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**CRIMINAL PROCEDURE CODE, 1973** – Section 102(3) – Offences under Section 467/ 468/ 471/ 420/ 385/ 386 read with Section 120-B of I.P.C. was alleged against the present petitioner alongwith others – The IO freeze the bank account without following the mandatory requirement/procedure prescribed under Section 102(3) – Effect of – Held, the freezing of the bank account by the concerned IO is unsustainable in law and accordingly quashed.



**Section 102(3)** – Duty of I.O – Discussed with case law.



**Section 205** – Dispensing with personal appearance – When can be granted ? – Held, the power under section 205 is not meant to be used routinely but only when circumstances so demand – Case law discussed.



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pending before the learned ADJ-cum-PO, Special Court (POCSO) Sundergarh to any other Court – No reference is made by the accused to any such order of the leaned trial court much less to take any exception to the same – Whether the transfer of trial is permissible on the basis of apprehension and perception ? – Held, No – Principles/guidelines issued by the Apex Court referred.

*Shyam Sundar Patel -V- State of Odisha & Anr.*
2023 (I) ILR-Cut…… 1089

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*Chhatar Singh @ Niku Singh -V- State of Odisha.*
2023 (I) ILR-Cut…… 1208

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*Smt. Rajeswari Senapati -V- State of Orissa & Ors.*
2023 (I) ILR-Cut…… 1011

**ORISSA HINDU RELIGIOUS ENDOWMENT ACT, 1951** – Section 44(ii) – Locus standi – Present appellants were not party to the original proceeding – They were only impleaded as respondents at a belated stage after rejection of their application for intervention on two occasion – Whether, the appellant has any locus standi to challenge the order of learned Deputy Commissioner in absence of any material placed by them ? – Held, No – The court is not inclined to interfere with the impugned judgment and dismiss the appeal.

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2023 (I) ILR-Cut…… 1184

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*Chandrasekhar Mishra -V- State of Odisha & Ors.*
2023 (I) ILR-Cut…… 1112

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*Bishnu Charan Biswal -V- Secy, Management Committee, Paradeep Port Trust, Jagatsinghpur & Anr.*
2023 (I) ILR-Cut…… 1200

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2023 (I) ILR-Cut…… 1031

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*Pankajini Sahu & Anr. -V- Joint Director, Enforcement Directorate, GOI & Anr.*

2023 (I) ILR-Cut…… 1099

**SERVICE LAW** – Domestic Inquiry – The management imposed major penalty without conducting any inquiry – Duty of the Court below – Held, the inquiry could be held in the reference, if it is so prayed for by the management – The employer shall have to be given a chance to adduce evidence before the Tribunal for justifying its action.

*The Management, Neelachal Hospital Pvt. Ltd. BBSR. -V- Prafulla Ku. Sarangi & Ors.*

2023 (I) ILR-Cut…… 982

**SERVICE LAW** – Promotion – When entry in the CCR could be construed as an adverse remark ? – Held, when an entry may be "good" or "very good" created obstacle in considering the case of an employee/civil servant for promotion to a higher post, such entry could be construed as an adverse remark and the incumbent is entitled to an opportunity to make a representation against such remark for its upgradation.

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**2023 (I) ILR - CUT-897**

FULL BENCH

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

W.A. NO. 317 OF 2019

**LITUMANJARI PRADHAN** …. Appellant

.V.

**CHAIRMAN, COUNCIL OF HIGHER SECONDARY EDUCATION, BBSR. & ORS.** …. Respondents

**(A) DOCTRINE OF PROMISSORY ESTOPPEL – Necessary ingredients for the application of the doctrine – Indicated with reference to case laws.** (Para 10)

**(B) INTERPRETATION OF STATUTE – If the law requires something to be done in a particular manner, then it must be done in that manner, and if is not done in that manner it would have no existence in the eye of law.** (Para 15)

**(C) ESTOPPEL – Whether, it is applicable against the law ? – Held, there can be no estoppel against the law.** (Para 15)

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

1. 74 (1992) CLT 350 : Nrusingha Charan Panda v. The Secretary, Board of Secondary Education, Orissa.
2. 1986 SCC OnLine Ori 65 : Suresh Chandra Choudhury v. Berhampur University.
3. (1982) 1 SCC 223 : Chhaganlal Keshavlal Mehta v. Patel Narandas n Haribhai.
4. 1991 SCC OnLine Ori 74 : Prabhat Kishor Sahu v. Sambalpur University.
5. 2020 SCC OnLine Ori 804 : Pratima Sahoo v. State of Orissa.
6. 1992 SCC OnLine Ori 51 : Miss Reeta Lenka v. Berhampur University.
7. 2021 SCC OnLine Ori 1969 : Varsachala Chetan v. State of Odisha.
8. 68 (1989) CLT 694 : Gajandra Patra v. Utkal University.
9. 1989 NOC 29 (Orissa) : Bisweswar Behera v. Utkal University.
10. AIR 1990 Orissa 90 : Reetanjali Pati v. Board of Secondary Education.
11. (O.J.C. No. 3345 of 1988) : Biswanath Tarai v. Utkal University.
12. (2015) 11 SCC 628 para 32 : Tata Chemicals Ltd. v. Commr. of Customs.
13. (2015) 7 SCC 728 : Joshi Technologies International Inc. V. Union of India.
14. (1979) 1 SCC 560 : Jagir Singh v. Ranbir Singh.
15. (2003) 2 SCC 593 : Dayal Singh v. State of Punjab.
16. (2022) 7 SCC 98 : Apex Laboratories (P) Ltd. v. CIT.

For Appellant : Mr. G.N. Sahu

For Respondents: None

JUDGMENT Date of Judgment : 31.03.2023

***BY THE BENCH***

1. This reference arises from an order dated 21st November, 2022 passed by the Division Bench of this Court. Unable to agree with the conclusion reached by a coordinate Division Bench of this Court in ***Nrusingha Charan Panda v. The Secretary, Board of Secondary Education, Orissa***[1] the referring Bench has asked this larger Bench to decide whether ***Nrusingha Charan Panda*** (*supra*) has been correctly decided.

2. The factual background leading to the present reference is that the Appellant appeared in +2 CHSE examinations in 1996 in the 'Arts Stream'. This comprised the subjects of English, M.I.L (Odiya), History, Optional Odiya (O.O) and Education. The Council of Higher Secondary Education (CHSE), issued a Mark Sheet showing the awarded marks in individual subjects. The 'Full Marks' for each of the above subjects, except M.I.L. (O), was 200. For M.I.L. (O) the Full Marks was 100. In terms of the governing Regulations of the CHSE, for a student to "Pass" she had to secure 30% of the 'Full Marks' in a particular subject. However, where the subject had both 'theory' and 'practical' papers, the student was required to secure a minimum of 30% of the total marks each in the 'theory' and 'practical' papers in order to be declared 'pass' in the concerned subject.

3. The Mark Sheet showed that in 'English', the Appellant had secured 14 marks in "Paper I" and 21 marks in "Paper II", aggregating 35 marks out of 200 (which was less than 30%). Resultantly, she failed in the English subject. In MIL (O) the Appellant secured a total of 36 marks out of 100 and passed in the said subject. In 'History' she secured 44 marks in Paper I and 58 marks in Paper II aggregating to 102 out of 200. Thus, she passed in History. In O.O, she secured 41 marks in Paper I and 35 in Paper II securing a total of 76 out of 200. Thus, she passed in OO as well. However, in 'Education' the Appellant scored 16 marks in Paper I and 26 marks in Paper II aggregating 42 marks out of 150 (less than 30%) and 38 marks out of 50 marks in Practical. As the Appellant had secured less than 30% in Papers I and II, she was declared 'failed' in the subject "Education". Since the Appellant has herself appended a copy of the Mark Sheet as received by her soon after the examination, the question of her not being aware that she failed in both English and Education did not arise.

4. Upon receiving the Mark Sheet, the Appellant applied for a chance to re-sit for the English subject alone. In the second examination, where she appeared as a compartmental candidate, the Appellant secured 26 marks in Paper I and 34 marks in Paper II, aggregating 60 marks out of 200. Thereby she 'passed' the English subject in compartment. Yet, despite being aware that she had failed in Education, the Appellant did not opt to sit for a compartmental examination for the "Education" subject.

**1. 74 (1992) CLT 350**

5. The Appellant went on to enrol herself in the Bachelor of Arts programme at Panchayat Samiti College, Jharbandh affiliated to the Sambalpur University. She passed the Bachelor of Arts examination in April, 1999. It is pertinent to note at this juncture that no original "certificate of passing" in the CHSE examination was issued to her at any point in time. The said college and the university where the Appellant had enrolled for the Bachelor of Arts programme did not apparently insist on her producing such certificate at any point in time after granting her admission in the said programme.

6. The case of the Appellant is that when she approached the Pachayat Samiti Junior College, Jharbandh where she had pursued her +2 course for issuance of the Original pass certificate of the exam, the Principal of the said institution issued a certificate on 26th March, 2008 to the effect that she was placed in 'Compartmental Division' and that "Unfortunately, we have not yet received her Board Certificate which was to be issued for the CHSE till date." She then applied to the approached the CHSE on 13th July, 2012 for issuance and delivery of the Original "Certificate of Passing" in the +2 Arts examination. The receiving officer of the CHSE issued a receipt indicating therein 'remaining case'. After making a representation to the CHSE she filed W.P. (C) 17090 of 2012 in this Court praying for a mandamus to the CHSE to issue to the Appellant the Original Certificate of Higher Secondary Education.

7. In a reply filed to the said petition, the CHSE made it clear that no such certificate could be issued as the present Appellant was still adjudged as "Fail" in the subject "Education" as she had not appeared in the compartmental examination for the same.

8. The learned Single Judge disposed of the writ petition declining to issue the mandamus as prayed for after noting that the Appellant, despite knowing that she had failed in the 'Education' subject, chose not to sit for a compartmental examination. Nevertheless, it was observed that if any mistake had been committed by the authority then in that event the CHSE may take steps to allow the Appellant to appear in the compartment examination in the subject Education and upon passing the said examination, she could be issued a pass certificate.

9. Being still aggrieved, the Appellant filed the present appeal contending that the principle of promissory estoppel would apply. Mr. G. N. Sahu, learned counsel for the Appellant relied on the decision of the Division Bench of this Court in ***Nrusingha Charan Panda*** (*supra*) to urge that since the Appellant had "no knowledge" of her having not passed the Education subject, the CHSE could not deny issuing a pass certificate to her. However, as already noted, the Division Bench of this Court which heard the present appeal did not agree with the conclusion in the said case and by order dated 21st November, 2022 referred to the larger Bench the correctness of the said decision.

10. At the outset, it requires to be noted that the central issue as far as the decision in ***Nrusingha Charan Panda*** (*supra*) was concerned, was the applicability of the doctrine of promissory estoppel. The ingredients for the application of the doctrine, as explained in several judgments of the Supreme Court of India, can be broadly summarized as under:

a. That there was a representation or promise in regard to something,
b. That the representation or promise was intended to affect/alter the legal relationship of the parties and to be acted upon, and,
c. That it is, one on which, the other side has, in fact, acted to its prejudice.

One exception is that if the individual had "knowledge" about the truth/ fact of the matter, then the doctrine of estoppel will not apply.

11. This Court in ***Suresh Chandra Choudhury v. Berhampur University***[2], upon placing reliance on the Supreme Court's judgment in ***Chhaganlal Keshavlal Mehta v. Patel Narandas n Haribhai***[3]***,*** held that one of the requirements of applicability of the principle of estoppel is the person concerned must show that he was not aware of the true state of things or that he had no means to know the same. In ***Suresh Chandra*** *(supra)*, the applicability of the principle of estoppel was rejected because it was held that the petitioner would have been in a position to "know" on the basis of the mark-sheet supplied to him that he had failed in the examination in question. Therefore, as the Petitioner had the means of knowing that he had not succeeded in examination; it was held that the University was not estopped from declaring subsequently that the Petitioner had failed. The ratio of this decision has been consistently followed in ***Prabhat Kishor Sahu v. Sambalpur University***[4]; ***Pratima Sahoo v. State of Orissa***[5]; ***Miss Reeta Lenka v. Berhampur University***[6]***; Varsachala Chetan v. State of Odisha***[7]; ***Gajandra Patra v. Utkal University***[8]; ***Bisweswar Behera v. Utkal University***[9]; and ***Reetanjali Pati v. Board of Secondary Education***[10].

12. In ***Nrusingha Charan Panda*** *(supra)* the Petitioner was declared 'pass' in the Annual High School Certificate Examination conducted by the Board of Secondary Education, Orissa, Cuttack. The S.L.C. and the mark sheet were issued to him by the Head Master of the School on the basis of the result and the marks list communicated to him by the Board. The Board upon realising the error in the publication of the marks list, intimated to the Head Master of the School. However, the Petitioner therein was not informed that he had failed in the exam. Therefore, the Court applied the principle of estoppel after holding on facts that (a) he had no knowledge of the failure and (b) the mistake lay on the part of the authorities.

**2. 1986 SCC OnLine Ori 65** **3. (1982) 1 SCC 223** **4. 1991 SCC OnLine Ori 74**
**5. 2020 SCC OnLine Ori 804** **6. 1992 SCC OnLine Ori 51** **7. 2021 SCC OnLine Ori 1969**
**8. 68 (1989) CLT 694** **9. 1989 NOC 29 (Orissa)** **10. AIR 1990 Orissa 90**

13. While ***Nrusingha Charan Panda*** was decided on 23rd January 1992, a Full Bench of this Court on 17th July 1992, i.e. nearly six months later, decided two writ petitions by a common judgment in ***Miss Reeta Lenka v. Berhampur University*** *(supra)*. The other writ petition decided by the same judgment was ***Biswanath Tarai v. Utkal University*** (O.J.C. No. 3345 of 1988). The facts in ***Reeta Lenka*** were that the results of Miss Reeta, the Petitioner therein , were cancelled at a belated stage subsequent to issuance of a mark sheet and the College Leaving Certificate declaring her as passed. Moreover, a provisional certificate was also issued to her after it was brought to her attention that her results were cancelled due to mass copying, without extending the opportunity of hearing. It was held therein that the principle of promissory estoppel would apply even though there would be no obligation to "hear" a vast majority of students who adopt unfair means which leads to cancellation of their results. In Ms. Reeta's case, there were only 12 examinees. Therefore, it was held that the principles of natural justice ought to have been extended to them. Moreover, we may note that a provisional pass certificate was issued to Ms. Reeta "after" having informed her of the cancellation of her results, demonstrating the lackadaisical attitude of the authorities. This Court has, however, in ***Reeta*** *(supra)* reaffirmed the position that one of the requirements of estoppel is that the person concerned must show that he was not aware/ had no knowledge of the true state of things or that he had no means to know the same. At the same time in the connected writ petition ***Biswanath Tarai v. Utkal University*** (*supra*), the same Full Bench on facts declined to extend to him the benefit of the doctrine and negatived his prayer that the cancellation of his results should be reversed. Going by the tests laid down in the Full Bench of this Court in the two cases, i.e. ***Reeta Lenka*** and ***Biswanath Tarai***, it is evident that the decision in ***Nrusingha Charan Panda*** *(supra)* may require reconsideration and would no longer be good law.

14. Applying the principles enunciated in the aforementioned decisions to the present case, the Appellant cannot possibly claim that she was unaware that she had failed in the Education subject. The CHSE Mark Sheet made available to her immediately after results were declared made that fact abundantly cleared. There was no occasion for the Appellant to be under a misconception as to that fact. In the circumstances, the question of applying the doctrine of promissory estoppel in her case does not arise.

15. As noticed earlier, the Appellant was not entitled to be declared as 'Pass' in view of the regulations which govern the CHSE conducted examinations including +2 Arts. Directing the authorities to issue and deliver the Original "Certificate of Passing" in the CHSE examination to the present Appellant would tantamount to compelling the authority to act against the law. There can be no estoppel against the law as has been laid down in ***Tata Chemicals Ltd.*** **v.** ***Commr. of Customs***.[11] If the law requires something to be done in a particular manner, then it must be done in

**11. (2015) 11 SCC 628 para 32**

that manner, and if it is not done in that manner, it would have no existence in the eye of the law[12]. Merely because the Appellant was extended the benefit of deemed passing in the CHSE examination, albeit wrongly, this wrong act cannot be allowed to perpetuate[13]. Therefore, in light of the fact that the Appellant had knowledge but chose not to rectify her situation, we are unable to accept the contention of the learned counsel for the Appellant that the action of the authorities is hit by the principle of estoppel.

16. It is no doubt true that the Courts have, more often than not, leaned in favour of the students, but as the things stand, a line must be drawn between cases where there have been a *bona fide* error and cases where the circumstances are dubious. It is a well settled principle that what cannot be done directly, it cannot be done indirectly – ***Quando aliquid prohibetur ex directo prohibetur et per obliquum***. Reliance may be placed on the decision in ***Jagir Singh v. Ranbir Singh[14]; Dayal Singh v. State of Punjab (2003) 2 SCC 593*** and ***Apex Laboratories (P) Ltd. v. CIT[15].***

17. It is inconceivable that the Appellant, when looking at her Mark Sheet, was not aware that she had failed in both English and Education subjects. She chose not to. The marks secured by the Appellant in the Education subject should have propelled her to attempt the compartment examination in that subject, as she did for English subject.

18. The learned Single Judge has directed that in the event the authorities have made a mistake then the Appellant should be given an opportunity of again sitting for the Education paper in compartment. That occasion, as this Court sees it, does not arise in the facts of the present case since the authorities and in particular the CHSE informed the Appellant at the outset through the Mark Sheet that she had failed in the Education subject. No mistake can be attributed to them on that score.

19. The reference is answered by observing that the decision of this Court in ***Nrusingha Charan Panda*** *(supra)* is no longer good law in light of the later Full Bench decision of this Court in ***Miss Reeta Lenka*** (*supra*) which continues to hold the field.

20. As a result, the writ appeal is dismissed.

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**12. Ibid**
**13. Joshi Technologies International Inc. V. Union of India (2015) 7 SCC 728 para 43, 44**
**14. (1979) 1 SCC 560**
**15. (2022) 7 SCC 98**

**2023 (I) ILR - CUT- 903**

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

CRLMC NO. 2863 OF 2017

**SRI ASUTOSH MOHAPATRA & ORS.** …. Petitioners

-V-

**SMT. JYOTI PANDA@MOHAPATRA & ANR.** …. Opp.Parties

**CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 r/w Section 12(1) of Protection of Women from Domestic Violence, Act 2005 – The Opp.Party/wife left the matrimonial home in the year 2009 – She filed an application U/s. 12 of 2005 Act after lapse of 9 years – Whether petition U/s. 12 is maintainable on the ground of limitation ? – Held, No – There is no valid explanation offered anywhere in the complaint why the complaint was filed belatedly – The allegations against Petitioner Nos. 2 to 4 in the complaint are vague, not specific – Hence the impugned order of both the trial & Appellate Court are dismissed.**

(Paras 14 – 15)

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

1. (2013) 14 SCC 374 : Chandralekha v. State of Rajasthan.
2. (2010) 7 SCC 667 : Preeti Gupta v. State of Jharkhand.
3. (2019) 8 SCC 642 : Seenivasan v. State.
4. (2022) 6 SCC 599 : Kahkashan Kausar v. State of Bihar.

For Petitioners : Mr. Gautam Misra, Senior Advocate.

For Opp.Parties: Mr. Bigyan Sharma.

ORDER Date of Order : 11.04.2023

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

1. The present petition under Section 482 Cr.P.C. seeks the quashing of the order dated 15th March 2017 passed by the SDJM, Bhubaneswar in CMC No.706 of 2016 filed by the present Opposite Parties under Section 12 (1) of the Protection of Women from Domestic Violence Act, 2005 (PWDV Act). The petition also seeks the setting aside of a judgment dated 1st September 2017 passed by the Sessions Judge, Khurda at Bhubaneswar dismissing the appeal under Section 29 of PWDV Act thereby affirming the order dated 15th March 2017 of the SDJM dismissing the petition filed by the present Petitioners questioning the maintainability of the aforementioned CMC No.706 of 2016 on the ground of limitation. *Inter alia*, both the SDJM and the Sessions Judge took the view that the question of limitation was mixed question of fact and law which could be gone into only at the stage of trial.

2. The background facts are that Petitioner No.1 had married to Opposite Party No.1 on 6th July, 2007. A son was born on 23rd May, 2008. In the complaint filed under Section 12 (1) of the PWDV Act on 23rd November 2016, Opposite Party No.1 is silent about when she left the matrimonial home whereas according to the Petitioners she left matrimonial home some time in 2009.

3. Mr. Gautam Misra, learned Senior Advocate for the Petitioners, at the outset submits on instructions that he is pressing the present petition for quashing of CMC No.706 of 2016 only as far as Petitioner Nos.2 to 4 i.e., the father-in-law, mother-in-law and brother-in-law are concerned and not Petitioner No.1 who happens to be the husband of Opposite Party No.1.

4. Referring to the application under Section 12 (1) of the PWDV Act, Mr. Misra submits that the allegations as far as Petitioner Nos.2 to 4 are concerned are at best vague and unspecific and the entire petition has been made belatedly 9 years after Opposite Party No.1 left the matrimonial home. He refers *inter alia* to the decisions in ***Chandralekha v. State of Rajasthan (2013) 14 SCC 374***, ***Preeti Gupta v. State of Jharkhand (2010) 7 SCC 667***, ***Seenivasan v. State (2019) 8 SCC 642*** and ***Kahkashan Kausar v. State of Bihar (2022) 6 SCC 599***.

5. Mr. Bigyan Sharma, learned counsel for Opposite Party No.1, on the other hand defends the impugned orders of the SDJM and Sessions Judge and submits that the question of limitation if any is a mixed question of fact and law and the parties could not avoid facing trial on that score. As far as the allegations against the Petitioners under PWDV Act are concerned, he submits that there were allegations made against Petitioner Nos.2 to 4 which were specific although the exact dates on which such incidents occurred were not mentioned. He submits that the non-compliance of orders passed by the Court in proceedings under the PWDV Act would itself constitute an offence and therefore, the Court should not at this stage interfere with the proceedings under Section 482 Cr PC.

6. The above submissions have been considered. On a perusal of the order dated 15th March 2017, it is seen that baring the last paragraph of the order, it merely sets out all the contentions of the Petitioners and observes that since PWDV Act is a beneficial law intended to provide relief to a destitute lady and has retrospective effect "the cause of domestic violence can be better appreciated at the time of trial and not at the present stage".

7. As far as the judgment dated 1st September 2017 of the Sessions Judge is concerned, again it proceeds on the basis that all the contentions raised by the Petitioners "shall be gone through during the trial of the case and the same cannot be considered, entertaining a preliminary objection." That order also does not deal with the objection as regards the complaint under the PWDV Act being highly belated i.e. nearly 9 years after Opposite Party No.1 left the matrimonial home. A perusal of the application under the PWDV Act reveals that it is silent on when Opposite Party

No.1 actually left the matrimonial home and what transpired during the 9 years till the filing of the complaint.

8. Mr. Sharma, learned counsel for Opposite Party No.1 volunteers that Petitioner No.1 husband had filed an application for divorce under Section 13 (i) of the Hindu Marriage Act, 1955 (CP No.234 of 2017) in the Family Court at Bhubaneswar on 25th March, 2017 after receiving the notice in the CMC No.706 of 2016. This still does not explain why Opposite Party No.1 had to wait for over 9 years to file the complaint under the PWDV Act in relation to events that transpired in 2007, 2008 and so on. In other words, there is no valid explanation offered anywhere in the complaint why the complaint was filed belatedly.

9. Secondly, specific to Petitioner Nos. 2 to 4 who are the "inlaws", the Court finds that in many of the paragraphs of the complaint, there are general allegations against all the 'in-laws' and no specific allegations pertaining to each of them. Importantly, many of the allegations are without any dates being mentioned and therefore, at best can be termed as vague and non-specific. The person drafting the complaint definitely did not keep in mind the requirement of law that the allegations have to be specific and when they concern several accused persons they have to be specific each of them.

10. In ***Chandralekha v. State of Rajasthan*** *(supra)*, the Supreme Court while quashing the FIR pertaining to the in-laws observed that "the allegations are extremely general in nature. No specific role is attributed to each of the Appellants." It also noted that in the facts of the case, the complaint had been filed six years after the complainant left the matrimonial house. It was observed in the said case "in our opinion, such extraordinary delay in lodging the FIR raises grave doubt about the truthfulness of the allegations made by Respondent No.2 against Appellants 1, 2 and 3, which are, in any case, general in nature."

11. Again in ***Preeti Gupta v. State of Jharkhand*** *(supra)*, while quashing a complaint under Section 498-A IPC against the relatives of the husband, the Court cautioned that such allegations "require to be scrutinized with great care and circumspection" and that "the tendency of implicating the husband and all his immediate relations is also not uncommon." The Court also reflected on the role of the Members of the Bar and observed that they have an obligation to ensure "that the social fibre of the family life is not ruined or demolished. They must ensure that the exaggerated versions of small incidents should not be reflected in the criminal complaints."

12. In ***Seenivasan v. State*** *(supra)*, there were bald allegations made against the relatives of the husband and other family members. While quashing the complaint, the Court observed that if the proceedings were allowed to go on it would amount to an abuse of the process of the Court.

