned Arbitrator is reasonable. The same has been previously reiterated by this Court in ***State of Orissa v. Bhagyadhar Dash***[14] ***and P.R. Shah Shares & Stock Broker (P) Ltd. v. B.H.H. Securities (P) Ltd.***[15]. It is, thus, clear in view of the law discussed hereinabove the learned Sole Arbitrator was well within the permissible countours in deciding the question in the matter that he did.

VI. ISSUE B: WHAT IS THE SCOPE OF THIS COURT'S POWER UNDER SECTION 37 OF THE A&C ACT AND WHETHER THE ARBITRAL AWARD IS PATENTLY ILLEGAL AS ALLEGED?

32. In the present matter, this Court is only concerned with Section 37(1)(c) which states that an appeal lies under Section 37 of the A & C Act from an order setting aside or refusing to set aside an arbitral award under Section 34 of the A & C Act. The extent of judicial scrutiny under Section 34 of the A & C Act is limited and the scope of interference is narrow. Under Section 37 of the A & C Act, the extent of judicial scrutiny and scope of interference is further narrower.Where there are concurrent findings of facts and law, first by the Arbitral Tribunal which are then confirmed by the court while in seisin of a Section 34 application, in an appeal under Section 37, the Appellate Court should be very cautious and reluctant to interfere in the findings returned in the award by the Arbitral Tribunal and confirmed by the Court under Section 34 of the A & C Act.

33. The Supreme Court in ***K. Sugumar v. Hindustan Petroleum Corpn. Ltd.***[16]**,** wherein it has been observed as:

> "*2. The contours of the power of the Court under Section 34 of the Act are too well established to require any reiteration. Even a bare reading of Section 34 of the Act indicates the highly constricted power of the civil court to interfere with an arbitral award. The reason for this is obvious. When parties have chosen to avail an alternate mechanism for dispute resolution, they must be left to reconcile themselves to the wisdom of the decision of the arbitrator and the role of the court should be restricted to the bare minimum. Interference will be justified only in cases of commission of misconduct by the arbitrator which can find manifestation in different forms including exercise of legal perversity by the arbitrator."*

13. (2019) 15 SCC 131 **14.** 2016 SCC OnLine Ori 1039 **15**. (2012) 1 SCC 594 **16.** (2020) 12 SCC 539

34. Furthermore the Supreme Court in ***Haryana Tourism Ltd. v. Kandhari Beverages Ltd.***[17] has further held as:

> *"9. As per settled position of law laid down by this Court in a catena of decisions, an award can be set aside only if the award is against the public policy of India. The award can be set aside under Sections 34/37 of the Arbitration Act, if the award is found to be contrary to: (a) fundamental policy of Indian law; or (b) the interest of India; or (c) justice or morality; or (d) if it is patently illegal. None of the aforesaid exceptions shall be applicable to the facts of the case on hand. The High Court has entered into the merits of the claim and has decided the appeal under Section 37 of the Arbitration Act as if the High Court was deciding the appeal against the judgment and decree passed by the learned trial court. Thus, the High Court has exercised the jurisdiction not vested in it under Section 37 of the Arbitration Act. The impugned judgment and order [Kandhari Beverages Ltd. v. Haryana Tourism Ltd., 2018 SCC OnLine P&H 3233] passed by the High Court is hence not sustainable."*

More recently, a similar view was also echoed by the Supreme Court in ***Punjab State Civil Supplies Corporation Ltd. v. Ramesh Kumar and Company***[18].

35. In ***Oil & Natural Gas Corporation Ltd. v. Western Geco International Limited***[19], the Apex Court has observed that the award could be set aside if it is against the public policy of India, that is to say, if it is contrary to:

> (a) fundamental policy of Indian law; or
> (b) the interest of India; or
> (c) justice or morality; or
> (d) if it is patently illegal.

After being subsequently discussed in ***Associate Builders v.Delhi Development Authority***[20] the position of law was clarified and laid down recently by the Supreme Court in ***Ssangyong Engg. & Construction Co. Ltd. v. NHAI***[21], wherein the Apex Court was pleased to hold that:

> *"34. What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in paras 18 and 27 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] i.e. the fundamental policy of Indian law would be relegated to "Renusagar" understanding of this expression. This would necessarily mean that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] expansion has been done away with. In short, Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as explained in paras 28 and 29 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in para 30 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] .*
>
> *35. It is important to notice that the ground for interference insofar as it concerns "interest of India" has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be*

17. (2022) 3 SCC 237 **18.** Civil Appeal No. 6832 of 2021 **19.** (2014) 9 SCC 263 **20**. (2015) 3 SCC 49

understood as a conflict with the "most basic notions of morality or justice". This again would be in line with paras 36 to 39 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49: (2015) 2 SCC (Civ) 204] , as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.

36. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paras 18 and 27 of Associate Builders [Associate Builders v. DDA,(2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , or secondly, that such award is against basic notions of justice or morality as understood in paras 36 to 39 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] . Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as understood in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , and paras 28 and 29 in particular, is now done away with.

37. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within "the fundamental policy of Indian law", namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

38. Secondly,it is also made clear that reappreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.

39. To elucidate, para 42.1 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Para 42.2 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], however,would remain,forif an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair- minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).

41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse."

36. It is seen that the learned Arbitrator has elaborately considered various documents, submissions and evidence led by the parties in respect of each claim, particularly the one on maintainability of the reference of the dispute to arbitration. The learned Arbitrator has extensively gone into the evidence and evaluated the entire material before him and has rendered a detailed speaking award. An award can be challenged only on the grounds mentioned in Section 34(2) of the Act and in absence of any such ground, it is not possible to re-examine the facts to find out whether a different decision can be arrived at. This view was reiterated by the High Court of Delhi in ***M/S Pragya Electronics Pvt. Ltd. v. M/s Cosmo Ferrites Ltd.***[22] and the Apex Court in ***Swan Gold Mining Ltd. v. Hindustan Copper Ltd.***[23]. The Appellants have averred that the award is patently illegal without substantiating the same before this Court. In fact, it appears from the record, that they have actually not pleaded any such ground before the learned District Judge in their petition under Section 34 of the A & C Act. In light of the aforesaid facts and the Appellants' inability to substantiate its case, this Court does not doubt that there is any apparent violation of any terms of public policy in the present case, much less any patent illegality given the fact that this Court finds the reasoning to be cogent on the basis of which the learned Arbitrator has arrived at his conclusions.

37. The learned District Judge was correctly seized of the contours of the powers vested in him under Section 34 of the A & C Act. An arbitral award is not to be lightly interfered with. Unless the error of facts and law leads to perversity, there is no scope to upset an arbitral award. The learned court below has been of the correct opinion that it is the subjective satisfaction of the learned Arbitrator which should be respected.

VII. ISSUE C: WHETHER THE SUPPLEMENTARY AGREEMENT CAN BE READ AS A PART OF THE MAIN AGREEMENT?

38. The Appellants have brought up the supplementary agreement so contentiously in their petition as it is fairly obvious that the learned Sole Arbitrator has chosen to not rely on the same in his arbitral award. However, as the ground is pressed, this Court finds itself constrained to deal with the same.

39. In a recent judgment in ***Inox Wind Ltd. v. Thermocables Ltd.***[24], the Supreme Court has held that "a general reference to a standard form of contract of one party will be enough for incorporation of arbitration clause". This was apparently an expansion of the scope for incorporation by reference of an arbitration clause contained in a standard form of terms and conditions of a party.

40. In ***Aughton Ltd. v. M.F. Kent Services Ltd.***[25], the English Court of Appeal held that a general reference to a contract would be insufficient to incorporate any arbitration clause, unless sufficient cause existed to suggest to the contrary, and

22. 2021 SCC On line Del 3428 **23.** (2015) 5 SCC 739 **24.** (2018) 2 SCC 519
25. (1992) 57 BLR (CA)

a special reference was, therefore, necessary. The law has however moved on, notably in the light of the subsequent first instance decisions of Langley J. in ***Sea Trade Maritime Corpn. v. Hellenic Mutual War Risks Assn. (Bermuda) Ltd.***[26] which discussed the single contract/two contract reference regime and Hamblen J. in ***Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v. Sometal SAL***[27]***.In Habas Sinai***[28], Hamblen J.held that a general reference would be sufficient for incorporation of an arbitration clause from a standard form of contract if such standard terms were previously agreed between the two parties in another contract(s) or if they were standard terms of one party set out in the back of an offer letter, order or another document.

41. Following the approach in ***Aughton***[29], the Supreme Court in ***M.R. Engineers & Contractors (P) Ltd. v. Som Datt Builders Ltd.***[30] has held that:

> *"16. There is a difference between reference to another document in a contract and incorporation of another document in a contract, by reference. In the first case, the parties intend to adopt only specific portions or part of the referred document for the purposes of the contract. In the second case, the parties intend to incorporate the referred document in entirety, into the contract. Therefore when there is a reference to a document in a contract, the court has to consider whether the reference to the document is with the intention of incorporating the contents of that document in entirety into the contract, or with the intention of adopting or borrowing specific portions of the said document for application to the contract.*
>
> *17. We will give a few instances of incorporation and mere reference to explain the position (illustrative and not exhaustive). If a contract refers to a document and provides that the said document shall form part and parcel of the contract, or that all terms and conditions of the said document shall be read or treated as a part of the contract, or that the contract will be governed by the provisions of the said document, or that the terms and conditions of the said document shall be incorporated into the contract, the terms and conditions of the document in entirety will get bodily lifted and incorporated into the contract. When there is such incorporation of the terms and conditions of a document, every term of such document (except to the extent it is inconsistent with any specific provision in the contract) will apply to the contract. If the document so incorporated contains a provision for settlement of disputes by arbitration, the said arbitration clause also will apply to the contract."*

42. The basis of the doctrine of incorporation by reference is that the parties have to be aware of the said other document that is sought to be incorporated. Issues 4, 5, and 6 framed by the learned Tribunal pertain to the supplementary agreement. The supplementary agreement dated 09.02.1998 referred to the main agreement in its preamble and continued to refer to it throughout. It was entered into as a supplement to the main agreement and was intended to be read as a part and parcel of the main agreement.The Appellants claim that the Dy.C.E (C) and Superintending Engineer (C) were not authorised to execute the supplementary agreement and the same was not within the knowledge of the Appellant-Company. The Respondent claims, on the other hand, that the Appellants Company by their subsequent conduct have ratified the supplementary agreement. All advances, payments, recoveries from bills, etc. were allegedly made in terms of the supplementary agreement itself. The

26. (2007) 1Loyd's Rep 280 **27**. 2010 EWHC 29 (Comm) **30**. (2009) 7 SCC 696

learned Arbitrator has gone into all these contentions and the evidence produced in this regard in great detail to ultimately come to the finding that MCL did not ratify the supplementary agreement by its conduct and no estoppel operates against them in that respect.

43. A contract for construction involves numerous details, technical, financial administrative and otherwise. There are, understandably, many formalities to be carried out. Some contracts may be small; some simple. Some involve large chunks of money. Some others have an unduly concentrated share of technical complexities. An arbitration clause is not just another clause in a contract. It has some added significance, having regard to its nature. It is clarified that the learned Arbitrator has held the arbitration clause in the main agreement itself to have existed and forming an intention to refer the disputes to arbitration between the parties after proper analysis of the facts and materials produced in evidence. Both these findings are based on facts and this Court shall not sit in re-appreciation of the same as they do not appear prima facie illegal, perverse or contrary to law. Even though the arbitration was invoked with a reference to the supplementary agreement. This issue is thus decided accordingly.

VIII. CONCLUSION:

44. At this juncture, this Court also deems it appropriate to refer to a similar case which was disposed of by this Court in ARBA No.51 of 2005 vide judgment and final order dated 22.2.2007 titled as ***Mahanadi Coalfields Ltd. v. Rawani Constructions and Anr.***[31].The facts of the present matter remain conspicuously similar to the facts of the matter referred to above in as much as the question therein also revolved around whether the arbitration clause existed in light of scoring off of the same in the agreement and had the same Appellant apart from we doubt, a similar agreement as the Clause referred to is also numbered similarly. This Court was at that time was of the opinion that no ground for interference is made out under Section 37 of the A & C Act in the matter referred to above which was ultimately affirmed by the Supreme Court vide order dated 01.10.2007 in SLP(C) No.9812 of 2007.

45. The power and the jurisdiction of the Court to set aside an award are specifically laid down in Section 34 of the A & C Act. If none of the conditions laid down in the said Section is satisfied, the award cannot be set aside on re-appraisal of the evidence. In view of the aforesaid judicial pronouncements, this Court does not find any cogent ground to hold that the application of the Appellants/MCL in any manner satisfied the conditions laid down in Section 34 of the A & C Act for setting aside the impugned award.

46. The appeal is, accordingly, dismissed and the judgment of the learned District Judge, Sambalpur passed in Arbitration Petition No.5 of 2004 is hereby affirmed. Consequently, all the pending I.As. are dismissed. No order as to costs.

31. 2007 SCC On Line Ori 63

2023 (I) ILR – CUT - 831

MISS. SAVITRI RATHO, J.

CRLMC NO. 615 OF 2023

1. BASANTA KUMAR SAHOO
2. NIRAKAR SAHOO
3. SANTILATA SAHOO .....Petitioners

.V.

1. STATE OF ORISSA
2. MADHUSMITA SAHOO .....Opp. Parties

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Application for quashing of criminal proceeding – Petitioners are husband and in laws of opp. Party no. 2 – Cognizance has been taken for the commission of offences punishable under section 498A/ 294/ 323/ 506 and 34 of the I.P.C. and Section 4 of the D.P. Act – Marriage of the parties dissolved amicable by filing petition under Section 13 (B) of the Hindu Marriage Act – Whether the criminal proceedings pending before the courts below should be quashed by exercising the powers under the section 482 of CrPC – Held, Yes – Reason indicated with reference to case laws. (Para 7,8)

Case Laws Relied on and Referred to :-

1. SLP (Crl) No. 3769 of 2003:Ruchi Agarwal Vs. Amit Kumar.
2. (2013) 4 SCC 58:Jitendra Raghuvanshi Jitendra Raghuvanshi & Ors. Vs. Babita. Raghuvanshi & Anr.
3. SLP (Crl) Diary No. 33313/2019:Rangappa Javoor Vs State of Karnataka.
4. (2010) 15 SCC 238:Pradipta Kumar Swain Vs State of Orissa.

For Petitioners : Mr. S.P. Dash

For Opp. Party No. 1 : Mr. J. Katikia,AGA

JUDGMENT Date of Judgment: 16.02.2023

MISS. SAVITRI RATHO, J.

1. This application under Section 482 Code of Criminal Procedure (in short "Crl.P.C."), has been filed by the petitioners for quashing the criminal proceeding arising out of Bhandaripokhari P.S. Case No. 147/2016 corresponding to G.R. Case No. 1679 of 2016 pending in the Court of learned S.D.J.M., Bhadrak.

2. Mr.S.P. Dash, learned counsel for the petitioners submits that the petitioners are the husband and parents-in-law of opposite party no. 2. Bhandaripokhari P.S. Case No. 147/2016 had been registered against the petitioners for commission of offences punishable under Sections 498A/ 294/ 323/ 506 and 34 of the I.P.C. and Section 4 of the D.P. Act pursuant to the F.I.R. lodged by opposite party no.2. The petitioner No. 1 was arrested during investigation and released on bail After charge sheet was filed against the petitioners, the learned S.D.J.M. has taken cognizance of

offences under Sections 498A/ 294/ 323/ 506 and 34 of the I.P.C. and Section 4 of the D.P. Act and issued process against the petitioners .They have appeared in the case and have been released on bail.

3. He further submits that when steps for reconciliation failed, on the intervention and advice of their well wishers, petitioner no.1 and opposite party no.2 decided to part their ways amicably for which C.P. No. 166 of 2020 was filed by them under Section 13 (B) of the Hindu Marriage Act for mutual divorce in the court of learned Judge, Family Court, Bhadrak. The petitioner No. 1 has already paid the permanent alimony to the opposite party No. 2 The proceeding has been disposed of on 01.03.2021 dissolving the marriage of the petitioner no.1 and opposite party no.2 on mutual consent. In paragraph 10 of the petition, it had been inter alia stated that it had been agreed that steps should be taken for withdrawal / compromise of the various proceedings pending in various Courts which includes G.R. Case No. 1679/2016, pending before the learned S.D.J.M., Bhadrak. As the opposite party no.2 did not take any steps for withdrawal of G.R. Case No. 1679/2016, this petition has been filed.

4. Mr. Dash, learned counsel for the petitioner has relied on the decision of the Supreme Court in the case of ***Ruchi Agarwal vs Amit Kumar SLP (Crl) No. 3769 of 2003*** decided on 05.11.2004

5. Mr. J. Katikia, learned Additional Government Advocate has fairly submitted that in cases where the marriage between the parties have been dissolved by a decree of mutual divorce, cases between them are usually withdrawn or quashed by the higher Courts so that harmony is maintained between the parties .

6. The copy of the petition under Section 13 (B) of the Hindu Marriage Act has been annexed as Annexure-2 to this application. Paragraph 10 of the petition is extracted below :

> *"10. That both the parties have agreed to settle their disputes amicably by filing compromise or withdrawing (which are arose between the parties) i.e. G.R. Case No.1679/16 pending before S.D.J.M., Bhadrak, C.R.P. No.132/2016 pending before Family Judge, Jajpur all the execution proceeding i.e. 85/2019 Criminal appeal 01/2019 (U/S. 29 of D.V. Act pending in the court of the Addl. Sessions Judge, Jajpur Road and D.V. case No. 161/2016 and other dispute. Further the 2nd petitioner has agreed not to claim any maintenance further against the first petitioner."*

Perused the copy of the judgment dated 10.03.2021 passed in C.P.No. 166 of 2020 which has annexed as Annexure-3 to this application. It has been stated therein that the marriage articles have been returned to opposite party No.2 and she has been paid Rupees Six lakhs towards permanent alimony.

7. In the case of ***Jitendra Raghuvanshi Jitendra Raghuvanshi and Others v. Babita Raghuvanshi and Another reported in (2013) 4 SCC 58*** , the Supreme Court has held as follows :

> *"15. In our view, it is the duty of the courts to encourage genuine settlements of matrimonial disputes, particularly, when the same are on considerable increase. Even if the offences are non-compoundable, if they relate to matrimonial disputes and the court is satisfied that the parties have settled the same amicably and without any pressure, we hold that for the purpose of securing ends of justice, Section 320 of the Code would not be a bar to the exercise of power of quashing of FIR, complaint or the subsequent criminal proceedings.*
>
> *16. There has been an outburst of matrimonial disputes in recent times. The institution of marriage occupies an important place and it has an important role to play in the society. Therefore, every effort should be made in the interest of the individuals in order to enable them to settle down in life and live peacefully. If the parties ponder over their defaults and terminate their disputes amicably by mutual agreement instead of fighting it out in a court of law, in order to do complete justice in the matrimonial matters, the courts should be less hesitant in exercising its extraordinary jurisdiction. It is trite to state that the power under Section 482 should be exercised sparingly and with circumspection only when the court is convinced, on the basis of material on record, that allowing the proceedings to continue would be an abuse of the process of the court or that the ends of justice require that the proceedings ought to be quashed. We also make it clear that exercise of such power would depend upon the facts and circumstances of each case and it has to be exercised in appropriate cases in order to do real and substantial justice for the administration of which alone the courts exist. It is the duty of the courts to encourage genuine settlements of matrimonial disputes and Section 482 of the Code enables the High Court and Article 142 of the Constitution enables this Court to pass such orders"….*

In the case of ***Rangappa Javoor vs State of Karnataka (SLP (Crl) Diary No. 33313/2019*** disposed of on 30.01.2023 , the appellant - Rangappa Javoor and his 1 wife / respondent no.2 - Geeta Javoor, had entered into a settlement agreement and a decree of divorce by mutual consent was granted.The parties had agreed that the FIR and the proceedings arising there from should be quashed. But the application of the husband to quash the criminal proceedings arising out of the FIR, was dismissed by the High Court. In the Supreme Court, the wife did not appear though served with notice and it was stated that she had remarried .The Supreme Court held as follows :

> *…"This court has held that in cases of offences relating to matrimonial disputes, if the Court is satisfied that the parties have genuinely settled the disputes amicably, then for the purpose of securing ends of justice, criminal proceedings inter- se parties can be quashed by exercising the powers under Article 142 of the 2 Constitution of India or even under Section 482 of Code of Criminal Procedure, 1973."…*

In the case of ***Pradipta Kumar Swain vs State of Orissa reported in (2010) 15 SCC 238***, the Supreme Court quashed the complaint under Section 498-A and 379 I.P.C as it was submitted that there was a compromise between the parties and the complainant had remarried and had a child from the second marriage and had not appeared despite service of notice.

8. After considering the submissions of the counsel, the decisions of the Supreme Court and this Court and after going through the petition under Section 13 (B) of the Hindu Marriage Act (Annexure 2) and the judgment passed in C.P.No.166 of 2020 (Annexure 3), as the marriage of the petitioner no.1 and opposite party no.2

has been dissolved by a decree of mutual divorce, permanent alimony has been paid to the opposite party No.2 and it had been specifically agreed between them that the GR case would either be withdrawn or compromised, I am satisfied that it would be in the interest of justice to exercise inherent power under Section- 482 of the Crl.P.C and quash the proceedings in the GR Case.

9. The criminal proceeding arising out of Bhandaripokhari P.S. Case No. 147/2016 corresponding to G.R. Case No. 1679 of 2016 pending in the Court of learned S.D.J.M., Bhadrak against the petitioners is accordingly quashed.

10. The CRLMC is accordingly allowed.

11. Liberty is granted to opposite party no.2 to approach this Court for variation or recall of this order, in case, there has been any misrepresentation or suppression of facts by the petitioners.

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2023 (I) ILR – CUT- 834

R.K. PATTANAIK, J.

CRLMC NO.1295 OF 2022

ROHIT SHARMA …….Petitioner

.V.

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

AND

CRLMC NO.1004 OF 2022

SATISH DABAS & ANR. …….Petitioners

.V.