13. In ***Kahkashan Kausar v. State of Bihar*** *(supra)*, again it is observed in para 17 as under:

> "17. The abovementioned decisions clearly demonstrate that this court has at numerous instances expressed concern over the misuse of section 498A IPC and the increased tendency of implicating relatives of the husband in matrimonial disputes, without analysing the long term ramifications of a trial on the complainant as well as the accused. It is further manifest from the said judgments that false implication by way of general omnibus allegations made in the course of matrimonial dispute, if left unchecked would result in misuse of the process of law. Therefore, this court by way of its judgments has warned the courts from proceeding against the relatives and in-laws of the husband when no prima facie case is made out against them."

14. The above observations made in the context of Section 498-A IPC would be equally relevant to a petition under the PWDV Act. In the present case, the Court finds that as far as Petitioner Nos.2 to 4 are concerned, the allegations in the complaint are vague, not specific to each of them, and significantly, the complaint itself appears to be belated without any valid explanation for the delay in filing it.

15. For the aforementioned reasons, in light of the legal position explained in the aforementioned decisions, as far as Petitioner Nos. 2 to 4 are concerned, this Court while setting aside the order dated 15th March 2017 of the SDJM, Bhubaneswar and the judgment dated 1st September 2017 of the Sessions Judge, Khurda at Bhubaneswar, quashes CMC No. 706 of 2016 under Section 12 (1) of the PWDV Act. It is clarified that CMC No.706 of 2016 will continue against Petitioner No.1 and his contentions are left open to be urged at the appropriate stage in the trial court.

16. The CRLMC is disposed of in the above terms. Issue urgent certified copy of this order as per rules.

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## 2023 (I) ILR - CUT-906

**Dr. S.MURALIDHAR, C.J & G.SATAPATHY, J.**

W.A. NO. 777 OF 2021 & BATCH OF WRIT APPEALS
(W.A.NO(s). 300,305,317,318,319,343,346,468,483,484, 485,739,742,926,927,928,929,930,935,952,1085,1086,1087,768, 1219,673,776 & 1118 OF 2022)

**STATE OF ODISHA & ANR.** …. Appellants

-V-

**PATITAPABAN DUTTA DASH & ORS.** …. Respondents

**SERVICE LAW – Regularisation – Regularisation of service of Data Entry Operators in terms of letter dt. 17.09.2013 issued by General Administration Department, Govt. of Odisha, as they have completed six years of service – Hon'ble single Judge allow the writ petition directing the Govt. to regularise their service – State challenges the order in writ appeal – Held, the court is not persuaded to interfere with impugned judgement of the learned single judge.** (Para 47)

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

1. (2006) 4 SCC 1 : State of Karnataka v. Umadevi.
2. 2010 (II) OLR (SC) 982 : State of Karnataka v. M. L. Kesari.
3. 2021 SCC Online SC 256 : University of Delhi v. Delhi University Contract Employees Union.
4. (2015) 8 SCC 265 : Amarkant Rai v. State of Bihar.
5. AIR 2018 SC 233 : Sheo Narain Nagar v. State of U.P.
6. (2019) 17 SCC 648 : Rajnish Kumar Mishra v. State of U.P.

For Appellants : Mr. Ashok Ku. Parija, Advocate General
Mr. M.K. Khuntia & Mr. R.N. Mishra, A.G.A(s).

For Respondents:Mr. B.S. Tripathy.

JUDGMENT Date of Judgment : 12.04.2023

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

1. These writ appeals by the State of Odisha are directed against the impugned judgment dated 9th September, 2021 of learned Single Judge allowing the writ petitions filed by the Respondents and directing that their services as Data Entry Operators (DEOs) in the Tahasils of Cuttack and other districts should be regularized in terms of a letter dated 17th September, 2013 issued by the General Administration Department (GA Department), Government of Odisha since they had already completed six years of service and had been appointed against sanctioned posts by following due procedure of selection. It was directed that they should be granted all the consequential and financial benefits in accordance with law within two months from the date of communication of the judgment.

2. While a detailed judgment was delivered in the first batch of writ petitions of which the lead petition was W.P.(C) No.19951 of 2020 (***Patitapaban Dutta Dash v. State of Odisha***) and against which the State of Odisha has filed W.A. No.777 of 2021, in all the connected writ petitions the said judgment was followed to grant identical relief. Those orders have been challenged in the companion appeals by the State of Odisha in this batch.

3. This Court has heard the submissions of Mr. Ashok Kumar Parija, learned Advocate General (AG) assisted by Mr. M.K. Khuntia and Mr. R.N. Mishra, learned Additional Government Advocates for the Appellants-State and Mr. B.S. Tripathy1, learned counsel for the Respondents in the appeals.

***Background facts***

4. The background facts are that on 24th November, 2006 the Revenue Disaster Management Department ('RDM Department'), Government of Odisha wrote to the Director, Land Records and Service, Odisha regarding "engagement of Date Entry Operators-cum-Assistants for preparation and distribution of land passbooks on contract basis". The said letter reads as under:

> "Sub: Engagement of Data Entry Operators-cum-Assistants for preparation and distribution of Land Pass Books on contract basis.
>
> Sir,
> I am directed to convey the sanction and creation of 600 posts of Data Entry Operators-cum-Assistants who are to be engaged in the different districts to render assistance for preparation and distribution of Land Pass Books for a period of six months at the rate of Rs.4000/-P.M. each as per the numbers indicated in the enclosed statement, which is based on the number of Khatadars available in the districts as communicated by you earlier.
>
> 2. While conveying the sanction order to the respective Collectors the following aspects may be kept in view.
>
> i) The recommended qualification would be Matriculate with knowledge of computer operation. The temporary collection staff who were engaged earlier in collection work may be given preference. If the required number of Data Entry Operators-cum-Assistants are not available in the district after exhausting the above conditions and wherever service providers were available, the Collectors may take their Assistance to fill up the residual vacancies.
>
> ii) If service providers are not available in their districts the Collectors are free to engage from the open market.
>
> iii) The engagement orders will be issued by the respective Collectors specifying the date of engagement clearly for a period of six months. The disengagement is automatic on expiry of term and no termination order needs to be issued again.
>
> iv) A copy of the sample format prescribed by the Finance Department for engagement of hand on contractual basis is appended hereto for your reference. A copy of the same may also be endorsed to each Collector alongwith the sanction order for their reference and use.
>
> 3. The necessary instructions to the respective Collectors may be issued in the above line with due approval of the Member, Board of Revenue and copy of the same may also be sent to this Department for record.
>
> 4. These instructions are issued with the concurrence of Finance Department vide U.O.R. 452/GS-I dated 18.11.2006."

5. Following the said letter, the Respondents were engaged as DEOs after a computer test was held. For that purpose, each of the Respondents was informed by the Collector, Cuttack, by a letter dated 24th January, 2008 that the candidate's name had been shortlisted from the list supplied by the District Employment Exchange and that a computer test was going to be organized on 31st January, 2008. A candidate was asked to come for the said test along with xerox certified copies of the relevant documents. It is stated that a written undertaking was obtained from each of the candidates in a proforma which *inter alia* was in the form of acknowledgement that candidate "was fully aware that my appointment is purely temporary and on

contract basis and can be terminated at any time without any notice and assigning any reason thereof. Further, I am fully aware that my continuance in the said post is contingent upon extension of the said post with concurrence of Finance Department and subject to my satisfactory performance to be evaluated by the appropriate authority". The written undertaking further stated that "in future I shall not claim regular scale of pay and other allowances for continuing in the said post merely on the ground that I have been given a contract appointment and my contractual appointment have been extended from time to time". It is not in dispute that the said engagement has in many of the cases in this batch, continued for well over 10 years now. In fact, all the contesting individual Respondents are even today working as DEOs in the various Taluks.

6. The issue of regularization of the services of the DEOs was discussed at a meeting convened by the Chief Secretary, Government of Odisha held on 28th April, 2012. The minutes of the meeting acknowledged that "600 DEOs-cum-Assistant Posts" was created (in 171 Old Tahasils) of the State by abolishing equivalent number of consolidation Grade-I Posts in 2006". It further acknowledged that the DEOs were to initially facilitate issuance of land passbooks but subsequently they attended all the computerization related work of the Tahasils. It was further acknowledged in the minutes of the said meeting that over the years these DEOs were found to be very useful to run day to day affairs of Tahasil work. There were two categories of DEO available in Tahasil office (i) Directly recruited through test and (ii) Outsourced from Service Providers. Regularisation of these posts was stated to be in the public interest.

7. After a threadbare discussion, the following decisions were taken: (i) the DEOs engaged contractually in Tahasils should continue and should not be disengaged till a decision regarding regularization is finalized and (ii) the Government is contemplating to frame a policy of regularisation of contractual DEOs of various Department. The policy so framed shall be applicable to these DEOs. The minutes of the said meeting was circulated by a letter dated 3rd May, 2012 of the Addl. Secretary to the Govt., RDM Department.

8. On 17thSeptember, 2013 the GA Department issued the resolution indicating the Government's policy on regularization. The said resolution, which was gazetted, explained that the regular appointment of Group C and Group D employees under the State Government involving the following categories was under active consideration of the Government for some time past:

> (i) contractual appointments/engagements made against the contractual posts created with the concurrence of the Finance Department on abolition of the corresponding regular post, or
>
> (ii) contractual appointments/engagements made against the contractual posts created with the concurrence with the Finance Department without abolition of any corresponding regular posts in case of news offices, or

(iii) for strengthening of the existing offices/services

9. The requirement was that (i) the engagements should have been made following the recruitment procedure prescribed for the corresponding regular posts and (ii) the principle of reservation as decided by the State Government from time to time. The regularization of the contractual employees would be effective from the date of completion of six years of service or from the date of publication of Resolution (i.e.) 17th September, 2013 whichever was later, in the order in which the names appeared in the gradation list. The period of six years was to be counted from the date of contractual appointment prior to the publication of the said Resolution. Upon regular appointment, the contractual posts, if any, would get converted to regular sanctioned posts.

10. Following this, the Orissa Group-C and Group-D Posts (Contractual Appointment) Rules, 2013 ('the 2013 Rules') were issued by way of a Notification dated 12th November, 2013. The 2013 Rules recognized two categories of contractual employees:

> (a) Category I: Contractual appointments/engagements made against contractual posts created with the concurrence of Finance Department without following the recruitment procedure including the Odisha Reservation of Vacancies in Posts and Services (for Scheduled Castes and Scheduled Tribes) Act, 1975 ('ORV Act') and the rules made there under and Rules regulating recruitment for the regular posts;
>
> (b) Category II: Contractual Engagements made through manpower service provider agencies with concurrence of Finance Department.

11. Rule 8 of the 2013 Rules is relevant and reads as under:

> "***8. Special Provision for different Categories of existing Contractual Employees:***
>
> (a) The contractual employees belonging to Category-I and the persons provided by the manpower service provider agencies under Category-II, who shall be less than 45 years of age and shall have completed at least one year of continuous service, in case they apply for Recruitment under sub-rule(1) of rule 5 for any Group C and Group D posts, shall be allowed relaxation of upper age limit for entry into Government service; provided they satisfy all other eligibility criteria for the post as laid down in the relevant recruitment rules.
>
> (b) They shall be allowed one per cent extra marks on the total marks of the examination for each competed year of continuous service subject to a maximum of fifteen per cent, which shall be added to the marks secured by them for deciding the merit position."

12. On 16th January, 2014 the GA Department issued yet another Resolution whereby while reiterating the conditionalities of regularization of contractual employees (similar to the Resolution dated 17th September, 2013), it was made explicit in para 2 as under :

> "2. A part from the contractual employees fulfilling the conditionalities elucidated in Para 1 above, there are other categories of contractual employees engaged with or without creation of posts with the concurrence of Finance Department, without following the relevant recruitment and reservation Rules. There are also contractual employees engaged on out

> sourcing basis through service providing agencies. These contractual employees are not eligible for regularization as per the aforesaid Resolution."

13. Thus, it was clear as to who was not eligible for regularization. in terms of the Resolution dated 17th September, 2013. A High-Powered Committee (HPC) was to be constituted in order to ensure that the mandatory eligibility conditions spelt out therein.

14. On 24th February, 2016 a letter was written by the RDM Department to the Secretary, Board of Revenue. Odisha, Cuttack regarding "Creation of 692 posts of Junior Clerk in lieu of abolition of 692 corresponding regular vacant posts in Survey and Settlement Organization under Board of Revenue, Odisha, Cuttack." The said letter conveyed the sanction of the Governor to the creation of 692 posts of Junior Clerk in 317 Tahasils "in lieu of abolition of 692 corresponding regular vacant posts in his survey and settlement organization under the Board of Revenue." These posts included that of the Draftsman, Amin and Musharim. It was further noted that "the posts so created is required for regularization of Data Entry Operators engaged on contractual basis in all the Tahasils of the State by following the relevant recruitment rules and provisions of ORV Act as per the stipulations contained in G.A. Department Notification No. 32010/Gen dated 12.11.2013 and their emoluments & service conditions shall be governed by the aforesaid notification of G.A. Department."

15. Asserting their right to regularization as a result of long years of service, and in terms of the Resolution dated 17th September, 2013, the Respondents first approached the Orissa Administrative Tribunal (OAT) with O.A. No.554 (C) of 2019 and batch in which the interim order was passed by the OAT on 1st March, 2019 permitting them to continue as DEOs but clarifying that the pendency of the OA would not be a bar for the State to consider their prayer for regularization.

16. On 26th September, 2019 while extending the contractual appointment of the DEOs, it was stipulated by the Government that such extension will be up to 28th February, 2020 or "till completion of the process of recruitment and appointment against such 692 posts of Junior Clerks created for the Tahasils whichever is earlier."

17. Following the abolition of the OAT with effect from 2nd August, 2019 and upon request by the Respondents, the cases in the OAT were transferred to this Court on 18th November, 2019 and registered as writ petitions one of which was WPC (OAC) No. 554 of 2019 filed by Patitapaban Dutta Dash.

18. Apprehending that in view of the clause in the extension letter dated 26th September, 2019 that the extension would be only till such time 692 posts of Junior Clerks are regularly filled, Patitapaban Dutta Dash filed W.P.(C) No.3678 of 2020. The said writ petition was disposed of by this Court on 3rd February, 2020 stating

that the Government should examine if the Petitioners' services could be regularized as per the Resolution dated 17th September, 2013.

19. Meanwhile, on 16th March, 2020 a decision was taken at a meeting of the HPC under the Chairmanship of the Chief Secretary that the DEOs working in the Tahasils of the State cannot be regularized. The minutes of the said meeting reveal that it was decided that the DEOs were not entitled to be regularized as neither any recruitment rule had been followed while engaging them nor the ORV Act had been followed. The said minutes noted that as of 16th March, 2020 572 DEOs were working in different districts "out of which 491 posts were engaged by Collectors on contractual basis and the rest 81 by outsourcing through service providers."

20. After the minutes of the meeting dated 16th March, 2020 a fresh set of writ petitions were filed including W.P.(C) No.19951 of 2020. In view of the above development, Patitapaban Datta withdrew WPC (OAC) No. 554 of 2019 on 2nd September 2021 before this Court.

***First round of litigation***

21. W.P.(C) No.19951 of 2020 and the connected petitions were disposed of by the learned Single Judge on the first date of its hearing on 20th August, 2020 holding that their cases were squarely covered by the ratio of the decision of the Supreme Court in ***State of Karnataka v. Umadevi (2006) 4 SCC 1*** and ***State of Karnataka v. M. L. Kesari 2010 (II) OLR (SC) 982*** since each of the Petitioners had put in more than 10 years of service as DEOs albeit on contractual basis and were covered by the Resolution dated 17th September, 2013. The State was accordingly directed to consider their cases for regularization within a period of four months.

22. The above orders were then challenged in a batch of writ appeals. Three of these writ appeals i.e. W.A. Nos.100, 101 and 29 of 2021 were disposed of by a Division Bench of this Court on 26th March, 2021 and 21st June, 2021 setting aside the directions issued by the learned Single Judge that the services of the Respondents should be regularized and they should be granted consequential benefits. The Division Bench permitted the Respondents (Writ Petitioners) to make representations to the State which were to dispose them of by a reasoned order.

23. Meanwhile on 18th March 2021 an order was issued by the RDM Department extending the tenure of 572 contractual posts of DEOs engaged in the Tahasils by a further period of six months up to 31st August, 2021.

24. The remaining writ appeals came up for hearing on 17th June, 2021 before another Division Bench. After noting that the writ petitions had been disposed of by the learned Single Judge on the very first date of hearing without an opportunity to the State to file a reply, the orders were set aside by the Division Bench and the cases were remitted to the learned Single Judge to be decided afresh after ensuring pleadings were completed in a time-bound manner.

***Second round of litigation***

25. Thereafter, upon completion of pleadings, the impugned judgment dated 9th September, 2021 came to be passed by the learned Single Judge allowing W.P.(C) No.19951 of 2020 and the connected writ petitions of the batch by holding that their cases were covered by the Resolution dated 17th September, 2013 and issuing a mandamus to the State of Odisha to regularise their services. This judgment which is common to the entire batch of writ petitions has been challenged in the present writ appeals, the lead case of which is W.A. 777 of 2021.

26. In W.A. No.777 of 2021 the following order was passed by this Court on 18th November, 2021:

> "1. Mr. Khuntia, learned Additional Government Advocate (AGA) for the Appellant drew attention of this Court to the Odisha Group C and Group D Posts (Contractual Appointment) Rules, 2013 and submitted that among the many grounds urged by the Appellants to assail the impugned judgment dated 9th September, 2021 of the learned Single Judge one is that the learned Single Judge was in error in observing that the above rules have no application in view of the earlier resolution dated 17th September, 2013 of the General Administration Department (GAD). According to him, the Respondents would be considered in their turn for regularization in terms of Rule 5 read with Rule 8 (a) of the aforementioned Rules and that the decision in ***State of Karnataka v. Uma Dei (3), (2006) 4 SCC 1*** will have no application since the contractual appointments of the Data Entry Operators (DEOs) in the present case were not against the sanctioned posts of DEOs but the sanctioned post of Junior Clerks and that too on a short term contractual basis.
>
> 2. When asked by the Court how many of the existing contractual employees have in fact benefited by Rule 8(a) of the 2013 Rules, AGA short time for instructions.
>
> 3. The further submission of the learned AGA is that the GAD resolution dated 17th September, 2013 has to be read with the subsequent resolution dated 16th January, 2014 which further clarifies the conditions on which the contractual appointees are eligible for regularization. It is submitted that a High Power Committee (HPC) has to examine whether in fact the contractual employees satisfy the conditions for being regularized. When asked whether in the present case an HPC was constituted to consider the claims of the Respondents, again Mr. Khuntia states that he has to seek instructions.
>
> 4. Mr. Tripathy, learned counsel states that the Respondents do not intend to file any contempt petition as of now. In that view of the matter, no interim orders are called for.
>
> 5. An additional affidavit be filed by the Appellant within two weeks clarifying the above aspects.
>
> 6. List on 18th January, 2022."

***Applicability of the 17th September 2013 Resolution***

27. It must be noted at the outset that the case of the Respondents as articulated by the Mr. B.S. Tripathy-1, learned counsel is that they are not covered by the 2013 Rules but by the Resolution dated 17th September, 2013. The case of the Appellants-State of Odisha as articulated by the learned AG, on the other hand, is that it is only the 2013 Rules if at all that would apply but definitely not the Resolution dated 17th September, 2013.

28. In terms of the Resolution dated 17th September, 2013 there were three stipulations to be fulfilled. One was that the engagement had to be against sanctioned posts created by the abolition of corresponding posts. This stands fulfilled since by the letter dated 24th November, 2006 as 600 posts of DEO were in fact created and in terms of the minutes of the meeting of the Chief Secretary held on 28th April, 2012 the said 600 posts were created by abolishing equivalent number of consolidation Grade I posts.

29. It was contended by the learned AG that the said 600 posts were 'temporary posts' as defined in Clause 45 of the Odisha Service Code, which defines such post to mean "a post carrying a definite rate of pay and sanctioned for a limited time." In response to the Respondents' contention that the said 600 posts have not in fact been abolished as of date, the learned AG has with the written note of submissions dated 4th April 2023 enclosed a file noting dated 18th November 2006 which states that the 600 posts of DEO "will be temporary and contractual which will be abolished on the expiry of six months."

30. The fact remains that the engagement of the Respondents as DEOs has been continued from time to time with the last extension being up to 31st August 2021. It is contended by the learned AG in the written note of submissions that with there being no further extension of the engagement of the DEOs beyond 31st August, 2021, the 600 posts should be 'deemed to have been abolished." But then the Respondents have with their written submissions dated 3rd April 2023 enclosed copy of a letter dated 2nd December 2022 issued by the RDM Department to all the Collectors instructing them to keep paying monthly remuneration to the contractual DEOs during the pendency of the present writ appeals.

31. The position that emerges from the above discussion is that there is as of date no formal abolition of the 600 posts of DEOs created earlier by the letter dated 24th November 2006. Even if one were to assume that they are 'deemed' to be abolished then too if one were to go by the letter dated 24th May 2016 of the RDM Department which created 692 posts of Junior clerks and the subsequent letter dated 26th September 2019 of the RDM Department which granted extension to the DEOs by six months from 1st September 2019 or "till completion of the process of recruitment and appointment against such 692 posts of Junior Clerks created for the Tahasils whichever is earlier" the position is that the said 692 created posts do exist for being filled up by way of regular recruitment of DEOs. Either way, it cannot be said that there are no sanctioned posts to accommodate the DEOs. The question of having to create 'supernumerary' posts to regularize the services of the DEOs does not arise. There was no such direction issued by the learned Single Judge, even by implication. So much for the first of the three criteria of the Resolution dated 17th September 2013.

32. The second of the three criteria was that "the recruitment procedure prescribed for the corresponding regular posts" should have been followed. As far as this condition is concerned, the AG referred to the Odisha Secretariat Data Entry Operators (Methods of Recruitment and Conditions of Service) Rules, 2008 (2008 Rules) notified on 30th December, 2008. The method of recruitment as stipulated in 2008 Rules was the holding of a competitive examination preceded by an advertisement for filling up of the vacancy and scrutiny of the applications. The AG contended that none of the Respondents have undergone any selection process that is even remotely close to the above recruitment procedure.

33. It is seen that the 2008 Rules applied to the DEOs working in the Secretariat and not elsewhere. Secondly, they were prospective and became operational only after their notification on 30th December, 2008. The Respondents were, however, engaged earlier than the 2008 Rules, for an initial period of six months, following a computer test organized by the Collectorates of various Districts. If that was the recruitment procedure followed at the relevant time and if in fact the Respondents underwent that procedure of selection, it could not be said that no recruitment procedure was followed. In any event there was admittedly no prescribed recruitment procedure for "the corresponding regular posts" since till then there were no 'equivalent' posts comparable to that of DEOs. Further each of the Respondent DEOs have by now i.e. 2023 put in more than 10 years of continuous service.

34. The third condition is that the principle of reservation of posts as set out in the ORV Act must have been followed. From the narration of facts thus far it is noticed that the responsibility for providing for reservations, even for contractual engagement, was with the government. Perhaps, at the time the engagement of the Respondents on contractual basis as DEOs took place, it was not expected to continue beyond 6 months and therefore, it was not thought to apply the ORV Act. As it transpired their engagement has been continued from time to time without a break for over 10 years in some cases and even 15 years in certain others. If this was a lapse, then the Government is to blame and the Respondents who had no say in it, cannot be denied regularisation on that score alone. Also, as will be noted hereafter, the State government has in other similar cases of contractual engagement accepted the Court verdicts and regularised the services of the persons so engaged even when in their cases, the ORV Act was not followed.

35. Mr. Tripathy, learned counsel for the Respondents, has placed on record a copy of the office order dated 14th December, 2018 issued by the RDM Department listing out the actual tasks entrusted to DEOs in view of the various e-Governance applications launched by the Government. The relevant portion of the said office order reads as under:

> *"xxx xxx xxx*

*In view of the above, the following works/assignments are to be entrusted to the Data Entry Operators engaged in Tahasil Offices and this need to be followed scrupulously.*

*i) Day to day up-dation of various e-Governance applications in the Tahasils like LRMS, RCCMS, CCMS and CMS etc.*

*ii) To facilitate the Record Keeper for entry of required inputs for correction of RoR and dispatch thereof.*

*iii) To handle e-District related matters for quick issue of various Miscellaneous Certificates.*

*iv) Preparation of all MIS/MPR as required and necessitated.*

*v) To handle e-dispatch work.*

*vi) Preparation of Salary bill of employees of the Tahasil under HRMS & IFMS platform.*

*The above works are only indicative but not exhaustive. These may vary as per requirement."*

36. Therefore, it is obvious that the DEOs are needed for the work of the Government and have been found fit and qualified to undertake all of the above tasks. This explains why their services have been continued from time to time.

37. As regards the submission of the learned AG that the DEOs do not satisfy the requirement of the Resolution dated 16th January, 2014 issued by the GA Department, it is seen that the said resolution more or less encapsulates the three conditionalities in the Resolution dated 17th September, 2013 which, for the reasons already discussed, do stand fulfilled in the present case.

38. During the course of his submissions, the learned AG contended that the entitlement of the Respondents was only to age relaxation and weightage as provided in the 2013 Rules. However, it was pointed out by Mr. Tripathy learned counsel for the Respondents, that the 2013 Rules stand repealed by the Odisha Groups "B", "C" and Group "D" posts (Repeal and Special Provisions) Rules, 2022 notified on 16th October, 2022. Mr. Tripathy also referred to a communication dated 9th February, 2023 issued by the Chief Secretary in General Administration & Public Grievance Department to all Additional Chief Secretaries and Principal Secretaries regarding filling up of vacancies of Groups A, B and C posts on regular basis. This appears to indicate that the 2013 Rules have been given up for good by the State Government.