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

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Whether interference of Court at the initial stage of the investigation is permissible ? – Held, No – To prevent or derail the investigation accepting the defence plea at the threshold of investigation would not be wise and justified – In other words, the Court is not inclined to quash the proceeding at the initial stage of the investigation as in any case on the submission of report U/s. 173 Cr.P.C, the petitioners will have the remedy to challenge the same as per and in accordance with law. (Para 13)

Case Laws Relied on and Referred to :-

1. AIR 1992 SC 604 : State of Haryana & Ors. Vs. Ch. Bhajan Lal & Ors.
2. (2022) 7 SCC 124 : Vijay Kumar Ghai & Ors. Vs. State of West Bengal.
3. (2014) 15 SCC 221 : Teeja Devi @Triza Devi Vs. State of Rajasthan & Ors.
4. (2012) 4 SCC 547 : State of Orissa & Ors. Vs. Ujjal Kumar Burdhan.

5. (2009) 11 SCC 529 : Ravindra Kumar Madhanlal Goenka & Anr. Vs. Rugmini Ram Raghav Spinners Pvt. Ltd.
6. (2006) 6 SCC 736 : Indian Oil Corporation Vs. NEPC India Limited & Ors.
7. (2019) 10 SCC 686 : CBI Vs. Arvind Khanna.

For Petitioners : Mr. Biyotkesh Mohanty
Mr. Sinha Shrey Nikhilesh & Associates.

For Opp. Parties : Mr. S.S. Mohapatra, ASC for OP No.1
Mr. B.P. Pradhan, Advocate & Associates for OP No.2

JUDGMENT Date of Judgment: 22.02.2023

R.K. PATTANAIK, J.

1. Instant petitions under Section 482 Cr.P.C. are at the behest of the petitioners for quashing of the criminal proceeding in connection with Rambha P.S. Case No.92 dated 15th March, 2022 corresponding to G.R. Case No.320 of 2022 pending in the file of learned J.M.F.C.,Khallikote on the grounds inter alia that no prima facie case is made out under Sections 420 read with 34 IPC and furthermore, at the dispute is civil in nature.

2. Since the matter arises out of a common cause of action, the both the petitions have been clubbed together and are disposed of by the following order.

3. In the present case, opposite party No.2 lodged the FIR against the petitioners with the allegation that the consignment of oil was honoured and released in good faith but payment was not ensured despite several requests and finally, the liability was denied. It has been alleged therein that the petitioners in collusion with each other cheated opposite party No.2 and avoided paying an amount of Rs.12,58,455/-. On lodging of the report, Rambha P.S. Case No.92 of 2022 was registered. The initiation of a criminal action at the behest of opposite party No.2 is currently under challenge predominantly on the ground that the dispute to be civil in nature.

4. The petitioners in CRLMC No.1004 of 2022 are the Directors of the company M/s. Golden Cashew Products Private Limited which is said to have business transaction with opposite party No.2, whereas, the petitioner in CRLMC No.1295 of 2022 is a purchase agent, who negotiated between the parties for sale of the goods.

5. Heard Mr. Mohanty, Mr. Nikhilesh, learned counsels for the petitioners as well as Mr. Mohapatra, learned counsel for the State besides Mr. Pradhan, learned counsel for opposite party No.2.

6. CRLMC No.1004 of 2022: The petitioners would plead that the allegations as per the FIR (Annexure-1) are outrightly false and in sofar as the dispute is concerned, the same is a commercial transaction and hence, civil in nature and therefore, the criminal proceeding against them at the instance of opposite party No.2 cannot be sustained in law. It is claimed that the prosecution is not tenable

since the intention to cheat from the inception is conspicuously absent and has been levied with a purpose to coerce the petitioners to make the payment which is being demanded by opposite party No.2. It is further claimed that if there was no delivery of the consigned material, the petitioners would not liable to make the payment and furthermore, it has been concealed that the vehicle which is stated to have carried the consignment met with an accident and as such, it was never delivered and that apart, no indent was placed with the opposite party No.2. The learned counsel for the petitioners refer to the decision of the **State of Haryana and others Vrs. Ch. Bhajan Lal and others AIR 1992 SC 604** to contend that even by considering allegations contained in the FIR, no offence is made out and the criminal proceeding is manifestly attended with malafide and since the nature of dispute arises out of a business transaction, the criminal proceeding is not maintainable in law.

7. CRLMC No.1295 of 2022: Whereas the petitioner in the present case submits that it was a dispute between the parties as seller and buyer and he was merely a purchase agent and his limited role was to negotiate the price of the goods, such as, CSNL oil. It is further submitted that opposite party No.2 intentionally and willfully concealed the fact that the vehicle which was transporting oil bearing registration No.GJ08Y9899 met with an accident on 27th December, 2021 and the driver of the said vehicle died at the spot for which Khallikote P.S. Case No.777 of 2021 was registered under Sections 279 and 304 IPC and deliberately suppressed the fact that the goods for which the payment is being demanded never reached its destination. Under the above circumstances, since there was a transaction on both the sides, the criminal proceeding on the strength of the FIR lodged by opposite party No.2 could not have been initiated. The learned counsel for the petitioner similarly submits that even after considering the FIR, no offence of cheating under Section 420 IPC is made out and hence, the impugned FIR is liable to be quashed.

8. According to opposite party No.2 on the intimation received from the petitioners (CRLMC No.1004 of 2022) the vehicle with the oil was released with an understanding that the payment for the same would be ensured on the following date i.e. 28th December,2021.It is further alleged therein that opposite party No.2 was requested by the above petitioners and M/s. Avon Bulk Carriers also pressurized to release the tanker by as they were having other assignment and such request was honoured in good faith with the commitment that the payment would be made following day, however, surprisingly received a response through e-mail of having not purchased the material for not receiving it disowning the liability.The allegations are that the petitioners in collusion cheated opposite party No.2 with the requisite intention and avoided payment which the latter was lawfully entitled.

9. Learned counsel for the petitioners cited a decision of the Apex Court in **Vijay Kumar Ghai and others Vrs. State of West Bengal (2022) 7 SCC 124** and contend that the criminal proceeding should be quashed since no criminal offence is

made out and also for the fact that the dispute is the result of a transaction between the parties and also initiated maliciously or tainted with malafide so as to pressurize the petitioners in CRLMC No.1004 of 2022 to make the payment in respect with the goods which was never indented for and delivered by opposite party No.2 in view of the fact that the vehicle allegedly carrying the goods met with an accident, the fact which was concealed and not disclosed in the FIR.

10. Mr. Pradhan, learned counsel for opposite party No.2 cited decisions such as **Teeja Devi @Triza Devi Vrs. State of Rajasthan and Others (2014) 15 SCC 221; State of Orissa and others Vrs. Ujjal Kumar Burdhan (2012) 4 SCC 547; Ravindra Kumar Madhanlal Goenka and Another Vrs. Rugmini Ram Raghav Spinners Pvt. Ltd. (2009) 11 SCC 529;Indian Oil Corporation Vrs. NEPC India Limited and others (2006) 6 SCC 736** besides **CBI Vrs. Arvind Khanna (2019) 10 SCC 686** and it is contended that since a case of malafide and cheating is alleged and prima facie revealed from the impugned FIR, it cannot be quashed, inasmuch as,a criminal prosecution is not entirely barred for a cause of action arising out of a commercial transaction on the premise that it is a civil dispute. In Ch. BhajanLal (supra), the Apex Court held and concluded that the criminal proceeding may be quashed if the allegation in the FIR or in the complaint even if accepted at their face value do not prima facie constitute any offence or discloses a cognizable offence or where FIR or the complaint are so inherently improbable on the basis of which no just conclusion can be reached that there is sufficient ground for proceeding against the accused and also where the criminal proceeding is at manifestly attended with malafide or where the prosecution is maliciously instituted with an ulterior motive etc. The said judgment has been referred to in **Vijay Kumar Ghai** case. The above is the settled position of law and it is also well established that a civil dispute cannot be given a criminal colour and any such attempt should be nipped at the bud and the proceeding should be quashed in exercise of inherent jurisdiction. In so far as the decisions cited by opposite party No.2 in **Teeja Devi @ Triza Devi** (supra), the Supreme Court concluded that there should not be interference with the investigation accepting the defense that the FIR has been lodged only as a counterblast to the civil action as after filing of report under Section 173 Cr.P.C., the accused shall have the remedy to challenge the same in accordance with law. Similarly in **Ujjal Kumar Burdhan** (supra), it is held that extra-ordinary jurisdiction under Section 482 Cr.P.C. though very wide and expansive, there is no fetter in its exercise but should be invoked with care, caution and circumspection and sparingly only when no prima facie case is made out from the FIR or the complaint if taken on its face value and accepted in their entirety. In **Indian Oil Corporation** (supra), the Apex Court also held that even when the disputes are civil in nature and remedy is available under law, the criminal prosecution disclosing commission of an offence is not barred.

11. In the instant case, opposite party No.2 alleges that on the indent of the petitioners in CRLMC No.1004 of 2022, the consignment was dispatched.

However, as per said petitioners, no such delivery was received as opposite party No.2 was informed not to dispatch any consignment and that apart, the vehicle which was involved in the transportation of oil met with an accident on its way and as such, there was no delivery of the goods for which the payment was demanded. In the FIR, opposite party No.2 indicated that on 27th December, 2021 38.815 MTs of CS&L oil was delivered and raised invoice and e-waybill in respect thereof the fact which was informed to the petitioners but since it was already late, the vehicle was released and commitment was made by them to make the payment on 28th December, 2021 which was not honoured and finally such receipt of delivery was denied and also the alleged payment.

12. The defence of the petitioners is that there was no delivery at all as the vehicle transporting the oil met with the accident, the fact which was suppressed. Such a plea is advanced in juxtaposition to the claim that the consignment had been released but payment was committed under the peculiar circumstances narrated in the FIR. Whether it was on the instruction of the petitioners that the consignment was dispatched by opposite party No.2 is a matter which needs investigation. As per opposite party No.2, there were several requests to make the payment but it was delayed and deferred and was finally avoided with an e-mail intimation disowning the liability even denying any purchase made.

13. The dispute between the parties as to if there was any transaction vis-a-vis the goods which is claimed by opposite party No.2 and denied by the other side for whatever reasons even informing the former to stop the dispatch is required to be examined with referenceto the evidence collected during investigation. If the alleged consignment was dispatched and thereafter, no payment was made and when such transaction was denied outrightly disclaiming the purchase, as to what was the intention behind disowning the liability is required to be elicited from the material evidence to be gathered during investigation. If malafide is alleged and the liability has been denied with the claim that the goods have not been received contrary to the claim of the other side that it was indeed dispatched, a criminal action may lie which cannot be defended on the ground that the dispute is civil in nature. The law is well settled that there is no bar for a criminal prosecution in a case of present nature where malafide is alleged notwithstanding the fact that a civil remedy is available to the parties involved. Such a question as to if the consignment was on the request of the petitioners as claimed by opposite party No.2 is to be thrashed out on consideration of the evidence furnished along with the chargesheet. On the ground of a civil dispute out of a business transaction, a criminal proceeding cannot be set at naught when bad intention is attributed for having been cheated.The Apex Court in **Teeja Devi @ Triza Devi** (supra) reiterated the law that criminal investigation should not be interfered with on the ground that the FIR was lodged only as a counterblast to a civil action. The investigation is also not to be intervened and interfered with at its threshold by accepting the defence as to absence of any

malafide when bad intention is alleged by the informant. Since in the present case, the investigation is in progress or on the verge of closure (might be over by now), it would be too premature to accept the defence straightway believing the version of the petitioners, who have been alleged of having acknowledged the consignment but resiled thereafter and even denied to make the payment towards the end. In **Ravindra Kumar Madhanlal Goenka** (supra), the Apex Court in a similar situation relating to payment and supply of cotton bales for manufacturing yarn and dealing with an allegation of cheating/fraud discouraged acceptance of defence during pendency of investigation which could be looked into and entertained at the time of trial. The Apex Court in **Ujjal Kumar Burdhan** (supra) concluded that the Courts should be loath in interfering at early or initial stage of investigation which is necessary to test the veracity of the alleged offence and any obstruction or hindrance of process of law from taking its normal course, without any supervening circumstances may tantamount to miscarriage of justice.If there was any misconduct or mischief committed by the petitioners in denying the liability or a genuine defence was advanced opposing the contractual obligation is a matter to be examined and for that, a detailed enquiry and investigation is needed. To prevent or derail the investigation accepting the defence plea at the threshold of investigation would not be wise and justified. In other words, the Court is not inclined to quash the proceeding at the initial stage of the investigation as in any case on the submission of report under Section 173 Cr.P.C., the petitioners will have the remedy to challenge the same as per and in accordance with law.

14. Accordingly, it is ordered.

15. In the result, the CRLMCs stand dismissed.

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2023 (I) ILR – CUT - 839

R.K. PATTANAIK, J.

CRLMC NO. 3130 OF 2013

BRIJ MOHAN SOMANI .....Petitioner

.V.

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

(A) ELECTRICITY ACT, 2003 – Section 135,126 r/w OERC Distribution (Condition of Supply) Code, 2004 – Whether the criminal prosecution under section 135 of the Electricity Act can be allowed to survive and would be justified after final assessment in terms of section 126 thereof was concluded – Held, No. – In view of the clear intendment of the law

as expounded in Sri Seetaram Rice Mill, the criminal prosecution against the petitioner is unjustified and untenable in law and its continuance would be an abuse of process of court. (Para 13)

(B) ELECTRICITY ACT, 2003 – Distinction between Section 126 and 135 – Explained with case laws. (Para 6-13)

Case Laws Relied on and Referred to :-

1. 2012 AIR SCW 616 : Executive Engineer Vs. M/s. Sri Seetaram Rice Mill.
2. (2018) 3 SCC 608 : Maharastra State Electricity Distribution Company Ltd. Vs. Appellate Authority & Anr.
3. AIR 2014 SC 2567 : Rishipal Singh Vs. State of U.P. & Anr.
4. 1992 SCC (Cri) 426 : State of Haryana & Ors. Vs. Ch. Bhajan Lal & Ors.
5. (2013)6 SCC 740 : Chandran Ratnaswami Vs. K.C. Palanisamy & Ors.

For Petitioner : Mr. Umesh Ch. Mohanty

For Opp. Parties : Mr. T.K. Praharaj, SC, O.P. Nos.1 & 2
Mr. P.K. Tripathy, O.P. No.3

JUDGMENT Date of Judgment: 22.02.2023

R.K. PATTANAIK, J.

1. The petitioner has filed the instant petition under Section 482 Cr.P.C. for quashing of the criminal proceeding in connection with Special Case No.32(E) of 2011 arising out of Energy P.S. Case No.29 dated 17th May, 2011 registered under Section 135 of the Electricity Act, 2003 (hereinafter referred to as 'the Act') pending in the file of learned Additional District and Special Judge, Balasore on the grounds inter alia that no prima facie case is made out for prosecution and therefore, the same is not tenable in law.

2. In brief, the allegation is that on an inspection dated 10th May, 2011, it was found that the industry, namely, M/s SNM Business Pvt. Ltd. run by the petitioner with the consumer No.L51637 has given extended load of 69 KVA to an under construction oil refinery unit situated just adjacent to it in violation to the provisions of OERC Distribution (Conditions of Supply) Code, 2004 (shortly as 'the OERC Code, 2004') for which the FIR was lodged.

3. Heard. Mr. Mohanty, learned counsel for the petitioner, Mr. Praharaj, learned counsel for the State-opposite party Nos.1 and 2 and Mr. Tripathy, learned counsel for opposite party No.3.

4. Mr. Mohanty, learned counsel for the petitioner submits that the criminal prosecution under Section 135 of the Act cannot be sustained in law when there has been an assessment under Section 126 thereof. It is contended that the petitioner's unit which is dealing with manufacture and processing of rice, rice bran, oil from cake etc. availed power supply in the year 1999 with a contract demand of

83 KW and was classified by the licensee as a medium industry and on account of expansion/modernization/diversification (EMD) installed additional machineries for the purpose of downstream units like oil mill, solvent plant etc. and the unit as a whole has functioned since then. It is further submitted that initial contract demand of 83 KW was enhanced to 160 KVA in 2001, then to 260 KVA in 2003, 340 KVA with effect from November, 2006 and was classified under large industry category. It is claimed that when the matter for enhancement of contract demand from 340 KVA to 600 KVA was pending with the additional security including processing fee were deposited with the NESCO, the inspection was held on 10th May, 2011 in a manner contrary to the procedure specified in the OERC Code, 2004 leading to a conclusion that the consumer exceeded in utilizing the power beyond the contract demand thereby violating Clauses 34, 104 to 106 of the said Code. According to the petitioner on receiving provisional assessment objection was filed to drop the same since the power under the contract demand was never used for any other purpose save and except for the purpose of expansion of unit within its own premises having one and single service connection meant for a consumer of large industry, however, without considering the objection and appreciating Clause (b) appended to the Explanation of sub- section (6) of Section 126 of the Act in its proper perspective, the final assessment was passed under Section 126(3) thereof which was challenged in appeal under Section 127(1) before the Electrical Inspector (T&D), Balasore in AAC No.01 of 2011 and the said order of the Appellate Authority,at the assessment was interfered with, was questioned by the NESCO in WP(C) No.972 of 2012 which was allowed relying upon the judgment of the Apex Court in **Executive Engineer Vrs. M/s. Sri Seetaram Rice Mill 2012 AIR SCW 616** even when the above decision is distinguishable in the facts and circumstances of the case. Precisely by taking the aforesaid grounds, Mr. Mohanty, learned counsel for the petitioner would finally submit that the criminal proceeding pending before the learned court below should be quashed when the petitioner has been assessed under Section 126 of the Act.

5. On the contrary, Mr.Tripathy, learned counsel for opposite party No.3 submits that the assessment under Section 126 of the Electricity Act has been confirmed in W.A. No.267of 2013 as the appeal filed against the judgment in WP(C) No.972 of 2012 was dismissed and morefully when the petitioner paid the final assessed dues and executed a fresh agreement under Annexuree-5 on 30th May, 2012. It is contended that the proceedings under Sections 126 and 135 of the Act are quite distinct and independent and despite the assessment proceeding against the petitioner's industry, there was no bar to initiate a prosecution which is under challenge.While contending so, the decision in **Sri Seetaram Rice Mill** (supra) is referred to. In other words, according to Mr. Tripathy, learned counsel for opposite party No.3, for the self-same cause of action, despite an assessment under Section 126 of the Act, a criminal prosecution under Section 135 thereof can be initiated and apart from the above decision, he cited another judgment in the case of

Maharastra State Electricity Distribution Company Ltd. Vrs. Appellate Authority and Another (2018) 3 SCC 608. Mr. Tripathy highlighted upon the scheme of the Act and the provisions of the OERC Code 2004 with reference to Chapter-XII besides Regulations 103 to 105 which are in relation to assignment without permission; re-sale, transfer dishonest abstraction of power and theft of energy. A copy of the judgment in W.A. No.267 of 2013 (**M/s SNM Business Pvt. Ltd. Vrs. The Executive Engineer and Another**) is placed on record by Mr. Tripathy, learned counsel for opposite party No.3 along with the excerpts of the provisions of the OERC Code 2004. Mr. Praharaj, learned SC adopted the argument of Mr. Tripathy, learned counsel for opposite party No.3 while justifying the continuance of the criminal proceeding notwithstanding final assessment in terms of Section 126 of the Act.

6. By judgment dated 14th September, 2022 in W.A. No.367 of 2013, the challenge of opposite party No.3 in WP(C) No.972 of 2012 was upheld thereby setting aside the decision of the Appellate Authority-cum-Deputy Inspector (T&D), Balasore, who had overturned the assessment order dated 10th June, 2011. It has been concluded in the aforesaid judgment that there was no concluded contract till it was actually signed on 30th May, 2012 and hence, it could not be said that the contract demand was formally enhanced to 600 KVA and until such time, any excess consumption of electricity contrary to the authorized use would ipso facto attract Section 126 of the Act read with Regulation 106 of the OERC Code.

7. The question is, whether, the criminal prosecution under Section 135 of the Electricity Act can be allowed to survive and would be justified after final assessment in terms of Section 126 thereof was concluded?

8. In this connection, the decision in **Sri Seetaram Rice Mill** (supra) is relevant where in it has been held that upon plain reading of Sections 126 and 135 of the Act, the marked difference is discernible as both operate in distinct fields having no common premises in law; and that Sections 126 and 127 of the Act together constitute a complete Code in themselves covering all relevant considerations for passing of an order of assessment in cases which do not fall under Section 135 which deals with theft of power. If the aforesaid judgment is read, understood and duly appreciated, it would appear that in contradistinction to Section 135 of the Act, Section 126 would be applicable to the cases where there is no theft of electricity but the power has been consumed in violation of the terms and conditions of supply leading to malpractices which may squarelyfall within the expression 'unauthorized use of electricity'defined in clause (b)appended to the Explanation of sub-section (6) of Section 126 of the Act.The finer distinction between Sections 126 and 135 of the Act is that in the former, unauthorized use of electricity even in absence of intention invites a civil consequence, whereas, in the latter, dishonest intention with the requisite mens rea is a relevant factor for consideration, since theft of electricity is alleged. If a consumer simply used

excessive load over and above the contract demand in violation of the terms and conditions of the supply agreement, the case would fall under Section 126 of the electricity Act but if by any means or method thereis abstraction of energy with the ill-intention and without authorization, a criminal action would befall in terms of Section 135 thereof.

9. For proper appreciation of the distinction between Sections 126 and 135 of the Act, the relevant passages of the decision in **Sri Seetaram Rice Mill** (supra) are extracted herein below:

> "15. Upon their plain reading, the mark differences in the contents of Sections 126 and 135 of the 2003 Act are obvious. They are distinct and different provisions which operate in different fields and have no common premise in law. We have already noticed that Sections 126 and 127 of the 2003 Act read together constitute a complete code in themselves covering all relevant considerations for passing of an order of assessment in cases which do not fall under Section 135 of the 2003 Act. Section 135 of the 2003 Act falls under Part XIV relating to 'offences and penalties' and title of the Section is'theft of electricity'. The Section opens with the words 'whoever, dishonestly' does any or all of the acts specified under clauses (a) to (e) of Sub-section (1) of Section 135 of the 2003 Act so as to abstract or consume or use electricity shall be punishable for imprisonment for a term which may extend to three years or with fine or with both. Besides imposition of punishment as specified under these provisions or the proviso thereto, Sub-section (1A) of Section 135 of the 2003 Act provides that without prejudice to the provisions of the 2003 Act, the licensee or supplier, as the case may be, through officer of rank authorized in this behalf by the appropriate commission, may immediately disconnect the supply of electricity and even take other measures enumerated under Sub-sections (2) to (4) of the said Section. The fine which may be imposed under Section 135 of the 2003 Act is directly proportional to the number of convictions and is also dependent on the extent of load abstracted. In contradistinction to these provisions, Section 126 of the 2003 Act would be applicable to the cases where there is no theft of electricity but the electricity is being consumed in violation of the terms and conditions of supply leading to malpracticeswhich may squarely fall within the expression 'unauthorized use of electricity'. This assessment/proceeding would commence with the inspection of the premises by an assessing officer and recording of a finding that such consumer is indulging in an 'authorized use of electricity'. Then the assessing officer shall provisionally assess, to the best of his judgment, the electricity charges payable by such consumer, as well as pass a provisional assessment order in terms of Section 126(2) of the 2003 Act. The officer is also under obligation to serve a notice in terms of Section 126(3) of the 2003 Act upon any such consumer requiring him to file his objections, if any, against the provisional assessment before a final order of assessment is passed within thirty days from the date of service of such order of provisional assessment. Thereafter, any person served with the order of provisional assessment may accept such assessment and deposit the amount with the licensee within seven days of service of such provisional assessment order upon him or prefer an appeal against the resultant final order under Section 127 of the 2003 Act. The order of assessment under Section 126 and the period for which such order would be passed has to be in terms of Sub-sections (5) and (6) of Section 126 of the 2003 Act. The Explanation to Section 126 is of some significance, which we shall deal with shortly hereinafter. Section 126 of the 2003 Act falls under Chapter XII and relates to investigation and enforcement and empowers the assessing officer to pass an order of assessment.
>
> 16. Section 135 of the 2003 Act deals with an offence of theft of electricity and the penalty that can be imposed for such theft. This squarely falls within the dimensions of Criminal Jurisprudence and mens rea is one of the relevant factors for finding a case of

theft. On the contrary, Section 126 of the 2003 Act does not speak of any criminal intendment and is primarily an action and remedy available under the civil law. It does not have features or elements which are traceable to the criminal concept of mens rea.

17. Thus, it would be clear that the expression 'unauthorized use of electricity' under Section 126 of the 2003 Act deals with cases of unauthorized use, even in absence of intention. These cases would certainly be different from cases where there is dishonest abstraction of electricity by any of the methods enlisted under Section 135 of the 2003 Act. A clear example would be, where a consumer has used excessive load as against the installed load simpliciter and there is violation of the terms and conditions of supply, then, the case would fall under Section 126 of the 2003 Act. On the other hand, where a consumer, by any of the means and methods as specified under Sections 135(a) to 135(e) of the 2003 Act, has abstracted energy with dishonest intention and without authorization, like providing for a direct connection bypassing the installed meter. Therefore, there is a clear distinction between the cases that would fall under Section 126 of the 2003 Act on the one hand and Section 135 of the 2003 Act on the other. There is no commonality between them in law. They operate in different and distinct fields. The assessing officer has been vested with the powers to pass provisional and final order of assessment in cases of unauthorized use of electricity and cases of consumption of electricity beyond contracted load will squarely fall under such power. The legislative intention is to cover the cases of malpractices and unauthorized use of electricity and then theft which is governed by the provisions of Section 135 of the 2003 Act.

18. Section 135 of the 2003 Act significantly uses the words 'whoever, dishonestly' does any of the listed actions so as to abstract or consume electricity would be punished in accordance with the provisions of the 2003 Act. 'Dishonesty' is a state of mind which has to be shown to exist before a person can be punished under the provisions of that Section.

19. The word 'dishonest' in normal parlance means 'wanting in honesty'. A person can be said to have 'dishonest intention' if in taking the property it is his intention to cause gain, by unlawful means, of the property to which the person so gaining is not legally entitled or to cause loss, by wrongful means, of property to which the person so losing is legally entitled. 'Dishonestly' is an expression which has been explained by the Courts in terms of Section 24 of the Indian Penal Code, 1860 as 'whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person is said to do that thing dishonestly'. [The Law Lexicon (2^{nd} Edn. 1997) by P. Ramanatha Aiyar]

20. This Court in the case of Dr. S. Dutt v. State of U.P.[AIR 1966 SC 523] stated that a person who does anything with the intention to cause wrongful gain to one person or wrongful loss to another is said to do that dishonestly.

21. Collins English Dictionary explains the word 'dishonest' as not honest or fair; deceiving or fraudulent. Black's Law Dictionary (Eighth Edition) explains the expression 'dishonest act' as a fraudulent act, 'fraudulent act' being a conduct involving bad faith, dishonesty, a lack of integrity or moral turpitude.

22. All these explanations clearly show that dishonesty is a state of mind where a person does an act with an intent to deceive the other, acts fraudulently and with a deceptive mind, to cause wrongful loss to the other. The act has to be of the type stated under Sub-sections (1)(a) to (1)(e) of Section 135 of the 2003 Act. If these acts are committed and that state of mind, mens rea, exists, the person shall be liable to punishment and payment of penalty as contemplated under the provisions of the 2003 Act. In contradistinction to this, the intention is not the foundation for invoking powers of the competent authority and passing of an order of assessment under Section 126 of the 2003 Act."

10. It is contended on behalf of opposite party No.3 that there is no bar for simultaneous proceedings under Sections 126 and 135 of the Act provided a case is made out for both and while stating so, referred to the authority of the Apex Court in **Maharastra State Electricity Distribution Company Ltd.** (supra), wherein, it has been held and observed as under:

> "18. In the scheme of the Act, we find that Section 126 of the Act deals with assessment of electricity charges payable by such person (consumer) for unauthorized use of electricity whereas Section 135 deals with the cases of theft of electricity.
>
> 19. In other words, once the Board detects the case of unauthorized use of electricity by any consumer, in such event, the Board gets a cause of action to proceed against such person/consumer under Section 126 or/and 135 under the Act. Both Sections 126 and 135 are independent in all respects and provide different kind of liability and consequences. One involves monetary liability (Section 126) whereas the other involves criminal liability (Section 135).
>
> 20. The Board is, therefore, at liberty to take recourse to the provisions of Section 126 or/and 135 of the Act against such person/consumer as provided therein in accordance with law."

There is no quarrel over the legal position that the civil liability and penal consequence exist independently and are exclusive of each other. An act with or without intent may carry a civil liability but when such is also treated as an offence and defined accordingly, the conduct and mens rea plays a pivotal role. In the case at hand, if knowing well excess power is consumed, it would be an instance of 'unauthorized use' but when the conduct reveals otherwise and not merely extraction rather its stealing by whatever means, the act becomes a mischief and has to be held as a theft punishable under Section 135 of the Act, whereas, the former is only visited with a civil consequence. The clear and demarcated distinction between the aforesaid provisions is to be realized which is what has been lucidly explained in **Sri Seetaram Rice Mill** (supra).

11. As pleaded by the petitioner, the drawal of excess load by the petitioner's company above the contract demand would be permissible under law and cannot be said to be unauthorized use/consumption within the meaning of Section 126 of the Act read with the provisions of the OERC Code,2004 more particularly when application for enhancement of contract demand was under process and pending with the NESCO. However, such a pleading has lost its relevance, as in the meantime, the assessment which was overruled in appeal and confirmed in WP(C) No.972 of 2012 stood finally affirmed in W.A. No.267 of 2013.

12. Now the consideration would be,whether, the petitioner can still be proceeded with for an offence under section 135 of the Act, which according to Mr. Mohanty, learned counsel appearing for him is not permissible with the argument that for such unauthorized use of power for which assessment was made under Section 126 thereof leaves no room for any prosecution.Mr.Tripathy, learned counsel for opposite party No.3, however, submits that the manner in which the l oad was

diverted and power was extracted, it amounted to an act of theft punishable under Section 135 of the Act. Mr. Mohanty, learned counsel for the petitioner first of all cited a decision of this Court in **Sambit Kumar Vrs. State of Odisha MANU/OR/0114/2022** to submit that there was no mens rea on the part of the petitioner to commit such an offence. Furthermore, the decision in **Rishipal Singh Vrs. State of U.P. and Another AIR 2014 SC 2567** is placed reliance on by Mr. Mohanty by contending that even if the uncontroverted allegations as appearing in the FIR are taken at its face value, the same do not disclose commission of an offence of theft. Law is well settled that if on a bare perusal of FIR of complaint, if no prima facie case is made out; or it disclosed any cognizable offence to have been committed, a criminal proceeding may be quashed in exercise of the Court's extra- ordinary jurisdiction as enunciated by the Apex Court in **State of Haryana and others Vrs. Ch. Bhajan Lal and others reported in 1992 SCC (Cri) 426**.The decision in **Chandran Ratnaswami Vrs. K.C. Palanisamy and others (2013)6 SCC 740** relied upon by Mr. Mohanty, learned counsel for the petitioner reiterates the legal position as encapsulated in **Ch. Bhajan Lal** case with regard to the exercise of jurisdiction under Section 482 Cr.P.C.. If any of the condition(s) as illustrated in **Ch. Bhajan Lal** (supra) is/are fulfilled, in such a situation, inherent jurisdiction may have to be exercised in order to do complete justice and also to prevent abuse of process of law.

13. An assessment was made vis-à-vis the petitioner which was finally sustained by this Court in W.A. No.267 of 2013. Referring to such an action, Mr. Mohanty, learned counsel appearing for the petitioner submits that it is a case of civil liability and hence the petitioner cannot and could not have been subjected to criminal prosecution. It is restated that a civil liability and criminal prosecution can go together if a case is made out. In other words, if the facts do reveal commission of an offence independent of any civil consequence, the criminal prosecution would lie.The allegation in the FIR is that power was consumed unauthorizedly and for the said purpose, electricity connection was supplied to an under construction refinery unit situated at a distance of 200 Metres approximately from the existing business premises thereby the consumer has given extended load violating the OERC Code, 2004. Mr. Tripathy, learned counsel for opposite party No.3 refers to clauses 104,105 and 106 of the OERC Code, 2004 to satisfy the Court that the petitioner unauthorizedly diverted power to another unit in contravention to the contract which tantamount to theft of energy punishable under Section 135 of the Act. It is further submitted that necessary seizure was made with respect to welding and drill machines and cable, etc. used in supplying power to the under construction refinery unit custody of which under a zima was refused by the petitioner. Admittedly, request of the petitioner for enhancement of the load was pending consideration which is in respect of the industry but electricity connection was alleged to be supplied to a unit situated adjoining to it. For the excess load use without the approval has been duly assessed in a proceeding under Section 126 of

the Act but at the same time when the mischief was detected as the power was diverted to another unit, prosecution under Section 135 of the Act was initiated against the petitioner. Mr. Mohanty, learned counsel for the petitioner contends that there was no diversion and it is a case of use of excess load and the electricity was consumed by the business unit for which the assessment under Section 126 of the Act has already been over. In other words, it is claimed that the alleged under construction unit is no separate establishment and it was within the business premises to which the power was supplied and for such unauthorize use, assessment under Section 126 of the Act was made and realized and hence, it is no case of theft. In order to understand the course of action adopted while taking action to realize the dues for use of excess power, it would be apposite to reproduce the related provision of Section 126 of the Act which is extracted below:

> "(1) If on an inspection of any place or premises or after inspection of the equipments, gadgets, machines,devices found connected or used, or after inspection of records maintained by any person, the assessing officer comes to the conclusion that such person is indulging in unauthorised use of electricity, he shall provisionally assess to the best of his judgment the electricity charges payable by such person or by any other person benefited by such use.
>
> (2) The order of provisional assessment shall be served upon the person in occupation or possession or in charge of the place or premises in such manner as may be prescribed.
>
> (3) The person, on whom an order has been served under sub-section (2), shall be entitled to file objections, if any, against the provisional assessment before the assessing officer, who shall, after affording a reasonable opportunity of hearing to such person, pass a final order of assessment within thirty days from the date of service of such order of provisional assessment, of the electricity charges payable by such person.
>
> (4) Any person served with the order of provisional assessment may, accept such assessment and deposit the assessed amount with the licensee within seven days of service of such provisional assessment order upon him:
>
> (5) If the assessing officer reaches to the conclusion that unauthorised use of electricity has taken place,the assessment shall be made for the entire period during which such unauthorised use of electricity has taken place and if, however, the period during which such unauthorised use of electricity has taken place cannot be ascertained, such period shall be limited to a period of twelve months immediately preceding the date of inspection.
>
> (6) xxx xxx
>
> Explanation-For the purposes of this section: (a) xxx xxx
>
> (b) "*unauthorised use of electricity*" means the usage of electricity-(i) by any artificial means; or (ii) by a means not *authorised by the concerned person or authority or licensee*; or (iii) through a tampered meter; or (iv) for the purpose other than for which the usage of electricity was authorised; or (v) for the premises or areas other than those for *which the supply of electricity was authorised.*" (Emphasis in italics is by the Court)

The above provision deals with provisional assessment applying the rule of best judgment and realization of additional electricity charges on account of unauthorized use of power. In particular, if Clause (b) to Explanation of sub- section (6) of Section 126 of the Act is read at in juxtaposition to Section 135 thereof, it would appear that simultaneous actions may follow suit for the mischiefs some of which

are identical in nature, however,the distinction lies in dishonest intention distinguishable from unauthorized use of power. In the case at hand, it is made to suggest that by unauthorized means, there was extended supply of power to an under construction unit which was detected during inspection. So to say, the petitioner is alleged of utilizing and extending power to an adjoining unit without any authority. The background facts are to be refreshed to understand if at all the action of the petitioner resulted in the commission of theft of power.The industry was a small scale unit initially and slowly upgraded itself to a large scale establishment which was accomplished with EMD and for that the contract demand was enhanced from time to time. Indisputably, a request was received for enhancement of contract demand and execution of a fresh contract in that regard and the licensee was in seisin over the matter at the relevant point of time when the inspection was conducted. Admittedly, no action, such as, disconnection in the power supply to the unit was taken which is normally carried out in case of theft. It rather appears that the supply was extended to a downstream refinery unit which was under construction and in that connection, the machines, cable etc. were found at the spot and led to its seizure. In anticipation of the approval of the contract demand though a formal agreement was to be signed between the parties, the excess load was consumed unauthorizedly and in that respect, additional bill was raised for the period in question, a dispute which was assailed and was finally put to rest in W.A. No.267 of 2013. According to the Court, it is outrightly a case of unauthorized use of electricity by the consumer without any dishonest intention to steal power which is sine qua non to initiate a prosecution under Section 135 of the Act. By the nature of the conduct of the petitioner and being a consumer can be said to have overused power than the limit he was eligible and entitled to extending it to a downstream under construction unit for which additional demand was raised at a time when enhancement in load and a decision thereon by the licensee was still subjudice. Any activities for and in relation with or connected to the main industry and unauthorised use of electricity by a consumer for the said purpose would invite civil consequence in absence of any dishonest intention as in the present case where the power was extended to an under construction downstream unit. So, therefore, to say that the act amounts to theft of power and does fall within the mischief of Section 135 of the Act would be stretching things too far when it would be a case of unauthorized use of electricity simpliciter which ought to have culminated with the realization of the extra-demand. The Court is reminded of the clear intendment of the law as expounded in **Sri Seetaram Rice Mill** (supra) and hence arrives at a conclusion that the criminal prosecution vis-à-vis the petitioner is unjustified and untenable in law and its continuance would be an abuse of process of court.

14. Accordingly, it is ordered.

15. In the result, the CRLMC stands allowed. As a logical sequitur, the criminal proceeding in connection with Special Case No.32(E) of 2011 arising out of Energy

P.S. Case No.29 dated 17th May, 2011 pending in the court of learned Additional District and Special Judge, Balasore is hereby quashed for the reasons discussed herein before.

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2023 (I) ILR - CUT- 849

SASHIKANTA MISHRA, J.

CRLREV NO. 579 OF 2011

SANJIT KUMAR MISHRA & ORS. …….Petitioners

.V.

RANJIT MISHRA ...……...Opp. Party

(A) CODE OF CRIMINAL PROCEDURE, 1973 – Section 401, 302 – Whether a legal heir can be substituted upon death of the original complainant in a complain case? – Held, Yes – The right to prosecute subsists even after death of the original complainant. (Para 15,16)

(B) CODE OF CRIMINAL PROCEDURE, 1973 – Section 401 – Whether one legal heir can continue a complaint case against another legal heir – Held, Yes.

Case Laws Relied on and Referred to :-

1. (1967) 1 SCR 807 : AIR 1967 SC 983:Ashwin Nanubhai Vyas Vs. State of Maharashtra.
2. (2018) 1 SCC 71 : Chand Devi Daga Vs. Manju K. Humatani.
3. (2006) 5 SCC 530 : Balasaheb K Thackeray and another Vs. Venkat .
4. (2001) 3 SCC 462 : J.K. International Vs. State (Govt. of NCT of Delhi) & Ors.

For Petitioners : M/s. D.Panda, A.K.Parida, D.P.Dhal & C.R.Panda.

For Opp. Parties : Mr. B.K.Ragada, N.Das & L.N.Patel.

JUDGMENT Date of Judgment: 06.09.2022

SASHIKANTA MISHRA, J.

1. Two interesting questions are involved in the present revision - whether a legal heir can be substituted upon death of the original complainant in a complaint case and if so,whether one legal heir can continue such proceeding against other legal heir(s).

2. The facts of the case lie in a narrow compass.

3. One Baidyanath Mishra (since deceased) filed a complaint case bearing ICC No. 55 of 2000 before the JMFC(O), Bhubaneswar alleging commission of offence

under sections 426/448/506/34 IPC and Section 24 of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007. It was alleged by the complainant that a house had been purchased in the name of his deceased wife at Sailashree Vihar, Bhubaneswar, who died intestate, whereupon the property devolved on her sons, Ranjit Kumar Mishra, Sanjit Kumar Mishra, Susanta Kumar Mishra and married daughter Sasmita Mishra. The complainant was residing in the said house with his three sons as all his children had executed a registered General Power of Attorney in his favour. The mother of his daughter-in-law, Snehapama Devi started interfering in the complainant's life and so also his sons, threatened him to send him to jail on the false allegation of dowry demand. The complainant was forcibly evicted from his room on 19.03.2010 and was not permitted to enter the house and the room was given to the mother of his daughter-in-law. On such allegation, the complainant filed a complaint against his son, Sanjit Kumar Mishra, Snehapama Devi (mother of his daughter-in-law) and Padmini Priyadarshini Mishra (daughter-in-law). After conducting inquiry under Section 200 of Cr.P.C., learned trial court took cognizance of the offence under sections 426/506/34 IPC and summons was issued fixing 18.05.2010 for appearance of the accused persons. The eldest son of the complainant, namely,Ranjit Kumar Mishra was cited as a witness on 15.05.2010.The complainant died at Kalinga Hospital while under treatment.On 19.07. 2010, his eldest son, Ranjit Kumar Mishra filed a petition seeking to be substituted as a complainant expressing his desire to contest the case. The petition for substitution was opposed by the accused persons, who took the plea that the accused persons are liable to be discharged upon death of the complainant. However learned Court below, by relying on the decision of the Apex Court in the case of **Ashwin Nanubhai Vyas v. State of Maharashtra**, (1967) 1 SCR 807 : AIR 1967 SC 983, allowed the petition forsubstitutionby substituting the deceased complainant with Ranjit Kumar Mishra. The accused persons as named above being aggrieved have preferred the present revision with the present Ranjit Kumar Mishra being the sole opposite party.

4. Heard Mr.D. Panda, learned counsel for the petitioners and Ms. Agnisikha Ray, learned counsel for opposite party.

5. It is argued by Mr. D. Panda that unlike a civil proceeding, the Code of Criminal Procedure does not recognize substitution of a deceased complainant. Referring to the decision of **Ashwin Nanubhai Vyas** (supra), Mr. Panda contends that the Code provides only for dismissal of a complaint upon death of an accused but does not expressly provide for continuanceof the complaint thereafter. Therefore, what happens on the death of the complainant, in a case started on a complaint has to be inferred generally from the provisions of the Code. According to Mr. Panda since the Code provides that in the absence of the complainant, the accused must be either acquitted or discharged, the same principle must be applied in the case of death of a complainant. It is alternatively argued by Mr. Panda that

even assuming for the sake of argument that a legal heir can be substituted as the complainant upon death of the original complainant, the same would be permissible only against person or persons other than the legal heirs. In the instant case, one of the accused persons, namely Sanjit Mishra (petitioner no1) is admittedly a legal heir being the son of the deceased-complainant.Therefore, Ranjit Mishra (opposite party) himself being a legal heir cannot continue the proceeding against another legal heir.

6. Per contra, Ms. Agnisikha Ray, referring to the decision of the Apex Court in the case of ***Chand Devi Daga v. Manju K. Humatani***, reported in (2018) 1 SCC 71 has argued that the provision under Section 249 of Cr.P.C. which provides for discharge of the accused in the absence of the complainant is applicable only when the offence can be lawfully compounded or is non-cognizable but not in respect of non-compoundable offences such as the ones Section 426/506 IPC. Since the Code is silent as to what would happen in case of death of a complainant in a warrant case, it means the provision under Section 249 Cr.P.C. cannot be made applicable to such cases. Since the original complainant had filed the complaint against the accused persons, the opposite party being the legal heir has got every right to seek continuance of the proceeding upon the death of his father as otherwise, the accused persons would be allowed to go scot-free.

7. Law is now fairly well settled that the legal heirs of the deceased complainant can be substituted in his place. The case laws in this regard shall be referred to a little later. It would be apposite at the outset to refer to the rival contentions put forth in this regard before this Court with reference to the relevant statutory provisions. Admittedly, the complaint was filed by one Baidyanath Mishra. During pendency of the complaint, he died. On an application filed by the complainant's elder son, he was allowed to be substituted in his place. After recording the initial statement of the deceased complainant and conducting enquiry under section 202 of the IPC, learned court below has taken cognizance of the offences under section 426/506/34 IPC.