39. Faced with the above situation, the learned AG volunteered, during the course of arguments, and has also put it in writing in the written note of submissions dated 4th April 2023, that "this Hon'ble Court, in the interests of substantial justice, may extend the benefit of age relaxation and weightage to the Respondents herein even though the said Rules stand repealed." The learned AG also referred to a similar direction issued by the Supreme Court in ***University of Delhi v. Delhi University Contract Employees Union 2021 SCC Online SC 256.***

***Other similar matters***

40. At this juncture, the Court would like to refer to the State Government's approach to other cases of regularisation of contractual employees, which has also

been adverted to by the learned Single Judge in the impugned judgment. The first one is the judgment of the OAT in OA No. 2172 (C) of 2015 (***Jatin Kumar Das v. State of Odisha***) which was affirmed both by this Court as well as the Supreme Court of India with the dismissal of the State's SLPs. The State Government has issued a series of orders implementing the said judgment. In seeking to distinguish the said judgment, it is contended by the AG that in the said case the posts were sanctioned and the applicants were subject to a screening test. Both the conditionalities stand fulfilled in the present cases as well, as discussed earlier in this judgment.

41. The second instance is the judgment dated 10th February 2021 of the Division Bench of this Court in W.A. 822 of 2020 (***State of Odisha v. Biswamitra Das***), where again after the dismissal of the State's SLPs by the Supreme Court, the said judgment has been implemented. The said judgment is sought to be distinguished by the AG by contending that there was a selection held and that the posts there were sanctioned. For the reasons already discussed, these factors are present in the present cases as well.

42. Apart from the above instances, the Respondents have placed before this Court a compilation of orders of this Court, which have been upheld by the Division Bench, and in some instances the Supreme Court of India. These orders have been implemented by the State Government and the services of the successful contractual employees have been regularised. A sampling of such orders include the Office Order dated 1st August, 2014 issued by the ST & SC Development Department, Government of Odisha, the Office Order dated 31st December, 2020 issued by the Panchayati Raj and D.W. Department regularizing the services of one Sri Kishore Chandra Das, a contractual driver following the order passed by the High Court in W.P.(C) No.16023 of 2020 affirming the order passed by OAT in OA No.770 of 2017. Likewise, the order passed by this Court in W.P.C. (OA) No.814 of 2017 ***(Susanta Kumar Dash v. State of Odisha)*** on 23rd June, 2021 has been implemented by an Office Order dated 23rd March, 2022 of the Panchayati Raj and D.W. Department. There are also other orders of regularization issued on 21st August, 2018. The order passed by the High Court on 6th January, 2020 in W.A. No.353 of 2019 ***(Member Secretary Orissa Water Supply and Sewerage Board v. Soumendra Kumar Samantaray)*** has been affirmed by the Supreme Court by its order dated 17th November, 2020 and this order too has been implemented by the Government. The services of all the above similarly placed persons having been regularised by the State Government, there should be no difficulty in implementing the impugned judgment of the learned Single Judge. If indeed 2013 Rules are not available any longer, it would be unfair not to extend the benefit of the Resolution of 17th September, 2013 to the Respondents who are obviously qualified and have the requisite experience having worked as DEOs in the Tahasils for more than 10 years. Therefore, instead of adopting the route of 'age relaxation and weightage' *de hors*

the replead 2013 Rules, the State Government might as well implement the impugned judgment of the learned Single Judge particularly considering that 692 sanctioned posts of Junior Clerks created by the letter dated 24th May 2016 of the RDM Department for the very purpose of regular engagement of DEOs, are available.

***Case Law***

43. As regards the decision in ***Umadevi*** *(supra)* as explained later in ***M.L.Kesari*** *(supra),* the Respondents can possibly seek the extension of the benefit of the ratio of the aforementioned decisions for two reasons. One, that the Respondents were engaged against sanctioned posts and two, they were engaged after qualifying in a computer test. In ***M.L. Kesari*** (*supra*), the Supreme Court explained:

> "It is evident from the above that there is an exception to the general principles against `regularization' enunciated in *Umadevi*, if the following conditions are fulfilled:
>
> (i) The employee concerned should have worked for 10 years or more in duly sanctioned post without the benefit or protection of the interim order of any court or tribunal. In other words, the State Government or its instrumentality should have employed the employee and continued him in service voluntarily and continuously for more than ten years.
>
> (ii) The appointment of such employee should not be illegal, even if irregular. Where the appointments are not made or continued against sanctioned posts or where the persons appointed do not possess the prescribed minimum qualifications, the appointments will be considered to be illegal. But where the person employed possessed the prescribed qualifications and was working against sanctioned posts, but had been selected without undergoing the process of open competitive selection, such appointments are considered to be irregular.
>
> ***Umadevi*** *casts a duty upon the concerned Government or instrumentality, to take steps to regularize the services of those irregularly appointed employees who had served for more than ten years without the benefit or protection of any interim orders of courts or tribunals, as a one-time measure.*" (emphasis supplied)

44. Going by the above legal position, in the present cases, at the highest, the Respondents could be considered to be 'irregularly' appointed and therefore would, even on the touchstone of ***Umadevi*** *(supra),* be eligible for regularisation. The law in ***M.L. Kesari*** (*supra*), has been reiterated in ***Amarkant Rai v. State of Bihar (2015) 8 SCC 265***, ***Sheo Narain Nagar v. State of U.P. AIR 2018 SC 233*** and in ***Rajnish Kumar Mishra v. State of U.P. (2019) 17 SCC 648***.

***Other points urged***

45. In the written submissions of the Appellants-State three new points, not mentioned during the course of arguments or in the memorandum of appeal in W.A. 777 of 2021, have been urged. The first is that Respondents 7 and 8 in W.A. 777 of 2021 were disengaged as DEOs in 2015 and re-engaged in 2018 and therefore had not completed even 3 years before filing the writ petition. The second is that of the 572 DEOs whose tenure has been continued, 91 have been engaged through

outsourcing agencies. Thirdly, it is stated that many DEOs have been engaged after 2010.

46. Since the above submissions have been made after the conclusion of the hearing, in the written note, there is no opportunity to the Respondents to reply to them. In any event, assuming they are factually correct, if DEOs have been engaged since 2010, they have by now completed over 10 years. If 91 of them are through outsourcing agencies, then their cases can be considered with other similarly placed DEOs who have come in through outsourcing, whose cases are being considered in a separate batch of matters listed in this Court on 8th August 2023. Thirdly, as regards Respondents 7 and 8, the 2013 Rules had required at least 6 continuous years of service for being eligible for regularisation. Since the orders of implementation of the judgment of the learned Single Judge will be obviously issued separately for each person, case by case, the State will keep this aspect in view in individual cases. None of these appear to be good reasons to deny implementation of the impugned judgment of the learned Single Judge.

***Conclusion***

47. For the aforementioned reasons, the Court is not persuaded to interfere with the impugned judgment of the learned Single Judge. It should now be implemented in letter and spirit within a period of twelve weeks. The writ appeals are dismissed, but in the circumstances, with no orders as to costs.

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## 2023 (I) ILR - CUT-919

**Dr. S.MURALIDHAR, C.J & G.SATAPATHY, J.**

W.A. NO. 1 OF 2023

**Dr. KRUSHNA CHANDRA JENA** …. Appellant

-V-

**STATE OF ODISHA & ORS.** …. Respondents

**ORISSA CIVIL SERVICE (PENSION) RULE, 1992 – Rule 47 r/w clause 260 of the Orissa University First Statute, 1990 – The Appellant served in the Sambalpur University as Professor of the P.G. Department for a total period of 8 years 6 months and 11 days – Whether he is entitle to pension as per the 1992 Rules r/w clause 260 of the First Statute ? – Held, No – Unless the minimum qualifying service of 10 years was rendered, the employee would not be entitled to pension in terms of the 1992 Rule.**

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

1. W.P.(C) No.19656 of 2015 (disposed of on 14th October, 2019) : Dr. Krushna Chandra Jena v. State of Odisha.
2. 2019 (I) ILR-CUT 641 (SC) : P. Bandopadhya v. Union of India.

For Appellant : Mr. Jayant Ku. Rath, Sr. Adv. & Mr. D.N.Rath.

For Respondents: Mr. M.K. Khuntia, Addl.Govt. Adv.

ORDER Date of Order : 19.04.2023

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

1. The challenge in the present writ appeal is to an order dated 26th August, 2022 passed by the learned Single Judge in W.P.(C) No.6122 of 2021 filed by the present Appellant.

2. The question in the writ petition was whether the Respondent-Sambalpur University was justified in declining the prayer of the Appellant, who retired as a Professor in Law of the P.G. Department, for pension.

3. The aforementioned writ petition was the second round of litigation before the learned Single Judge. Initially, the Petitioner had filed W.P.(C) No.19656 of 2015 which came to be disposed of on 14th October, 2019 (***Dr. Krushna Chandra Jena v. State of Odisha***) directing the Appellant to make a fresh representation to the Vice Chancellor (VC) of Sambalpur University. The Appellant then made a representation on 23rd October, 2019. After considering it and giving a hearing to the Appellant an order was passed on the basis of the resolution of the Syndicate dated 19th September, 2020 rejecting his representation. This was then challenged by the Appellant in W.P.(C) No.6122 of 2021.

4. The case of the Appellant was that he had served in the Sambalpur University first as a Principal of an affiliated LR Law College and later as Professor of the PG Department for a total period of 8 years 6 months and 11 days. Prior thereto, he had served in various colleges affiliated to the Utkal University for a period of 6 years 3 months and 21 days. If both these periods were counted together, he would have completed a total tenure of 14 years 10 months and 2 days and was, therefore, eligible for pension as he had completed more than ten years of teaching.

5. Reliance was placed by the Appellant himself on three statutory provisions i.e. Clause 260 of the Odisha University First Statute, 1990 which deals with 'counting of past service' and which read as under :

> "Clause 260 of the Orissa University First Statute 1990
>
> 260. Counting of past service
>
> "The period of qualifying service rendered by an employee under any of the following institutions shall count for the purpose of gratuity and pension:

> (a) State Government (b) Any Indian University (c) Any College affiliated to any University of the State and aided by the State Government (d) Board of Secondary Education, Orissa (e) Council of Higher Secondary Education, Orissa; (f) Any recognized institution of higher education and/or research aided by the State/Central Government…"

6. The other provisions were Rule 47 of the Orissa Civil Service (Pension) Rules, 1992 and Rule 6(1) of the Odisha Aided Educational Institutions Employees Retirement Benefit Rules, 1981, which read as under :

> "Rule 47 of Orissa Civil Service (Pension) Rules, 1992
>
> 47(5)(i) In the case of a Government Servant retiring in accordance with the provisions of these rules before completion of the minimum qualifying service of ten years shall not be entitled for pension, but he shall be entitled to service gratuity to be paid at a uniform rate of half month's emoluments for every completed six monthly period of service." (Substituted vide Finance Department Notification No.24142/F., dtd. 04.09.2015).
>
> Rule 6(1) of the Odisha Aided Educational Institutions Employees Retirement Benefit Rules, 1981 (Inserted by Notification of Dept. of Higher Education dated 26th November, 2016)
>
> 6(1) In computing the length of qualifying service of an employee retiring on or after the 1 day of April, 1982 from an aided educational institution, all previous services rendered both in any one or more than one aided educational institution(s) as well as in Government establishment, except those rendered prior to the attaining the age of 18 years, whether temporary, officiating or permanent, shall, subject to the conditions specified in sub-rules (2), (3), (4), and (5), be taken into account for the purpose of retirement benefits under these rules."

7. For the purposes of Clause 260 one of the categories of the institutions where an employee had to render service for the purpose of 'qualifying service' for gratuity and pension was "any college affiliated to any University of the State and aided by the State Government". On the Appellant's own showing and as indicated by him in his written notes of submissions before the learned Single Judge, he served in several institutions affiliated to the Utkal University between 5th July, 1982 and 21st December, 2004. This included the Capital Law College, the Jagjiban Ram Law College, the GNM Law College and lastly the University Law College first as part time Lecturer and thereafter as Lecturer.

8. In a preliminary counter affidavit filed before the learned Single Judge, it was pointed out by the Sambalpur University that the Appellant did not possess the qualifying service of 10 years inasmuch as "he was appointed temporarily on monthly consolidated basis for a limited time in non-pensionable service in an unaided establishment with broken service" and, therefore, he was not entitled to any pension as per the relevant provisions of the OCS (Pension) Rules and the Odisha University First Statute, 1990. Apart from rejecting the Appellant's representation on the ground that the institutions served were not an aided institutions and the Sambalpur University took the stand that the Appellant was not appointed on regular basis against the sanctioned posts and, therefore, he did not qualify for pensionable service.

9. The learned Single Judge has, in the impugned order, referred to the decision of the Supreme Court of India in ***P. Bandopadhya v. Union of India 2019 (I) ILR -CUT 641 (SC)*** where it was observed that unless the minimum qualifying service of 10 years was rendered, the employee would not be entitled to pension in terms of the CCS (Pension) Rules, 1962.

10. Mr. Jayant Ku. Rath, learned Senior Counsel, appearing for the Appellant, argued that there was nothing in Clause 260 of the Statutes that mandated service against a 'sanctioned post' or on regular basis. He, accordingly, submitted that this could not be a ground for rejecting the plea of the Appellant for pension.

11. A reading of Clause 260 of the Orissa University First Statute which talks of counting of past service, makes it clear that for the purpose of qualifying service, the employee in question had to necessarily serve in a college not only affiliated to the University but also be 'aided by the State Government'. With Sambalpur University clearly taking a stand that the service rendered by the Appellant prior to joining in the Sambalpur University, was in 'unaided' institutions, the burden shifted to the Appellant to show that the said institutions, affiliated to the Utkal University, were in fact 'aided' institutions i.e. aided by the State Government. Despite, the Sambalpur University stated on affidavit in reply to the writ petition that the said institutions were 'unaided', no rejoinder was filed by the Appellant to dispute the above averment. In fact, even in the written note of submissions filed before the learned Single Judge, the Appellant does not state that he had served in institutions that were aided by the State Government prior to joining the Sambalpur University.

12. In that view of the matter, it could not be said that the Sambalpur University erred in rejecting the Appellant's representation for grant of pension.

13. The Court is, therefore, unable to find any error having been committed by the learned Single Judge in dismissing the Appellant's writ petition. The writ appeal is accordingly dismissed.

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## 2023 (I) ILR - CUT-922

**Dr. S.MURALIDHAR, C.J & G.SATAPATHY, J.**

W.A. NOS. 467 AND 468 OF 2010

**CUTTACK MUNICIPAL CORPORATION, CUTTACK** .....Appellant

-V-

**JOINT COMMISSIONER, CONSOLIDATION AND SETTLEMENT, CUTTACK & ORS.** .....Respondents

**FRAUD – The suit land was stood in the name of Cuttack Municipal Corporation since 1931 – The Additional Tahasildar Cuttack in OEA case settled the land in favour of Respondents 2 & 3 without verifying the original record and without issuing any notice to CMC, which amount to fraud – Whether the order sustainable under law ? – Held, this Court has no hesitation to conclude that the original order dated 7th January 1978 of the OEA Collector-cum-Additional Tahasildar, Cuttack in vesting case as it was obtained by fraud and therefore, all the consequential orders also have to be declared as illegal – Fraud vitiates all transactions.** (Paras 34 – 37)

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

1. AIR 1931 PC 84 : Padmalav Achariya v. Fakira Debya.
2. AIR 2015 SC 1021 : Jt. Collector Ranga Reddy Dist v. D.Narsingh Rao.
3. (2007) 6 SCC 186 : Suraj Bhan v. Financial Commissioner.
4. 2014 (II) OLR 649 : State of Odisha v. Pravabati Das.
5. 81 (1996) CLT 292 : Chunti Patra v. State of Odisha.
6. 2014(I) OLR 871 : Rama Devi (dead) v. Ch. Dhananjaya Mohapatra.
7. 2013 (II) OLR 490 : Narayan Chandra Pradhan v. The Tahasildar, Bhubaneswar.
8. (2005) Supp. OLR 950 : Prafulla Chandra Muduli v. State of Odisha.
9. 1995 (I) OLR 537 : Trilochan Singh v. Commissioner of Land Records.
10. 1992 (II) OLR 529 : Manamohan Rout v. State of Odisha.
11. (2006) 7 SCC 470 : M.Minakshi v. Metadin Agarwal.
12. AIR 1994 SC 853 : S.P Chengalvaraya Naidu vs Jagannath.
13. (2007) 4 SCC 211 : A.V.Pappaya Sastry v. Govt. of A.P.

For Appellant(s) : Mr. S.P. Mishra, Senior Advocate

For Respondent(s) : Mr. Debakanta Mohanty, AGA
Mr. P.K. Rath, Mr. P.K. Satapathy, Mr. D.R. Mohapatra

JUDGMENT Date of Judgment : 21.04.2023

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

1. Both these appeals by the Cuttack Municipal Corporation (CMC) are directed against a common judgment dated 28th June 2010 passed by the learned Single Judge dismissing W.P.(C) No.12031 and 12032 of 2006 filed by the CMC. By the impugned judgment, the learned Single Judge declined to interfere with the orders dated 24th February 2004 passed by the Joint Commissioner, Settlement and Consolidation, Odisha, Cuttack in R.P. Case No.1612 and 1613 of 2003.

***Background facts***

2. The case of the CMC is that in a settlement that took place in 1931, land pertaining to Khata No. 917 consisting of 41 plots of village-Bahar Bisinibar measuring an area of Ac 25.80 decimals was recorded in the name of Cuttack Municipality. Out of the said extent, suit Plot No.1135/3776 measuring an area of Ac 0.606 decimals corresponding to Sabik Khata No.917 was recorded as *Puratan Patita*.

3. The case of the two purchasers i.e. Mr. Govinda Prasad Pattnaik (Respondent No. 2 in W.A. 467 of 2010) and Smt. Baisali Mohanty (Respondent No. 2 in W.A. 468 of 2010) is that their vendor Naba Kumar Acharya (Respondent No.3 in both the writ appeals), inherited the suit plot from his father Sri Gajendra Kumar Acharya in whose favour land in Tauzi No. 2499 was allotted following a judgment and decree passed by the Sub-Judge, Cuttack in a partition suit Case No. 94 of 1924 which was affirmed by the Privy Council in ***Padmalav Achariya v. Fakira Debya AIR 1931 PC 84***. It is claimed that the names of the intermediary Gajendra Acharya was entered in the D Register prepared under Section 4 Part 2 of the Land Registration Act 1876 and that the said D Register was maintained by the Collector, Cuttack. It is further claimed by Respondent Nos.2 and 3 in both appeals that facilities were granted to the ex-intermediary for settlement of Khas land and personal Jagir lands in terms of a Notification and instructions issued to the Land Reforms Commissioner, Orissa by a G.O. dated 2nd March 1964 of the Revenue and Excise Department for suo motu settlement.

4. It is further claimed by Respondents 2 and 3 that on the above basis a Vesting Case No. 3699 of 1976 was initiated before the Tahasildar, Cuttack in which the Revenue Inspector is stated to have prepared a report on the basis of which on 7th January 1978, the OEA Collector-cum-Additional Tahasildar is supposed to have settled the suit plot in favour of Naba Kumar Acharya (Respondent No.3 in the appeals) under Sections 6 and 7 of the Odisha Estate Abolition Act (OEA Act). It is thus claimed by Respondents 2 and 3 in both appeals that Respondent No.3 acquired the right, title and interest in respect of the suit plot under Khata No. 917, Plot No. 1135/3776 and that his possession was confirmed by the Tahasildar, Cuttack in OEA Case No. 3699 of 1976.

5. In 1981, on the above basis, Naba Kumar Acharya (Respondent No.3 in both the writ appeals) filed Objection Case No.3654 of 1981 praying that Sabik Plot No.1135/3776 should be recorded in his name.

6. The case of the CMC is that the above order dated 7$^{th}$ January, 1978 had been passed by the Additional Tahasildar, Sadar Cuttack behind the back of the CMC. Further, it is contended by CMC that Sabik Khata No. 917 is not under Tauzi No. 2499 and as such the suit plot never vested in the Government under the OEA Act to begin with. In other words, since the suit plot was not in the State and/or intermediary interest, it did not vest in the Government under the OEA Act. The case of the CMC is that Tauzi No. 2499 consists of Khata No. 693 (Anabadi comprising 7 plots of a total area of Ac. 91.974 dec), Khata No. 694 (Sarbasadharan, comprising 1 plot of a total area of Ac. 0.140 dec) and Khata No. 695 (Rakhit, comprising 2 plots of a total area of Ac. 9.021 dec. It is contended by CMC that Tauzi 2499 vested with the Government vide 2291/EA dated 14$^{th}$ September, 1953 but that this did not include Khata No. 917 belonging to Cuttack Municipality.

Therefore, according to the CMC, the settlement of Plot 1135/3776 in favour of Respondent No.3 is a nullity.

7. Nevertheless, the Assistant Settlement Officer (ASO) partly allowed the prayer of Respondent No.3 in respect of Hal Plot No.283, Hal Plot No.286 and Hal Plot No.296 measuring Ac.0.606 decimals by order dated 28th June 1983. The corresponding suit Hal Plot Nos. 283, 286 and 296 were thus recorded in favour of Respondent No.3 in a separate Stitiban Khata. Ac 0.603 decimal covering Hal Plot Nos. 282, 286/363 and 283/367 remained in the Municipal Hal Khata. Of these, Plot No. 286/363 was the CMC Employees quarters.

8. The order of the ASO was challenged by the CMC by filing Appeal Case No.1673 of 1983 before the Additional Settlement Officer, Cuttack. After hearing the parties, the Additional Settlement Officer allowed the appeal by an order dated 14th October 1985, thereby setting aside the order of the ASO with the finding that the Tahasildar had no jurisdiction to settle Municipal land under the OEA Act in favour of Opposite Party No.3. It was further held that the name of Respondent No.3 was only recorded in the remarks column of the Hal Municipal ROR with illegal note of possession and, therefore, the OEA settlement itself was illegal, invalid and void in the eye of law.

9. After the order passed by the Additional Settlement Officer in Appeal Case No.1673/1983, Respondent No.3 is stated to have transferred a piece of land from Hal Plot No.282, 283(P) and 286 in favour of Govinda Pattnaik (Respondent No.2 in WA 467 of 2010). Respondent No.3 also transferred Plot measuring Ac 0.40 decimal from Hal Plot No.283 (P) in favour of Smt. Baisali Mohanty (Respondent No.2 in WA 468 of 2010) by registered sale deeds (RSDs) executed in the month of April, 1987.

10. However, Respondent No.3 did not challenge the order dated 14th October 1985 passed by the Additional Settlement Officer in Appeal Case No.1673 of 1983. Subsequently, the Hal ROR was published on 13th October 1987 in favour of CMC.

11. In 1995, eight years after publication of the 1987 ROR, Govind Pattanaik (Respondent No.2 in W.A. No.467 of 2010) and Smt. Baisali Mohanty (Respondent No.2 in W.A. No.468 of 2010) filed before the Tahasildar, Sadar, Cuttack Mutation Case Nos.1749, 1750 and 1751 of 1995 to mutate their names in respect of the said land. Notices were issued to the CMC by the Tahasildar. Without referring to the RSDs, the Tahasildar allowed mutation in respect of Ac.0.438 decimals in favour of the applicants and their vendor in separate Khata.

12. According to the CMC, the Tahasildar, without verifying the documents and hearing the matter in a proper perspective immediately granted Patta by creating a separate Stitiban Khata in favour of the purchaser being Khata No.49/03, 49/04 and 49/05. The above order of the Tahasildar was challenged by the CMC before the

Sub-Collector, Cuttack in Appeal Nos.87, 88 and 89 of 1996. The Sub-Collector dismissed the appeal of the CMC, thus upholding the order dated 7th January 1978 passed by the Tahasildar, Sadar in OEA Case No.3699 of 1976.

13. By an order dated 22nd August 2009, the Member Board of Revenue after analyzing the law and subject was pleased to set aside both the orders of the Tahasildar as well as the Sub-Collector.

14. The CMC filed an application before the Collector, Cuttack for taking up an inquiry with regard to the alleged OEA Case No. 3699/1976. The Collector inquired about the matter and ultimately came to conclusion vide order dated 26th September, 2001, that there is a prima facie fraud committed in the said OEA Record and the said case record is missing.

15. After the order passed by the Tahasildar as well as Sub-Collector, the purchasers Govinda Pattnaik and Smt. Baisali Mohanty got the land mutated in their favour. Patta was also issued in their favour since 1996. In 2001, the said two purchasers preferred R.P. Case Nos. 2161/2001 and 2162/2001 before the learned Commissioner of Land Records & Settlement seeking correction of the Hal ROR of the 1987 settlement in respect of Municipal Khata No.118 pertaining to Hal Plot No.282, 283 & 286 in their favour in a separate Khata on the ground that the said plot originally belonged to Sri Gajendra Kumar Acharya who was an Ex-intermediary and in Khas possession of the suit plot and that it stood settled in favour of his son Naba Kumar Acharya by the order dated 7th January 1978 passed by the Additional Tahasildar, Cuttack in OEA Case No.3699/1976.