8. Mr. Debashis Panda has argued that as per section 256 of CrPC the Magistrate can acquit the accused on death of the complainant. There is no provision in the Code whereby the legal heirs of the deceased complainant can be substituted in his place to continue the proceeding. Mr. Panda has relied upon the decision of the Apex Court in the case of ***Ashwin Nanubhai Vyas*** (supra) in support of his contentions. Ms Ray on the other hand, has argued that since cognizance has been taken of the offences under section 426/506/34 IPC, the procedure prescribed for trial of warrant cases has to be adopted. She further argues that there is no provision akin to section 256 of CrPC for trial of warrant procedure cases.Section 256 applies in case of summons procedure cases only. Ms Ray has relied upon the decision of ***Chand Devi Daga*** (supra) in support of her contentions.

9. Undisputedly, cognizance has been taken by learned court below of the offences under sections 426/506/34 IPC. In view of the involvement of section 506 of IPC, there is no doubt that the case is to be tried as per procedure laid down for warrant cases. Chapter XIX of the Code deals with trial of warrant cases by magistrates and contains the provisions from section 238 to 250. Section 249 provides as under:

> *"**249. Absence of complainant**.—When the proceedings have been instituted upon complaint, and on any day fixed for the hearing of the case, the complainant is absent, and the offence may be lawfully compounded or is not a cognizable offence, the Magistrate may, in his discretion, notwithstanding anything hereinbefore contained, at any time before the charge has been framed, discharge the accused.*

10. On the other hand, Chapter XX deals with trial of summons cases by magistrates and contains the provision under section 256, which reads as under:

> *"**256. Non-appearance or death of complainant**.—(1) If the summons has been issued on complaint, and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day:*
>
> *Provided that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may, dispense with his attendance and proceed with the case.*
>
> *(2) The provisions of sub-section (1) shall, so far as may be, apply also to cases where the non- appearance of the complainant is due to his death."*

11. Obviously, the procedure prescribed under Chapter XIX would be applicable to the case at hand and therefore, there is considerable force in the submission of Ms Ray that there is no direct provision akin to the one under section 256 of CrPC. In the case of ***Balasaheb K Thackeray and another vs. Venkat*** reported in ***(2006) 5 SCC 530***, it was held that section 302 of the code can be invoked to permit the prosecution to be conducted by any person other than a police officer below the rank of inspector; but no person other than the advocate general or the government advocate or a public prosecutor or assistant public prosecutor shall be entitled to do so without such permission of the magistrate. Holding thus, the Apex Court allowed the prayer of the legal heirs of the deceased complainant in the said case to continue with the proceeding by seeking necessary permission from the magistrate. Following the ratio of ***Balasaheb*** (supra), the Apex Court in the case of ***Chand Devi Daga*** (supra) also held that taking assistance of Section 302 of the code, the legal heirs can continue the prosecution upon death of the original complainant. Referring to the earlier decisions the court held as under:

> *"14. Two-Judge Bench in Jimmy Jahangir Madan v. Bolly Cariyappa Hindley (dead) By Lrs., (2004) 12 SCC 509 : 2004 SCC (Cri) Supp 317] referring to this Court's judgment in Ashwin Nanubhai Vyas [Ashwin Nanubhai Vyas v. State of Maharashtra, AIR*

1967 SC 983 : 1967 Cri LJ 943] had held that heirs of the complainant can continue the prosecution. Following was held in para 5: (SCC p. 512)

"5. The question as to whether the heirs of the complainant can be allowed to file an application under Section 302 of the Code to continue the prosecution is no longer res integra as the same has been concluded by a decision of this Court in Ashwin Nanubhai Vyas v. State of Maharashtra [Ashwin Nanubhai Vyas v. State of Maharashtra, AIR 1967 SC 983 : 1967 Cri LJ 943] in which case the Court was dealing with a case under Section 495 of the Code of Criminal Procedure, 1898, which is corresponding to Section 302 of the Code. In that case, it was laid down that upon the death of the complainant, under the provisions of Section 495 of the said Code, mother of the complainant could be allowed to continue the prosecution. It was further laid down that she could make the application either herself or through a pleader. Undisputedly, in the present case, the heirs themselves have not filed the applications to continue the prosecution, rather the same have been filed by their power-of-attorney holders. …"

15. In view of what has been discussed above, we are of the view that the High Court did not commit any error in allowing the legal heirs of the complainant to prosecute the criminal miscellaneous petition before the High Court. We do not find any error in the order of the High Court. The appeal is dismissed.

12. Section 302 occurs in Chapter XXIV of the Code relating to General Provisions as to inquiries and trials, which reads as under;

*"**302. Permission to conduct prosecution.**—(1) Any Magistrate inquiring into or trying a case may permit the prosecution to be conducted by any person other than a police officer below the rank of inspector; but no person, other than the Advocate-General or Government Advocate or a Public Prosecutor or Assistant Public Prosecutor, shall be entitled to do so without such permission:*

Provided that no police officer shall be permitted to conduct the prosecution if he has taken part in the investigation into the offence with respect to which the accused is being prosecuted.

(2) Any person conducting the prosecution may do so personally or by a pleader.

13. In the case of ***J.K. International vs. State (Govt. of NCT of Delhi) and Others*** reported in (2001) 3 SCC 462, the Apex Court while interpreting the scope of a private person intending to participate in the conduct of prosecution, held as follows;

"12. The private person who is permitted to conduct prosecution in the Magistrate's Court can engage a counsel to do the needful in the court in his behalf. It further amplifies the position that if a private person is aggrieved by the offence committed against him or against anyone in whom he is interested he can approach the Magistrate and seek permission to conduct the prosecution by himself. It is open to the court to consider his request. If the court thinks that the cause of justice would be served better by granting such permission the court would generally grant such permission. Of course, this wider amplitude is limited to Magistrates' Courts, as the right of such private individual to participate in the conduct of prosecution in the Sessions Court is very much restricted and is made subject to the control of the Public Prosecutor. The limited role which a private person can be permitted to play for prosecution in the Sessions Court has been adverted to above. All these would show that an aggrieved private person is not altogether to be eclipsed from the scenario when the criminal

court takes cognizance of the offences based on the report submitted by the police. The reality cannot be overlooked that the genesis in almost all such cases is the grievance of one or more individual that they were wronged by the accused by committing offences against them."

Of course, the said case was instituted on the basis of police report and not a private complaint as in the case at hand. However, the principle underlying the observations as quoted above can be adopted in the present case.

14. From a conspectus of the analysis made hereinbefore by relying upon the ratio decided in the cited cases, it would be evident that notwithstanding absence of a specific provision, the statutory intent of the provisions of the Code is not to foreclose the right of a person to continue with the prosecution upon death of the complainant. In other words, it is impliedly acknowledged that the victim of a crime may die but the crime committed against him does not. Nor does the guilt of the offender get washed away only because the victim is no more. On the contrary, the offender would still remain liable to be prosecuted for his deeds and punished, if found guilty.

15. Thus, there is no doubt that the legal heirs of a complainant can continue the proceeding after his death and to such extent therefore, the magistrate did not commit any error in allowing one of his legal heirs to prosecute the complaint originally filed by his father. However, the petition filed by the son of the deceased complainant to substitute him in place of his father must be deemed to be an application for permission to conduct prosecution as per the provisions of Section 302 of the Code and consequently, the impugned order passed in allowing the application must be deemed to have been passed also as per the provision under Section 302 CrPC.

16. The other question that falls for consideration is, can one legal heir maintain the complaint against another legal heir.It must be kept in mind that the original complaint was filed by one Baidyanath Mishra against his son, daughter-in-law and the mother of his daughter in law. Undoubtedly, his son is a Class I legal heir. Of course, his daughter-in-law (during the life time of her husband) and her mother do not possess the same status as his son and therefore, ordinarily there can be no objection to the proceeding being continued against them. Taking the family as a whole, if the original complainant could maintain an action against his son, who is his legal heir, there is no reason as to why a person cannot maintain the complaint against his brother and other relations. From the ratio of the cases referred above it is evident that any action which seeks to foreclose the right of a person to prosecute a legitimate complaint against his legal heirs and relations cannot be approved. Viewed differently, the spirit of the decisions referred above is to the effect that the right to prosecute subsists even after death of the original complainant.

17. For the forgoing reasons therefore, this Court finds no infirmity or illegality in the impugned order so as to be persuaded to interfere. Accordingly, the revision

being devoid of merit is therefore, dismissed. Since, the complaint is of the year 2000, learned court below is directed to try and conclude the same as expeditiously as possible, preferably within a period of six months.

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2023 (I) ILR – CUT - 855

SASHIKANTA MISHRA, J.

W.P.(C) NO.11030 OF 2012

SMT. SONALI SINGH .....Petitioner

.V.

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

(A) ODISHA MISCELLANEOUS CERTIFICATE RULES, 1984 – Issuance of Residential Certificate – Whether a Residential Certificate be denied to a landless person merely because he does not have documentary evidence of ownership? – Held, No – That will run directly contrary to the Government Circular. (Para 13)

(B) RESJUDICATA – Whether an order passed without jurisdiction can attract the law of resjudicata?– Held, No.

Case Laws Relied on and Referred to :-

1. 2014(II) OLR 65 : Smt. Sarojini Sahoo Vs. State of Odisha & Ors.
2. 2010 (II) OLR 408 : Chautara @ Chatura Suna @ Nag Vs. Sub-Collector.

For Petitioner : Mr. P. Acharya.

For Opp. Party : Mr.N.K.Praharaj, G.A & Mr. Sukumar Ghosh

JUDGMENT Date of Judgment :10.11.2022

SASHIKANTA MISHRA, J.

The Petitioner claims to be a permanent resident of village Padmapur under P.O.-Boisinga in the district of Mayurbhanj. It is her case that her father is a resident of Arun Nagar under Mahakalapada P.S. of Kendrapara District and that after her marriage with Sushanta Singh in the year 2008, she has been residing in her husband's house at Padmapur. Further, she has passed Class-VIII and belongs to Scheduled Tribe. Pursuant to an advertisement dated 11th November, 2009 issued by the CDPO, Betnoti (Opposite Party No.4)for engagement as Anganwadi Worker at Padmapur Anganwadi Centre, the Petitioner applied for a residential certificate before the Tahasildar, Betnoti (Opposite Party No.3) along with all documents.After due inquiry the Sub-Collector,Baripada (Opposite Party No.2) issued a residential certificate in her favour in Misc. Case No.3888/2009 showing her a resident of

Padmapur village. The Petitioner claims that her father-in-law being a landless person is residing in Padmapur village since his marriage in the said village. Further, he is residing over Plot No.145 under Khata No.90 of the said village, which being a Government land, an Encroachment Case being E.C.No.2286/2008 has been initiated against him.After obtaining the residential certificate, the Petitioner applied for the post of Anganwadi Worker and being selected in the selection process was appointed as such by order dated 15th February,2010 and she joinedon the same day. Subsequently, basing on a complaint lodged by two persons, namely, Sania Singh and Jagannath Singh, the Opposite Party No.3 reviewed the earlier order granting resident certificate and cancelled the same without granting any opportunity of hearing to the Petitioner. The said order was purportedly passed under Rule 7 of the Odisha Miscellaneous Certificate Rules, 1984 (for short "Rules, 1984).Accordingly, by letterdated 22nd March, 2010, the Opposite Party No.3 intimated the fact of cancellation of residential certificate of the Petitioner to the CDPO, Betnoti (Opposite Party No.4). Thereafter, the Opposite Party No.5 filed an appeal before the Addl. District Magistrate, Baripada being DSWO(A) Case No.2/2011 with a prayer to cancel the engagement of the Petitioner as Anganwadi Worker of Padmapur Mini Anganwadi Centre. After hearing both sides, the appeal was allowed by quashing the selection of the Petitioner as Anganwadi Worker on the ground that the resident certificate issued in her favour had already been cancelled and the Opposite Party No.4 was directed to take steps to select a suitable candidate afresh after observing all formalities. Copy of the order of the A.D.M., passed on 30th March, 2012 is annexed to the Writ Petition as Annexure-7-A. Pursuant to such order, the Opposite Party No.4, vide order dated 19th April, 2012 directed disengagement of the Petitioner from her duty w.e.f. 16th April, 2012, copy of which is enclosed as Annexure-7 to the Writ Petition. Since the resident certificate was cancelled without notice to the Petitioner, she preferred an appeal being Misc. (A) No.3/2012 on 14th May, 2012 before the Opposite Party No.2 challenging the order of cancellation. It is stated that such appeal was preferred on an erroneous notion that the order cancelling the residential certificate was appealable, but in fact the same was not as it was actually passed under Rule 7 of the Rules, 1984. In any case, by order dated 18th May, 2012 the appeal was dismissed by the Opposite Party No.2 on the ground of delay. Since no other remedy is available in respect of an order passed under Rule 7 of Rules, 1984, the Petitioner approached this Court in the present Writ Petition.

2. In short, the Petitioner's case is that she having resided in Padmapur village after her marriage is a resident of the said village, which comes under the service area of the Mini Anganwadi Centre since 2008 and therefore, cancellation of the resident certificate is entirely illegal and unjustified. On such facts, the Petitioner has claimed the following reliefs in the present Writ Petition:-

> *"The petitioner therefore prays that your Lordships, would be graciously pleased to admit this case, call for records from the Opp.Parties, and after hearing the parties*

allow the same with cost and issue a writ in the nature of mandamus/certiorari or any other or further writ/directions quashing Annexures-7-A,8,9,10 and 12 or may pass any other order as Hon'ble Court deem fit and proper declaring that residential certificate under Annexure-5 is legal and correct."

3. A counter affidavit has been filed by the Opposite Parties 1 to 3. It is stated that considering the application submitted by the Petitioner for grant of resident certificate in her favour, the matter was referred to Revenue Inspector, Boisinga to cause an inquiry, who reported that village Bhalla was the permanent address of the Petitioner, but village Padmapur was her present address. It was also reported that she had no landed property recorded in her name or in the name of her family in village Padmapur and that she was residing on a Government land measuring Ac.0.10 decs covering Plot No.145 recorded in Government Khata No.90. Basing on such report, the Petitioner was granted residential certificate by the Opposite Party No.3. Subsequently, Sania Singh and Jagannath Singh of village Padmapur filed objection on 22nd January, 2010 before the Opposite Party No.3 against issuance of the resident certificate in favour of the Petitioner, which was also enquired through the R.I. Boisinga. The R.I. in his report dated 17th January, 2010 confirmed the fact that the father-in-law of the Petitioner had encroached upon Ac.0.10 dec. of Basti Jogya Kissam land out of Government Plot No.145 under Khata No.90 in Mouza Padmapur for which an Encroachment Case No.2286/2008-09 was instituted against him. It is further stated that as per the provisions of OGLS Act and Rules framed there under, the family of the Petitioner is not entitled for settlement of the encroached land. The husband of the Petitioner had obtained Voter Identity Card in the year 2007 in respect of village Padmapur. The Petitioner was called upon to appear for hearing on 18th March, 2010, but she did not appear and, therefore, exercising the power of review under Rule 7 of the Rules 1984, the Opposite Party No.3 came to the conclusion that the Petitioner originally belongs to village Bhalla under Dahikoti R.I. Circle and, accordingly, cancelled the resident certificate. It is also stated that in the inquiry report of the R.I. that the Petitioner is residing in her father-in-law's house at village Padmapur for the last one year and therefore, she cannot be said to be a permanent resident of Padmapur. The claim of the Petitioner regarding her marriage with Sushanta Singh and of residing with him is also admitted. On such grounds, cancellation of the resident certificate was sought to be justified.

4. The Opposite Party No.4 has also filed a counter affidavit. The basic facts of the case are admitted. It is stated that in view of the order passed by the A.D.M. in DSWO (A) Case No.2/2011, the Petitioner was directed to be disengaged and further, Notification dated 11th June, 2012 was issued inviting applications for filling up the posts of Anganwadi Worker for the Padmapur Anganwadi Centre.

5. The Petitioner filed a rejoinder to the counter filed by Opposite Party No.4 clarifying that she had challenged the order of cancellation of her resident certificate

inadvertently in an appeal before the Opposite Party No.2, which was dismissed on the ground of delay, the Petitioner therefore claims that the order of the Appellate Court (Opposite Party No.2) may be ignored.

6. Heard Mr. P. Acharya, learned counsel for the Petitioner, Mr. N.K.Praharaj, learned Government Advocate and Mr. Sukumar Ghosh, learned counsel appearing for the Opposite Party No.5.

7. Mr. Acharya argues that the impugned order of cancellation of the resident certificate is entirely illegal and contrary to the facts of the case. It is further argued that on the face of the finding that the Petitioner had married in village Padmapur and was residing in her father-in-laws house therein, it was not open to the Tahasildar to cancel the certificate more so, when originally a certificate had been issued basing on the same facts. That apart, no opportunity of hearing was granted to the Petitioner before cancelling the certificate. Mr. Acharya further contends that since disengagement of the Petitioner as Anganwadi worker was entirely based on the impugned order of cancellation of the resident certificate, the same is also rendered illegal and therefore, the Petitioner should be reinstated in service. In support of his contention Mr. Acharya has relied upon the decision of the Division Bench of this Court passed in the case of ***Smt. Sarojini Sahoo v. State of Odisha and others***; reported in 2014(II) OLR 65 and another Division Bench judgment rendered in the case of ***Anuradha Das v. Sub-Collector***, Puri passed in W.A. No.374/2013, decided on 3rd December, 2014.

8. Mr. N.K.Praharaj, learned Government Advocate, contends that the father-in-law of the Petitioner cannot be said to be a resident of village Padmapur inasmuch as he has illegally encroached upon Government land for which necessary proceeding under the OPLE Act has been initiated against him.It is further contended that resident certificate can only be granted to a person, who is actually a resident of the village in question, which the Petitioner is not. The mistake having been pointed out subsequently was rightly rectified by the Tahasildar.

9. Mr. Sukumar Ghosh, learned counsel appearing for the Opposite Party No.5, has argued that unless it is clearly shown that the Petitioner is a resident of the service area of the Mini Anganwadi Centre in question, she cannot be engaged as Anganwadi Worker. Since she had been engaged basing on the certificate issued erroneously, she was rightly disengaged upon rectification of the error. It is also argued by Mr. Ghosh that the Petitioner having preferred appeal against the order of cancellation of the resident certificate, the same was dismissed on the ground of limitation and therefore, the Petitioner cannot be permitted to invoke the writ jurisdiction of this Court to challenge the very same order on the principle of res judicata. According to Mr. Ghosh, there is no necessity for this Court to interfere in the matter.

10. Since a question of maintainability of the Writ Petition has been raised, it would be proper to consider the same at the outset.

It has been argued that the Petitioner had invoked the statutory remedy of appeal against the order of cancellation of the resident certificate which came to be dismissed on the ground of limitation. Therefore, unless the said order is challenged, it is not open to the Petitioner to question the order of cancellation of the resident certificate by invoking writ jurisdiction of this Court. A reference to the relevant statutory provisions at this stage would be apposite.Grant of resident/nativity certificate is governed under the provisions of Odisha Miscellaneous Certificates Rules, 1984 as it stood then. Rule 3 thereof, inter alia, provides for issuance of resident/nativity certificate by the Revenue Officer application for which is to be submitted under Rule 4. Necessary inquiry is to be made under Rule 5 and finally the order on the application is issued under Rule 6. Rule 8 provides that any person aggrieved by an order passed by the Revenue Officer under Rule 6 may prefer an appeal before different authorities enumerated therein. Thus, any order passed under Rule 6, i.e. allowing or rejecting the application for grant of Miscellaneous Certificate under Rule 4 is appealable under Rule 8. The power of review has also been conferred on the Revenue Officer under Rule 7, which reads as follows:-

> *"7.Review of the Orders – Notwithstanding anything contained in these rules, if it is revealed on subsequent verification or otherwise that the certificate should not have been granted or the contents thereof require modification, the Revenue Officer or any other officer superior to him in the revenue administrative hierarchy shall be competent to review the orders granting the said certificate and after giving the person concerned an opportunity of making any representation which he may wish to make, pass such orders as he deems just and proper in the circumstances of the case."*

11. Mr. Sukumar Ghosh has argued that review must be treated as an order passed under Rule 6 and not a separate order. Considering the scheme of the statutory provisions referred above, the argument advanced by Mr. Ghosh is not tenable for the reason that had it been so, the power of review would have been incorporated under Rule 6 itself instead of making a separate provision for the same. There is no dispute that the order passed under Rule 7 is not appealable. In the case of ***Chautara @ Chatura Suna @ Nag v. Sub-Collector***; reported in 2010 (II) OLR 408, after examining the provisions of the 1984 Rules this Court observed that no appeal is provided against an order of review/cancellation of the certificate passed under Rule 7 and therefore, the appeal preferred by the Petitioner therein was misconceived and the appellate authority i.e. the Sub-Collector had no jurisdiction to deal with the appeal.

12. In the instant case, the Petitioner preferred an appeal but as stated in the rejoinder, the same was filed inadvertently. The said appeal was rejected on the ground of limitation. The filing of the appeal and its subsequent rejection is of no consequence in view of what has been discussed in the preceding paragraph. Therefore, notwithstanding the filing of the appeal by the Petitioner and its rejection by the appellate authority, the present Writ petition challenging cancellation of the resident certificate under Rule 7 of the 1984 Rules is held to be maintainable.

13. Coming to the merits of the case, it is the case of the Petitioner that she is a resident of village Padmapur having married one Sushanta Singh of the said village. There seems to be no dispute that the father of Sushanta Singh namely, Rabin Kumar Singh has a house in the said village, but the same appears to be on a Government land.There is also no dispute that an encroachment case has been instituted against said Rabin Kumar Singh. It is also stated that said encroacher is not eligible for settlement of land in his favour. The purpose of grant of resident certificate is to show the resident/nativity of a person. In the present context, the resident certificate becomes relevant as it forms the basis for engagement of the Petitioner as Anganwadi Worker since the same shows that she belongs to the service area of the Anganwadi Centre in question. The 1984 Rules does not provide for any period of residency for acquiring eligibility to be granted resident certificate. In the absence of any such stipulation of time, it has been held that a person can be granted residential certificate if he resides in the particular locality for a period of at least one year continuously if he is otherwise eligible. The above view was taken by this Court in ***Sarojini Sahoo*** (supra). Merely because the Petitioner is residing in the house of her father-in-law, who is alleged to have encroached upon Government land, cannot be a ground to refuse residential certificate to her. Referring to the Government circular issued by the Revenue and D.M., Department on 8th March, 2011 and 2nd March, 2012, this Court in ***Sarojini Sahoo*** (supra) took note of the fact that residential certificate should not be denied to a landless person merely because he does not have documentary evidence of ownership of land. Therefore, cancellation of the certificate on the ground that the Petitioner's father-in-law has allegedly encroached upon Government land runs directly contrary to the Government circulars referred above. Therefore, the order of cancellation cannot be sustained in the eye of law. Consequently, the impugned order under Anneuxre-7-A passed by learned A.D.M. in quashing the selection of the Petitioner as Anganwadi Worker and the consequential order passed by the CDPO, Betnoti under Annexure-7 also cannot be sustained in the eye of law.

14. For the foregoing reasons therefore,the Writ Petition is allowed. The impugned orders under Annexures-10, 7-A and 7 are hereby quashed.

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2023 (I) ILR – CUT - 860

SASHIKANTA MISHRA, J.

CRLREV NO. 22 OF 2022

ASHOK KUMAR DAS .....Petitioner

.V.

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

CODE OF CRIMINAL PROCEDURE, 1973 – Section 173 (8) – Whether the Magistrate has power to direct further investigation & to take fresh cognizance even after submission of charge sheet & taking cognizance of offence? – Held, Yes.

Case Law Relied on and Referred to :-
1. (1985) 2 SCC 537 : Bhagwant Singh Vs. Commissioner of Police & Anr.

For Petitioner : Mr.Gouri Kumar Rath.

For Opp.Party No.1 : Mr.S.K.Mishra, Addl. Standing Counsel
For Opp.Party Nos.2 to 5 : None.

JUDGMENT Date of Judgment : 03.02.2023

SASHIKANTA MISHRA, J.

The Petitioner in the present revision questions the correctness of order dated 6th January, 2022 passed by learned J.M.F.C. (P), Kujanga in I.C.C. No.6/2022 whereby the complaint filed by him was dismissed on the ground that the Court has no power to order further investigation.

2. The brief facts relevant only to decide the present revision are that the Petitioner lodged an F.I.R. on 9th December, 2020 before the I.I.C. of Kujanga P.S. making several allegations against the present Opposite Party Nos.2 to 5. The F.I.R. was registered under Sections 283/379/34 of I.P.C. and investigation was taken up.

3. Upon completion of investigation the I.O. submitted charge sheet on 3rd April, 2021 also under the aforementioned sections. The Petitioner having come to know about submission of the charge sheet filed the aforementioned complaint case before the learned J.M.F.C., Kujanga stating therein that the case had not been properly investigated and charge sheet had been submitted ignoring his specific grievances. As such, it was prayed to take cognizance of the offences punishable underSections 294/149/120-B/381/382/406/408/424/418/426/427/440/441/442/ 448/ 451/ 462/455/ 506/34 of I.P.C. read with Section 3(1)(za) (D)/2(v)(va) of the SC and ST (P.A.) Act read with Essential commodities Act read with Liquefied Petroleum and Natural Gas (Regulation of Supply and Distribution) Order No.6(1)(a)(b). It was also prayed to direct the competent Police Officer to take up further investigation of the case. Learned J.M.F.C., after perusing the complaint petition and the connected G.R. Case held that in view of the ratio decided in the case of ***Vinubhai Haribhai Malaviya and Ors. vs. The State of Gujarat and Anr.***; in Crl. Appeal Nos.748-749 of 2017, the Court has no power to order further investigation. Thus, the complaint was dismissed.

4. Heard Mr. Gouri Kumar Rath, learned counsel for the Petitioner and Mr. S.K.Mishra, learned Addl. Standing counsel for the State. Despite sufficient notice, there was no appearance from the side of Opposite Party Nos.2 to 5.

5. Mr. Rath has strenuously argued that a bare reading of the charge sheet submitted by the Police would show that the case was not investigated properly and the grievances of the complainant had not been fully addressed.He further contended that the Court below committed manifest error in rejecting the complaint petition on the misconceived motion that he has no power to direct further investigation. On the contrary, law permits the informant to submit his objection to the charge sheet submitted by the investigating agency.The Magistrate is not supposed to act as a Post Office and mechanically accept the charge sheet, rather it is his bounden duty to ensure that the matter has been properly investigated. In the instant case, the Petitioner having filed a complaint specifically indicating that the commission of certain other offences had not been considered and investigated by the investigating agency, the Magistrate should have directed further investigation as provided under Section 156(3) read with Section 202 of Cr.P.C. Mr. Rath further submits that the impugned order has been passed on a complete misreading of the judgment of ***Vinubhai Haribhai (supra)*** by the Magistrate.

6. Per contra, Mr. Mishra contends that the Magistrate's power to direct further investigation even after submission of charge sheet is well recognized. The whole concept of providing opportunity to the informant to have his say in the matter after submission of charge sheet is to ensure that the charge sheet has been submitted following proper investigation. However, Mr. Mishra argues that the informant has attempted to expand the scope of the allegations contained in the F.I.R. lodged by him, which cannot be considered by the Magistrate in the case already registered against the accused persons.

7. From the rival contentions noted above, it is evident that the only question that is required to be determined in the present case is, whether the Magistrate has the power to consider a complaint filed by the informant after submission of charge sheet and direct further investigation basing thereon.

8. Admittedly, the Petitioner lodged F.I.R. on 9th December, 2020 making certain allegations against the accused persons, which was investigated and ultimately charge sheet was submitted. Being dissatisfied, the Petitioner filed the complaint in question alleging that the matter had not been properly investigated. According to the Petitioner, the investigating agency had deliberately reduced the rigors of the allegations by submitting charge sheet only for the offences under Sections 283/379/34 of I.P.C. and that too, only because the F.I.R. was registered as per the order passed by this Court in CRLMP No.1655/2020.

9. Be that at it may, law is well settled that the informant has a right to be informed of the result of the F.I.R. lodged by him. Therefore, if the complaint lodged by him ends in a final report being submitted by the investigating agency or Final Form (Charge Sheet) being submitted in a manner not acceptable to him, he has the right of submitting his objection (usually called protest petition) before the

Magistrate. In the case of ***Bhagwant Singh v. Commissioner of Police and another***; reported in (1985) 2 SCC 537, the Apex court held as under;

> *"It will be seen from the provisions to which we have referred in the preceding paragraph that when an informant lodges the first information report with the officer-in-charge of a police station, he does not fade away with the lodging of the first information report. He is very much concerned with what action is initiated by the officer-in-charge of the police station on the basis of the first information report lodged by him. No sooner he lodges the first information report, a copy of it has to be supplied to him, free of cost, under sub-section (2) of Section 154. If, notwithstanding the first information report, the officer-in-charge of a police station decides not to investigate the case on the view that there is no sufficient ground for entering on an investigation, he is required under sub-section (2) of Section 157 to notify to the informant the fact that he is not going to investigate the case or cause it to be investigated. Then again, the officer-in-charge of a police station is obligated under sub-section (2)(ii) of Section 173 to communicate the action taken by him to the informant and the report forwarded by him to the Magistrate under sub-section (2)(i) has therefore to be supplied by him to the informant. The question immediately arises as to why action taken by the officer-in-charge of a police station on the first information report is required to be communicated and the report forwarded to the Magistrate under sub-section (2)(i) of Section 173 required to be supplied to the informant. Obviously, the reason is that the informant who sets the machinery of investigation into motion by filing the first information report must know what is the result of the investigation initiated on the basis of the first information report. The informant having taken the initiative in lodging the first information report with a view to initiating investigation by the police for the purpose of ascertaining whether any offence has been committed and, if so, by whom, is vitally interested in the result of the investigation and hence the law requires that the action taken by the officer-in-charge of a police station on the first information report should be communicated to him and the report forwarded by such officer to the Magistrate under sub-section (2)(i) of Section 173 should also be supplied to him.*
>
> *Now, when the report forwarded by the officer-in-charge of a police station to the Magistrate undersub-section(2)(i) of Section 173 comes up for consideration by the Magistrate, one of two different situations may arise. The report may conclude that an offence appears to have been committed by a particular person or persons and in such a case, the Magistrate may do one of three things: (1) he may accept the report and take cognizance of the offence and issue process or (2) he may disagree with the report and drop the proceeding or (3) he may direct further investigation under sub-section (3) of Section 156 and require the police to make a further report. The report may on the other hand state that, in the opinion of the police, no offence appears to have been committed and where such a report has been made, the Magistrate again has an option to adopt one of three courses: (1) he may accept the report and drop the proceeding or (2) he may disagree with the report and taking the view that there is sufficient ground for proceeding further, take cognizance of the offence and issue process or (3) he may direct further investigation to be made by the police under sub-section (3) of Section 156. Where, in either of these two situations, the Magistrate decides to take cognizance of the offence and to issue process, the informant is not prejudicially affected nor is the injured or in case of death, any relative of the deceased aggrieved, because cognizance of the offence is taken by the Magistrate and it is decided by the Magistrate that the case shall proceed. But if the Magistrate decides that there is no sufficient ground for proceeding further and drops the proceeding or takes the view that though there is sufficient ground for proceeding against some, there is no sufficient ground for proceeding against others mentioned in the first information report, the informant would certainly be prejudiced because the first information report lodged by him would have failed of its purpose, wholly or in part. Moreover, when the interest of the informant in prompt and effective action being*

taken on the first information report lodged by him is clearly recognised by the provisions contained in sub-section (2) of Section 154, sub-section (2) of Section 157 and sub-section (2)(ii) of Section 173, it must be presumed that the informant would equally be interested in seeing that the Magistrate takes cognizance of the offence and issues process, because that would be culmination of the first information report lodged by him. There can, therefore, be no doubt that when, on a consideration of the report made by the officer-in-charge of a police station under sub-section (2)(i) of Section 173, the Magistrate is not inclined to take cognizance of the offence and issue process, the informant must be given an opportunity of being heard so that he can make his submissions to persuade the Magistrate to take cognizance of the offence and issue process. We are accordingly of the view that in a case where the Magistrate to whom a report is forwarded under sub-section (2)(i) of Section 173 decides not to take cognizance of the offence and to drop the proceeding or takes the view that there is no sufficient ground for proceeding against some of the persons mentioned in the first information report, the Magistrate must give notice to the informant and provide him an opportunity to be heard at the time of consideration of the report. It was urged before us on behalf of the respondents that if in such a case notice is required to be given to the informant, it might result in unnecessary delay on account of the difficulty of effecting service of the notice on the informant. But we do not think this can be regarded as a valid objection against the view we are taking, because in any case the action taken by the police on the first information report has to be communicated to the informant and a copy of the report has to be supplied to him under sub-section (2)(i) of Section 173 and if that be so, we do not see any reason why it should be difficult to serve notice of the consideration of the report on the informant. Moreover, in any event, the difficulty of service of notice on the informant cannot possibly provide any justification for depriving the informant of the opportunity of being heard at the time when the report is considered by the Magistrate." (Emphasis supplied)

10. It has been argued that the power to direct further investigation is available to be exercised by the Magistrate only at the pre-cognizance stage and not afterwards. If this view is accepted it would render the provision under Section 173 (8) otiose. In other words, if law confers power on the police to further investigate after submitting charge-sheet and to the Magistrate to accept additional or supplementary charge-sheet submitted even after taking cognizance as provided under sub-sections (2) to (6) of Section 173 of Cr.P.C, there is no reason why the Magistrate cannot direct further investigation himself on a petition being filed by the informant. If, acting on such order the police conducts investigation and submits its report, then the same procedure as indicated in sub-section (8) would have to be followed. In other words, if law requires that the result of the investigation ought to be informed to the informant so as to give him a chance to have his say, if any, in the matter, why should his protest, regardless of the form in which it is filed, be brushed aside at the threshold on the ground that final form has already been submitted? It goes without saying that the Magistrate may exercise the power either on his own motion or on the prayer of someone including the informant. In the event such further investigation discloses commission of other offences also, it would be open to the Magistrate to take fresh cognizance of the same and proceed further.

11. In the instant case, the learned Magistrate has relied upon the decision of the Apex Court in the case of ***Vinubhai Haribhai (supra)*** to hold that he has no power to direct further investigation as prayed for by the complainant.

12. On a careful reading of the judgment referred to above, this Court fails to see as to how the same is applicable to the present case. Even in the case of ***Vinubhai Haribhai (supra***), the Apex Court after referring to several previous judgments has ultimately held as under;

> *"What is not given any importance at all in the recent judgments of this Court is Article 21 of the Constitution and the fact that the Article demands no less than a fair and just investigation. To say that a fair and just investigation would lead to the conclusion that the police retain the power, subject, of course, to the Magistrate's nod under Section 173(8) to further investigate an offence till charges are framed, but that the supervisory jurisdiction of the Magistrate suddenly ceases mid way through the pre-trial proceedings, would amount to a travesty of justice, as certain cases may cry out for further investigation so that an innocent person is not wrongly arraigned as an accused or that a prima facie guilty person is not so left out. There is no warrant for such a narrow and restrictive view of the powers of the Magistrate, particularly when such powers are traceable to Section 156(3) read with Section 156(1), Section 2(h) and Section 173(8) of the Cr.P.C. as has been noticed hereinabove, and would be available at all stages of the progress of a criminal case before the trial actually commences. It would also be in the interest of justice that this power be exercised suo motu by the Magistrate himself, depending on the facts of each case. Whether further investigation should or should not be ordered is within the discretion of the learned Magistrate who will exercise such discretion on the facts of each case and in accordance with law. If, for example, fresh facts come to light which would lead to inculpating or exculpating certain persons, arriving at the truth and doing substantial justice in a criminal case are more important than avoiding further delay being caused in concluding the criminal proceeding, as was held in* ***Hasanbhai Valibhai Qureshi v. State of Gujarat and Ors****.; (2004) 5 SCC 347".* *(Emphasis supplied)*

13. The Apex Court in the case of ***Vinubhai Haribhai (supra***), held that the case under consideration when considered on its facts was not one which calls for any further investigation to the facts alleged in the F.I.R. in question. Whether the facts and allegations laid in the complaint in the instant case merit further investigation or not is a matter to be considered by the Magistrate in accordance with law.Unfortunately,without considering such aspects, the very complaint petition was dismissed on the grossly erroneous perception that the Magistrate did not have power to direct further investigation.

14. This court is of the considered view that the Magistrate has entirely misread the judgment of the Apex Court in ***Vinubhai Haribhai (supra),*** to hold that he has no power to direct further investigation. In fact, the aforementioned decision was also taken note of by a coordinate Bench of this Court in CRLMC No.1794 of 2017 (Manoj Kumar Agarwal v. State of Odisha, decided on 2.12.2022) to direct the concerned Magistrate to pass appropriate orders regarding further investigation under Section 173(8) of Cr.P.C. In view of what has been discussed hereinbefore, the ground taken by learned S.D.J.M. in the instant case cannot be countenanced in law.

15. It can thus safely be held that the power under sub-section (8) of Section 173 of Cr.P.C is available to be exercised by the Magistrate to direct further investigation and to act upon the result of such further investigation at any stage

before commencement of trial. There is no bar in law for the Magistrate to direct further investigation and to take fresh cognizance, if need be, even after submission of charge-sheet and taking of cognizance of some offences. Learned S.D.J.M. must, therefore, be held to have committed an error in holding that he had no power to direct further investigation for that the impugned order cannot be sustained.

16. In the result, the Revision is allowed. The impugned order is set aside. The matter is remitted to the learned S.D.J.M. to consider if any case for directing further investigation is made out. If so, learned S.D.J.M. shall direct the investigating officer to further investigate the matter and submit his report accordingly whereupon learned S.D.J.M. shall proceed further inaccordance with law.

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2023 (I) ILR - CUT- 866

A.K. MOHAPATRA, J.

W.P.(C) NO. 25947 OF 2022

SMT. NIRMALA SAHOO .....Petitioner

.V.

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

SERVICE LAW – Re-instatement – Petitioner was disengaged from service during the subsistence of her contractual period as Junior Engineer (Civil) – Due to entangle in a vigilance case, she was detained in custody for a period exceeding forty eight hours – Petitioner was acquitted from all charges with a finding by the Trial Court that the prosecution has failed miserably to establish the charges of offences – Whether the petitioner can be re-instated and regularised in service ? – Held, Yes – It would not be just, fair and proper to leave the petitioner alone to suffer whereas her batchmates have been regularised in service in the mean time. (Paras 23-27)

Case Laws Relied on and Referred to :-

1. 2022 (II) OLR – 772 : Rajib Lochan Biswal Vs. State of Odisha & Ors.
2. 2014 (I) OLR – 624 : Shri Sailendra Nath Mohanty Vs. Union of India & Ors.
3. (2018) 1 SCC 797 : Union Territory, Chandigarh Administration & Ors. Vs. Pradeep Kumar & Anr.

For Petitioner : M/s. P.K. Mishra, K.L. Kar & S. Mishra

For Opp. Parties: Mr. Saswat Das, Addl. Govt. Adv.

JUDGMENT Date of Hearing : 13.03.2023: Date of Judgment : 24.03.2023

A.K. MOHAPATRA, J.

The principal issue involved in the present writ petition is whether the Petitioner who was working as a Junior Engineer on contractual basis and was

subsequently terminated from service as he was entangled in a Vigilance Case and remained in custody for more than forty eight hours and later on after his acquittal in the criminal trial, this Court can issue a writ of mandamus directing the Opposite Parties to take the Petitioner back in service? To be specific, the Petitioner has approached this Court by filing the present writ petition with a prayer to quash the impugned order No.26591 dated 26.08.2013 under Annexure-7 and order dated 12.09.2022 under Annexure-16 and for a further direction to the Opposite Parties, more particularly Opposite Party No.1 to reinstate the Petitioner in service with all consequential service and financial benefits at par with her batchmates, who were engaged on contractual basis as Junior Engineer (Civil) under Annexure-2.

2. The factual matrix, in a narrow compass, leading to filing the present writ petition is that the Finance Department, Government of Odisha issued a guideline/circular dated 31.12.2004 to all departments of the Government of Odisha advising for abolition of 75% of base level vacant posts and for filling-up essential vacant posts including exempted category and single posts on contractual post with a consolidated salary. In the aforesaid guideline/circular, it was further clarified that such appointments on contractual basis shall be for a specific period which could be renewed from time to time with the concurrence of the Finance Department subject to satisfactory performance of the employee concerned by the competent authority.

3. Following the aforesaid Finance Department circular/guidelines, the H&U.D. Department vide order dated 17.5.2010 created 21 posts of Junior Engineer (Contractual) for 21 Urban Local Bodies. In order to fill up the aforesaid 21 posts on contractual basis, the Engineer-in-Chief (Civil) has sponsored the names of 21 numbers of Diploma Holder Civil Engineers of different category including the Petitioner from the panel maintained at their end to the H&U.D. Department. Thereafter, vide order dated 23.06.2010, the Opposite Party No.1 had engaged 21 Junior Engineers (Civil) including the Petitioner on contractual basis with a consolidated remuneration of Rs.9,300/- per month subject to the terms and conditions provided in F.D. Circular No.55764 dated 31.12.2004. The service of the Petitioner was placed/allotted to the office of the Executive Officer, Banpur NAC, Banpur and the Executive Officer, Banpur NAC issued a formal engagement order dated 12.7.2010 in favour of the Petitioner. Pursuant to which, the Petitioner joined in the post on 20.7.2010.

4. It is submitted by Sri P.K.Mishra, learned counsel appearing for the Petitioner that the Petitioner has been discharging her duties to the utmost satisfaction of the authorities.Furthermore, on the basis of the performance report submitted by the Executive Officer, Banpur NAC, the service of the Petitioner was being renewed from time to time in terms of F.D. Circular dated 31.12.2004.

5. While the matter stood thus, on the false allegation of one Sri Laxmidhar Sethi, a Contractor, who was entrusted with some construction work, Bhubaneswar Vigilance P.S. No.32 of 2013 was registered wherein the Petitioner has been

shown as an accused for commission of an offence under Section 7 of Prevention of Corruption Act, 1988. Pursuant to the said F.I.R., a trap was led by the Vigilance Police and the Petitioner was arrested on 17.8.2013 and was sent to judicial custody. After her release on bail, the Petitioner reported for duty. However, the Opposite Party No.1 without following the principle of natural justice vide Office Order dated 26.08.2013 disengaged the Petitioner from service w.e.f. 17.08.2013 on the ground that she was detained in custody for a period exceeding forty eight hours.

6. In the Vigilance P.S. Case No.32 of 2013, the I.O. submitted a charge sheet before the Special Judge, Vigilance, Bhubaneswar. Thereafter, the Petitioner faced the trial. The learned Special Judge, Vigilance, Bhubaneswar vide judgment dated 16.4.2018 acquitted the Petitioner from all charges with a finding that the prosecution has failed miserably to establish the charges under Section 7 and 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, for which the accused is entitled for an acquittal.

7. It is apt to mention here that while the trial in the criminal case was going on and the Petitioner was attending the Court regularly, vide order dated 2.4.2018 of the Opposite Party No.2, the services of other contractual Junior Engineers (Civil) engaged along with the Petitioner were regularized in the post of Junior Engineer (Civil) in the scale of pay of Rs.9,300-34,800/- with Grade Pay of Rs.4,200/- with all other admissible service benefits. It is also relevant to mention here that other Junior Engineers appointed on contractual basis along with the Petitioner were regularized on completion of six years of uninterrupted service.