16. R.P. Case Nos. 2161/2001 and 2162/2001 were dismissed on 20th December, 2002. Thereafter, Respondent No.2 filed Misc. Case No.794 of 2002, subsequently renumbered as Misc. Case No.15 of 2003, to implead Naba Kumar Acharya as a party in the aforesaid disposed of R.P. Cases. The notice issued thereon by the Joint Commissioner to Naba Kumar Acharya was not served on him. The process server submitted a report to the effect that the notice was served on one Lingaraj Acharya, son of Naba Kumar Acharya. Admittedly, no notice relating to the renumbered R.P. Case was served on the Opposite Parties in the said R.P. The Commissioner, nevertheless, by order dated 17th June 2003 restored R.P. Case Nos.2161/2001 and 2162/2001. Subsequently he passed an ex-parte order on 24th June 2003 allowing the two R.Ps.

17. CMC then filed Misc. Case No.78 of 2003 before the Joint Commissioner to recall the ex parte orders dated 17th and 24th June 2003. This was allowed by the Joint Commissioner and the above orders were recalled. However, subsequently, by an order dated 24th February 2004, R.P. No.1612 and 1613 of 2003 were again allowed by the Joint Commissioner. These orders were challenged in this Court by CMC in W.P.(C) Nos.12031 and 12032 of 2006.

18. In the impugned order dismissing the said petitions, the learned Single Judge has held that even if it were to be assumed that the lands were recorded in favour of the Cuttack Municipality in 1931 during the settlement operation, no documents had been produced to establish how CMC had acquired title over the lands. The learned Single Judge went on to observe as under:

> "In view of the clear position that settlement records neither create nor extinguish title and as the title of the ex-intermediary was virtually settled by the Civil Court and by the Privy Council, it can be safely concluded that the Cuttack Municipal Corporation cannot assail the same. Admittedly, out of the self-same area of Ac.0.606 decimals which was settled in favour of Naba Kumar Acharya, the ex-intermediary under the OEA Act had executed more than one sale deed in favour of the outsiders. No steps appear to have been taken by the Cuttack Municipal Corporation to claim right over the said property. At the other hand, the Cuttack Municipal Corporation had accepted their right, title and interest. Thus, it is not open to the Cuttack Municipal Corporation to assail the title of Opposite Party No.2 alone. Further, the Municipality is stopped from doing so in view of its past conduct."

19. As regards the plea of CMC that fraud had been practiced by Opposite Party No.3, the learned Single Judge held that the Settlement authorities have no jurisdictional authority to decide disputed questions of title. Therefore, while not interfering with the impugned orders of the Joint Commissioner, Settlement and Consolidation it was clarified that it would be subject to any decision as regards title to the land. It was clarified that if the title was decided in favour of the CMC by a competent Court, the RoR shall accordingly be corrected.

***Present appeals***

20. Notice was issued by this Court in the present writ appeals by the CMC on 1st May, 2019. At one stage during hearing of the writ appeals a question arose regarding availability of the original records of OEA Case No. 3699 of 1976. In its order dated 19th September, 2022 this Court recorded as under:

> "1. The contention of Mr. Misra, learned Senior Counsel appearing for the Appellant Cuttack Municipal Corporation (CMC) is that there is no record of OEA Case No.3699 of 1976 and that without ascertaining this fact the subsequent sale deeds have been registered in respect of Khata No.917 in Touza No. 2499 which according to him stood in the name of CMC since 1931.
>
> 2. Mr. Rath and other counsel appearing for the Respondents on the other hand contest the above submissions and point out that the CMC has, in fact, filed revision before the Board of Revenue arising from the same OEA case which is still pending before the Board of Revenue.
>
> 3. In order to resolve the issue whether the record of OEA Case No.3699 of 1976 is in fact available, a direction is issued to the State Government to produce the said record, if available, before the Court on the next date.
>
> 4. List on 8th December, 2022 along with W.A. No.468 of 2010."

21. Thereafter, on 8th December, 2022 learned Additional Government Advocate (AGA) sought time to trace out the record of OEA Case No. 3699 of 1976 and "if available, to produce it before the Court".

22. These writ appeals were heard on 29th March, 2023 when the Court was informed by the AGA, on the basis of written instructions, that despite a thorough search for the record of the aforementioned OEA Case in the office of the Tahasildar, Sadar Cuttack, the file was not traceable. The Court continued with the final hearing of the writ petitions.

***Submissions of counsel***

23. This Court has heard the submissions of Mr. S.P.Mishra, learned Senior Counsel appearing for the Appellants-CMC, Mr. Debakanta Mohanty, learned AGA for the State-Respondents and Mr. P.K. Rath, learned counsel for Respondent No.2 i.e. the Buyer and Mr. P.K. Satapathy and Mr. D.R. Mohapatra learned counsel also appearing for the Buyers.

24. Mr. S.P. Mishra, learned Senior Counsel for the CMC contended that CMC had throughout pointed out the fraud played by Respondent No.3 in getting the suit land recorded in his favour in 1978 by invoking the OEA Act. What was overlooked was that Respondent No.3 was neither an ex-landlord nor an intermediary in respect of Sabik Khata No.917 and therefore, settlement of such land in his favour in OEA Case No.3699/1976 was beyond the scope of the OEA Act and beyond the jurisdiction of the Addl. Tahasildar, Cuttack.

25. It is further pointed out by Mr. Mishra that when Touzi No.2499 of Mouza Bahar Bisinabar was recorded in favour of Gajender Kumar Acharya, the 1st part Khewat No. 5 which vested to the Government consisted of 3 Sabik Khata i.e. Khata No. 693, 694, 695. That Touzi did not consist of Sabik Municipal Khata No.917. So, the Sabik Municipal Plot No.1135/3776 under Khata No.917 was never vested in the Government. Hence, the Tahasildar had no jurisdiction to correct the ROR which was recorded in favour of the Appellant in the years 1931 and 1987.

26. Mr. Mishra, learned Senior Counsel, additionally relied on Section 55 of the Transfer of Property Act and submitted that no title existed in favour of Opposite Party No.3 at any point of time in respect of the land in the aforementioned Sabik Municipal Khata No.917. In other words, Respondent No.3 was neither in Exlandlord nor an Intermediary. Consequently, the settlement of such land in his favour in OEA Case No.3699/1976 was clearly impermissible in law. What was also overlooked is that the Member, Board of Revenue by order dated 22nd August, 2009 allowed OSS Nos.733-735/2003 filed by the CMC. The order passed by the Tahasildar, Sadar Cuttack was set aside. It is submitted that despite this fact being brought to the notice of the learned Single Judge, the writ petitions were disposed of without considering the said documents.

27. Mr. P.K. Rath, learned counsel for Respondent No. 2, sought to place reliance on the decision in ***Jt. Collector Ranga Reddy Dist v. D. Narsingh Rao AIR 2015 SC 1021*** and submitted that there was an inordinate delay in exercising the

revisional jurisdiction vis-à-vis entries made in the ROR in 1987 and, therefore, such objection should not have been entertained at all in the first place. It is submitted that the order dated 7th January, 1978 in OEA Case No.3699/1976 was based on the amin inquiry report dated 10th June, 1977. Further, salami rent has also been paid in respect of the property in question. He also pointed out that CMC's OEA Appeal No.4 of 2006 to challenge the order dated 7th January, 1978 passed by the Tahasildar in OEA Case No.3699/1976 was dismissed on 21st July, 2007 on the ground of limitation.

28. It must be added here that the order passed in Mutation Revision Case in O.S.S. No.733 of 2003, O.S.S. No.734 of 2003 and O.S.S. No.735 of 2003 was challenged before this Court in W.P.(C) No.20358 of 2009, W.P.(C) No.20359 of 2009 and W.P.(C) No.20361 of 2009. The said three writ petitions were disposed of with a direction that the right of the parties will be governed by the decision of this Court in the said pending writ appeals as well as the order to be passed in OEA Revision Case No.29 of 2009 pending before the Board of Revenue Orissa, Cuttack.

29. Mr. Rath further points out that both the purchasers i.e. Respondent No.2 in each of the writ appeals had purchased the land from Respondent No.3 by obtaining permission from the Administrative Officer, Urban Land Ceiling Section, Collectorate Cuttack on 19th March, 1971. The CDA had approved the building plans on 19th January, 1990. On 17th June, 1995 the Director, Municipal Administration restrained the CMC from interfering with the peaceful possession of the suit land.

30. It is pointed out that the order passed by the ASO on 28th June, 1983 upholding CMC's objection was reversed by the Additional Settlement Officer by order dated 14th October, 1985. It is accordingly submitted that the impugned orders do not require for any interference. Relying on the decision in ***Suraj Bhan v. Financial Commissioner (2007) 6 SCC 186*** it is submitted that the entries in the revenue record or zamabandi does not confer title on a person whose name appears in Record of Rights. No ownership, is conferred on the basis of such entry. So far as the title of the property is concerned it can only be decided by the competent Civil Court.

31. In support of the proposition that an order passed by the OEA authority has to be respected and followed by the Settlement Authority for preparation of ROR, reliance is placed on the decisions in ***State of Odisha v. Pravabati Das 2014 (II) OLR 649; Chunti Patra v. State of Odisha 81 (1996) CLT 292; Rama Devi (dead) v. Ch. Dhananjaya Mohapatra 2014(I) OLR 871; Narayan Chandra Pradhan v. The Tahasildar, Bhubaneswar 2013 (II) OLR 490; Prafulla Chandra Muduli v. State of Odisha (2005) Supp. OLR 950; Trilochan Singh v. Commissioner of Land Records 1995 (I) OLR 537*** and ***Manamohan Rout v. State of Odisha 1992 (II) OLR 529.*** Relying on the decision in ***M. Minakshi v. Metadin Agarwal (2006) 7***

***SCC 470,*** it is submitted that a void order is not non-est unless it is set aside by a competent Court of law.

***Analysis and reasons***

32. The above submissions have been considered. What is unable to be denied from the entire narration of facts is that the land always stood recorded in the name of CMC from 1931 onwards. Sabik Plot No.1135/3776 under Khata No.917 never vested in the Government. The land in question on the other hand was recorded twice in the ROR in favour of CMC, once in 1931 and then in 1987.There is, therefore, merit in the contention that in respect of such land, to allow the mutation in the ROR as was done by the Tahasildar on 30th May, 1996 was entirely without jurisdiction. It does appear that the fraud was practiced to get the RORs recorded in favour of Respondent No.3 who in turn sold to Respondent No.2. Respondent No.3 even did not possess valid title of the plot in question. He could not have conferred valid title on that basis.

33. The facts here appear to be tell-tale. The fact of the earlier settlement in favour of the Cuttack Municipality was not even noticed in the proceedings before the Additional Tahasildar in OEA Case No.3699/1976, if at all there were genuine proceedings. It will be recalled that these writ appeals were adjourned from time to time to require production of the original records of the said case. This was particularly important in light of the submission on behalf of the CMC as noted in this Court's order dated 19th September, 2022 that: "that there is no record of OEA Case No.3699 of 1976 and that without ascertaining this fact the subsequent sale deeds have been registered in respect of Khata No.917 in Touza No.2499 which according to him stood in the name of CMC since 1931." As it transpires, that record is not available. This was overlooked by both the learned Single Judge while passing the impugned order and the Joint Commissioner who dismissed the revision petitions of the CMC. The absence of the original record makes the grant of certified copies of the documents relied upon by the Respondents 2 and 3 in both writ appeals, even more suspicious. The absence of an original record, despite diligent search by the office of the Tahasildar, Cuttack must, in the circumstances explained hereinbefore, lead to an adverse inference against Respondents 2 and 3. This Court has no hesitation to conclude that the original order dated 7th January, 1978 of the OEA Collector-cum-Additional Tahasildar, Cuttack in Vesting Case No. 3699 of 1976 was obtained by fraud.

34. The law is well settled that fraud vitiates all transactions. In ***S.P Chengalvaraya Naidu vs Jagannath AIR 1994 SC 853***, the Supreme Court explained:

> "The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being

> abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation."

In the same decision the Supreme Court explained: "A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage."

35. In ***A. V. Pappaya Sastry v. Govt. of A.P. (2007) 4 SCC 211***, the Supreme Court held:

> "Now, it is well settled principle of law that if any judgment or order is obtained by fraud, it cannot be said to be a judgment or order in law. Before three centuries, Chief Justice Edward Coke proclaimed; "Fraud avoids all judicial acts, ecclesiastical or temporal".
>
> It is thus settled proposition of law that a judgment, decree or order obtained by playing fraud on the Court, Tribunal or Authority is a nullity and non est in the eye of law. Such a judgment, decree or order by the first Court or by the final Court has to be treated as nullity by every Court, superior or inferior. It can be challenged in any Court, at any time, in appeal, revision, writ or even in collateral proceedings. In the leading case of *Lazarus Estates Ltd. v. Beasley, (1956) 1 All ER 341* Lord Denning observed:
>
> "No judgment of a court, no order of a Minister, can be allowed to stand, if it has been obtained by fraud."
>
> In *Duchess of Kingstone, Smith's Leading Cases*, 13th Edn., p.644, explaining the nature of fraud, de Grey, C.J. stated that though a judgment would be res judicata and not impeachable from within, it might be impeachable from without. In other words, though it is not permissible to show that the court was 'mistaken', it might be shown that it was 'misled'. There is an essential distinction between mistake and trickery. The clear implication of the distinction is that an action to set aside a judgment cannot be brought on the ground that it has been decided wrongly, namely, that on the merits, the decision was one which should not have been rendered, but it can be set aside, if the court was imposed upon or tricked into giving the judgment. It has been said; Fraud and justice never dwell together (fraus et jus nunquam cohabitant); or fraud and deceit ought to benefit none (fraus et dolus nemini patrocinari debent).
>
> Fraud may be defined as an act of deliberate deception with the design of securing some unfair or undeserved benefit by taking undue advantage of another. In fraud one gains at the loss of another. Even most solemn proceedings stand vitiated if they are actuated by fraud. Fraud is thus an extrinsic collateral act which vitiates all judicial acts, whether in rem or in personam. The principle of 'finality of litigation' cannot be stretched to the extent of an absurdity that it can be utilized as an engine of oppression by dishonest and fraudulent litigants."

36. Mr. P.K. Rath, learned counsel for the Respondent No. 2 relied upon the decision in ***Jt. Collector Ranga Reddy Dist*** *(supra)* where it was *inter alia* observed that "Even in cases where the orders sought to be revised are fraudulent, the exercise of power must be within a reasonable period of the discovery of fraud." However, in this particular case the CMC has at the earliest point in time after it discovered the

fraud been urging the said plea in the proceedings before various fora. The orders in its favour in the other contemporary proceedings under the Odisha Survey and Settlement Act, as noticed earlier, were passed on that basis.

37. This Court is satisfied that in the present case the order dated 7th January, 1978 passed by the Additional Tahasildar in OEA Case No.3699 of 1976 was vitiated by fraud and, therefore, all the consequential orders also have to be declared illegal.

38. For the aforementioned reasons, the impugned order of the learned Single Judge is set aside. Correspondingly, the orders dated 24th February, 2004 passed by the Joint Commissioner, Settlement and Consolidation dismissing R.P. Case Nos.1612 and 1613 of 2003 is also hereby set aside. Further, and again correspondingly, the order dated 7th January, 1978 of the OEA Collector-cum-Additional Tahasildar, Cuttack in Vesting Case No. 3699 of 1976 recording the settling the lands in favour of the Respondent No.3 is also hereby set aside. If the present occupants of the plots in question do not hand over vacant and peaceful possession thereof to the CMC on or before 1st July, 2023, it will be open to CMC to take possession thereof in accordance with law.

39. The writ appeals are accordingly allowed in the above terms. The interim order is vacated but, in the circumstances, with no order as to costs.

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## 2023 (I) ILR – CUT-932

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

WPCRL NO. 93 OF 2022

**1. D. ANITA MAJHI @ MILA** .....Petitioners
**2. NIKITA MAJHI@MINATI @BUMBULI NARENGEKE**
**3. SUSHANTI MAJHI@JHUNU**

-V-

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

**CONSTITUTION OF INDIA, 1950 – Article 21 – Speedy trial – The petitioners are languishing in custody near about 8 years – During their detention & to their dismay, they were shown to be accused in some cases in which investigation is pending – Whether the petitioners are entitled to enforce fundamental right and secure their release ? – Held, Yes – The delay in completing the trial appears un-surmountable and**

**the petitioners right enshrined under Article 21 is offended everyday – The Court directed the Trial Court to complete the trial within four months, or else the petitioners be released on bail on suitable terms and conditions.** (Paras 7, 9, 24)

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

1. AIR 1979 SC 1369 : Hussainara Khatoon & Ors. Vs. Home Secretary, State of Bihar, Patna.
2. (1978) 2 SCR 621 : Maneka Gandhi Vs. Union of India.
3. 1992 AIR 1701 : Abdul Rehman Antulay and Ors. Vs. R.S. Nayak and Ors.
4. (1996) 4 SCC 33 : Common Cause Vs. Union of India and Ors.
5. (2013) 1 SCC 314 : Manubhai Ratilal Patel Tr. Ushaben Vs. State of Gujarat & Ors.

For Petitioner : Mr. P.K. Jena

For Opp. Parties: Mr. J. Katikia, Addl. Govt. Adv.

JUDGMENT Date of Judgment: 09.02.2023

***S. TALAPATRA, J.***

1. We have heard Mr.P.K. Jena, learned counsel appearing for the Petitioners as well as Mr. J. Katikia, learned Additional Government Advocate appearing for the State-Opposite Parties.

2. By means of this petition, the Petitioners have urged this court to quash the cases catalogued under Annexure-1,which are pending against the Petitioners either in the investigation stage or where the trial has been held up. A catalogue of those cases where the trial has commenced, but not concluded have been provided by the Petitioners including their status on the day of filing of the writ petition.

3. Mr. Jena, learned counsel appearing for the Petitioners in his submission has drawn our attention to similar other cases where the Petitioners have already been acquitted. He has further added that Petitioners are being hunted by the State for their social activities, non-violent and peaceful in nature. But the State has, without any foundation, considered their activities as hostile to the State and deliberately branded their activities as "extremist" which are absolutely unfounded and unsustainable.On similar allegations, several other cases were filed against the Petitioners and they have been acquitted in those cases after trial, as would be evident from the table below.

**CASES IN WHICH PETITIONERS WERE ACQUITTED**

| Sl.No. | P.S. Case No. & Date | G.R. Case No. | Trial Court & ST Case No. | Acquitted on |
|---|---|---|---|---|
| 1 | Adava P.S. No. | 73/2010(C) | Sessions Judge, Gajapati Parala khemundi (81/2014) | 04.07.2016 |
| 2. | Adava P.S. No.26 Dt.12/13.05.2010 | 113/2010(D) | Sessions Judge, Gajapati Paralakhemundi (83/2014) | 18.11.2016 |

| | | | | |
|---|---|---|---|---|
| 3. | Mohana P.S. No.24 Dt.11.03.2013 | 40/2013 | Sessions Judge, Gajapati Paralakhemundi (75/2014) | 15.03.2018 |
| 4. | Mohana P.S. No.19 Dated 28.02.2014 | 22/2014 | Sessions Judge, Gajapati Paralakhemundi (84/2014) | 16.07.2018 |
| 5. | Mohana P.S. No.21 Dtd.08.03.2013 | 38/2013 | Addl. Sessions Judge, Gajapati Paralakhemundi (79/2014) | 04.07.2017 |
| 6. | Adava P.S No. 14 Dated 24.03.2010 | 16/2010 (D) | Sessions Judge, Gajapati Paralakhemundi (78/2014) | 23.06.2017 |
| 7. | Adava P.S No. 23 Dated 01.05.2010 | 105/2010(B) | Sessions Judge, Gajapati Paralakhemundi (82/2014) | 15.03.2017 |
| 8. | Adava P.S No. 58 Dated 23.10.2010 | 221/2010(B) | Sessions Judge, Gajapati Paralakhemundi (80/2014) | 17.02.2017 |
| 9. | Adava P.S No. 17 Dated 20.10.2011 | 135/2011 | Addl. Sessions Judge, Gajapati Paralakhemundi (77/2014)(T) | 01.07.2015 |
| 10. | Mohana P.S No. 84 Dated 21.12.2010 | 250/2010(A) | Sessions Judge, Gajapati Paralakhemundi (76/2014) | 22.08.2017 |

It may be noted that the above catalogue of cases in which the Petitioners have been acquitted was prepared on the date of filing of the writ petition i.e. on 22.07.2022. The status of these cases has been updated by the affidavits filed by the parties. The updated status would be discussed later.

4. Mr. Jena, learned counsel appearing for the Petitioners has empathetically stated that the grievances of the Petitioners in nutshell are that (i) there is inordinate delay in completion of investigation and filing the police report (ii) in some cases, though the charge-sheet has been filed there is inordinate delay in taking cognizance of the offence for not submitting the sanction from the designated authority and the courts have been waiting for a long time which is not expected of the courts, (iii) in some cases, the Petitioners were not even produced before the Magistrates at regular intervals as required by the law (iv) in some cases, trial in respect of the accused commenced but the Petitioners were not produced to face the trial along with the other co-accused, (iv) in some cases,trial has begun but the cases are repeatedly adjourned for non-attendance of the prosecution witnesses and (v) the Petitioners were not informed about some cases pending against them, even though they are in the judicial custody.According to Mr. Jena, learned counsel in some cases, this court was pleased to intervene and direct the State to produce the Petitioners, where they were not produced.

5. The decision in ***Hussainara Khatoon & Ors. vs. Home Secretary, State of Bihar, Patna:*** AIR 1979 SC 1369 has been pressed into service. Apart that, in Paragraph-9 of the writ petition, the Petitioners have made reference to the common judgment delivered in CRLMC No. 2358 of 2019 and CRLMC No.2359 of 2019, instituted by the Petitioners, where it has been observed that "the Petitioners are in the judicial custody for nearly six years and hence, the court is of the considered view that there is an urgent need and necessity to direct the concerned courts to

expedite disposal of the cases and complete the trial within the stipulated time". It has been further observed in the said common order that the Petitioners continued to be detained without being produced and remanded by the concerned court below for non-availability of security escort, a phenomenon which cannot be appreciated. It has been observed that since the Petitioners are shown to have been implicated after four years from the date of the alleged incident, following the principle as enunciated in ***Hussainara Khatoon*** (supra), this court was pleased to direct the courts below, where the cases of the Petitioners were pending to enlarge them on bail taking into account the peculiar facts and circumstances of the cases. It has been further directed that the court concerned shall expedite early commencement of trial and ensure its completion preferably within a period of six months and unless there is un-surmountable impediment, the Petitioners shall be released on bail on appropriate terms and conditions as deemed just and proper. The said common order dated 07.01.2022 is available at Annexure-2 to the writ petition.

6. Mr. Jena, learned counsel has submitted that the present Petitioners are in the judicial custody for over last eight years being implicated in a slew of cases. The Petitioners cannot be blamed for the said delay in progress of the trial and as such, it is the duty of the State to take all such appropriate steps to complete the trial, as expeditiously as possible in just and fair manner. To buttress his contention, Mr. Jena, learned counsel has referred to the observation made in ***Hussainara Khatoon*** (supra) by the Apex Court, which reads as follows:

> *"There is also one other infirmity of the legal and judicial system which is responsible for this gross denial of justice to the under-trial prisoners and that is the notorious delay in disposal of cases. It is a sad reflection on the legal and judicial system that the trial of an accused should not even, commence for a long number of years. Even a delay of one year in the commencement of the trial is bad enough: how much worse could it be when the delay is as long as 3 or 5 or 7 or even 10 years, speedy trial is of the essence of criminal justice and there can be no doubt that delay in trial by itself constitutes denial of justice. It is interesting to note that in the United States, speedy trial is one of the constitutionally guaranteed rights. The Sixth Amendment to the Constitution provides that, in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. So also Article 3 of the European Convention on Human Rights provides that, every one arrested or detained shall be entitled to trial within a reasonable time or to release pending trial."*

7. Having referred to ***Maneka Gandhi vs. Union of India***: (1978) 2 SCR 621, it has been further held in ***Hussainara Khatoon*** that Article 21 confers a fundamental right on every person not to be deprived of his life or liberty except in accordance with the procedure prescribed by law. The procedure should be reasonable, fair and just. If a person is deprived of his liberty under a procedure which is not reasonable, fair or just, such deprivation would be violative of his fundamental right protected under Article 21 and he would be entitled to enforce such fundamental right and secure his release. No procedure which does not ensure a speedy trial can be regarded as reasonable fair or just and it would play foul with the provisions of Article 21. In ***Hussainara Khatoon*** (supra) it has been further observed as follows:

> *"There, can, therefore, be no doubt that speedy trial, and by speedy trial we mean reasonably expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21. The question which would, however, arise is as to what would be the consequence if a person accused of an offence is denied speedy trial and is sought to be deprived of his liberty by imprisonment as a result of a long delayed trial in violation of his fundamental right under Article 21. Would he be entitled to be released unconditionally freed from the charge leveled against him on the ground that trying him after an unduly long period of time and convicting him after such trial would constitute violation of his fundamental right under Article 21? That is a question we shall have to consider when we hear the writ petition on merits on the adjourned date. But one thing is certain and we cannot impress it too strongly on the State Government that, it is high time that the State Government realised its responsibility to the people in the matter of administration of justice and set up more courts for the trial of cases."*

8. In the case in hand, the Petitioners are languishing in custody for about 8 years. During their detention to their dismay, they were shown to be accused in some cases in which investigation is pending. Mr.Jena, learned counsel has emphasized that in all the similar types of cases, where the trial has been completed, the Petitioners were acquitted as there was no evidence against them. This is a ploy to keep the Petitioners behind the bars. The delay in completing the trial appears un-surmountable and the Petitioners' right enshrined under Article 21 is offended every day.