8. After acquittal in the vigilance case, the Petitioner submitted a representation dated 4.10.2018 with a prayer to reinstate her in service in the regular establishment treating the period of disengagement as continuity in service for all purposes. The Opposite Party No.1 vide letter dated 28.06.2019 and 01.10.2019 requested the Deputy Secretary to Government,G.A. (Vigilance) Department to provide information regarding filing of appeal, if any, against the judgment passed by the learned Special Judge, Vigilance, Bhubaneswar. In reply to the letter by Opposite Party No.1, the Deputy Secretary to Government, G.A. (Vigilance) Department by his reply dated 28.01.2020 intimated the Opposite Party No.1 that G.A. (Vigilance) Department has decided not to prefer any appeal against the order of acquittal. Despite such reply, since no action was taken by the Opposite Parties, the Petitioner was compelled to file another representation on 07.09.2020. From letter dated 17.1.2022, the Petitioner came to learn that the department has decided not to reengage the Petitioner as a Junior Engineer by revoking the dismissal order.

9. Additionally, the Petitioner received a communication under Annexure-14 wherein she has been informed that the representation submitted by her has been rejected. The letter dated 17.1.2022 under Annexure-14, on close scrutiny, reveals that the same is devoid of any valid reason.

10. Being aggrieved by the order dated 17.1.2022 under Annexre-14, the Petitioner had earlier approached this Court by filing W.P.(C) No.6179 of 2022. This Court vide order dated 21.03.2022 had set aside the order dated 17.1.2022 under Annexure-14 with the observations and direction to Opposite Party No.1 to consider the representation of the Petitioner dated 07.09.2020 afresh by taking into consideration all developments that had taken place in the matter including the intimation received from the Vigilance Department. However, the Opposite Party No.1 vide order dated 12.09.2022 had again rejected the claim of the Petitioner in consultation with Opposite Parties No.2 and 3 on the ground that her contractual appointment was over, as she was disengaged from service on the ground of her detention in custody for more than forty eight hours and that for good governance, it is decided not to allow renewal of contract with the Petitioner due to doubtful integrity in the first part of the service.

11. Mr. P.K. Mishra, learned counsel appearing for the Petitioner contended that the Engineer-in-Chief (Civil) following due recruitment procedure prepared a panel of Diploma Holder Civil Engineers for their engagement as Junior Engineer (Civil) under Annexure-2. Further, on the request of the Opposite Party No.2, the E.I.C. (Civil) sponsored the names of eligible Civil Engineers including the Petitioner for appointment/engagement as contractual Junior Engineers in different ULBs. Thereafter, the Petitioner was engaged against a contractual post created with the concurrence of the Finance Department and, accordingly, she has joined in the post on 20.07.2010. He further contended that subject to satisfactory performance, the service of the Petitioner was being renewed from time to time. He further contended that after acquittal of the Petitioner in the vigilance case after a full blown trial, it is no more open to the Opposite Parties to dispute the verdict as well as the finding of the competent criminal court on the subject. He also contended that by doubting the integrity of the Petitioner, the Opposite Parties are showing utter disrespect/disregard to the competent criminal court and the final verdict delivered by such competent court. In such view of the matter, the learned counsel for the Petitioner submitted that once the criminal court has come to a conclusion that the prosecution has miserably failed to bring home the charges and, accordingly, the Petitioner was acquitted of all charges, the Opposite Parties should have accepted the verdict of the competent criminal court and, accordingly, they should have revoked the disengagement order passed against the Petitioner and the Petitioner should have been reinstated in service with all consequential service and financial benefits.

12. Learned counsel for the Petitioner also contended that before disengaging the Petitioner, the authorities did not follow the principles of natural justice. The Petitioner accepted the same as she was detained in custody for more than forty eight hours in connection with vigilance case. Once the vigilance case has ended in acquittal, the Opposite Parties are duty bound to revoke the disengagement order and to reinstate the Petitioner and the Petitioner be treated at par with other Junior

Engineers, who were engaged along with the Petitioner and whose services have been regularized in the meantime.

13. The Opposite Parties No.1 and 4 have jointly filed a counter affidavit. In the counter affidavit, the Opposite Parties have admitted that the Petitioner was provisionally engaged on contractual basis as Junior Engineer (Civil) in Banpur NAC vide H&U.D.Department Order dated 23.06.2010 on a consolidated remuneration of Rs.9,300/- only per month. As per the terms and conditions of the appointment, such appointment is valid upto the end of February with the stipulation that the renewal of the contract of appointment can be considered only if the continuance of the post is extended with concurrence of the Finance Department and subject to satisfactory performance to be evaluated by the appropriate authority. Accordingly, the service of the Petitioner was renewed for the year 2011-12,2012-13 and 2013-14 basing upon her performance report.

14. The counter affidavit further reveals that since the Petitioner was entangled in Bhubaneswar Vigilance P.S. Case No.32 dated 16.08.213 while she was working in NAC, Banpur, the Petitioner was arrested on 17.08.2013 and remained in judicial custody till 30.08.2013. Since the Petitioner was engaged on contractual basis, she was disengaged from contractual service w.e.f. 17.08.2013. Such decision is also backed by G.A.(Vigilance) Department letter dated 05.09.2013 requesting the H&U.D. Department to disengage the Petitioner from service. Furthermore, to justify their conduct in disengaging the Petitioner, the Opposite Parties have relied upon certain observations of the final judgment delivered by the learned Special Judge, Vigilance, Bhubaneswar. However, the Opposite Parties have not disputed the fact that the evidence with regard to demand and acceptance of gratification by the accused being discrepant in nature, it cannot be said that the prosecution has established its case beyond all reasonable doubt and that the doubt in the mind of the Court still persists regarding the demand, as a result of which, the Petitioner has been acquitted of all charges.

15. The rejection of Petitioner's representation has been justified by the Opposite Parties by saying that keeping in view the transparency in administration and good governance, it is decided better not to allow renewal of contract with the Petitioner due to doubtful integrity in the first part of the service.

16. Learned Additional Government Advocate appearing for the State-Opposite Parties contended that since the Petitioner was appointed on contractual basis and once the contract is over as the same was terminated lawfully, the question of reinstating the Petitioner in service by revoking the order of disengagement does not arise. The contractual relationship of employer and employee ceases to exist between the Petitioner and the Opposite Parties upon termination of the contract. Moreover, learned Additional Government Advocate also led emphasis on the grounds of rejection of Petitioner's representation. He further contended that despite

acquittal in the criminal case, the Opposite Parties can independently assess the integrity of the Petitioner and they are free to take a decision as to whether the Petitioner deserves to be reinstated in service or not. On careful consideration and further after assessing the integrity of the Petitioner in the first part of the service, the Opposite Parties have decided not to reinstate the Petitioner in service. As such, the decision of the Opposite Parties is not liable to be interfered with by this Court in exercise of its power of judicial review.

17. Learned counsel appearing for the Petitioner, on the other hand, in support of his contention, relied upon a judgment of this Court in the case of ***Abhimanyu Mallick v. State of Odisha and others*** (W.P.(C) No.17307 of 2020 decided on 25th July, 2022). He further contended that the facts of the case in *Abhimanyu Mallick* (supra) are almost identical to the facts of the present case. In the said case, the Petitioner was a Contract Teacher and after she was acquitted in the criminal trial, a coordinate Bench of this Court after a detailed discussion has issued a direction to reinstate the Petitioner in service with all service benefits after quashing the impugned termination order. Further, a direction was also given to take steps to regularize the service of the Petitioner with all consequential service benefits from the date his immediate juniors in the list of Contract Teachers, who were engaged in the year 2011-12, were regularized.

18. Learned counsel appearing for the Petitioner also relied upon a judgment of this Court in the case of ***Rajib Lochan Biswal v. State of Odisha & Others***, reported in 2022 (II) OLR – 772. Referring to the above noted judgment, learned counsel for the Petitioner argued that mere involvement in a criminal case cannot be treated as proof of guilt. Referring to the said judgment, it is also contended that involvement in a criminal case cannot come within the ambit of misconduct, unprofessional behaviour, bad management, mismanagement, misbehaviors as defined in Clause-9 of the agreement executed by the Petitioner in that case with the Government.

19. Learned counsel appearing for the Petitioner also relied upon paragraph-8 of the said judgment, which is extracted hereinbelow:-

> *"On the undisputed facts of the case as narrated above, it is to be considered whether involvement in the Vigilance Case can amount to misconduct within the meaning of Clause-9. It is well known in criminal jurisprudence that an accused is presumed to be innocent till he is proved guilty in a regular trial and that mere involvement in a criminal case cannot be treated as proof of guilt. Be that as it may, Clause-9 itself defines 'misconduct' as 'improper or unprofessional behaviour, bad management, mismanagement, misbehaviors'. Obviously, involvement in a criminal case cannot come within the ambit of any of the aforementioned acts. Though it is stated that whether an act is a misconduct or not would be construed by the first party at his discretion, the same cannot imply that the authority is empowered to act arbitrarily or whimsically or without legally acceptable reason. 'Misconduct' within the meaning of Clause-9 would obviously mean, misconduct that has been proved in accordance with law. If the reasoning put forth by the opposite party authorities is accepted it would imply that a mere allegation would be akin to proof, which is contrary to all legal principles."*

20. Learned counsel for the Petitioner also referred to the order of this Court in the case of ***Sunita Sahu v. Principal Secy. to Govt. of Odisha & Ors.*** (WPC(OAS) No.12 of 2018 decided on 09.09.2022).In Sunita Sahu's case (supra), this Court had also issued a direction to reinstate the Petitioner after the Petitioner was acquitted by the learned Special Judge, Vigilance in a Vigilance Case involving the Petitioner in that case. Further, a coordinate Bench of this Court also took a view that the ground of termination was solely the involvement of the vigilance case. This Court found that the order of termination passed by the Opposite Parties is not legal and justified. Accordingly, direction was issued to reinstate the Petitioner.

21. Learned counsel for the Petitioner also referred to a judgment of this Court in the case of ***Shri Sailendra Nath Mohanty v. Union of India and three others,*** reported in ***2014 (I) OLR – 624***. Referring to the judgment delivered by a Division Bench of this Court, learned counsel for the Petitioner submitted that the sole allegation against the Petitioner in the reported case was misappropriation of money and the charges in the criminal case was similar to the charges in the disciplinary proceeding and that the charges in criminal case having failed and the Petitioner having been acquitted, the disciplinary authority cannot come to a conclusion in the disciplinary proceeding that the Petitioner has committed misappropriation. Since in the said reported case the Petitioner was found guilty in a disciplinary proceeding conducted after the Petitioner was acquitted in the criminal proceeding and the disciplinary authority found the Petitioner guilty, this Court by an elaborate order has come to a conclusion that the criminal charges having failed, it cannot be concluded in the disciplinary proceeding that he has committed misappropriation and, accordingly, the impugned order was quashed and the Opposite Parties were directed to reinstate the Petitioner in his previous post.

22. Learned Additional Government Advocate appearing for the State-Opposite Parties, on the other hand, relied upon a judgment of the Hon'ble Supreme Court in the case of ***Union Territory, Chandigarh Administration and Others v. Pradeep Kumar and Another***, reported in ***(2018) 1 SCC 797***. On perusal of the said judgment, it appears that the issue involved in that case is the suitability of the Petitioner for police service after he was involvement in a criminal case and subsequently acquitted by the criminal court. Further, it has been specifically observed by the Ho'ble Supreme Court that the respondents-candidates were acquitted on the basis of benefit of doubt. Finally, the Hon'ble Supreme Court concluded that the acquittal in a criminal case is not conclusive of suitability of candidate, unless it is honourable acquittal and that the employer can go into issue of suitability. Accordingly, the Hon'ble Supreme Court allowed the appeal and the order of Screening Committee rejecting the candidature of the respondents-candidates was upheld.

23. Having heard the learned counsels for the respective parties and upon a careful consideration of the pleadings from both the sides as well as the documents

referred to and the judgment relied upon by learned counsels appearing for both the sides, this Court is of the view that the issue involved in the present case, in a narrow compass, is that whether the Petitioner can be reinstated in service after she was disengaged from service during the subsistence of her contractual period as a Junior Engineer (Civil). No doubt, the allegations which are made against the Petitioner are of serious in nature. However, the law is fairly well settled that unless the charges are established in a court of law, it cannot be presumed that the Petitioner is guilty of the offence alleged against her.This principle is fundamental to the criminal jurisprudence.Therefore,this Court is required to examine as to whether the Petitioner can be reinstated in service in view of the order of acquittal passed by the competent criminal court.

24. The first question that falls for consideration before this Court is the manner in which the Petitioner has been dismissed from service. Indisputably, the Petitioner was disengaged from service once, it came to the notice of the Opposite Parties that the Petitioner has been entangled in a vigilance case involving allegation of misappropriation. The order of disengagement dated 26.08.2013 under Annexure-7 is very cryptic and short. The same reveals that the Petitioner has been disengaged from service as she was detained in custody on 17.08.2013 for a period exceeding forty eight hours. Admittedly, no notice whatsoever was given to the Petitioner. Moreover, the same is not the requirement of law as the Petitioner was a contractual employee and was found in custody for more than forty eight hours.

25. After the Petitioner was disengaged from service, the Petitioner faced trial in T.R. Case No.9 of 2014 in the Court of Special Judge, Vigilance, Bhubaneswar although the prosecution tried its best to bring home the charges by leading evidence, however, the learned Special Judge was not satisfied with the evidence adduced by the prosecution. Therefore, the Petitioner was acquitted of all charges with a finding by the trial Court that the prosecution has failed miserably to establish the charge for offence under Section 7 and 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988. This Court at this juncture observes that the order of the acquittal is not based on any benefit of doubt. It is a case where the prosecution has failed miserably to adduce cogent and trustworthy evidence against the Petitioner to establish the charges made against the Petitioner. Therefore, this Court has no hesitation to come to a conclusion that the Petitioner has been acquitted on merits and upon the failure of the prosecution to lead cogent and unimpeachable evidence against the Petitioner.

26. After the Petitioner was acquitted from all charges, the Vigilance Department itself has communicated that they have decided not to file any appeal against the order of acquittal that shows even the Vigilance Department was not convinced with the material in their possession which were produced before the Court in course of the trial. Had there been some grounds, the department would not have caused any delay in approaching the appellate court by filing an appeal which is an usual

practice. Therefore, this Court has no hesitation in accepting the judgment of the trial Court in the present case and in coming to a conclusion that the Petitioner has been acquitted on merits that too due to lack of proper evidence against the Petitioner. At this stage, this Court is encountered with a question as to whether it would be proper and safe to accept the views of the department with regard to integrity of the present Petitioner that too there is no material on record which would raise any doubt on the integrity of the Petitioner as has been observed in the impugned rejection order. On the contrary, the Opposite Parties have themselves admitted in the counter affidavit that on satisfactory performance the service contract of the Petitioner was renewed for three years. Moreover, had the integrity been doubtful, the Opposite Parties would not have renewed the service contract of the Petitioner.

27. The next question which is pertinent for a just and fair adjudication of the issue involved in the present writ petition is with regard to reinstatement of the Petitioner in service. As has already been discussed hereinabove, the Petitioner who is having the required eligibility for appointment as a Junior Engineer and on being duly selected and empanelled, her name was recommended for appointment along with 20 others to the H&U.D. Department. The H&U.D. Department had appointed the Petitioner along with others and subsequently the contract was renewed from time to time after assessment of the performance by the appropriate authority. Moreover, the services of persons who were appointed along with the Petitioners have already been regularized in the meantime upon completion of six years of service. However, since the Petitioner was entangled in the vigilance case, she was disengaged from service. Therefore, it would not be just, fair and proper to leave the Petitioner alone to suffer whereas her batchmates have been regularized in service in the meantime. The only allegation against the Petitioner was her involvement in the vigilance case. The prosecution having failed to prove the charges, the allegation made against the Petitioner was found to be false. Therefore, in exercise of the power of judicial review, this Court as a Court of equity has to treat the Petitioner at par with the batchmates who were not only allowed to continue in the contractual service, but also upon completion of six years of service have been regularized against regular/sanctioned posts in the Government service. Moreover, no disciplinary proceeding was initiated against the Petitioner before or after the criminal case questioning her integrity and conduct during her service period.

28. Accordingly, this Court in view of the aforesaid analysis of fact as well as the legal position, has no hesitation in quashing the impugned orders under Annexures-7 and 16 by declaring that the termination of the service of the Petitioner is bad and illegal, accordingly, the Opposite Parties are directed to reinstate the Petitioner in service immediately within a period of eight weeks from the date of production of a certified copy of this judgment. The Petitioner be also given the benefit of continuity in service from the date of termination to till date at par with her

batchmates, however, by applying the principle of "no work no pay", she shall not claim any salary/wages and she will not be entitled to any financial benefit from the date of her termination to till her reinstatement in service. The authorities shall treat the Petitioner at par with her batchmates and shall take steps for regularization of her service against any available vacant regular post with all consequential service benefits from the date on which her batchmates who were engaged along with the Petitioner from the year 2010 were regularized in service. The Opposite Parties shall do well to complete the entire exercise within a period of three months from the date of communication of this judgment or on production of a certified copy of this judgment by the Petitioner.

29. The writ petition is allowed. However, there shall be no order as to cost.

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2023 (I) ILR – CUT - 875

V. NARASINGH, J.

W.P. (C) NO. 34757 OF 2020

SATYA KUMAR NANDA .....Petitioner

.V.

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

SERVICE JURISPRUDENCE – Disciplinary proceeding – Non supply of preliminary inquiry report – Final order passed by the authority suffers from vice of lack of reasoning – Effect of – Held, the disciplinary authority has signally failed to discharge it's statutory obligation of giving reasons while passing the impugned order, as such this court is persuaded to relegate the matter to the stage of disciplinary authority, in the interest of Justice and equity. (Para 8-15)

Case Laws Relied on and Referred to :-

1. AIR 2013 SC 1513: Nirmala J. Jhala Vs.State of Gujarat.
2. AIR 1996 SC 484 : B.C. Chaturvedi Vs.Union of India.
3. (2021) 6 SCC 771 : RadhaKrishan Industries Vs. State of Himachal Pradesh & Ors.
4. 2008 (2) SCC 41 : Uttar Pradesh State Sugar Corporation Ltd. Vs. Kamal SwaroopTondon.
5. 2019 SCC Online SC 932 : Maharashtra Chess Association Vs. Union of India.
6. (2010) 9 SCC 496 : Kranti Associates Vs. Masood Ahmed Khan.

For Petitioner : Mr.S. K. DAS

For Opp. Parties No. : Mr. S. N. Pattnaik, AGA

JUDGMENT Date of Hearing & Judgment : 20.01.2023

V. NARASINGH, J.

1. Heard learned counsel for the petitioner and learned counsel for the Opposite Parties.

2. It is submitted that the petitioner who was working as an Inspector of Police was found guilty and was imposed the punishment of one black mark for his "gross misconduct and intentional dereliction of duty" in Kalahandi District proceeding No.02 of 2016 by the final order of disciplinary authority at Annexure-9.

3. It is on record that in the said proceeding, the petitioner was asked to submit his preliminary explanation and such preliminary explanation, being found unsatisfactory, enquiry was entrusted to one Officer in the rank of Additional SP. After conducting the enquiry, the Enquiry Officer submitted his finding holding the petitioner (the Charged Officer) not guilty.

4. It is on record that disagreeing with the finding of the Enquiry Officer, the petitioner as the Charged Officer was called upon to submit his explanation/representation if any relating to the finding of Enquiry Officer and thereafter punishment of one black mark was imposed.

5. It is the contention of the learned counsel for the petitioner that the procedure as adopted by the disciplinary authority is unknown to service jurisprudence and it is the further submission that copy of the preliminary enquiry report on the basis of which the final order was passed, was never supplied to him and as such it is submitted, there has been violation of principle of natural justice.

6. Per contra, learned counsel for the State while not disputing the proposition of law regarding use of preliminary enquiry report, while imposing punishment, submits that the assertion that preliminary enquiry report has not been supplied to the delinquent petitioner is not correct and the same is de hors the record.

7. To fortify his stand that the manner in which the preliminary enquiry report has been pressed into service amounts to violation of principle of natural justice, the petitioner relies on the judgment of the apex Court in the case ***of Nirmala J.Jhala vs. State of Gujarat*** reported in ***AIR 2013 SC 1513*** more particularly paragraphs 23 & 25 thereof. The said paragraphs are culled out hereunder for convenience of reference:

> "23. In view of above, it is evident that the evidence recorded in preliminary inquiry cannot be used in regular inquiry as the delinquent is not associated with it, and opportunity to cross-examine the persons examined in such inquiry is not given. Using such evidence would be violative of the principles of natural justice.
>
> xxx xxx xxx
>
> 25. The preliminary enquiry may be useful only to take a prima facie view, as to whether there can be some substance in the allegation made against an employee which may warrant a regular enquiry.

8. It is trite law that though this Court cannot act as an appellate authority in the matter of departmental proceeding, ***(Ref:- B.C. Chaturvedi vs. Union of India*** reported in ***AIR 1996 SC 484)*** but at the same time cannot ignore if violation of natural justice comes to the fore.

9. Learned counsel for the State Mr. S.N. Pattnaik, relying on PMR No.851 submitted that the Petitioner has an effective remedy of appeal to the Government. It is his submission that in the face of such effective statutory remedy, this Court ought not to exercise its plenary jurisdiction. Hence, it is submitted with force that even if the entire allegation of violation of principle of natural justice is accepted at its face value, in view of the alternative remedy, noted hereinabove, this Court ought not to exercise its discretion.

10. It is no longer res integra that in the face of effective alternative remedy, this Court normally does not exercise its discretion. The exception to the said rule has been reiterated by the apex Court in the case of ***RadhaKrishan Industries Vs. State of Himachal Pradesh & Others*** reported in ***(2021) 6 SCC 771.***

11. It is the submission of the learned counsel for the State that the case at hand does not fall within the exception as stated in the aforesaid case to warrant exercise of jurisdiction under Article 226 & 227 in the given facts.