9. In ***Abdul Rehman Antulay and Ors. vs. R.S. Nayak and Ors***. : 1992 AIR 1701, the Apex Court while delving on the right to speedy trial held that it encompasses all the stages, namely the stage of investigation, inquiry, trial, appeal, revision and retrial. The concerns underlying the right to speedy trial as highlighted in ***Abdul Rehman Antulay*** (supra) are as follows:

> *"(a) the period of remand and pre-conviction detention should be as short as possible. In other words, the accused should not be subjected to unnecessary or unduly long incarceration prior to his conviction.*
>
> *(b) the worry, anxiety, expense and disturbance to his vocation and peace, resulting from an unduly prolonged the investigation, inquiry or trial should be minimal; and*
>
> *(c) undue delay may well result in impairment of the ability of the accused to defend himself, whether on account of death, disappearance or non-availability of the witness or otherwise."*

10. It has been asserted that this Court in some bail petitions viz, BLAPL No.4362/2019 and BLAPL No.4363/2019 concerning the Petitioners having rejected the prayer of bail had specifically directed the trial courts to complete the trial as expeditiously as possible. The Petitioners are poor tribal ladies and they intended to improve their standard of life. To achieve their cause, they have participated in certain non-violent activism. According to Mr. Jena, learned counsel, it is the fundamental right of the Petitioners in a democracy to voice their grievances and that activism cannot be brought within the fold of criminality in the manner that has been done by the State in the cases of the Petitioners. It reflects poorly on functioning of a democracy.

11. Mr. J. Katikia, learned Additional Government Advocate has raised the question of maintainability of this writ petition for issuance of a writ of habeas corpus. True it is that the present writ petition cannot be entirely treated as a writ petition for a writ of habeas corpus. But in view of the various judgments, such as ***Hussainara Khatoon*** (supra) and the ***Common Cause vs. Union of India and others***: (1996) 4 SCC 33 the detention of the Petitioners for more than 8 years is serious infringement of fundamental right to liberty.The Petitioners have approached this court for issuance of the writ of habeas corpus for their release. Mr. Katikia, learned Additional Government Advocate has relied on the decision of the Apex Court in ***Manubhai Ratilal Patel Tr. Ushaben vs. State of Gujarat and Ors.:*** (2013) 1 SCC 314, where the Apex Court held that unless the writ court is satisfied that a person has been committed to jail custody by virtue of an order that suffers from the vice of lack of jurisdiction or absolute illegality, the writ of habeas corpus cannot be issued.

12. We are of the considered view that, in this case, a writ of habeas corpus cannot be issued, but the fundamental constitutional aspects, as raised by the Petitioners need our consideration.

13. The Petitioners are poor tribal ladies. They cannot be pushed to further litigation by merely accepting the technical objection raised by Mr. Katikia, learned Additional Government Advocate. We shall lay our observations later, after scrutinizing the statements and the information made available to us.

14. The State through the Opposite Party No.2 has filed an affidavit in terms of our order dated 09.09.2022, as we expressed doubt about the status of the cases pending against the Petitioners. By our order dated 09.09.2022, we directed the State to file a short affidavit. In compliance, the Opposite Parties No.2 and 3 have filed two affidavits respectively on 05.09.2022 and 08.09.2022. In those affidavits, the State has provided the status of the cases as referred in the writ petition and also the status of the investigation, wherever it is relevant. Another affidavit has been filed by the Opposite Party No.2 on 19.10.2022 by showing the cases pending against each of the writ petitioners.

15. For purpose of reference, the cases which are pending against the Petitioner No.2, namely, Nikita Majhi @ Minati @ Bumbuli Nrengeke from the Ganjam District are as follows:

**Details of Cases Registered Against Nikita Majhi @ Minati @ Bumbuli Nrengeke In Sorada P.S.**

| Sl. No. | SORADA P.S. CASE REFERENCE | GR. NO. | CASE IN WHICH THE TRIAL COMMENCED BUT IT IS NOT CONCLUDED | CASES PENDING IN THE STAGE OF INVESTIGATION | CASES PENDING BEFORE THE HON'BLE COURT |
|---|---|---|---|---|---|

| | | | | | |
|---|---|---|---|---|---|
| 1 | Case No.129 dtd.31.12.12 U/s.121/120(b)/121-A/124-A/435 IPC/7 CRLA Act -1982/17 CRLA Act-1908/Sec.3 the young persons harmful publication Act-1956 | 02/2013(A)/ST No.136/18 | Judgment on 15.10.2022 | Disposed | ADJ, Bhanjanagar |
| 2. | Case No.95 dtd.12.11.2011 U/s.10/16/18/20 UAP Act/Sec.4 & 5 of Explosive Substance Act | No.145/11-A/ST No.135/18 | Judgment closed on 13.09.2022 | Disposed | ADJ, Bhanjanagar |
| 3. | Case No.123 dtd.22.12.2012 U/s.307/34/121/120-B IPC/16/18/18-A/20 UAP Act./4 & 5 Explosive Substance Act | No.199/12-A/ST No.134/18 | Judgment on 14.09.2022 | Disposed | ADJ, Bhanjanagar |
| 4. | Case No.128 Dtd.31.12.2012 U/s.121/120-B/121-A/124-A/435 IPC/7 CRLA Act.- 1932/17 CRLA Act-1908/Sec.3 The young persons harmful publication Act-1956 | No.01/13-A/ST No.137/18 | Judgment on 14.10.2022 | Disposed | ADJ, Bhanjanagar |
| 5. | Case No.106 Dtd.21/12/2011 U/s.144/148/149/435/IPC/7 CRLA Act-1932/17 CRLA Act 1908/16/17/18/20 UAP Act-2008/25(1-B) Arms Act./Sect.3 The young persons harmful publication Act-1956/3 & 4 Explosive Substance Act | No.164/11-A/ST No.56/20 | (Total 15 Witness) No witnesses examined | Trial Stage | ADJ, Bhanjanagar |

The cases registered against the Petitioner No.2 in Badagada P.S. as per statement made by the Opposite Party No.2 are as follows:

**Details of Cases Registered Against Nikita Majhi @ Minati @ Bumbuli Nrengeke In Badagada P.S.**

| Sl.No. | BADAGADA P.S. CASE REFERENCE | GR. NO. | CASE IN WHICH THE TRIAL COMMENCED BUT IT IS NOT COCLUDED | CASES PENDING IN THE STAGE OF INVESTIGATION | CASES PENDING BEFORE THE HON'BLE COURT |
|---|---|---|---|---|---|

| | | | | | |
|---|---|---|---|---|---|
| 1. | Case No.18 dtd.22.02.2010 U/s.121/121/A/120-B/124-A/34 IPC/ Sec.19/13/16/18-A UAP Act/Sec.3 & 4 E.S. Act | No.27/2010 | The case has been split up into ST-87/16,162/17, 133/18,131/15,100/20 in the case Total 16 No. of witnesses are examined out of 16 witness ST-87/16 (2 nos.) ST-162/17 (4 nos.), ST-133/18(7nos), ST-131/15 (4 nos), ST-100/20 (15 Nos. witness not been examined till now | The case is under trial | ADJ, Bhanjanagar |
| 2. | Case No.06 Dtd.24.01.2011 U/s.120-B/121/121-A/124-A/Sec.7 CRLA Act/Sec.10/16/18-A/13/20/39/40 UAP Act. | No.164/11A/ST-56/20 | The case has been split up into ST-86/16, 61/17, 132/15,99/20 in the case Total 14 No. witnesses are examined but in ST No.86/16 (1 nos.), ST-132/15 (1 nos), ST-99/20 (16 Nos.) of witness are to be examined | The case is under trial | ADJ, Bhanjanagar |
| 3. | Case No.28 Dtd.30.04.2012 U/s.307/292 IPC/16/18/20 UAP Act./7 & 17 CRLA Act./Sect.25 (1-B(a)/ 27 Arms Act./Sec.3 The young persons harmful publication Act-1956/3 & 4 Explosive Substance Act | No.54/12 | The charges against the accused persons have been framed on 17.01.2022 | No. witnesses have been examined till date | ADJ, Bhanjanagar |
| 4. | Case No.4 Dtd.19.01.2011 U/s.120-B/121/121-A/435/379/149 IPC/Sec.17 of CRLA Act./Sec.10/13/16/18-A/20/39/40 of UAP Act. | No.06/11 | The case is under trial | The case has been splitted up into ST.53/20,55/20 ,08/21,37/21,94/20, Total 16 Nos. of Witnesses Examined 02 More witnesses have not been examined | ADJ, Bhanjanagar |
| 5. | Case No.45/13 Dtd.14/04/2013 U/s.120-B/121/121-A/122/124-A/307 IPC/Sec.25(1-B)(a)/27 Arms Act/Sec.3&4 E.S. Act./Sec.3 The young persons harmful publication Act-1956/3 & 4 Explosive Substance Act | No.66/2013 | The case is under trial | -- | ADJ, Bhanjanagar |

| | | | | | |
|---|---|---|---|---|---|
| 6. | Case No.05 Dtd.19.01.2011 U/s-120-B/121/121-A/ 124-A/435/436 IPC | No.07/2 011 | Judgment | Judgment has been pronounced on 19.08.2022 and the accused persons are found not guilty | ADJ, Bhanjanagar |

16. So far as the Petitioner No.3, namely, Sushanti Majhi @ Jhunu is concerned, it has been informed by the State that the following cases are pending in the Badagada P.S.

**DETAILS OF CASES REGISTERED IN BADAGADA P.S.**

| Sl. No. | BADAGADA P.S. CASE REFERENCE | GR. NO. | CASE IN WHICH THE TRIAL COMMENCED BUT IT IS NOT COCLUDED | CASES PENDING IN THE STAGE OF INVESTI GATION | CASES PENDING BEFORE THE HON'BLE COURT |
|---|---|---|---|---|---|
| 1 | Case No.18 dtd.22.02.2010 U/s.121/121/A/120-B/124-A/34 IPC/Sec.19/13/16/18 -A UAP Act/Sec.3 & 4 E.S. Act | No.27/ 2010 | The case has been split up into ST-87/16,162/17,133/18,131/15,100/ 20 in the case Total 16 No. of witnesses are examined out of 16 witness ST-87/16 (2 nos.) ST-162/17 (4 nos.), ST-133/18(7nos), ST-131/15 (4 nos), ST-100/20 (15 Nos. witness not been examined till now | The case is under trial | ADJ, Bhanjanagar |
| 2. | Case No.06 Dtd.24.01.2011 U/s.120-B/121/121-A/124-A/Sec.7 CRLA Act/Sec.10/16/18-A/13/20/39/40 UAP Act. | No.16 4/11A/ ST-56/20 | The case has been splitted up into ST-86/16, 61/17,132/15,99/20 in the case Total 14 No. witnesses are examined but in ST No.86/16 (1 nos.), ST-132/15 (1 nos), ST-99/20 (16 Nos.) of witness are to be examined | The case is under trial | ADJ, Bhanjanagar |
| 3. | Case No.28 Dtd.30.04.2012 U/s.307/292 IPC/16/18/20 UAP Act./7 & 17 CRLA Act./Sect.25 (1-B(a)/27 Arms Act./Sec.3 The young persons harmful publication Act-1956/3 & 4 Explosive Substance Act | No.54/ 12 | The charges against the accused persons have been framed on 17.01.2022 | No. witnesses have been examined till date | ADJ, Bhanjanagar |

| | | | | | |
|---|---|---|---|---|---|
| 4. | Case No.4 Dtd.19.01.2011 U/s.120-B/121/121-A/435/379/149 IPC/Sec.17 of CRLA Act./Sec.10/13/16/18-A/20/39/40 of UAP Act. | No.06/ 11 | The case is under trial | The case has been splitted up into ST.53/20,55/20,08/21, 37/21,94/20, Total 16 Nos. of Witnesses Examined 02 More witnesses have not been examined | ADJ, Bhanjanagar |
| 5. | Case No.45/13 Dtd.14/04/2013 U/s.120-B/121/121-A/122/124-A/307 IPC/Sec.25(1-B)(a)/27 Arms Act/Sec.3&4 E.S. Act./Sec.3 The young persons harmful publication Act-1956/3 & 4 Explosive Substance Act | No.66/ 2013 | The case is under trial | -- | ADJ, Bhanjanagar |
| 6. | Case No.05 Dtd.19.01.2011 U/s-120-B/121/121-A/124-A/435/436 IPC | No.07/ 2011 | Judgment | Judgment has been pronouncd on 19.08.2022 and the accused persons are found not guilty | ADJ, Bhanjanagar |

17. By a separate affidavit filed by the Opposite Party No.3, it has been stated that the Petitioner No.2 is involved in 22 cases of Gajapati district and the charge-sheets have been filed in all those cases and out of those 22 cases, the Petitioner No.2 has been acquitted in 09 cases and 13 cases are pending for trial. Those are described in two tables below:

**Cases where acquittal has been ordered**

| | | | |
|---|---|---|---|
| 1 | 44/10 68/10 | Adava PS Case No.14. dtd. 24.03.2010, 147/148/435/120(B)/121/121(A)/ 124(A)/427/149 IPC /25 Arms Act/17 Cr.L.A. Act/10/13 of U.A. (P) Act | Acquittal |
| 2 | 47/10 73/10 | Adava PS Case No.15. dtd. 25.03.2010, 147/148/435/120(B)/121/121(A)/ 124(A)/427/149 IPC /17 Cr.L.A. Act/10/13 of U.A. (P) Act/3 P.D.P.P. Act | Acquittal |
| 3. | 54/10 105/10 | Adava PS Case No.23. dtd. 01.05.2010 u/s.120(B)/121/124(A)/149 IPC/25 Cr.L.A. Act/3 & 4 E.S. Act/10/13 of U.A. (P) Act/17 Cr.L.A. Act | Acquittal |
| 4 | 58/10 221/10 | Adava PS Case No.26. dtd. 12.05.2010, 147/148/302/395/120(B)/121/121(A)/124(A)/149 IPC/25/27 Arms Act/17 Cr.L.A Act/10/13/16/18/20 of U.A. (P) Act. | Acquittal |

| | | | |
|---|---|---|---|
| 5. | 86/10<br>221/10 | Adava PS Case No.58. dtd. 23.10.2010, 120(B)/121/121(A)/124(A) IPC/25/27 Arms Act/17 Cr.L.A Act/10 &13 U.A. (P) Act. | Acquittal |
| 6. | 92/10 | Mohana PS Case No.84 dt. 21.12.10 U/s.147/148/342/120(B)/121/121(A) /436/506/149 IPC/25/27 Arms Act/17 Cr.L.A. Act/10/13 U.A. (P) Act | Acquittal |
| 7. | 67/11 | Adava PS Case No.37. dtd. 20.10.2011 U/s. 147/148/120(B)/121/121(A)/ 124(A)/149 IPC/17 Cr.L.A Act/16/18 of U.A. (P) Act. | Acquittal |
| 8. | 22/13 | Mohana PS Case No.24 dtd. 11.03.2013 U/s.147/148/307/120(B)/ 121(A)/124 (A)149 IPC/25/27 Arms Act/17 Cr.L.A. Act/16,18,20,23,38 of U.A. (P) Act | Acquittal |
| 9. | 22/14 | Mohana PS Case No.19 dtd. 28.02.2014 U/s.147/148/120(B)/121/ 121(A)/124(A) 149 IPC/17 Cr.L.A. Act/25/ Arms Act/4(b)9i)/5(a) E.S. (Amendment) Act, 2001/17/18/18(a)/20/23(1) U.A. (P) Act | Acquittal |

Cases where trial is pending against the Petitioner No.2 have been provided in a table:

| | | | |
|---|---|---|---|
| 1. | 10/09<br>29/09 | Adava PS Case No.7 Dt.16.02.09 u/s.121/121-A/124(A)/307/427/ 332/333 IPC/25/27 Arms Act/3 & 4 E.S. Act/17 Cr.L.A. Act/10/13 U.A.(P) Act | Charge sheeted /pending trial |
| 2. | 101/09<br>260/09 | Adava PS Case No.43. dtd. 28.12.09, u/s.147/148/435/120(B)/ 121/121(A)/124(A)/149 IPC /25/27 Arms Act/ 17 Cr.L.A. Act/3 P.D.P.P. Act/ 10/13 U.A. (P) Act | Charge sheeted /pending trial |
| 3. | 102/09<br>261/09 | Adava PS Case No.44. dtd. 28.12.2009, u/s.147/148/435/120(B)/ 121/121(A)/124(A)/149 IPC /25/27 Arms Act/ 17 Cr.L.A. Act/3 P.D.P.P. Act/ 10/13 U.A. (P) Act | Charge sheeted /pending trial |
| 4. | 103/09<br>262/09 | Adava PS Case No.45. dtd. 28.12.2009, u/s.147/148/435/120-B/ 121/121(A)/124(A)/149 IPC /25/27 Arms Act/ 17 Cr.L.A. Act/10/13 U.A. (P) Act/ 3 P.D.P.P. Act | Charge sheeted /pending trial |
| 5. | 104/09<br>263/09 | Adava PS Case No.46. dtd. 28.12.2009, u/s.147/148/435/120-B/ 121/121(A)/124(A)/149 IPC /25/27 Arms Act/ 17 Cr.L.A. Act/3 P.D.P.P. Act/ 10/13 U.A. (P) Act | Charge sheeted /pending trial |
| 6. | 105/09<br>264/09 | Adava PS Case No.47. dtd. 30.12.2009, u/s.147/148/435/120-B/ 121/121(A)/124(A)/149 IPC /25/27 Arms Act/ 17 Cr.L.A. Act/10/13 U.A. (P) Act | Charge sheeted /pending trial |
| 7. | 87/10<br>233/10 | Adava PS Case No.63. dtd. 05.11.2010, u/s.147/148/120(B)/ 121/121(A)/124(A)/149 IPC /25/27 Arms Act/ 17 Cr.L.A. Act/10 &13 U.A. (P) Act | Charge sheeted /pending trial |
| 8. | 03/11<br>2/11 | Adava PS Case No.01. dtd. 10.01.2011, u/s.147/148/435/427/120(B)/ 121/121(A)/124(A)/283/149 IPC /25/27 Arms Act/ 17 Cr.L.A. Act/10 &13 U.A. (P) Act, 3 PDPP Act. | Charge sheeted /pending trial |
| 9. | 53/12<br>99/12 | Mohana PS Case No.40. dtd. 22.06.2012, u/s.120(b)/121/121(a)/ 124(A)/ 468 IPC/17 Cr.L.A. Act/16/18/20 UAP Act | Charge sheeted /pending trial |
| 10 | 118/12<br>184/12 | Mohana PS Case No.71. dtd. 19.11.2012, u/s.120(b)/121/121(a)/124(a) IPC/17 Cr.L.A. Act/25/27/ Arms Act/3 & 4 E.S. Act/16/18/20 UAP Act | Charge sheeted /pending trial |
| 11. | 120/12<br>191/12 | Mohana PS Case No.73 dtd. 05.12.2013 u/s.120(B)/121/121(A)/124 (A)/153(B) IPC/17 Cr.L.A. Act /25 Arms Act/3 & 4 E.S. Act /16,18,20,38 of U.A. (P) Act | Charge sheeted /pending trial |
| 12 | 21/13<br>38/13 | Mohana PS Case No.21 dtd. 8.3.2013 u/s.147/148/307/386/364/368/120(B)/121/121(A)/124 (A)/153(B) /149 IPC/25/27 Arms Act/16,18,18-A,23 of U.A. (P) Act | Charge sheeted /pending trial |
| 13. | 117/12 | Mohana PS Case No.69 dtd. 14.11.2012 u/s.147/148/307/ 120(B)/ 121(A)/124 (A)/153(B) /149 IPC/25/27 Arms Act/17 (2) Cr.L.A. Act/3& 4 E.S. Act/16/19/20 U.A. (P) Act | Charge sheeted /pending trial |

18. So far as the Petitioner No.3 is concerned, she is involved in 15 cases and the charge sheets have been submitted in all these cases. Out of 15 cases, she has been acquitted in 05 cases and 10 cases are still pending for trial. The details of the cases where the Petitioner No.3 has been acquitted are given in a table below:

**LIST OF ACQUITTAL CASES**

| | | |
|---|---|---|
| 1. | Mohahana PS Case No.21 . Dtd. 8.03.2013 u/s.147/148/307/386/364/368/ 120(B)/121/121(A)/124(A)/153(B)/149 IPC/25/27 Arms Act/16,18,18-A, 23 of UAP Act | Acquittal |
| 2. | Mohahana PS Case No.84 . Dtd. 21.12.10 u/s.147/148/342/120(B)/121/121(A)/ 436/506/149 IPC/25/27 Arms Act/17 Cr.L.A. Act/10/13 of U.A.(P) Act | Acquittal |
| 3. | Adava PS Case No.37 Dtd. 20.10.2011 u/s.147/148/120(B)/121/121(A)/124(A) 149 IPC/17 Cr.L.A. Act/16/18 of U.A.(P) Act | Acquittal |
| 4. | Mohahana PS Case No.24 dtd. 11.3.2013 u/s.147/148/307/120(B)/121(A)/ 124(A)/149 IPC/25/27 Arms Act/17 Cr.L.A. Act/16,18,20,23,38 of UAP Act | Acquittal |
| 5. | Mohahana PS Case No.19 dtd. 28.02.201 u/s.147/148/120(B)/121/121(A)/ 124(A)/149 IPC/17 Cr.L.A. Act /25 Arms Act/4(b)(i)/5(a) E.S. (Amendment) Act, 2001/17/18/18(a)/20/23 (1) UAP Act | Acquittal |

19. In the affidavit filed by the Opposite Party No.3, the list of cases pending for trial against the Petitioner No.3 has been disclosed in the form of a table, which is reproduced below:

**LIST OF CASES PENDING TRIAL**

| | | |
|---|---|---|
| 1 | Adava PS Case No.14. dtd. 24.03.2010, 147/148/435/120(B)/121/121(A)/ 124(A)/427/149 IPC /25 Arms Act/17 Cr.L.A. Act/10/13 of U.A. (P) Act (SR No.44/10) | Charge sheeted /Pending Trial |
| 2 | Adava PS Case No.15. dtd. 25.03.2010, 147/148/435/120(B)/121/121(A)/ 124(A)/427/149 IPC /17 Cr.L.A. Act/10/13 of U.A. (P) Act/3 P.D.P.P. Act | Charge sheeted /Pending Trial |
| 3. | Adava PS Case No.23. dtd. 01.05.2010 u/s.120(B)/121/124(A)/149 IPC/25 Cr.L.A. Act/3 & 4 E.S. Act/10/13 of U.A. (P) Act/17 Cr.L.A. Act | Charge sheeted /Pending Trial |
| 4 | Adava PS Case No.26. dtd. 12.05.2010, 147/148/302/395/120(B)/ 121/121(A)/124(A)/149 IPC/25/27 Arms Act/17 Cr.L.A Act/10/13/16/18/20 of U.A. (P) Act. | Charge sheeted /Pending Trial |
| 5. | Adava PS Case No.63. dtd. 05.11.2010, u/s.147/148/120(B)/121/ 121(A)/124(A)/149 IPC/25 & 27 Arms Act/17 Cr.L.A Act/10 &13 U.A. (P) Act. | Charge sheeted /Pending Trial |
| 6. | Adava PS Case No.01. dtd. 10.01.2011, u/s.147/148/435/427/120(B)/121/121(A)/124(A)/283/149 IPC/25 Arms Act/17 Cr.L.A Act/10 /13 U.A. (P) Act, 3 PDPP Act | Charge sheeted /Pending Trial |
| 7. | Mohana PS Case No.40 dtd. 22.06.2012 U/s.120(b)/121(a)/124 (A)/468 IPC/17 Cr.L.A. Act/16/18/20 of U.A. (P) Act | Charge sheeted /Pending Trial |
| 8. | Mohana PS Case No.71 dtd.19.11.12 u/s. 120(b)/121/121(a)/124 (a) IPC/17 Cr.L.A. Act/25/27 Arms Act/3 &4 E.S. Act/16/18/20 of U.A. (P) Act | Charge sheeted /Pending Trial |
| 9. | Mohana PS Case No.73 dtd.05.12.2012 u/s. 120(B)/121(A)/124 (A)/153(B) IPC/17 Cr.L.A. Act/25 Arms Act/3 &4 E.S. Act/16,18, 20, 38 of U.A. (P) Act | Charge sheeted /Pending Trial |
| 10. | Mohana PS Case No.69 dtd.14.11.12 u/s. 147/148/307/120(B)/121(A)/124 (A)/153(B) /149 IPC/25 /27 Arms Act /17(2) Cr.L.A. Act/ 3 &4 E.S. Act /16/19/20 of U.A. (P) Act | Charge sheeted /Pending Trial |

20. So far as the Petitioner No.1 is concerned, it has been stated that, she is involved in 06 cases under the Sorada P.S. and 06 cases under the Badagada P.S. of Ganjam district. The list of those cases has been provided in two separate tables, which are reproduced hereunder:

**Details of cases registered against the Petitioner No.1 in Sorada P.S. and their status**

| Sl. No. | Sorada P.S. Case reference | GR. No. | Case in which the trial commenced but it is not concluded | Cases pending in the stage of investigation | Cases pending before the Hon'ble Court |
|---|---|---|---|---|---|
| 1. | Sorada PS Case No.129 dtd. 31.12.12 U/s.121/120(B)/121-A/124-A/435 IPC/7 Cr.LA Act -1932/17 Cr.LA Act-1908/Sec.3 The young persons (Harmful Publication Act-1956 | 02/13(A) | Pending for I.Os deposition | Trial stage | ADJ, Bhanjanagar |
| 2. | Sorada P.S.Case No.95 dtd.12.11.2011 U/s.10/13/ 16/18/20 UAP Act/Sec.4 & 5 of Explosive Substance Act | 145/11(A) | Pending for I.Os deposition | Trial stage | ADJ, Bhanjanagar |
| 3. | Sorada P.S. Case No.123 dtd.22.12.2012 U/s.307/34/ 121/120-B IPC/16/18/18-A/20 Unlawful Activities Prevention Act, 2008/4 & 5 Explosive Substance Act | 199/12(A) | I.O./witness examination completed | Argument | ADJ, Bhanjanagar |
| 4. | Sorada P.S. Case No.128 dtd.31.12.2012 U/s.121/120-B/121-A/124-A/435 IPC/7 Cr.L.A. Act, 1932/17 Cr.L.A. Act, 1908/ Sec.3 The Young persons (Harmful Publication Act 1956) | 01/13(A) | Pending for I.Os deposition | Trial stage | ADJ, Bhanjanagar |
| 5. | Sorada P.S. Case No.21 dtd.01.04.2011 U/s.121/121-A//124-A/395 IPC/7 Cr.L.A. Act, 1932/17 Cr.L.A. Act, 1908/ Sec.10/13/16/18-A/20 Unlawful Activities Prevention Act, 2008/ Sec.25(1-b)/27 Arms Act. | 31/11 | Charge yet to be framed | Charge yet to be framed | ADJ, Bhanjanagar |
| 6. | Sorada P.S. Case No.106 dtd. 21.12.2011 U/s.144/148/149/ 435 IPC/7 Cr.L.A. Act-1932/17 Cr.L.A. Act 1908/16/ 17/18/20 Unlawful activities amendment Prevention Act 2008/ 25 (1-B) Arms Act/Sect 3 young persons harmful publication Act 1956 & Sec 3 & 4 Explosive Substance Act | 164/11(A) | Pending for I.Os. deposition | Trial stage | ADJ, Bhanjanagar |

**Details of cases registered against the Petitioner No.1 in Badagada PS and their status**

| Sl. No | Case reference with sec. of law | GR Case No. | Case in which the trial commenced but it is not concluded | Case pending in the stage of investigation |
|---|---|---|---|---|
| 1. | Badagada P.S. Case No.28 dtd. 30.04.2012 U/s.307/292 IPC/R.E. Sec.16/18/20 UAP Act/Sec.25(1-B) (a) & 27 Arms Act/Sec.3 of Young Persons harmful publication Act-1956/41 RWP Act/67 IT Act | GR No. 54/12 | The charges against the accused persons of this case have been framed on 17.01.2022. No witnesses have been examined till now. | Case is pending before the Hon'ble court of Addl. District cum Sessions Judge, Bhanjanagar |
| 2. | Badagada PS Case No.45 dtd. 14.04.2013 U/s.120(B)/121/121(A)/ 122/124(A)/307 IPC/Sec.25(1-B) (a)/27 Arms Act/Sec.3/4 of E.S. Act/ Sec.3 of Young Persons harmful publication Act-1956 | 66/2013 | ------ | The case has not yet been committed to the Hon'ble court of Session from the Hon'ble Court of JMFC Sorada |
| 3. | Badagada PS Case no.18/2010 dtd. 22.02.2010 U/s.121/121(A)/120(B)/ 124(A)/34 IPC/Sec.19/13/16/18(A) UAP Act/Sec.3 & 4 E.S. Act. | 27/2010 | The case is under trial. The case has been splitted up into ST-87/16, 162/17, 133/15,100/20. In the case total number of witnesses are 16. Out of 16 witnesses, in ST-87/16 (02 nos), in ST-162/17 (04 nos), in ST-133/18, (07 nos), in ST-131/15 (04 nos) and in ST-100/20 (15 nos) witnesses have not been examined till now. | Case is pending before Hon'ble court of Addl. District cum Sessions Judge, Bhanjanagar |
| 4. | Badagada P.S. Case No.04 dtd. 19.01.2011 U/s.120(B)/121/121(A) /435/379/149 IPC/Sec-17 of CRL.L A. Act/Sec-10/13/16/18(A)/20/39/40 of UAP Act | 06/2011 | The case is under trial. The case has been splitted up into ST-53/20, 55/20, 08/21, 37/21 and 94/20. Total number of witnesses of the case is 16. In all the splited cases 02 more witnesses have not been examined till now | -Do- |
| 5. | Badagada PS Case No.05 dtd.19.01.2011 U/s. 120(B)/121/ 121(A)/124(A)/435/427 IPC | 07/2011 | The trial of the case is over and the judgment has been pronounced on 19.08.2022 that the accused persons are found not guilty. | |
| 6. | Badagada PS Case No.06 dtd. 24.01.2011 U/S. 120(B)/121/121(A)/ 124(A) IPC/Sec.10/16/18(A)/ 13/20/ 39/40 UAP Act | 13/2011 | The case is under trial. The case has been splitted up into ST-86/16,61/17, 132/15 and 99/20. There are total 14 witnesses in the case. But in ST-86/16 (one), ST-61/17 (two nos), in ST-132/15 (one) and in ST-99/20 (16 nos.) of witnesses are to be examined | Case is pending before the Hon'ble court of Addl. District cum Sessions Judge, Bhanjanagar |

But the Opposite Party No.3 in the affidavit dated 05.09.2022 has stated that there is no information that the Petitioners No.2 and 3 have been implicated in those cases.

21. Another affidavit has been filed by the Opposite Party No.3 on 08.09.2022. According to us, this is the upgraded list so far as the Petitioner No.1 is concerned. It has been clearly stated therein that out of 15 cases registered against her, she has been acquitted in 07 cases being Adava P.S. Case No.14/10, Adava P.S. Case No.15/10, Mohana P.S. Case No.21/13, Mohana P.S. Case No. 84/10, Adava P.S. Case No.37/11, Mohana P.S. Case No.24/13 and Mohana P.S. Case No.19/14. For purpose of better reference we quote the Paragraph-5 of the said affidavit filed by the Opposite Party No.3:

> *"5.That the petitioner has provided the list of cases where the petitioner is involved. Out of 15 cases, in 07 cases trial have been concluded where the petitioner has been acquitted which are as follows:*
>
> *(1) Adava PS Case No.14, dtd.24.03.2010,147/148/435/120(B)/121/121(A)/427/149 IPC/25 Arms Act/17 Cr.L.A. Act/10/13 of U.A.(P) Act.*
>
> *(2)AdavaPSCaseNo.15,dtd.25.03.2010,147/148/435/120(B)/121/121(A)/124(A)/427/149 IPC/17 Cr.L.A. Act/10/13 of U.A. (P) Act/3 P.D.P.P. Act.*
>
> *(3)MohanaP.S.CaseNo.21dtd.8.3.2013u/s.147/148/307/386/364/368/120(B)/121/121(A)/124(A)/153(B)/149 IPC/25/27 Arms Act/16,18,18-A,23 of UAP Act.*
>
> *(4)MohanaP.S.CaseNo.84Dt.21.12.10U/s.147/148/342/120(B)/121/121(A)/436/506/149IPC/25/27 Arms Act/17 Cr.L.A. Act/10/13 U.A.(P) Act.*
>
> *(5) Adava P.S.CaseNo.37dtd.20.10.11U/s.147/148/120(B)/121/121(A)/124(A)/149 IPC 17 Cr.LAAct/16/18 of U.A. (P) Act. (The Adava Ps Case No.17/2011 has been wrongly mentioned instead of Adava PS case No.37/2011 and Adava PS Case No.17/2011 has been registered U/s.47(a) B & O Excise Act.*
>
> *(6) Mohana PS Case No.24 dtd.11.3.2013U/s.147/148/307/120(B)/121(A)/124(A)/149 IPC/25/27 Arms Act/17 Cr. L.A. Act/16,18,20,23,38 of UAP Act.*
>
> *(7) Mohana P.S. CaseNo.19dtd.28.02.2014U/s.147/148/120(B)/121/121(A)/124(A)/149 IPC/17Cr.L.A. Act/25 arms Act/4 (b) (i)/5 (a) E.S. (Amendment ) Act, 2001/17/18/18(a)/20/23(1) U.A. (P) Act."*

In respect of other 08 cases, the Opposite Party No.1 has stated in Paragraph-6 of the said affidavit dated 08.09.2012 as follows:

> *"6. It is submitted that out of 15 cases, 08 (eight) cases are still pending in the Hon'ble Courts which are as follows:*
>
> *(1) Adava PS Case No.23, dtd.01.05.10 u/s.120(B)/121/124(A)/149 IPC/25 Cr.L.A. Act/3 & 4 E.S. Act/10/13 of U.A. (P) Act/17 Cr.L.A. Act.*
>
> *(2) Adava PS Case No.26 dtd.12.05.2010, 147/148/302/395/12(B)/121/121(A)/124(A)/149 IPC/25/27 Arms Act/17 Cr.L.A. Act/10/13/16/18/20 of U.A. (P) Act.*
>
> *(3)Adava PS Case No.63, dtd.05.11.2010, U/s.147/148/120(B)/121/121(A)/124(A)/149 IPC/25 &27 arms Act/17 Cr.L.A. Act/10 & 13 UA (P) Act.*

*(4) Adava PS Case No.01 Dt.10.01.2011 u/s. 147/148/435/427/120(B)/121/121(A)/ 124(A)/283/149 IPC/25 Arms Act/17 Cr.L.A. Act/10 /13 UA (P) Act, 3 PDPP Act.*

*(5) Mohana PS Case No. 40, dtd. 22.06.2012 u/s. 120(b)/121/121(a)/124(A)/468 IPC/17 Cr.L.A. Act/16/18/20 UAP Act.*

*(6) Mohana PS Case No.71, dtd.19.11.12 u/s. 120(b)/121/121(a)/124(a) IPC/17 Cr.L.A. Act/25/27 Arms Act/ 3& 4 E.S. Act/16/18/20 UAP Act.*

*(7) Mohana PS Case No.73, dtd.05.12.2012 u/s. 120(B)/121/121(A)/124(A)/153(B) IPC/17 Cr.L.A. Act/25 Arms Act/ 3& 4 E.S. Act/16,18,20,38 of UAP Act.*

*(8) Mohana PS Case No.69, dtd.14.11.12 u/s. 147/148/307/120(B)/121(A)/124(A)/153(B)/149 IPC/25/27 Arms Act/17(2) Cr.L.A. Act/3& 4 E.S. Act/16/19/20 of UAP Act."*

It has been categorically stated that in other 07 cases, no charge-sheet has been filed against the Petitioner No.1. For this purpose, we would reproduce Paragraph-7 of the affidavit dated 08.09.2022.

*"7. That on verification, it is found that the Charge-sheet has not been submitted against the Petitioner No.1, D. Anita Majhi @ Mila in the following cases:*

| Sl. No. | Case Reference | G.R. No. | Remarks |
|---|---|---|---|
| 01 | Adava P.S. Case No.7 Dtd.16.12.2009 | 29/2009 | C.S. has been submitted Vide No.29 Dtd.22.06.2013 against accused Johan Raita & 33 others, Where C.S. has not been submitted against the petitioner. |
| 02 | Adava P.S. Case No.43 Dtd.28.12.2009 | 260/2009 | C.S. has been submitted Vide No.24 Dtd.20.06.2013 against accused Ladan @ Prahalad Majhi & 58 others, Where C.S. has not been submitted against the petitioner. |
| 03 | Adava P.S. Case No.44 Dtd.28.12.2009 | 261/2009 | C.S. has been submitted Vide No.25 Dtd.20.06.2013 against accused Ladan @ Prahalad Majhi & 58 others, where C.S. has not been submitted against the petitioner. |
| 04 | Adava P.S. Case No.45 Dtd.28.12.2009 | 262/2009 | C.S. has been submitted Vide No.26 Dtd.20.06.2013 against accused Ladan @ Prahalad Majhi & 58 others, where C.S. has not been submitted against the petitioner. |
| 05 | Adava P.S. Case No.46 Dtd.28.12.2009 | 263/2009 | C.S. has been submitted Vide No.27 Dtd.20.06.2013 against accused Ladan @ Prahalad Majhi & 58 others, where C.S. has not been submitted against the petitioner. |
| 06 | Adava P.S. Case No.47 Dtd.28.12.2009 | 264/2009 | C.S. has been submitted Vide No.28 Dtd.20.06.2013 against accused Ladan @ Prahalad Majhi & 58 others, where C.S. has not been submitted against the petitioner. |
| 07 | Adava P.S. Case No.58 Dtd.23.10.2010 | 221/2010 | C.S. has been submitted Vide No.61 Dtd.31.12.2013 against accused Afira Badamajhi & 14 others, where C.S. has not been submitted against the petitioner. |

22. Thus, it has been also asserted that on thorough examination and verification of all cases which are pending or where trial has already been completed, no such information is available about complicity of the other two Petitioners, namely, Nikita Majhi @ Minati @ Bumbuli Narengeke [the Petitioner No.2] and Sushanti Majhi @ Jhunu [ the Petitioner No.3]. Therefore, we can safely hold that against the Petitioners No.2 and 3 there are no cases where the investigation is pending. Even against the Petitioner No.1, there is no case is pending in the investigation stage.

23. The Petitioners have also filed an updated statement in response to the affidavits filed by the Opposite Parties, as referred before. For purpose of reference, we reproduce their said statement, which has been filed by an affidavit dated 10.10.2022:

**PARTICULAR OF THE CASES IN WHICH ORDER DATED 07.01.2022 HAS BEEN PASSED BY THIS HON'BLE COURT IN CRLMC NO.2358/2019 & CRLMC NO.2359/2019**

| Sl. No | P.S. Case No & date | GR Case No | Trial Court & ST Case No. | Present status and Remark |
|---|---|---|---|---|
| 1. | Badagada P.S No.4 dated 19.01.2011 | 6/2011 | Addl. Sessions Judge, Bhanjanagar | Though the Hon'ble Court vide order dated 07.01.2022 directed to complete trial within 6 months and in any case not later than 31.10.2022 but for absence of the I.O in the last 3 case dates for his examination, trial has not completed yet. |
| 2 | Badagada P.S No.5 dated | 7/2011 | Addl. Sessions Judge, Bhanjanagar (58/2020) | Petitioners were acquitted vide judgment dated 16.08.2021 by Ld. ADJ, Bhanjanagar |

**CASES IN WHICH PETITIONERS WERE ACQUITTED**

| Sl. No | P.S Case No. | GR Case No. | Trial Court & ST Case No. | Acquitted on |
|---|---|---|---|---|
| 1 | Adava P.S No. | 73/2010(C) | Sessions Judge, Gajapati paralakhemundi (81/2014) | 04.07.2016 |
| 2 | Adava P.S No. 26 Dated12/13.05.2010 | 113/2010(D) | Sessions Judge,Gajapati paralakhemundi (83/2014) | 18.11.2016 |
| 3. | Mohana P.S No. 24 Dated 11.03.2013 | 40/2013 | Sessions Judge,Gajapati paralakhemundi (75/2014) | 15.03.2018 |
| 4. | Mohana P.S No. 19 Dated 28.02.2014 | 22/2014 | Sessions Judge,Gajapati paralakhemundi (84/2014) | 16.07.2018 |
| 5. | Mohana P.S No. 21 Dated 08.03.2013 | 38/2013 | Addl.Sessions Judge,Gajapat paralakhemundi (79/2014) | 04.07.2015 |
| 6. | Adava P.S No. 14 Dated 24.03.2010 | 16/2010 (D) | Sessions Judge,Gajapati paralakhemundi (78/2014) | 23.06.2017 |
| 7. | Adava P.S No. 23 Dated 01.05.2010 | 105/2010 | Sessions Judge,Gajapati paralakhemundi (82/2014) | 15.03.2017 |
| 8. | Adava P.S No. 58 Dated 23.10.2010 | 221/2010(B) | Sessions Judge,Gajapati paralakhemundi (80/2014) | 17.02.2017 |
| 9. | Adava P.S No. 17 Dated 20.10.2011 | 135/2011 | Addl.Sessions Judge,Gajapat paralakhemundi (77/2014)(T) | 01.07.2015 |
| 10 | Mohana P.S No. 84 Dated 21.12.2010 | 250/2010 (A) | Sessions Judge,Gajapati paralakhemundi (76/2014) | 22.08.2017 |
| 11 | Badagada P.S No. 5 Dated | 7/2011 | Addl. Sessions Judge, Bhanjanagar (58/2020) | Petitioners were acquitted vide judgment dated 16.08.2022 by Ld. ADJ Bhanjanagar |
| 12 | Sorada P.S No. 123 Dated 22.12.2012 | 199/2012 (B) | Addl. Sessions Judge, Bhanjanagar (134/2018) | All the petitioners were acquitted vide judgment dated 13.09.2022 |
| 13 | Sorada P.S. No.95 Dated 12.11.2011 | 145/2011(B) | Addl. Sessions Judge, Bhanjanagar (135/2018) | All the petitioners were acquitted vide judgment dated 14.09.2022 |

**CASES IN WHICH TRIAL COMMENCED BUT NOT CONCLUDED**

| Sl. No. | P.S Case No. & Date | GR Case No. | Trial Court & ST Case No. | Present Status |
|---|---|---|---|---|
| 1. | Bhanjanagar P.S No. 18 Dated 21.01.2011 | 57(A)/2011 | Addl. Sessions Judge, Bhanjanagar (87/2020) | Trial Commenced one PW examined |
| 2. | Badagada P.S case No. 6 Dated | 13/2011 | Addl. Sessions Judge, Bhanjanagar (69/2020) | No witness examined |
| 3. | Badagada P.S case No. 18 Dated 22.02.2010 | 27/2010(B) | Addl. Sessions Judge, Bhanjanagar (133/2018) | 7 PWS examined trial adjourned for non turning of I.O in last 3 cases dates. |
| 4. | Badagada P.S case No. 4 Dated 19.01.2011 | 6/2011 | Addl. Sessions Judge, Bhanjanagar (53/2020) | For non examination of 1.0 and informant trial could not progress in last 3 dates. Other witnesses already examined |
| 5. | Badagada P.S Case No. 28 Dated 30.04.2012 | 54/2012 | Addl. Sessions Judge, Bhanjanagar (59/2020) | No witnesses examined |
| 6. | Sorada P.S. Case No.21 Dated 01.04.2011 | 31/2011(B) | Addl. Sessions Judge, Bhanjanagar (59/2020) | Charge framed on 13.09.2022, no witness examined |
| 7. | Soroda P.S. Case No.106 Dated 21.12.2011 | 164/2011(A) | Addl. Sessions Judge, Bhanjanagar (56/2020) | No witness examined |

**PENDING BEFORE JMFC SORODA**

| Sl. No. | P.S. Case No. & Date | GR Case No. | Trial Court & ST Case No. | Present status |
|---|---|---|---|---|
| 1. | Badagada P.S. Case No. 45 Dated 14.04.2013 | 66/2013 | C.S. Not filed | Produced before JMFC Soroda |
| 2. | Badagada P.S. Case No. 22/2014 | 52/2014 | C.S. Not filed | Produced before JMFC Soroda |

**PENDING BEFORE JMFC MOHANA**

| Sl. No | P.S. Case No. & Date | GR Case No. | Trial Court & ST Case No. | Present Status/Remark |
|---|---|---|---|---|
| 1. | Adava P.S case No. 7 Dated 16.12.2009 | 29/2009 | Co-accused were acquitted. The petitioners were neither produced in Court , nor brought on remand. | Petitioners came to know about the cases from the affidavit dated 19.07.2019 filed by the SDPO Aska in HC in BLAPL NO. 4363/2019. As per affidavit dated 08.09.2022 filed by DSP DIB Gajapati C.S No. 29 is submitted on 22.06.2013 against accused Johan Raita and 33 others but not against the petitioner No.1 |

| | | | | |
|---|---|---|---|---|
| 2. | Adava P.S case No. 43 Dated 28.12.2009 | 260/2009 | Co-accused were acquitted. The petitioners were neither produced in Court , nor brought on remand. | Petitioners came to know about the cases from the affidavit dated 19.07.2019 flied by the SDPO Aska in HC in BLAPL NO. 4363/2019. As per affidavit dated 08.09.2022 filed by DSP DIB Gajapati C.S No. 24 is submitted on 20.06.2013 against accused Ladan and 58 others but not against the petitioner No. 1 |
| 3. | Adava P.S case No. 44 Dated 8.12.2009 | 261/2009 | Co-accused were acquitted. The petitioners were neither produced in Court , nor brought on remand. | Petitioners came to know about the cases from the affidavit dated 19.07.2019 filed by the SDPO Aska in HC in BLAPL NO. 4363/2019. As per affidavit dated 08.09.2022 filed by DSP DIB Gajapati C.S No. 25 is submitted on 20.06.2013 against accused Ladan and 58 others but not against the petitioner No. 1 |
| 4. | Adava P.S case No. 45 Dated 28.12.2009 | 262/2009 | Co-accused were acquitted. The petitioners were neither produced in Court , nor brought on remand. | Petitioners came to know about the cases from the affidavit dated 19.07.2019 filed by the SDPO Aska in HC in BLAPL NO. 4363/2019. As per affidavit dated 08.09.2022 filed by DSP DIB Gajapati C.S No. 26 is submitted on 20.06.2013 against accused Ladan and 58 others but not against the petitioner No. 1 |
| 5. | Adava P.S case No. 46 Dated 28.12.2009 | 263/2009 | Co-accused were acquitted. The petitioners were neither produced in Court , nor brought on remand. | Petitioners came to know about the cases from the affidavit dated 19.07.2019 filed by the SDPO Aska in HC in BLAPL NO. 4363/2019. As per affidavit dated 08.09.2022 filed by DSP DIB Gajapati C.S No. 27 is submitted on 20.06.2013 against accused Ladan and 58 others but not against the petitioner No. 1 |
| 6. | Adava P.S case No. 47 Dated 28.12.2009 | 264/2009 | Co-accused were acquitted. The petitioners were neither produced in Court , nor brought on remand. | Petitioners came to know about the cases from the affidavit dated 19.07.2019 filed by the SDPO Aska in HC in BLAPL NO. 4363/2019. As per affidavit dated 08.09.2022 filed by DSP DIB Gajapati C.S No. 28 is submitted on 20.06.2013 against accused Ladan and 58 others but not against the petitioner No. 1 |
| 7. | Adava P.S case No. 58 Dated 23.10.2010 | 221/2009 | Co-accused were acquitted. The petitioners were neither produced in Court , nor brought on remand. | Petitioners came to know about the cases from the affidavit dated 19.07.2019 filed by the SDPO Aska in HC in BLAPL NO. 4363/2019. As per affidavit dated 08.09.2022 filed by DSP DIB Gajapati C.S No. 61 is submitted on 31.12.2013 against accused Afira Badamajhi and 14 others but not against the petitioner No. 1 |
| 8. | Adava P.S case No. 63 Dated 05.11.2010 | 233/2010 | Co-accused were acquitted. The petitioners were neither produced in Court , nor brought on remand. | Petitioners came to know about the cases from the affidavit dated 19.07.2019 filed by the SDPO Aska in HC in BLAPL NO. 4363/2019. |

| | | | | |
|---|---|---|---|---|
| 9. | Adava P.S case No. 1 Dated 10.01.2011 | 7/2011 | Co-accused were acquitted. Though petitioners are in jail, they were neither remanded nor produced in the Court | Petitioners came to know about the cases from the affidavit dated 19.07.2019 filed by the SDPO Aska in HC in BLAPL NO. 4363/2019. |
| 10. | 10. Mo ana P.S. Case No.40 Dated 22.06.2012 | 99/2012 | Co-accused were acquitted.Though petitioners in jail, they were neither remanded nor produced in the Court | Petitioners came to know about the cases from the affidavit dated 19.07.2019 filed by the SDPO Aska in HC in BLAPL NO. 4363/2019. |
| 11. | Mohana P.S case No. 71 Dated 19.11.2012 | 184/2012 | Co-accused were acquitted.Though petitioners are in jail, they were neither remanded nor produced in the Court | Petitioners came to know about the cases from the affidavit dated 19.07.2019 filed by the SDPO Aska in HC in BLAPL NO. 4363/2019. |
| 12. | Mohana P.S case No. 73 Dated 05.12.2012 | 191/2012 | Co-accused were acquitted.Though petitioners are in jail, they were neither remanded nor produced in the Court | Petitioners came to know about the cases from the affidavit dated 19.07.2019 filed by the SDPO Aska in HC in BLAPL NO. 4363/2019. |
| 13. | Mohana P.S case No. 69 Dated 14.11.2012 | 182/2012 | Co-accused were acquitted.Though petitioners are in jail, they were neither remanded nor produced in the Court | Petitioners came to know about the cases from the affidavit dated 19.07.2019 filed by the SDPO Aska in HC in BLAPL NO. 4363/2019. |

**CASES IN WHICH EVIDENCE IS CLOSED, CASE POSTED FOR ACCUSED STATEMENT**

| Sl. No. | P.S. Case No. & Date | GR Case No. | Trial Court & ST Case No. | Remark |
|---|---|---|---|---|
| 1. | Sorada P.S. No.129 Dated 31.12.2012 | 2/2013(B) | Addl. Sessions Judge, Bhanjanagar (136/2018) | Case posted to 13/14.10.2022 for accused statement |
| 2. | Sorada P.S. No.128 Dated 31.12.2012 | 1/2013(B) | Addl. Sessions Judge, Bhanjanagar (137/2018) | Case posted to 13/14.10.2022 for accused statement |

24. We have also taken information as regards the allegation made by the Petitioners that they were not produced in the trial. By a statement, various dates of production have been provided by the Opposite Parties. But they have not explained whether the Petitioners were produced on all the dates, or not. Even, the Petitioners did not reveal those dates. It appears that for non-availability of the security escort, the Petitioners could not be produced in the court on the date fixed by the court for production. What now emerges out of the information that the Petitioner No.1 is waiting for completion of trial in 08 cases as referred to above. It has been clearly stated by the Petitioners that in the following cases evidence is closed and the cases are posted for the accused statement:

(i) ST Case No.136/2018 corresponding to G.R. Case No.2/2013(B) and Sorada P.S. Case No.129 of 2012 in the court of Addl. Sessions Judge, Bahnjanagar and (ii) ST Case No.137/2018 corresponding to G.R. Case No.1/2013(B) and Sorada P.S. Case No.128 of 2012 in the Court of Addl. Sessions Judge, Bhanjanagar.