12. It bears repetition that non exercise of jurisdiction in the face of an alternative remedy is a self-imposed restriction by this Court in the matter of exercise of discretion under Articles 226 and 227. But it is trite law that jurisdiction of the High Court is equitable and discretionary and the power under the said Articles is to be exercised to reach injustice where ever it is found. In this context, reference may be made to the judgment of the apex Court in the case of ***Uttar Pradesh State Sugar Corporation Ltd. Vrs. Kamal SwaroopTondon*** reported in ***2008 (2) SCC 41.***

13. Such view has been reiterated by the apex Court in its latest pronouncement in the case of ***Maharashtra Chess Association vrs. Union of India*** reported in ***2019 SCC Online SC 932*** wherein the apex Court emphasized the need for the High Courts to adopt a "holistic" approach in exercising itsdiscretionary jurisdiction, in the backdrop of such jurisdiction, being a facet of the basic structure:-

> "While the powers the High Court may exercise under its writ jurisdiction are not subject to strict legal principles, two clear principles emerge with respect to when a High Court's writ jurisdiction may be engaged. First, the decision of the High Court to entertain or not entertain a particular action under its writ jurisdiction is fundamentally discretionary. Secondly, limitations placed on the court's decision to exercise or refuse to exercise its writ jurisdiction are self- imposed. It is a well settled principle that the writ jurisdiction of a High Court cannot be completely excluded by statute. If a High Court is tasked with being the final recourse to upholding the rule of law within its territorial jurisdiction, it must necessarily have the power to examine any case before it and make a determination of whether or not its writ jurisdiction is engaged. Judicial review under Article 226 is an intrinsic feature of the basic structure of the Constitution."

14. On perusal of the final order passed by the disciplinary authority, the DGP dated 20.12.2020 at Annexure-9, it is seen that ex facie the same suffers from vice of lack of reasoning. The operative portion of the said order is extracted hereunder for convenience of ready reference:-

> "The Explanation submitted by the charged officer to the first show cause being found unsatisfactory, the second show cause notice was served on the charged officer to explain as to why he should not be awarded punishment of "One Black Mark" for his gross misconduct and intentional dereliction of duty.
>
> The explanation submitted by the charged to the second show cause is not satisfactory.
>
> Hence, taking the totality of the facts and circumstances into account, I impose the proposed punishment of "One Black Mark" on Inspector Satya Kumar Nanda for his gross misconduct and intentional dereliction of duty.
>
> Kalahandi district proceeding No.02/2016 is disposed off accordingly."

This Court has no hesitation to hold that the disciplinary authority has failed to discharge the duty enjoined upon him and did not give any reason before rejecting the defence of the petitioner and on this score alone the impugned order at Annexure-9 is liable to be set aside. In this context reference is respectfully made to the dictum of the apex Court in the case of ***Kranti Associates vs. Masood Ahmed Khan reported in (2010) 9 SCC 496***. And, in fact it is on record that the petitioner had never submitted the second show cause and the second show cause referred to in the said order is a misnomer.

15. As discussed above, in the considered view of this Court, on a conspectus of materials on record, that the disciplinary authority has signally failed to discharge its salutary obligation of giving reasons while passing the impugned order as such, this Court is persuaded to relegate the matter to the stage of disciplinary authority in the interest of justice and equity.

16. Hence, the impugned order of the disciplinary authority at Annexure-9 is quashed.

17. Since it is stated that because of the imposition of black mark, the officers who were juniors to the petitioner have been promoted in the meanwhile, the disciplinary authority is called upon to dispose of the appeal within a period of three months, if such an appeal is filed within a period of four weeks from the date of receipt/production of this order.

18. The W.P.(C) accordingly stands disposed of. No costs.

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2022 (I) ILR - CUT- 879

BIRAJA PRASANNA SATAPATHY

WPC(OAC) NOS. 3249 & 3250 OF 2015

DEVADATTA BARIK .....Petitioner

.V.

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

AND

WPC(OAC) NO.3250 OF 2015

PRASANTA KUMAR BARIK .....Petitioner

.V.

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

SERVICE LAW – Appointment – Advertisement was made for the post of Pharmacists – Prescribed qualification for the post was Diploma in Pharmacy – The candidature of petitioners were not considered on the ground that they have acquired higher qualification, i.e, Bachelor of Pharmacy – Whether persons with higher qualification can apply for the post? – Held, Yes – The Court directs the authority to award the prescribed mark in favour of the petitioners possessing the qualification of B.Pharma as has been awarded in favour of candidates with D.Pharma qualification.

Case Law Relied on and Referred to :-

1. AIR 2021 SC- 2221 : Puneet Sharma Vs. Himachal Pradesh State Electricity Board Ltd.

For Petitioners :M/s.Sujata Jena, S.Mohanty,G.B.Jena, B.P. Chhulasingh & A.K.Das.

For Opp. Parties : Mr.A.P.Das, Addl. Standing Counsel

ORDER Date of Hearing:14.12.2022 : Date of Order: 03.01.2023

BIRAJA PRASANNA SATAPATHY, J.

1. Since issue involved in both the cases is identical and the challenge made in the writ petitions are also similar, both the matters are heard analogously and disposed of vide the present common order.

Both the Writ Petitions have been filed inter alia for a direction on the Opposite Parties to consider the candidature of the Petitioners for the post of Pharmacist in the district of Cuttack as per the advertisement issued under Annexure-1.

2**.** The factual backdrop giving rise to filing of the present case is that even though both the Petitioners posses the qualification of Bachelor in Pharmacy, but in view of the stipulation contained in the advertisement issued on 22.07.2015 under Annexure-1 for recruitment to the post of Pharmacist, they were made ineligible to

make their application on the ground that the prescribed qualification was Diploma in Pharmacy. The Petitioners challenging the same approached the Tribunal in O.A No.3249(C) of 2015 and 3250(C) of 2015. The Tribunal while issuing notice of the matter vide order dated 03.09.2015 passed the following order:-

> *"Heard learned counsel for the applicant, Mrs. S. Mohanty and learned Addl. Standing Counsel, Mr. H.K.Panigrahi.*
>
> *Admit. Issue notice.Counter be filed within four weeks. Rejoinder, if any, be filed two weeks thereafter.*
>
> *List this case after six weeks.*
>
> *So far as prayer for interim relief is concerned, the respondents are directed to allow the applicant to participate in the selection process for the post of Pharmacists, but his result be kept in sealed cover.Send copies".*

2.1. In terms of the order passed by the Tribunal on 03.09.2015, though the Petitioners were allowed to participate in the selection process, but the results were not published and kept in sealed cover.

2.2. It is contended that since the Petitioners in both the cases possess the qualification of B. Pharma, which is a higher qualification than the prescribed qualification indicated in the advertisement under Annexure-1 i.e. D. Pharm, the action of the Opposite Party No.1 in debarring the Petitioners who possess higher qualification than that of the prescribed qualification is not legally sustainable. The Petitioners in support of their eligibility submitted that in respect of similar advertisement issued by AIIMS,Bhubaneswar on 28.02.2014 under Annexure-4-Series, the prescribed qualification was degree in Pharmacy from the recognized University. Similarly in respect of another advertisement issued by the Government of India, Ministry of Home Affairs under Annexure-4-Series, the prescribed qualification for the post of Pharmacist was degree or Diploma in Pharmacy from any recognized institutions of the Central or State Government. Not only that in respect of another advertisement issued by the NNBC Ltd., which is a Government of India Public Sector Enterprises for the post of Asst. Pharmacist Grade-3, the prescribed qualification was Diploma in Pharmacy or Degree in Pharmacy. Accordingly, it is contended that since the Petitioners possess higher qualification than that of the prescribed qualification indicated in Annexure-1, the Petitioners are eligible for their participation in the selection process and for consideration of their claim for appointment.

2.3. It is also contended that in view of the interim order passed by the Tribunal on 03.09.2015, the Petitioners were allowed to participate in the selection process, but the result of the Petitioners are not being published and kept in a sealed cover. Unless appropriate direction is issued to the Opposite Parties to publish the result, the Petitioners will be seriously prejudiced.

2.4. With regard to acceptance of their application on the ground of having higher qualification, learned counsel for the Petitioners relied on a decision of the

Hon'ble Apex Court in the case of ***Puneet Sharma v. Himachal Pradesh State Electricity Board Ltd***., reported in ***AIR 2021 SC- 2221***.

2.5. Hon'ble Apex Court in the said decision in Paragraphs-5 and 37 has held as follows:-

> *"5. Ms. Kavita Wadia, appearing for the degree holder appellants, contended that the expression "minimum" was deliberately used without any bar under the rules and did not prevent appointment of degree holders to the post of JE (Elect.) in HPSEB, and that diploma was only a minimum requirement. This, she argued is established beyond doubt from Clause 11 of the Rules for appointment to higher promotional post of Assistant Engineers (Elect.) where under 5% quota is provided for those who possessing degree at the time of their appointment as JE (Elect.) and 5% separately for those who acquired degree during their service as JE (Elect.) after their confirmation. She relies on the decision of this court in Govt of A.P. vs P. Dalip Kumar which held that the expression 'minimum' entitles the employer to choose a person with higher qualification. A minimum acts as a cut-off filter for the same, and does not debar recruitment of higher qualified candidates.*
>
> *xxx xxx xxx"*
>
> *37. The considerations which weighed with this court in the previous decisions i.e. P.M. Latha, Yogesh Kumar, Anita (Supra) were quite different from the facts of this case. This court's conclusions that the prescription of a specific qualification, excluding what is generally regarded as a higher qualification can apply to certain categories of posts. Thus, in Latha and Yogesh Kumar as well as Anita (supra) those possessing degrees or post-graduation or B.Ed. degrees, were not considered eligible for the post of primary or junior teacher. In a similar manner, for "Technician-III" or 17(2019) 8 SCC 416 18 SLP (C) 10533-37 of 2020 lower post, the equivalent qualification for the post of Junior Engineer i.e. diploma holders were deemed to have been excluded, in Zahoor Ahmed Rather (supra). This court is cognizant of the fact that in Anita as well as Zahoor (supra) the stipulation in Jyoti (supra)which enabled consideration of candidates with higher qualifications was deemed to be a distinguishing ground. No such stipulation exists in the HPSEB Rules. Yet, of material significance is the fact that the higher post of Assistant Engineer (next in hierarchy to Junior Engineer) has nearly 2/3rds (64%) promotional quota. Amongst these individuals, those who held degrees before appointment as a Junior Engineers are entitled for consideration in a separate and distinct sub-quota, provided they function as a Junior Engineer continuously for a prescribed period. This salient aspect cannot be overlooked; it only shows the intent of the rule makers not to exclude degree holders from consideration for the lower post of Junior Engineers".*

2.6. Accordingly, learned counsel for the Petitioners contended that since the Petitioners in both the cases possess higher qualification i.e. B. Pharma, as against the prescribed qualification of D. Pharma in the advertisement under Annexure-1, the candidature of the petitioners are required to be considered and accepted by the Opposite Parties with publication of their result.

3**.** Mr. A.P.Das, learned Addl. Standing Counsel on the other hand made his submission basing on the stand taken in the counter affidavit filed by the Opposite Party No.4.

3.1. It is contended that pursuant to the interim order passed by the Tribunal, though the Petitioners were allowed to participate in the selection process, but since

they failed to secure the required cut-off marks and they also failed to produce D. Pharma pass certificate, the result of the Petitioners is not required to be published at all.

3.2. It is contended that since the Petitioners do not possess the required qualification of Diploma in Pharmacy and instead possess the qualification of Bachelor in Pharmacy, there is no occasion on the part of the authority to award mark, as has been extended in favour of the candidates having qualification of Diploma in Pharmacy.

3.3. It is also contended that the Petitioners if would have possessed Diploma in Pharmacy along with Bachelor in Pharmacy then their case could have been considered. It is also contended that even though the Petitioners were allowed to participate in the selection process, but since they have failed to secure the cut-off mark, no direction can be issued to consider their candidature by publishing the result.

4. I have heard Ms. S. Mohanty, learned counsel for the Petitioners and Mr. A. P. Das, learned Addl. Standing Counsel for the State-Opposite Parties. On their consent, these matters were taken up for final disposal at the stage of admission.

5. This Court taking into account the order passed by the Tribunal on 03.09.2015 and the stand taken in the counter affidavit passed the following order on 02.09.2022:-

> *"Pursuant to the order passed by this Court, an additional affidavit has been filed on 26.8.2022.*
>
> *This Court after going through the same finds that no averment has been made as to whether the petitioner has qualified in the written test, which he has taken pursuant to the interim order passed by this Court. Mr. Y.S.P.Babu, learned A.G.A submitted that the result of the petitioner has been kept in a sealed cover. Accordingly, this Court directs Mr. Babu, learned AGA to produce the sealed cover where the result of the petitioner has been kept, on the next date.*
>
> *List this matter on 16th September, 2022".*

5.1. Subsequently, when the result sheet of the Petitioners kept in a sealed cover was produced before this Court, after perusal of the same, this Court passed the following order on 16.09.2022:-

> *"Heard Ms. S.Mohanty, learned counsel appearing for the Petitioners, Mr. Panigrahi, learned Addl. Standing Counsel for the State and Mr. S.B. Jena, learned counsel for the Opposite Party Nos.4 to 9.*
>
> *Pursuant to the last order passed on 02.09.2022, Mr. Panigrahi, learned Addl. Standing Counsel for State produced the sealed cover including the result of the petitioners in Court today. This Court after going through the same finds that though names of the Petitioners in both the cases are indicated in the category of S.E.B.C but no mark as such has been awarded and indicated in the relevant table meant for S.E.B.C category.*

Since the Petitioners are permitted to appear the test by virtue of the interim order passed by this Court, Mr.Panigrahi, learned Addl. Standing Counsel for the State is directed to obtain instruction as to the mark has secured by both the Petitioners in the said test by the next date. The sealed cover be kept in record.

List this matter on 28th of September, 2022.

5.2. Pursuant to the order passed by this Court on 16.09.2022, this Court was intimated by the learned Addl. Government Advocate that since the Petitioners in both the cases do not have the requisite qualification as prescribed in the advertisement, they are not eligible for their selection. Considering such submission of the learned Addl. Government Advocate, this Court passed the following order on 28.09.2022:-

"Heard Ms. Mohanty, learned counsel for the petitioner and Mr. Y.S.P. Babu, learned AGA.

Pursuant to the last order passed by this Court Mr. Babu, learned AGA provided instruction to this Court that the petitioner has not qualified the test taken by the opp. party, in terms of the order passed by the learned Tribunal on 3.9.2015, Ms. Mohanty, learned counsel for the petitioner submitted that no mark has been awarded with regard to the qualification possessed by the petitioner towards Bachelor in Pharmacy. Mr. Babu, learned A.G.A on the other hand, submitted that since only Diploma Holders in Pharmacy are eligible to make their applications, no mark has been awarded to the petitioner for having the qualification of Bachelor in Pharmacy. Ms. Mohanty on the other hand relied on a decision of the Hon'ble Apex Court passed in the case of ***Puneet Sharma Vs. Himachal Pradesh State Electricity Board Limited, reported in AIR 2021 SCC 2221****. In the said decision, Hon'ble Apex Court has held that persons with higher qualification can make their applications, even if the post advertised allows candidates with lesser qualification to make their application.*

Considering the rival submissions made by the learned counsel for the parties and taking into account the facts that the petitioners have not been awarded any mark for their qualification of Bachelor in Pharmacy, Mr. Babu, learned A.G.A is directed to obtain instruction as to whether pursuant to the selection process initiated under Annexure-1, all the posts of Pharmacists have been filled up in the meantime or not. Such instruction shall be provided to this Court by the next date.

List this matter on 28th October, 2022".

In terms of the order passed on 28.09.2022, no further instruction was provided to the Court. However, it is contended that since the Petitioners do not possess the required qualification of Diploma in Pharmacy, while calculating their marks, no mark has been awarded for their having the qualification of B. Pharma.

5.3. In view of the analyzing made hereinabove and taking into account the decision of the Hon'ble Apex Court in the case of ***Puneet Sharma as cited*** (supra), this Court is of the opinion that since the Petitioners posses higher qualification than the qualification prescribed in the advertisement under Annexure-1 for the post of Pharmacist, their candidature is required to be considered and accepted. Therefore, this Court while disposing the Writ Petition directs the Opposite Party No.4 to award the prescribed mark in favour of the Petitioners for their possessing qualification of B. Pharma as has been awarded in favour of the candidates with D. Pharma

qualification. After award of such mark for their qualification in B. Pharma, if it is found that, the Petitioners have secured the cut-off mark for their selection, then necessary follow-up action will be taken by the Opposite Party No.4 by providing appointment to the Petitioners as against any available vacancies. This Court directs Opposite Party No.4 to complete the entire exercise within a period of two months from the date of receipt of this order.

6. With the aforesaid observations and directions, both the Writ Petitions are disposed of

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2023 (I) ILR – CUT - 884

SANJAY KUMAR MISHRA, J.

W.P.(C) NO. 21213 OF 2017

CHANDRAKANTI KANDI .....Petitioner

.V.

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

SERVICE LAW – Appointment – Petitioner prays for a direction to re-evaluate the answer sheet by an expert committee – Whether re-evaluate of answer sheet is permissible? – Held, No – In absence of any provision entitling a candidate to have his answer book re-evaluate, that to contrary to the answer key prepared on the basis of views of the expert committee, the prayer for re-evaluation is not permissible. (Para 7,8)

Case Law Relied on and Referred to :-

1. (2004) 6 SCC 714: Pramod Kumar Srivastava Vs. Chairman, Bihar Public Service Commission & Ors.

For Petitioner : Mr. B.K. Routray

For Opp. Parties : Mr. P. Mohanty, Mr. G.N. Rout, ASC.

JUDGMENT Date of Judgment: 21.02.2023

SANJAY KUMAR MISHRA, J.

1. The Petitioner, who had applied for the post of Homeopathic Medical Officer pursuant to advertisement No.23 of 2015-16, her name not being shown in the selection list, has preferred the Writ Petition to quash the notice no.5216 dated 10.08.2017 with further prayer to declare the Petitioner to be qualified for recruitment in the post of Homeopathic Medical Officer.

2. The sole grievance of the Petitioner is that though she answered question Nos.10, 97 and 100 correctly, but such answers have been shown to be

incorrect in the answer key and her final marks have been reduced. To demonstrate the said alleged error committed by the OPSC, it has been detailed in the Writ Petition that as against question No.10, though the Petitioner has answered No.(C) to be correct answer but the answer sheet available in the website of OPSC shows answer (B) to be correct. Similarly, as against question No.97 though the Petitioner has answered No.(C) to be correct answer, but the answer sheet made available in the website of the OPSC shows answer (B) to be correct. So far as question No.100, though the Petitioner has answered No.(B) to be correct answer but the answer sheet available in the website of OPSC shows answer (A) to be correct.

3. It is further case of the Petitioner that one candidate named Jyotirmayee Mallick, having Roll No.101374, has been declared successful, who has secured 80.414 marks out of 200 marks (which includes paper-I and II) where as the Petitioner, having Roll No. 101178, has secured 79.414 marks out of 200 marks (which includes paper-I and II). According to the Petitioner if the three questions, which she has answered correctly, will be taken into account, then the marks of the Petitioner will be 82.414 and that will be higher than the mark secured by Jyotirmayee Mallick.

4. Being noticed, the contesting Opposite Party Nos.2 & 3 have filed their Counter Affidavit wherein a specific stand has been taken that before the evaluation of the OMR answer sheets in paper-I & paper-II of the aforesaid examination, the opinions of the eminent experts, who had expertise in the subject, were taken regarding correctness of the questions and answer keys etc. along with five objections received from some outsiders as the academic matters are best left to academicians and on the basis of views of expert committee, the evaluation of OMR answer sheets has been made through Computer and result was declared as per orders of the Commission. Hence, the allegation made by the Petitioner regarding wrong answer key prepared by the OPSC is incorrect.

5. Learned Counsel for the Petitioner submits that OPSC and its eminent experts may have adequate expertise in specified subjects but to err is human nature and there has been a clear discrepancy in marking of OMR which has shown correct answer to be incorrect and vice versa.

6. Accordingly, he prays for a direction that Petitioner's answer sheet may be re-evaluated by an expert committee to ensure justice. To substantiate his submission made, learned Counsel for the Petitioner relies on the judgment of apex Court in case of ***Bihar Staff Selection Commission & Ors. v. Arun Kumar & Ors***. Dated 06.05.2020.

7. Learned Counsel for the OPSC, relying on the judgment of the apex Court in case of ***Pramod Kumar Srivastava v. Chairman, Bihar Public Service Commission and Ors. reported in (2004) 6 SCC 714*** submits that there is no provision entitling a candidate to have his answer book re-evaluated, that to contrary to the answer key

prepared on the basis of views of the expert committee. He further submits that in view of the settled position of law as held in case of Pramod Kumar Srivastava (Supra), the Writ Petition deserves to be dismissed. He relies on paragraphs 7 & 8 of the said judgment which are extracted below:

> "7. We have heard the appellant (writ- petitioner) in person and learned counsel for the respondents at considerable length.The main question which arises for consideration is whether the learned Single Judge was justified in directing re-evaluation of the answer-book of the appellant in General Science paper. Under the relevant rules of the Commission, there is no provision wherein a candidate may be entitled to ask for re-evolution of his answer-book. There is a provision for scrutiny only wherein the answer books are seen for the purpose of checking whether all the answers given by a candidate have been examined and whether there has been any mistake in the totaling of marks of each question and noting them correctly on the first cover page of the answer-book. There is no dispute that after scrutiny no mistake was found in the marks awarded to the appellant in the General Science paper. In the absence of any provision for re-evaluation of answer-books in the relevant rules, no candidate in an examination has got any right whatsoever to claim or ask for re-evaluation of his marks.
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> This question was examined in considerable detail in Maharashtra State Board of Secondary and Higher Secondary Education and Anr.v.Paritosh Bhupesh Kurmarsheth and ors., MANU/SC/0055/1984:[1985]1SCR29.Inthis case, the relevant rules provided for verification (scrutiny of marks) on an application made to that effect by a candidate. Some of the students filed writ petitions praying that they may be allowed to inspect the answer-books and the Board be directed to conduct re- evaluation of such the answer-books as the petitioners may demand after inspection. The High Court held that the rule providing for verification of marks gave an implied power to the examinees to demand a disclosure and inspection and also to seek re-evaluation of the answer-books. **The judgment of the High Court was set aside and it was held that in absence of a specified provision conferring a right upon an examinee to have his answer- books re-evaluated, no such direction can be issued**. There is no dispute that under the relevant rule of the Commission there is no provision entitling a candidate to have his answers books re-evaluated. In such a situation, the prayer made by the appellant in the writ petition was wholly untenable and the learned Single Judge had clearly erred in having the answer-book of the appellant re-evaluated.
>
> 8. Adopting such a course as was done by the learned Single Judge will give rise to practical problems. Many candidates may like to take a chance and pray for re-evaluation of their answer-books. Naturally, the Court will pass orders on different dates as and when writ petitions are filed. The Commission will have to then send the copies of individual candidates to examiner for re-evaluation which is bound to take time. The examination conducted by the Commission being a competitive examination, the declaration of final result will thus be unduly delayed and the vacancies will remain unfilled for a long time. What will happen if a candidate secures lesser marks in re-evaluation? He may come forward with a plea that the marks as originally awarded to him may be taken into consideration. The absence of clear rules on the subject may throw many problems and in the larger interest, they must be avoided."
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> (Emphasis supplied)

8. The present lis is pertaining to selection and appointment for the post of Homeopathic Medical Officer for which examination was held on 29.01.2017. Vide impugned notification dated 10.08.2017, the OPSC recommended the name of 169 successful candidates to be appointed in the said post Admittedly there is no interim order passed in favour of the Petitioner and the impugned notification has been worked out in the meantime.