So far as these two cases are concerned, we direct those courts to complete the trial by the next 04 months, else the Petitioners involved in those cases be released on bail on suitable terms and conditions. Seven cases where after completion of investigation, charge-sheets have not been filed against the Petitioners, the Petitioners are deemed to have been discharged from the criminal liability. Description of these cases are as follows:

(i) Adava P.S. Case No.7/09 corresponding to G.R. Case No.29/09, (ii) Adava P.S. Case No.43/09 corresponding to G.R. Case No. 260/09, (iii) Adava P.S. Case No. 44/09 corresponding to G.R. Case No. 261/09, (iv) Adava P.S. Case No. 45/09 corresponding to G.R. Case No. 262/09, (v) Adava P.S. Case No. 46/09 corresponding to G.R. Case No. 263/09, (vi) Adava P.S. Case No. 47/09 corresponding to G.R. Case No. 264/09 and (vii) Adava P.S. Case No. 58/10 corresponding to G.R. Case No. 221/10.

But in the following cases the trial has commenced but not been completed:

(i) ST Case No.87/2020 pending in the Court of Addl. Sessions Judge, Bhanjanagar corresponding to G.R. Case No.57(A)/2011 and Bhanjanagar P.S. Case No.18/2011, (ii) ST. Case No.69/2020 pending in the Court of Addl. Sessions Judge, Bhanjanagar corresponding to G.R. Case No.13/2011 and Badagada P.S. Case No.6/2011, (iii) ST Case No.133/2018 pending in the Court of Addl. Sessions Judge, Bhanjanagar corresponding to G.R. Case No.27/2010(B) and Badagada P.S. Case No.18/2010, (iv) ST Case No.53/2020 pending in the Court of Addl. Sessions Judge, Bhanjanagar corresponding to G.R. Case No.06/2011 and Badagada P.S. Case No.4/2011, (v) ST Case No.59/2020 pending in the Court of Addl. Sessions Judge, Bhanjanagar corresponding to G.R. Case No.54/2012 and Badagada P.S. Case No.28/2012, (vi) ST Case No.62/2020 pending in the Court of Addl. Sessions Judge, Bhanjanagar corresponding to G.R. Case No.31/2011(B) and Sorada P.S. Case No.21/2011 and (vii) ST Case No.56/2020 pending in the Court of Addl. Sessions Judge, Bhanjanagar corresponding to G.R. Case No.164/2011(A) and Soroda P.S. Case No.106/2011.

The trial of these cases shall be completed by 30.08.2023, else, the Petitioners shall be released on bail on appropriate terms and conditions. We have recorded our direction in respect of ST Case No. 136/2018 corresponding to G.R. Case No. 2/2013(B) and Sorada P.S. Case No. 129/2012 and ST Case No. 137/2018 corresponding to G.R. Case No. 1/2013(B) and Sorada P.S. Case No. 128/2012.

25. Further we should observe that according to the statement made by the Opposite Parties No.2 and 3, no case is pending against any of the Petitioners at the stage of investigation.

26. Having observed and declared thus, this writ petition stands allowed to the extent as indicated above.

27. There shall be no order as to costs.

28. Before parting with the records, we place our appreciation for the invaluable assistance provided to us Mr. J. Katikia, learned Additional Government Advocate appearing for the State.

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## 2023 (I) ILR – CUT-953

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

W.P.(C) NO. 16602 OF 2021

**SUPERINTENDING ENGINEER, PARADEEP ELECTRICAL CIRCLE, TPCODL, JAGATSINGHPUR & ANR.** .....Petitioners

-V-

**GRIEVANCE REDRESSAL FORUM, PARADEEP & ORS.** .....Opp.Parties

**ELECTRICITY ACT, 2003 – Section 43(i) r/w regulation 7(f) of Odisha Electricity Regulatory Commission Distribution (Condition of supply) Code, 2019 – In the present case the properties are managed by the trust under the Odisha Hindu Religious Endowments Act,1951 – Whether the consent of lawful owner (Trust Board) is required to obtain electricity connection by an occupier ? – Held, Yes – In absence of such consent of the owner of the property, the indemnity bond cannot be made substitute – The Opp.Party No.4/occupier may seek the permission or no objection from the commissioner or the Trust Board for the said electricity connection.** (Paras 18 -19)

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

1. 2018 (II) OLR 850: 2018 AIR CC 1551 (Ori) : Sairendri Devi & Ors. V. Kamuna @Kamrunisha & Ors.
2. 2006 (Supp.-II) OLR 357 : Ramaballav Das v. Dhyan Chandra Das.
3. W.P.(C) No.7340 of 2016 (dated 20.07.2018) : Abhimanyu Das v. Assistant General Manager (Electrical).

For Petitioners : Mr. P.K. Sahoo

For Opp. Parties : Ms. Sumitra Mohanty, Ms. Mamata Mishra, Mr. Amit Kumar Nath

JUDGMENT Date of Judgment : 10.03.2023

***S. TALAPATRA, J.***

By means of this writ petition, the order dated 21.12.2020 delivered in C.C. Case No.GRF/KED-II/778/2020 by the Grievance Redressal Forum (GRF, in short), Annexure-5 to the writ petition and the order dated 06.04.2021 delivered in Consumer Representation Case No.OM(I)-55 of 2021, Annexure-8 to the writ petition by the Ombudsman-I OERC, Bhubaneswar have been challenged. By the order dated 21.12.2020, the GRF has observed as follows:

> *"In the instant case when the complainant fulfills his lawful occupation over the premises to which power supply required as per Regulation 7(a) of OERC Code-2019 then there is no further requirement of approval from Endowment as sought by O.P. No.1. So we are inclined to direct the O.P. No.1 to approve the estimate forthwith without insisting any approval from Endowment. However, as the premises occupied through the meaning of Hereditary Trustee of Shri Baladevjew Bije Icchapur, this forum feels it proper to direct the complainant to execute an indemnity bond in view of Regulation 14 of OERC Code, 2019. That apart the O.P. No.2 also directed to supply electricity to the complainant after completion of all formalities but not exceeding 15 days from the date of this order."*

2. The Opposite Party No.4 [the complainant] filed a Consumer Representation Case, as referred, before the Ombudsman-I OERC, Bhubaneswar for compliance of the order of the GRF dated 21.12.2020, Annexure-5, to the writ petition. By the impugned order dated 06.04.2021, Annexure-8 to the writ petition, the said Consumer Representation Case was disposed of with direction to enforce the order of the GRF. It has been contended by the Petitioner that the Ombudsman is not authorized to direct enforcement the order of the GRF under the Electricity Act, 2003.

3. It is noticed that in terms of the delegation made by the Odisha Electricity Regulatory Commission (OERC, in short) by an administrative order vide the letter No.OERC/IO/PR/TrD/04/59 dated 13.01.2006, the Ombudsman has been authorized to redress "*the grievance of the Petitioner in such type of cases.* It has been observed therein as follows:

> *"Hence, the O.Ps are directed to comply with the aforesaid order of the GRF passed on dtd.21.12.2020 in C.C. Case No.778/2020 within a month hence, failing which the Petitioner would be at liberty to approach the Hon'ble OERC for necessary redressal of his grievance by resorting the provisions of the Section 142 of the Electricity Act 2003."*

4. According to the Petitioners, the Opposite Party No.4 made an application before the Executive Engineer (Electrical) to avail power supply for 23KW load by a three-phase electric line under GPS category with installation of 63 KVA Sub-Station over Plot No.896, Khata No.07, Mouza Kalabuda, Tahasil, Garadpur under Kendrapara district. Having received the said application, the Petitioner No.2, the Executive Engineer (Electrical) processed the said application. While the application was under consideration, the Petitioner No.2 received a communication from the Executive Officer, Shree Baladevjew Endowment, Kendrapara requesting him not to allow power supply without obtaining prior permission of the

Endowment Board or of the Addl. Asst. Commissioner of Endowment, Cuttack. The said communication was made on 18.12.2020 by the Opposite Party No.3 in this proceeding which has been marked as Annexure-1 in the writ petition. The Superintending Engineer, the Petitioner No.1 while scrutinizing the application for approval found that in the land document it is clearly mentioned that Shree Baladevjew Bije Ichhapur is the owner of the land. As it was found that the Opposite Party No.4 has applied to get electricity connection in his name without approval of the Endowment Authorities, the Petitioner No.1 directed the Petitioner No.2 by the letter dated 6.11.2020, Annexure-2 series to the writ petition to obtain the approval from the appropriate Endowment Authority and it was further directed that such approval should be submitted in the office for further course of action. Simultaneously, the Petitioner No.1 had made communication to the Collector, Kendrapara for further clarification by his letter dated 31.12.2020 as regards the power supply to the proposed premises and requested him for issuing necessary instructions in the matter. It was also brought to the notice of the Collector that the Opposite Party No.4 has filed one affidavit wherein it has been claimed that one Nabaghan Rout has authorized him to get the power supply. The said authorization is not apparent from the owner of the property. The owner of the property, as recorded in the Record of Right (ROR), is Shree Baladevjew Bije, Ichhapur.

5. In that stage, the Opposite Party No.4 approached the GRF by filing the said complaint case on 18.11.2020 making an allegation against the Petitioner No.1 that, he had been harassing the Opposite Party No.4 in violation of Clause 32 of OERC Regulation, 2019. The Petitioners having received the notice from the GRF had appeared and contended that the land belongs to Shree Baladev Jew, which is a juristic person and as such, no power supply can be extended in the name of the Opposite Party No.4 [the complainant] without approval either from the said Endowment Board or from the Addl. Asst. Commissioner of Endowment, Cuttack. In this regard, the Petitioner No.1 had communicated the Petitioner No.2 for apprising the said view to the Opposite Party No.4. By the impugned order dated 21.12.2020, the GRF allowed the complaint case and directed the Petitioner No.2 to supply the electricity connection to the Opposite Party No.4 on completion of formalities within a period not exceeding 15 days. The Petitioners were asked to submit the compliance report before the GRF, failing which that shall be treated as non-compliance of the order. As already stated, since the said order was not complied by the Petitioners, the Opposite Party No.4 approached the Ombudsman, the Opposite Party No.2 in this proceeding for directing the Petitioners to comply the order of the GRF. The Petitioners appeared before the Ombudsman and placed their views that without permission either from the Endowment Board or from the Addl. Asst. Commissioner, Endowment, Cuttack they cannot extend the electricity under the extant rules. Notwithstanding that legal position, the Ombudsman directed to comply the order dated 21.12.2020 as passed by the GRF.

6. Mr. P.K. Sahoo, learned counsel appearing for the Petitioners has contended that the Deity is a perpetual minor and its property is being managed by the Endowment Board constituted under Odisha Hindu Religious Endowments Act, 1951. That apart, the Opposite Party No.4 even in terms of his own version has no direct right over the property under reference, but according to his affidavit he has been representing another person purported to be the son and successor of the original hereditary trustee. When the Deity's land is being utilized for a commercial purpose *viz,* construction of Kalyan Mandap, the interest of the Deity can best be taken care of by the Endowment Authority irrespective of the fact whether the land is occupied by the hereditary trustee or not. In accordance with the requirement of the rule, the Opposite Party No.4 was asked to get approval/permission from the Opposite Party No.3, Shree Baladevjew Endowment Board represented by the Executive Officer. But the Opposite Party No.4 without obtaining such permission from the said Endowment Board filed a Consumer Complaint Case before the GRF. In Paragraph-16 of the writ petition, the Petitioners have crystallized their objection as follows:

> *"16. That the Opposite Party No.4 is not the hereditary trustee, but he has claimed to have been authorized by the successor of the original hereditary trustee, but he has applied to get electric connection in this name for commercial purpose. Since these facts are disputed and the occupancy/possession of the land of the Deity is disputed, it was in the interest of the Deity to take approval from the Addl. Asst. Commissioner of Endowment, Cuttack under which the management of the Deity is being done, hence, the impugned order is illegal and liable to be set aside."*

Mr. Sahoo, learned counsel has further stated that the Opposite Party No.3 had serious raised objection in the matter of extending the electricity line in the name of the Opposite Party No.4. In this perspective, the GRF's direction to extend the electricity line on filing of an Indemnity Bond as provided under Regulation 14 of the OERC, Code, 2019 is unsustainable, in as much as that Regulation is in respect of a domestic consumer. But, when the occupancy of the land is in serious dispute, it is not expected that the connection would be provided in the name of the Opposite Party No.4. In the case in hand, surprisingly, the applicant is a third party who has applied for getting 23 KW three-phase commercial connection. The applicant is not the occupier, as he himself has claimed to be an authorized person of the successor of the original hereditary trustee. Neither for the occupancy nor for the electricity line to the premises, as described before, the management or Endowment Board has accorded any consent or approval. The ROR relating to the land in question has been submitted before the GRF by the Opposite Party No.4. It is evident from the ROR that the land has been recorded in the name of the Deity and the recorded Marfatdar are Braja Sundar Rout and Nabaghana Rout in the joint status. There is no paper that Nabaghana Rout had consented for drawing the electricity line on the land of the Deity. According to Mr. Sahoo, learned counsel, under Section 41 of the Odisha Hindu Religious Endowments Act, 1951, a person claiming any hereditary right over the property of the Deity must have the approval or declaration from the

Trust Board as constituted by the Endowment Authority under the said Act. Mr. Sahoo, learned counsel has also pointed out that the Ombudsman does not have any authority to execute the order of the GRF.

7. Before we proceed to refer the contention of the Opposite Parties, it would be beneficial to reproduce the provision of Regulation 14 of Odisha Electricity Regulatory Commission Distribution (Conditions of Supply) Code, 2019. The said Regulation reads as follows:

> *"14. An applicant, who is not the owner of the premises occupied by him, shall execute an indemnity bond, indemnifying the licensee/supplier against any damages payable on account of any dispute arising out of supply of power to the premises."*

8. The Opposite Parties No.3 and 4 have filed their respective counter affidavits. We would first like to deal with the contention of the Opposite Party No.4 for obvious reasons as he is claiming his right over the said land. In the counter affidavit filed by the Opposite Party No.4 it has been admitted that, the real owner of the property is Shree Baladevjew Bije, Ichhapur and its name has been recorded in the ROR. But, it has been contended that the Deity is represented by the Marfatdars, namely, Brajasundar Rout and Nabaghana Rout, both are the sons of Arjun Charan Rout. According to the Opposite Party No.4, the other averments are matters relating to the records. In response to Paragraph-14 of the writ petition, it has been asserted by the Opposite Party No.4 that it is not true, that the land is being utilized *for commercial purpose* by construction of a Kalyan Mandap or that the interest of the Deity can best be taken care of by the Endowment Authority, irrespective of the fact whether the land is occupied by the hereditary trustee or not. It has been categorically denied that there is any requirement to take approval from the Addl. Asst. Commissioner of Endowment, Cuttack under which the management of the Deity is being done. The interpretation of Regulation 14 of Odisha Electricity Regulatory Commission Distribution (Conditions of Supply) Code, 2019, as referred before, has been seriously contested by the Opposite Party No.4. It has been also denied that the Opposite Party No.4 is a third party and not the occupier and only claiming to be an authorized person of the successor of the original hereditary trustee and that it is highly illegal to ask the Opposite Party No.4 to obtain the approval or permission either from the Trust Board or from the Addl. Asst. Commissioner of Endowment, Cuttack for getting the electricity line over the said land. It has been contended that authorisation from the son of Brajasundar Rout is not sufficient to have the electricity connection over the land in question. It has been strongly denied that the Opposite Party No.4 is a third party and he does not have any right to apply for the electricity connection under unauthorisation. But, what is evident is that the fact of authorisation has not been challenged. According to the Opposite Party No.4, as his ancestors *viz*, father and uncle are the hereditary trustees, so the Opposite Party No.4 himself is one of the trustees having inherited that status. He had submitted all the required documents to avail 23 KW load three-

phase GPS category line with instalation of 63 KVA Sub-station over the said property. The Opposite Party No.4 has asserted that, he is the son of late Brajasundar Rout and the nephew of Nabaghana Rout (alive) [the recorded Marfatdars]. A copy of the formatted application had been filed. The said application is available at Annexure-A/4 to the counter affidavit filed by the Opposite Party No.4, wherefrom it is evident that the Opposite Party No.4 has claimed to be the son of Brajasundar Rout. The Opposite Party No.4 has categorically stated that the other Marfatdar has by filing an affidavit given his no-objection to take the electricity against the scheduled land. The no objection has been given also by the concerned persons. Thereafter, the survey had carried out in respect of the questioned land and the surveyor has prepared a map, Annexure-E/4 to the counter affidavit filed by the Opposite Party No.4. The Opposite Party No.4 has also contended that, he has deposited the charges to the extent of Rs.1800/- for having the said electricity connection. It has been asserted that without any sanction of law, the Petitioner No.2 had asked the Opposite Party No.4 to take permission from the Endowment Board, which according to the Opposite Party No.4, is not at all necessary. From the ROR, it is evident that the father of the Opposite Party No.4 and his uncle are the hereditary trustees. According to the Opposite Party No.4, the Kalyan Mandap is made to increase the financial capacity of the Deity. According to Clause 7 of the OERC Code, 2004 and Clause 14 of the OERC Code, 2019 there is no need for approval from the Endowment Board when the Marfatdars are the occupiers for 102 years or more. The Petitioners, according to the Opposite Party No.4, did not comply with the order of the GRF, even not with the order of the Ombudsman. According to the Opposite Party No.4, the Petitioners are bound to supply the electricity to his premises, as Regulation 32 of the OERC Code, 2019 provides as follows:

> *"32. Every Distribution Licensee/supplier shall, on receipt of an application from the owner or occupier of any premises give supply of electricity to the premises within the time stipulated in Regulation 33, subject to the payment of fees, charges and security and the due fulfilment of other conditions to be satisfied by such owner or occupier of the premises."*

Thus, the entire action which had been challenged by the Opposite Party No.4 before the GRF was grossly illegal and in contrast to the prospective consumer's right. There is no prohibition that the hereditary trustee cannot claim such facility being the assigns of the Deity.

9. Ms. M. Mishra, learned counsel appearing for the Opposite Party No.4 has quite emphatically submitted that the Petitioners did not have any business nor any obligation to ask the Collector of the district to make an inquiry over the issues as noted before. As the entire action is illegal, such action cannot get affirmation from this Court. She has urged that the Petitioners be directed to extend the electricity line and to set up the 63KVA Transformer as per the application of the Opposite Party No.4 within a period, as would be stipulated by this Court.

10. The Opposite Party No.3, the Executive Officer, Shree Baladevjew Endowment Board Kendrapara has filed a separate counter affidavit and contended that the management of the Deity, namely, Shree Baladevjew is controlled absolutely by the Trust Board. It has been stated by the Opposite Party No.3 that Marfatdars, namely, Brajasundar Rout and Nabaghana Rout had not separated their interest as inherited. The Opposite Party No.4 claims to be son of Brajasundar Rout. He has filed one application before the Tahasildar, Garadpur being OLR Case No.14/2018 for changing *Kisam* of the land from agricultural to homestead. It is settled principle of law that Marfatdar has no right to file any petition in any Court without impleading the Deity as a party. The Deity is a perpetual minor and as per Section 19 of the Odisha Hindu Religious Endowments Act, 1951, the Opposite Party No.4 cannot take any action in respect of the land or any properties of the Deity unless the permission or the No Objection Certificate is obtained from the Endowment Commissioner. It has been also contended that the other Marfatdar has not been impleaded as the party in the said proceeding. Tahasildar by the order dated 29.08.2018 changed the *Kisam* of the land to homestead behind the back of the Opposite Party No.3. According to the Opposite Party No.3, without knowledge of the Deity, the Opposite Party No.4 has illegally constructed a building over the Deity's land. After the said illegal construction, he had applied for a new electricity connection to the said premises to use the said building commercially as a Mandap. The order of conversion came to the knowledge of the Opposite Party No.3 only when the Opposite Party No.4 had applied for a new electricity connection before the Petitioners. Immediately thereafter, the Deity filed objection on 18.12.2020 and also filed OLR Appeal No.17/2021 in the Court of the Sub-Collector, Kendrapara challenging the order of the Tahasildar converting the land to homestead. Based on the objection raised by the Opposite Party No.3 before the Petitioners, they have rightly denied to grant the electricity connection, unless the permission from the owner i.e. the Deity is obtained. The Opposite Party No.3 has also filed the intervention petition in OLR Appeal No.17/2021. It has been further asserted that the Opposite Party No.4 has constructed the said 'Mandap' for his own benefit, not for the benefit of the Deity, as claimed. It has been further asserted that *Nitikanti* of Deity is purely dependent on the usufructs of the agricultural land. If the electricity line is provided to the said 'Mandap' which has been constructed on the land without permission of the Trust Board or the authorized person, it will create such right which cannot be legally granted. As such, the action of the petitioners cannot be questioned on the touch stone of law.

11. Ms. S. Mohanty, learned counsel having appeared for the Opposite Party No.3 has submitted that Shree Baladevjew is a public Deity and its affairs are managed under Odisha Hindu Religious Endowments Act, 1951. It has its own Trust Board which looks after the management of the Deity. The Deity is the real owner of the land in question. In the ROR, names of Brajasundar Rout, the father of the Opposite Party No.4 and Nabaghana Rout have been recorded as Marfatdars and

*Kisam* of the disputed land as "sarad-2" have been entered. One of the Marfatdars, Brajasundar Rout is no more. In the year 2018, the Opposite Party No.4 claiming to be the son of the said Marfatdars filed one application being OLR Case No.14/2014 before the Tahasildar Garadpur for changing *Kisam* of the land from agricultural to homestead. It is the settled principle of law that the Marfatdars do not have any right to file any petition in any Court without impleading the Deity as the party. The Deity is a perpetual minor and as per Section 19 of the Odisha Hindu Religious Endowments Act, 1951, the Opposite Party No.4 should have taken permission or No Objection Certificate (NOC) from the Endowment Commissioner before filing the application for changing *Kisam* of the land belonging to the Deity. It has been further stated by the Opposite Party No.2 that the Opposite Party No.4 did not obtain any permission from the Endowment Commissioner nor from the Trust Board formed by the State Government. Moreover, the other Marfatdar has not been impleaded as party to the said proceeding. Ultimately, the Tahasildar by the order dated 29.08.2018 changed the *Kisam* of the land to homestead behind the back of the Opposite Party No.3. It has been further claimed by the Opposite Party No.3 that without knowledge of the Deity, a building over the Deity's land has been illegally constructed. After the construction was over, the Opposite Party No.4 applied for a new electricity connection to the said premises to use the said building commercially as a 'Mandap'. As stated before, the order of the conversion came to the knowledge of the Opposite Party No.3 only when the Opposite Party No.4 had applied for a new electricity connection before the Petitioners. The Deity filed the objection on 18.12.2020 claiming that the new electricity connection should not be given to the Opposite Party No.4, in as much as, the Opposite Party No.3 will not permit the property belonging to the Deity to squander away by illegal means. The order of conversion of the Tahasildar has been challenged by filing an appeal to the Sub-Collector, Kendrapara being OLR Appeal No.17/2021. The Opposite Party No.3 has further stated that the rejection is the right course in law. If the new electricity connection is extended to the Mandap for commercial purpose, it will affect the Deity in the multiple ways.

Section 19 of the Odisha Hindu Religious Endowments Act, 1951 provides that, "*notwithstanding anything contained in any law for the time being in force no transfer be it exchange, sale or mortgage and lease for a term exceeding five years of any immovable property belonging to, or given or endowed for the purpose of, any Religious institution, shall be made unless it is sanctioned and no such transfer shall be valid or operative unless it is so sanctioned".*

12. Even though the said provision of law has been referred by Ms. Mohanty, learned counsel appearing for the Opposite Party No.3, but there is not even ostentatious transfer involved in the present controversy.

13. The question whether the Marfatdar has any right to take decision regarding the properties, including the transfer has been well settled in ***Sairendri Devi & Ors. V. Kamuna @ Kamrunisha & Ors***. : 2018 (II) OLR 850: 2018 AIR CC 1551 (Ori.). It was held in ***Sairendri Devi*** that since there was no evidence on record that the Commissioner of Endowment accorded permission for sale of the land, the so-called alienation by the person styling herself as the Marfatdar shall not be valid or operative. The Marfatdar can have no title over the properties of Deity.