9. That apart, in view of the settled position of law as detailed above, so also the prayer made in the Writ Petition, the same deserves rejection.

10. Accordingly, the Writ Petition stands dismissed.

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2023 (I) ILR – CUT - 887

G. SATAPATHY, J.

CRA NO. 300 OF 1994

TARUN KUMAR PARIDA .....Appellant

.V.

STATE OF ORISSA .....Respondent

ESSENTIAL COMMODITIES ACT, 1955 – Section 7 r/w Probation of Offenders Act, 1958 – Section 4 – Offence U/S.7 of 1955 Act – Petitioner urges to modify the sentence of conviction of appellant by releasing him under the section 4 of the Act – Whether such modification is permissible? – Held, Yes – Reason indicated with reference to case law. (Para 5,7,8)

Case Laws Relied on and Referred to :-

1. (2005) 10 SCC 330 : Harivallabha & Anr. Vs. State of M.P.
2. (2022) 6 SCC 722 : Som Dutt & Ors. Vs. State of Himachal Pradesh.
3. (2021) 2 SCC 763 : Lakhvir Singh Vs. State of Punjab.
4. (2022) SCC Online SC 1686 : Vipul Vs. State of Uttar Pradesh.
5. (1987) SCC Online Ori 144 : T. Sushila Patra Vs. State.

For Appellant : Mr. S. Panda

For Respondent : Mr. S.S. Pradhan, AGA

JUDGMENT Date of Hearing : 21.02.2023 : Date of Judgment: 27.02.2023

G. SATAPATHY, J.

1. An appeal having come to be filed U/S.374(2) of Cr.P.C. by the appellant assailing his conviction for offence U/S.7 of Essential Commodities Act,1955 (in short the E.C. Act) and sentence to undergo Rigorous Imprisonment for a period of

three months and to a pay a fine of Rs.2,000/- in default whereof, to undergo further R.I. for 40 days as passed/recorded on 17.08.1994 by the learned Judge, Special Court, Phulbani in 2(c).C.C. Case No.1 of 1991.

2. In the course of hearing of the appeal, Mr. S. Panda, learned counsel for the appellant although seriously challenges the conviction of the appellant, but when this Court took him through the impugned judgment by analyzing the same and convinced him that the impugned judgment does not suffer from infirmity, he promptly submits that the appellant does not intend to challenge his conviction, but he craves for sympathetic consideration for his sentence and accordingly, learned counsel urges to modify the sentence of the convict- appellant by releasing him under the beneficial provision of Probation of Offenders Act, 1958 (in short, "P.O. Act") instead of sentencing him at once. Learned counsel for the State does not oppose such prayer of the appellant.

3. In view of the specific submission made by the learned counsel for the appellant, this Court clarifies it not to recapitulate the facts of the case in extenso, but limits itself to state the necessary facts for disposal of this appeal as, on 25.12.1990, the complainant-Marketing Inspector, Phulbani being assisted by other Government officials conducted raid in the house of convict-Tarun Kumar Parida and found him to have stocked 62 bags of rice weighing 42 Quintal 51 Kgs. & 300grams in his house without any authority and, accordingly, on completion of enquiry, the complainant filed a complaint against the appellant in the learned trial Court for violation of Clause-3(2) of Orissa Rice(Movement) Control Order, 1964 amended in the year 1990, Clause-3(2) & 2(1) of the Orissa & Paddy Control Order, 1965 which are punishable U/S.7 of the E.C. Act and Section 9 of E.C. Act. After appreciating the evidence upon conclusion of trial and hearing the parties, the learned Judge, Special Court, Phulbani while finding the appellant not guilty of offence U/S.9 of E.C. Act, found him guilty of offence punishable U/S.7 of E.C. Act for violation of the above Control Orders for unauthorizedly procuring and storing the above quantity of rice and, accordingly, the appellant was convicted and sentenced to the punishment indicated above.

4. In the above backdrop of case, since the appellant does not challenge his conviction, but prays for modification of sentence, this Court now proceeds to examine the position of law in this regard. Law is fairly well settled in respect of sentencing a convict for an offence not punishable with imprisonment for life or death by way of extending the beneficial provision of P.O. Act. In this regard, this Court considers it profitable to refer to the following decisions.

5. In ***Harivallabha and another Vrs. State of M.P.; (2005) 10 SCC 330***, upon noticing the conviction of the appellant for Sec.7 of the E.C. Act and High Court reducing the sentence of imprisonment to three months, the Apex Court in Paragraph 3 has held that:-

"A Court can refuse to release a person on probation of good conduct U/S.360 of the Cr.P.C., but in the facts and circumstances of the case, the appellants should have been dealt with under the provisions of Sec.360 of the Cr.P.C."

5.1 In ***Som Dutt and others Vrs. State of Himachal Pradesh; (2022) 6 SCC 722***, the Apex Court in Paragraph-6 has held as under:-

"Having regard to sentence imposed by the Courts below on the appellants for the offence U/S.379 r/w Section-34 of IPC, and having regard to the fact that there are no criminal antecedents against the appellants, the Court is inclined to give them the benefit of releasing them on probation of good conduct."

5.2 In ***Lakhvir Singh Vrs. State of Punjab; (2021) 2 SCC 763***, while extending the benefit of Sec. 4 of P.O. Act to the convict, the Apex Court has held the following in Para-6:-

"We may notice that the Statement of Objects and Reasons of the said Act explains the rationale for the enactment and its amendments: to give the benefit of release of offenders on probation of good conduct instead of sentencing them to imprisonment. Thus, increasing emphasis on the reformation and rehabilitation of offenders as useful and self-reliant members of society without subjecting them to the deleterious effects of jail life is what is sought to be subserved."

5.3 In ***Vipul Vrs. State of Uttar Pradesh; (2022) SCC Online SC 1686***, the Apex Court at Paragraph-30 has held as under:-

"Section 360 pertains to an order after conviction, to be passed by the Court after admonition, facilitating a release and also probation of good conduct. It is to be exercised on two categories of persons.The first category consists of persons attaining 21 years and above with the proposed punishment for a term of 7 years or less. While the other for a larger term except punishable with death or imprisonment for life This is made applicable to a convict aged under 21 years or any woman. The Court has to weigh the age, character and antecedent of the convict with the circumstances leading to the offence committed. If satisfied, it can release the convict entering into a bond while a direction to keep the peace and maintain good behavior can be ordered during the said period. As discussed, this provision can be pressed into service while dealing with chapter-XXIA other than convicting a person after trial. Like the other two provisions involving plea bargaining and compounding, Sec. 360 of the Code is also a forgotten one."

5.4. In ***T. Sushila Patra Vrs. State; (1987) SCC Online Ori 144***, while extending the benefit of Sec. 360 of the Cr.P.C. to the convict-petitioner after confirming her conviction in a case where she was sentenced to undergo RI for six months with payment of fine of Rs.1,000/- (Rupees One Thousand) in default whereof to undergo further RI for one month for offence U/S.7(1)(a) of the E.C. Act, this Court has held in Paragraph-8 as under:-

"There is no doubt that the provisions of the Essential Commodities Act in certain circumstances prescribed imposition of a minimum sentence and it is undoubtedly a special statute, but neither of those two conditions totally bars the discretion of the Court to grant probation to the convict either under the criminal procedure code or even under the relevant Sections of the Probation of Offenders Act."

6. In scrutinizing the facts of the case in the backgrounds of the scope and object of P.O. Act and authoritative pronouncements made in the cases referred to above, it appears that the learned trial Court had not delved the fact and situation in the case for not extending the beneficial provision of P.O. Act to the appellant in the impugned judgment, nor the learned trial Court had assigned any reason for withholding the benefit of P.O. Act to the appellant, but the fact remains that the appellant was convicted in this case for commission of offence U/S.7 of E.C.Act without specifying the particular clause of the penalties prescribed in the aforesaid Sections of the E.C. Act. However, taking into consideration the guilt of the convict for offence U/S.7 of E.C.Act for found stocked 62 bags of rice unauthorizedly in his house in contravention of Clause-3(2) of Orissa Rice (Movement) Control Order, 1964 amended in the year 1990, Clause-3(2) & 2(1) of the Orissa & Paddy Control Order,1965 which is punishable U/Ss.7(1)(a)(ii) of E.C.Act which prescribes with minimum punishment of three months, but which may extend to seven years and fine and, therefore, the benefit of Sec.3 of P.O. Act cannot be extended to the convict-appellant. However, the convict is first time offender and no previous conviction of the appellant has been proved against him and approximately 29 years have elapsed in the meantime after conviction of the appellant and the convict was aged about 31 years on the date of his conviction and now he would be 60 years.This Court, therefore, considers it unnecessary to send the convict- appellant to jail custody to suffer his sentence at this point of time. Besides, the sentence of the appellant to pay fine of Rs.2,000/- appears to be harsh when he is already found to have suffered the rigmarole of the trial and appeal for more than 30 years, which was like the sword of Damocles dangling over his head all through these years. The State, however, has not come up with any convincing materials to show that the convict is incorrigible and cannot be reformed and as has already been discussed that the object of punishment is also reformative.

7. Hence, in the above circumstances, this Court considers it proper to give the benefit of Sec.4 of P.O. Act to the convict-appellant inasmuch as the offence with which the appellant is convicted does not prescribes punishment for life or death, and having regard to the circumstances of the cases including the nature of offence and the character of the appellant, it is considered expedient to release the appellant on probation of good conduct.

8. In the result, the appeal is dismissed on contest, but in the circumstance, there is no order as to cost. As a logical sequitur, the conviction of the appellant is maintained, but instead of sentencing him to suffer any punishment, it is directed that the appellant be released U/S.4 of the P.O. Act for a period of one year upon his entering into a bond of Rs.10,000/-(Rupees Ten Thousand) with one surety to appear and receive sentence, when called upon during such period and in the meantime, to keep the peace and be of good behavior. The appellant shall remain under the supervision of the concerned Probation Officer during the aforesaid period. The sentence is, accordingly, modified.

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2023 (I) ILR – CUT - 891

CHITTARANJAN DASH, J.

CRLREV NO.1152 OF 2014

GHANASHYAM ROUTA .....Petitioner

.V.

P. NARASINGHA DORA .....Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 357(3) – Offence under Section 138 of N.I Act – The Learned Court below awarded substantive sentences as well as compensation in term of section 357(3) of Cr.PC but no fine amount was imposed – Whether such punishment justified? – Held, Yes – The punishment of substantive sentence & compensation is absolutely legal and justified.

(Para 12)

Case Law Relied on and Referred to :-

1. AIR 2012 SC 528 : R. Vijayan Vs. Baby & Anr.

For Petitioner : Mr.P. C. Panda

For Opp. Party : Mr. M.M. Swain

JUDGMENT Date of Judgment: 28.03.2023

CHITTARANJAN DASH, J.

1. Heard learned counsel for the parties.

2. The legality, propriety and correctness of the judgment and order dated 11th December, 2014 passed by the learned Additional Sessions Judge, Aska in Criminal Appeal No.20 of 2014 (01 of 2012 of Circuit Court, Aska) arising out of I.C.C.Case No.41 of 2007 passed by the learned J.M.F.C.,Aska has been challenged in this revision. The Petitioner having faced trial found guilty in the offence under section 138 of the Negotiable Instruments Act (hereinafter in short called "the N.I.Act") and sentenced to undergo simple imprisonment for a term of three months and to pay compensation of Rs.60,000/- under Section 357(3) Cr.P.C.

3. Succinctly, thecase of the Petitioner is that he and the complainant/ respondent are well known to each other and were good friends. The Petitioner, in order to purchase a Tractor with Trailor availed loan from the bank but could not repay the same within the stipulated period. He accordingly approached the complainant/ respondent to accommodate him with a friendly loan of Rs.43,000/- for repayment of the loan incurred by him from the bank. The complainant/ respondent reciprocating the gesture of friendship agreed and paid a sum of Rs.43,000/- to the

Petitioner/ accused towards a friendly loan. The Petitioner had promised to pay back the said amount at the time of need of the complainant/ respondent. On 25th December, 2006 the complainant/respondent requested the Petitioner/accused for repayment of the amount taken towards friendly loan. The Petitioner/accused could not repay the loan, however, on the request of the respondent, the Petitioner issued the cheque bearing No.403806 dated 26th December,2006 for the sum of Rs.43,000/- in favour of the respondent drawn on State Bank of India (ADB) Branch, Aska against his account No.01170070397.

4. The respondent presented the said cheque with his banker i.e. Rushikulya Gramya Bank, Aska Branch to credit the cheque amount to his account. On 1st June, 2007 the banker of the respondent intimated the complainant about the dishonour of the cheque on the ground of "insufficiency of fund" in the account of the Petitioner. Soon after the receipt of the intimation slip from the bank and the return of the cheque, on 11th June, 2007 the respondent issued a legal notice to the Petitioner accused through his Pleader demanding the dishonoured cheque amount within the statutory period i.e. 15 days of receipt of the demand.

5. On 20th June, 2007 the said legal notice returned back to the Respondent with endorsement "Addressee always absent, hence returning to the sender". As the Petitioner failed to comply the demand of the respondent by paying the dishonoured cheque amount, the Respondent brought the complaint before the competent court under Section 138 of the N.I. Act. The learned court below having found the complainant to have complied with the statutory requirement to bring the complaint under the provisions of under Section 138 N.I. Act in accordance with law and having met all requirements of law found the Petitioner accused to committed the offence U/s 138 of the N.I. Act, held him guilty therein and sentenced as mentioned above.

6. As reveals from the case record, the Petitioner being aggrieved by the judgment and order dated 26th July, 2012 of the learned J.M.F.C., Aska preferred the appeal before the Additional Sessions Judge, Aska. The learned Additional Sessions Judge, Aska having reassessed the evidence concurred with the findings of the learned J.M.F.C.,Aska and dismissed the Appeal, being aggrieved whereof the Petitioner preferred the present revision.

7. Mr. Panda, learned counsel for the Petitioner in course of the hearing in the revision while did not dispute the statutory compliance in respect to the issuance of cheque, its presentation, dishonour of the same, the legal notice and the complaint as laid from the side of the complainant, disputed the punishment awarded by the learned J.M.F.C. as concurred by the learned Additional Sessions Judge, Aska. According to Mr. Panda, the learned court below did not adhere to the provision of the offence under Section 138 N.I. Act in respect to the punishment provided there under and committed an illegality by awarding substantive sentence as well as

compensation in terms of Section 357(3) Cr.P.C when fine was part of the punishment. Mr. Panda relied upon the decision of the Apex Court in the case of ***R. Vijayan vrs. Baby and another reported in AIR 2012 SC 528.***

8. Mr. Panda though referred to the Judgment of the Apex Court reiterated that the Courts below having awarded the punishment with substantive sentence could not have awarded compensation U/s. 357(3) Cr.P.C and asserted the impugned Judgment and order bad in law and not sustainable in the eye of law.

9. Section 138 of the N.I. Act provides that a drawer of a cheque is deemed to have committed the offence if the following ingredients are fulfilled: (i) A cheque drawn for the payment of any amount of money to another person; (ii) The cheque is drawn for the discharge of the 'whole or part' of any debt or other liability. 'Debt or other liability' means legally enforceable debt or other liability; and (iii) The cheque is returned by the bank unpaid because of insufficient funds. However, unless the stipulations in the proviso are fulfilled the offence is not deemed to be committed. The conditions in the proviso are as follows: (i) The cheque must be presented in the bank within six months from the date on which it was drawn or within the period of its validity; (ii) The holder of the cheque must make a demand for the payment of the 'said amount of money' by giving a notice in writing to the drawer of the cheque within thirty days from the receipt of the notice from the bank that the cheque was returned dishonoured; and (iii) The holder of the cheque fails to make the payment of the 'said amount of money' within fifteen days from the receipt of the notice. Admittedly in the present Revision the Petitioner has not raised any issue in respect to these aspects. Hence, the complaint as laid by the Respondent is in order.

10. Coming to the point of dispute, when the impugned order is seen it reveals that the leaned court below having found the Petitioner guilty of the offence under section 138 of the N.I. Act sentenced him to undergo substantive sentence of simple imprisonment for three months and to pay compensation of Rs.60,000/- .The punishment stipulated under section 138 NI Act is as follows:

S 138. Dishonour of cheque for insufficiency, etc., of funds in the account.-

Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for [a term which may be extended to two years'], or with fine which may extend to twice the amount of the cheque, or with both: Provided that nothing contained in this

section shall apply unless— (a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier; (b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice; in writing, to the drawer of the cheque, [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and (c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.—For the purposes of this section, "debt of other liability" means a legally enforceable debt or other liability.

11. As discussed above, the Apex Court in ***R. Vijayan vrs. Baby and another*** (supra) has clarified the position of law in awarding the punishment:

> 5. Section 138 of the Act provided that where a cheque is dishonoured, the person drawing the cheque shall be deemed to have committed an offence and shall, without prejudice to any other provision of the Act, be punished with imprisonment for a term which may extend to one year or with fine which may extend to twice the amount of the cheque or with both.
>
> It may be mentioned that subsequent to the judgment of the learned Magistrate, the said Section 138 was amended (with effect from 6.2.2003) increasing and the period of imprisonment imposable to two years.
>
> 6. Section 357 relates to Order to pay compensation.
>
> "357. Order to pay compensation.--(1) When a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment order the whole or any part of the fine recovered to be applied ---
>
> (a) in defraying the expenses properly incurred in the prosecution;
>
> (b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the Court, recoverable by such person in a Civil Court;
>
> (c) & (d) x x x x (not relevant)
>
> (2) x x x x x (not relevant)
>
> (3) When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment order the accused person to pay, by way of compensation such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced."
>
> (4) An order under this section may also be made by an Appellate Court or by the High Court or Court of sessions when exercising its power of revision.
>
> (5) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the court shall take into account any sum paid or recovered as compensation under this section.

7. Sub-section (3) of section 357 , is categorical that the compensation can be awarded only where fine does not form part of the sentence. Section 357 (3) has been the subject-matter of judicial interpretation by this Court in several decisions. In State of Punjab vs. Gurmej Singh [2002 (6) SCC 663], this Court held :

"A reading of sub-section (3) of Section 357 would show that the question of award of compensation would arise where the court imposes a sentence of which fine does not form a part."

This Court also held that section 357(3) will not apply where a sentence of fine has been imposed.

8. In Sivasuriyan vs. Thangavelu [2004 (13) SCC 795], this Court held:

"In view of the submissions made, the only question that arises for consideration is whether the court can direct payment of compensation in exercise of power under sub-section (3) of Section 357 in a case where fine already forms a part of the sentence. Apart from sub-section (3) of Section 357 there is no other provision under the Code where under the court can exercise such power:"

After extracting section 357(3) of the Code, the Court proceeded to hold thus:

"On a plain reading of the aforesaid provision, it is crystal clear that the power can be exercised only when the court imposes sentence by which fine does not form a part. In the case in hand, a court having sentenced to imprisonment, as also fine, the power under sub-section (3) of Section 357 could not have been exercised. In that view of the matter, the impugned direction of the High Court directing payment of compensation to the tune of Rs. one lakh by the appellant is set aside."

9. It is evident from Sub-Section (3) of section 357 of the Code, that where the sentence imposed does not include a fine, that is, where the sentence relates to only imprisonment, the court, when passing judgment, can direct the accused to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced. The reason for this is obvious. Sub- section (1) of section 357 provides that where the court imposes a sentence of fine or a sentence of which fine forms a part, the Court may direct the fine amount to be applied in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the court, recoverable by such person in a Civil Court. Thus, if compensation could be paid from out of the fine, there is no need to award separate compensation. Only where the sentence does not include fine but only imprisonment and the court finds that the person who has suffered any loss or injury by reason of the act of the accused person, requires to be compensated, it is permitted to award compensation under compensation under section 357(3).

12. In the case in hand, the learned court below has awarded punishment with substantive sentence only besides the compensation and no fine has been imposed as against punishment. Consequently, fine being not a part of the punishment in the case, the compensation awarded by the court U/s.357 (3) is absolutely legal and justified.

13. In fact, the Petitioner has misconstrued the impugned Judgment and order, may be for the reason that the Petitioner put emphasis on the narration made in the

brief history given in the impugned Judgment passed by the Addl. Sessions Judge wherein the court described the "compensation" as "fine" which is apparently a misdescription by the Appellate court since the Judgment of the original Court does not have such description. To bring clarity the order passed by the learned JMFC is reproduced as follows;

> "Considering the nature and gravity of the offence and the manner of compensation of the same along with its impact on the society on the present days, I am of the view that sentence of imprisonment and award of compensation to be paid to the complainant will meet the ends of justice. Hence, the convict is hereby sentenced to undergo simple imprisonment for a term of three months and to pay compensation of Rs.60,000/- (Rs.43,000/- towards the cheque amount and Rs.17,000/- towards the legal expenses incurred by the complainant) under section 357 (3) of Cr.P.C. to the complainant."

In essence, therefore, the impugned judgment being absolutely in tune with the principles enunciated by the Apex Court, as above, is found to be a well reasoned order and requires no interference. Hence, ordered.

14. The revision is dismissed being devoid of merit.In the circumstances, however, there is no order as to cost.

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