14. The Opposite Party No.4, in the case in hand, has claimed that he is the hereditary trustee through one Brajasundar Rout since deceased. The status of Brajasundar Rout and Nabaghana Rout as Marfatdars have not been questioned. Nabaghana Rout has authorized the Opposite Party No.4 to take new electricity connection in respect of the land as referred before. The Opposite Party No.4 has taken No Objection Certificate (NOC) from the Sarapanch of Kalabuda Gram Panchayat also, even though the same may be essential for determination of death and hereditary rights. Moreover, subject to the decision of the appeal, the said land stands in the ROR in the name of two Marfatdars. It is also not the case of the Petitioners that, except those two hereditary trustees, there are other hereditary trustees in respect of the land in question. Section 39 of the Odisha Hindu Religious Endowments Act, 1951 provides that "*when the hereditary trustee of a Math nominates his successor he shall give intimation in writing to the Commissioner. Subsequent changes in the nomination may also be intimated within three months of the nomination. For purpose of succession, the last nominee so intimated shall be recognised by the Commissioner. If no appointment is made during life-time of the trustee, the Commissioner shall have full power to appoint an Executive Officer and the trust shall be brought under the direct control of the Commissioner and shall be treated as an institution under Chapter VII. In making this appointment, the Commissioner shall have due regard to the custom and usage and tenets of the Math. Any person aggrieved by the decision may within ninety days from the date of the decision institute a suit in a competent Court of law to establish his right to the Office of the hereditary Trustee but pending the result of such suit, if any, the order of the Commissioner shall be final*."

15. The Opposite Party No.4 did not claim that he was nominated by the Marfatdar, Brajasundar Rout. We are also alive of the provision contained in Section 28 of the Odisha Hindu Religious Endowments Act, 1951, which provides that, the power to the Commissioner to suspend, remove or dismiss hereditary trustee when sudden misconduct as provided under the said Section is approved. There is no dispute that property in question is being managed in terms of the Odisha Hindu Religious Endowments Act, 1951.

16. Section 3 (XII) of the Odisha Hindu Religious Endowments Act, 1951 has defined the Religious Endowments. While explaining it has been clearly provided under Explanation II that, "*any property which belonged to or was given or endowed*

*for the support of a religious institution, or which was given or endowed for the performance of any service or charity of a public nature connected therewith or of any other religious charity shall be deemed to be a "religious endowment" or "endowment" within the meaning of this definition, notwithstanding that, before or after the commencement of this Act, the religious institution has ceased to exist or ceased to be used as a place of religious worship or inspection, or the service or charity has ceased to be performed*." But the definition as provided under Section 3 (xii) has brought all the properties belonging to or given or endowed for the support of maths or temples or given or endowed for the performance of any service or charity connected therewith or of any other religious charity and includes the institution concerned and the premises thereof and also all properties used for the purposes or benefit of the institution and includes all properties acquired from the income of the endowed property. Therefore, there is no separate existence of any property which can be alienated by the Marfatdar. Hereditary trustee has been defined under Section 3 (vi) of the Odisha Hindu Religious Endowments Act, 1951 as the trustee of a religious institution, succession to whose Office devolves by hereditary right since the time of the founder or is regulated by custom or is specifically provided for by the founder, so long as such scheme of succession is in force. As such, after a Hindu Religious institution, math, temple or any other institution is brought under the Odisha Hindu Religious Endowments Act, 1951, the hereditary trustee cannot take decision even though the hereditary right may continue subject to the provision of the Odisha Hindu Religious Endowments Act, 1951. Even, if the status of the father of the Opposite Party No.4 as the Marfatdar is not questioned, but, when Shree Baladevjew Bije, Ichhapur has come under purview of the Odisha Hindu Religious Endowments Act, 1951, the Marfatdar/s cannot take any decision without the permission of the Trust Board or the Commissioner of the Hindu Endowment. As we have already discussed, Section 39 of the Odisha Hindu Religious Endowments Act, 1951 has provided how succession of the hereditary trustee may operate. No mode, save and except the said mode as provided under Section 39 of the Odisha Hindu Religious Endowments Act, 1951 shall be valid. If there was no nomination, the Commissioner may take the appropriate decision, even by appointing an Executive Officer.

Ms. Mohanty, learned counsel has in the final lap of her submission drawn our attention to Rule 66 of the Odisha Hindu Religious Endowments Rules, 1959, which provides that, *for the improvement and increase in the income of an institution, the trustee, with the previous permission of the Commissioner, may construct rented houses inside the premises of the institution or a temple, provided such construction does not in any way obstruct or inconvenience the free entrance of the public into the temple or in any way affect the decorum of the institution or temple.* Rule 65 of the said Rules requires the trustee of a religion institution to take the prior consent as regards any construction over the Trust properties and it has been clearly provided that no construction or alteration etc, shall be undertaken

without obtaining the previous sanction in writing from the Commissioner. Ms. Mohanty, learned counsel has submitted that the construction that has come up is illegal and unauthorised for non-compliance of Rules 65 and 66 of the Odisha Hindu Religious Endowments Rules, 1959. Extension of electricity connection to such illegal construction would be against the land and the public interest and that also will adversely affect the interest of the Deity, a perpetual minor guided by the Endowment Trust or the Endowment Commissioner.

17. In a series of decisions this High Court has recognized the power of the Commissioner in determining the succession of the hereditary trustee in absence of any nomination. In ***Ramaballav Das v. Dhyan Chandra Das*****:** 2006 (Supp.-II) OLR 357, this High Court has unequivocally laid down that the reigning Mahant has to make a nomination of his successor and give intimation of such nomination to the Commissioner and on being satisfied about the genuineness of the nomination, the Commissioner has to accept such nomination and recognize the nominee. The Commissioner has power to make an inquiry into genuineness of the intimation only and in doing so, he may verify the authenticity of the nomination from the Mahant himself and in case, the Mahant is dead or is not available then by taking independent evidence. But without nomination, interest of the hereditary trustee cannot devolve to his legal heir or the natural successor. The Opposite Party No.4 did not place any such document. The GRF has decided the occupation of the Opposite Party No.4 on Plot No.896 in Khata No.07 of Mouza-Kalabuda measuring 0.72 dec. and has observed that under Section 43(1) of the Electricity Act, 2003, the Opposite Party No.4 has right to get the electricity connection. The word 'occupier' as appearing in Section 43(1) has not been defined in the Electricity Act, 2003. But, in the Odisha Electricity Regulatory Commission Distribution (Conditions of Supply) Code, 2019, the said word has been defined as the person in occupation of the premises. But, Regulation 7 (f) of the Odisha Electricity Regulatory Commission Distribution (Conditions of Supply) Code, 2019 provides that an applicant, who is not an owner, but an occupier of the premises shall, along with any one of the documents required to be filed, also furnish a No Objection Certificate from *the owner of the premises*. In the case in hand, it cannot be disputed that owner of the properties is the Deity managed by a Trust under the Odisha Hindu Religious Endowments Act, 1951. It has been categorically stated by the Petitioners that, the distribution licensee has received no such NOC from the Opposite Party No.4 or from the Trust Board or from the Endowment Commissioner.

18. In ***Abhimanyu Das v. Assistant General Manager (Electrical)*** (judgment dated 20.07.2018 delivered in W.P.(C) No.7340 of 2016) this Court had occasion to observe *inter alia* as under:

> *"According to the considered view of this court, since as per the provision as referred herein above, the consent of the lawful owner is required to be given for getting electricity*

*connection and in its absence it cannot be provided, admittedly in this case the lawful owner has not given consent, hence the reason expressed by the licensee in not providing the electricity connection cannot be said to be unjust and improper."*

In absence of such consent of the owner of the property, the indemnity bond cannot be made the substitute, in as much as such practice is not recognized by law. That apart, we have seen how the hereditary right in absence of any nomination can only be determined by the Commissioner. As such, the order dated 21.12.2020 passed by the GRF in C.C. Case No.GRF/KED-II/778/2020, Annexure-5 to the writ petition and the subsequent order dated 06.04.2021 passed by the Ombudsman-I in C.R. Case No.OM(I) 55 of 2021, Annexure-8 to the writ petition are liable to be set aside. It is ordered accordingly.

19. The Opposite Party No.4 may seek the permission or no objection from the Commissioner or the Trust Board for the said electricity connection. If the Trust Board or the Commissioner of Endowment, permits the Opposite Party No.4 on due consideration to have the electricity connection, as prayed, as the occupier of the premises, the Petitioners shall be under legal obligation to provide the electricity connection to the Opposite Party No.4 subject to compliance of the other requirement, as prescribed by law.

20. In the result, this writ petition stands allowed. However, in the circumstances, there shall be no order as to costs.

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## 2023 (I) ILR - CUT-964

**Dr. B.R.SARANGI, J & M.S.RAMAN, J.**

STREV NO. 123 OF 2014

**M/s. INDIAN METALS & FERRO ALLOYS LTD, THERUBALI** …. Petitioner

-V-

**STATE OF ODISHA** …. Opp.Party

**(A) ORISSA ENTRY TAX ACT, 1999 – Section 7(5) – The petitioner has paid the tax in due time – As per the assessment of the Assessing Authority, the petitioner filed the revised return and paid 0.5% of entry tax on charcoal – But there was late payment of admitted tax for which penalty was imposed by the Assessing Authority and Appellate Authority – The Sales Tax Tribunal confirms the order of Appellate Authority – Whether Sales Tax Tribunal is correct in law in confirming penalty U/s. 7(5) of the OET Act by the First Appellate Authority? –**

**Held, No – Liability to pay penalty does not arise merely upon proof of default in filing return or failure to pay entry tax and furnish the return in due time – The petitioner has already paid the tax and there is no violation or deviation in payment of tax, as a consequence thereof, the petitioner is not liable to pay the penalty.** (Paras 9 & 23)

**(B) WORD & PHRASES – Penalty – Meaning and implication discussed with reference to case laws.** (Paras 15 – 20)

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

1. (1999) 115 STC 591 (Ker) : Fr. William Fernandez v. State of Kerala & Ors.
2. (1982) 50 STC 147 : State of Gujarat v. Shah Bhagwanji Manekchand.
3. [2013] 57 VST 484 (Orissa) : Tata Steel Ltd. v. State of Odisha.
4. [1970] 25 STC 211 (SC) : Hindustan Steel Ltd. v. State of Orissa.
5. [1997] 106 STC 604 (SC) : State of Madhya Pradesh v. Bharat Heavy Electricals Ltd.
6. [2008] 13 VST 424 (Mad) : Krishna Alloy Steels v. Registrar, TNTST.
7. [2009] 23 VST 249 (SC) : Sri Krishna Electricals v. State of Tamil Nadu & Anr.
8. (2005) 7 SCC 615 : State of U.P. v. Sukhpal Singh Bal.
9. CIT (2006) 7 SCC 483 : Amin Chand Payarelal v. Inspecting Asstt.
10. (2001) 1 SCC 278 : Consolidated Coffee Ltd v. Agricultural Tax Officer.
11. (2004) 2 SCC 783 : Karnataka Rare Earth v. Senior Geologist, Deptt.of Mines & Geology.
12. AIR 1997 SC 138 : Pratibha Processors v. Union of India.
13. (1981) 4 SCC 578 : Associated Cement Co. Ltd. v. Commercial Tax Officer.
14. 2009 (240) ELT 641 (SC) : Maruti Suzuki Ltd. v. Commissioner of Central Excise,Delhi-III.
15. 2009 (240) ELT 661 (SC) : Commnr.of C.Ex. v. Gujarat Narmada Fertilizers Co. Ltd.
16. (1958) 34 ITR 98 : CIT v. Gokuldas Harivallabhdas.
17. (1970) 76 ITR 696 (SC) : CIT v. Anwar Ali.

For Petitioner : M/s. S.P. Dalai, P.K. Jena, S.C. Sahoo, L.N. Sahoo and A.R. Mishra

For Opp.Party : Mr. S. Mishra, Standing Counsel for Revenue.

JUDGMENT Date of Hearing and Judgment : 23.03.2023

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

This is an application filed under Section 19 of the Orissa Entry Tax Act, 1999 seeking revision of the order dated 06.05.2014 passed by the Sales Tax Tribunal, Cuttack in S.A. No. 123 (ET) of 2004-05, which was preferred against the order dated 24.07.2004 passed by the Assistant Commissioner of Sales Tax, Koraput Range, Jeypore in First Appeal Case No. AAE (KOII) 56/2003-2004 reducing the demand to Rs.7,95,339.00 from Rs.14,35,281.00 raised by the Sales Tax Officer, Koraput II Circle, Rayagada vide order dated 22.01.2004 passed under Rule 11(3) of the Orissa Entry Tax Rules for the year 2002-03.

2. The background facts which led to filing of this revision are that M/s. Indian Metals and Ferro Alloys Ltd., Therubali, the petitioner herein, as a private limited

company, having its own chromite mines at Sukinda, Kalaringiatta Ransole of Jajpur district and Nua Sahi of Keonjhar district, is engaged in producing Ferro Silicon and High Carbon Ferro Chrome, for which the raw materials like Charcoal, Chrome Ore, Scrap Iron, Bauxite, Lime Stone, Magnesite Coke, etc. are needed. The Assessing Authority, while making assessment for the year 2002-2003, issued notice under Rule 10(2) of the O.E.T. Rules and Section 12(4) of the O.S.T. Act, 1947, in response to which petitioner caused production of sale invoices, sales book, stock register, statement of monthly return filed under Entry Tax Act and statement of purchase of raw materials and consumables etc. The Assessing Authority, on perusal of the same, found the gross receipt of the scheduled goods stood at Rs.31,71,24,715.00 and scheduled goods worth Rs.4,03,52,755.00 were procured from the registered dealers from inside the State of Odisha. No entry tax was found to be paid on Charcoal, Carbon paste, Coke (imported), Hydrated lime, Molasses and other store materials. These were treated as non-scheduled goods by the petitioner. The assessing authority, while disposing the assessment, treated Charcoal, Coke (imported) and Hydrated lime which is chemical, to be scheduled goods. It was observed that Charcoal has not been excluded from the list of schedule goods prescribed under the O.E.T. Act. Thereby, the petitioner filed the revised return and paid 0.5% of entry tax on Charcoal. But, there was late payment of admitted tax which attracted penalty as per Section 11(2)(ii) to the tune of Rs.3,30,909.00. The Assessing Authority observed that the petitioner did not pay tax on purchase of imported Coke of an amount of Rs.10,73,07,311.00. Therefore, he levied entry tax @ 0.5% on the purchase turnover of imported Coke and penalty as per Section 7(5) of the O.E.T. Act. Again, he imposed entry tax @ 1% on Hydrated lime as a consumable with penalty as per Section 7(5) of the O.E.T. Act. Accordingly, a demand of Rs.14,35,281.00 was raised vide order of assessment dated 22.01.2004 passed under Rule 11 (3) of the Orissa Entry Tax Rules.

2.1 Against such order passed by the Assessing Authority, the petitioner preferred First Appeal. But the appeal was allowed in part and the assessment was reduced to Rs.7,95,339.00 by the Assistant Commissioner of Sales Tax, Koraput Ranga, Jeypore. Against the said order, the petitioner filed Second Appeal before the Sales Tax Tribunal, Cuttack on the ground that the demand of entry tax on purchase value of Coke imported from outside the country is illegal. He relied on the decision of the Kerala High Court in case of ***Fr. William Fernandez v. State of Kerala & others***, (1999) 115 STC 591 (Ker) and stated that it has been wrongly distinguished by the Assessing Authority. He also contended that Hydrated lime is not a chemical, so, it is not coming under the list of scheduled goods and that in Item 6 in Part I of the schedule to Orissa Entry Tax Act, the entry of drugs and chemicals including medicine does not refer to chemical in dispute and that in the case at hand, levy of penalty of Rs.2.00 lakhs is not correct. But the Tribunal, relying on the case of ***State of Gujarat v. Shah Bhagwanji Manekchand***, (1982) 50 STC 147, observed that the forum below has rightly held that the Hydrated lime is a chemical and accordingly

levied tax, as in the case of ***Shah Bhagwanji Manekchand*** (supra), High Court of Gujarat held that lime to be a chemical. Therefore, the Tribunal came to a conclusion that the same can be taxed under the Orissa Entry Tax Act. So far as penalty is concerned, the Tribunal held that as per Section 7(5) of the O.E.T. Act, the 1st Appellate Authority has already reduced the same to Rs.2.00 lakh taking into consideration the circumstances of the case and legal position. In view of this, the Tribunal did not interfere with the order passed by the First Appellate Authority. Hence, this revision.

3. The petitioner has formulated the following questions of law:-

> *(1) Whether on the facts and in the circumstances of the case, the Sales Tax Tribunal was correct in holding that "Hydrate Lime" being a chemical can be treated as a schedule goods under the O.E.T. Act as mentioned in SI. No.6 Part-1 of Schedule appended to the O.E.T. Act and is liable for entry tax?*
>
> *(2) Whether on the facts and in the circumstances of the case, the Sales Tax Tribunal was correct in confirming the charging of entry tax on imported coke, when the dispute is pending for decision by the Larger Bench of the apex Court?*
>
> *(3) Whether on the facts and in the circumstances of the case, the order passed by the Sales Tax Tribunal is correct in law in confirming the imposition of penalty U/s. 7(5) of the O.E.T. Act by the first appellate authority?*

4. Mr. S.P. Dalai, learned counsel appearing on behalf of Mr. P.K. Jena, learned counsel for the petitioner has contended that the petitioner does not want to press the questions of law, as have been formulated under point nos. 1 and 2, therefore, he has confined his argument to question no.3. He contended that the petitioner is not liable to pay the penalty under Section 7(5) of the O.E.T. Act, as the petitioner has already paid the tax in due time. Therefore, imposition of penalty under Section 7(5) of the O.E.T. Act by the Assessing Authority, which has been reduced by the First Appellate Authority by two lakhs, cannot have any justification. Therefore, the order passed by the Sales Tax Tribunal, so far as imposition of penalty under Section 7(5) of the O.E.T. Act is concerned, cannot be sustained in the eye of law. To substantiate his argument, he has placed reliance on the case of ***Tata Steel Ltd. v. State of Odisha***, [2013] 57 VST 484 (Orissa) and submitted that prior to delivery of said judgment holding levy of entry tax on imported goods is within competence of the State, the petitioner-company deposited tax as per returns.

5. Mr. Sunil Mishra, learned Standing Counsel appearing for the Revenue has strenuously supported the order of the Tribunal which has been impugned in the present revision.

6. Admittedly, the petitioner, being a public limited company, is engaged in the manufacture and sale of various Ferro Alloys, like Ferro Silicon, Charge Chrome, High Carbon Ferro Chrome etc. For that purpose, it has been registered under the Odisha Sales Tax Act, 1947, the Odisha Entry Tax Act, 1999 and the

Central Sales Tax Act, 1956 with the Sales Tax Officer, Koraput-II Circle, Rayagada vide Certificate of Registration No. KO-II 94, KO-II 94 ET and KOC II 65 respectively. The petitioner had been filing its return regularly under the O.S.T., the O.E.T. & the C.S.T. Acts and was never a defaulter. During the period 2002-03, the petitioner had purchased scheduled goods and other than scheduled goods at Rs. 70,59,58,300.00 and also had purchased imported coke of 13855 MT for Rs. 10,73,07,311.00 and had not paid any entry tax on the ground that imported goods are not liable for taxation under the Odisha Entry Tax Act. Similarly, the petitioner had not paid any entry tax on purchase of Hydrated lime amounting to Rs.23,47,656.00 on the ground that the same is a non-scheduled goods.

7. It is not in dispute that Orissa Entry Tax Act, 1999 was enacted w.e.f. 01.12.1999. Entry 13 of Part I of Schedule appended to O.E.T. Act provides- "Caustic soda, soda ash and silicate of soda" and Entry 62 of Part I of Schedule appended to O.E.T. Act, which was added w.e.f. 24.07.2000, provides- "Sulphur, rock phosphates, ammonia, sulphuric acid, hydrochloric acid, liquid chlorine, caustic soda, alumina" and, as such, other chemicals which are not mentioned in the Schedule appended to the O.E.T. Act are un-scheduled chemicals or chemicals not mentioned in the Schedule appended to the O.E.T. Act.

8. Section 7(5) of the O.E.T. Act, provides that while making any assessment under Sub-section (4) of Section 7, the Assessing Authority may also direct the dealer to pay, in addition to tax assessed, a penalty not exceeding one and half times the amount of tax due that was not disclosed by the dealer in his return. Which means, due to the non-disclosing of schedule goods in the return filed by the assessee, the Assessing Authority may also direct the dealer to pay, in addition to the tax assessed, a penalty not exceeding one and half times of the amount of tax due. But if the assessee satisfies the authority concerned that non-submission of statement/return was not with intention to facilitate the evasion of the entry tax, no penalty should be imposed. Section 7(5) has to be construed to mean that the presumption contained therein is rebuttable and the penalty of one and half times of tax assessed stipulated therein is only the maximum amount, which could be levied and the Assessing Authority has the discretion to levy lesser amount depending upon the facts and circumstances. In the absence of satisfaction, the presumption is that non-disclosure in the return is with an intention to evade payment of entry tax and, as such, depending on the facts of each case the Assessing Authority has to decide what would be the reasonable amount of penalty to be imposed.

9. Thus, cardinal principle of the statute is that under the Act penalty may be imposed for failure to pay entry tax and furnish the return in due time, but the liability to pay penalty does not arise merely upon proof of default in filing return or failure to pay entry tax and furnish the return in due time. In this context, the petitioner is relying on the decision of the Apex Court rendered in the case of

***Hindustan Steel Ltd. v. State of Orissa***, [1970] 25 STC 211 (SC), wherein it has been held as follows:-

> *"An order imposing penalty for failure to carry a statutory obligation is the result of a quasi-criminal preceding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute*".

10. In ***State of Madhya Pradesh v. Bharat Heavy Electricals Limited***, [1997] 106 STC 604 (SC), the apex Court at Para 14 held as follows:-

> *"14. From the aforesaid it follows that section 7(5) has to be constructed to mean that the presumption contained therein is rebuttable and secondly the penalty of ten times the amount of entry tax stipulated therein is only the maximum amount which could be levied and the assessing authority has been discretion to levy lesser amount, depending upon the facts and circumstances of each case. Construing section 7(5) is ultra vires cannot be sustained".*

11. The Odisha Entry Tax Act being a new legislation and the petitioner being under the *bona fide* belief that the disputed goods is an un-scheduled goods and there being some confusion with regard to levy of entry tax on goods imported, being a new legislation, which is in a fluid state, no penalty should have been imposed. In this context, the judgment rendered in ***Krishna Alloy Steels v. Registrar, TNTST***, [2008] 13 VST 424 (Mad), is referred to wherein it has been held as follows:-

> *"The assessments made on the basis of the accounts, and not based on any other materials and were not estimates, had therefore, to be regarded as assessments made under section 12(1) to which the penal provisions of section 12(3) were not attracted. The levy of penalty for those two assessment years was liable to be set aside."*

12. In ***Sri Krishna Electricals v. State of Tamil Nadu and another***, [2009] 23 VST 249 (SC), it has been observed as follows:

> *"We find that the authorities have factually adjudicated the issues. In S. Durals case (1994)95 STC 372 (Mad) on which reliance was placed by the High Court to dismiss the writ petitions it was held that what was sold was in fact a complete wet grinder which was a new commodity and not merely parts thereof. The High Court has observed that the factual scenario was identical. The conclusions arrived at by the Revenue authorities and the High Court were that what was sold was a complete wet grinder which was a new commodity and not merely parts thereof. This being a factual finding, there is no scope for interference in these appeals so far levy of tax is concerned."*
>
> *So far as the question of penalty is concerned the items which were not included in the turnover were found incorporated in the petitioner's account books. Where certain items*

*which are not included in the turnover are disclosed in the dealer own account books and the assessing authorities include these items in the dealer's turnover disallowing the exemption, penalty cannot be imposed. The penalty levied stands set aside."*

13. The cardinal principle of taxing statute is that when two views are possible, the view favourable to the assessee should be preferred and in that view of the matter no penalty should have been imposed on the petitioner.

14. The connotation of penalty has been considered by the apex Court in ***State of U.P. v. Sukhpal Singh Bal***, (2005) 7 SCC 615. In the said case, while considering Section 10(3) of the UP Motor Vehicles Taxation Act (21 of 1997), it was observed that, penalty" is a slippery word and it has to be understood in the context in which it is used in a given statute. A penalty may be the subject-matter or a breach of statutory duty or it may be the subject-matter of a complaint. In ordinary parlance, the proceedings may cover penalties for avoidance of civil liabilities which do not constitute offences against the State. This distinction is responsible for any enactment intended to protect public revenue. Thus, all penalties do not flow from an offence as is commonly understood but all offences lead to a penalty. Whereas the former is a penalty which flows from a disregard of statutory provisions, the latter is entailed where there is *mens rea* and is made the subject-matter of adjudication. Penalty under Section 10(3) of the Act is compensatory. It is levied for breach of a statutory duty for non-payment of tax under the Act.

15. In ***Amin Chand Payarelal v. Inspecting Asstt.*** CIT (2006) 7 SCC 483, the apex Court, while considering Section 271(1)(a) of the Income Tax Act 1961, observed that the 'penalty' is a punishment imposed on a wrongdoer.

16. In ***Consolidated Coffee Ltd v. Agricultural Tax Officer***, (2001) 1 SCC 278, while considering the provisions contained in Section 42(1)(i) of the Income Tax Act 1961, the apex Court observed that the word 'penalty' occurring in Section 42(1)(ii) of the Act does not mean 'interest'. It is imposed on the assessee who fails to pay tax in time and the quantum of the penalty increases with the delay.

17. In ***Karnataka Rare Earth v. Senior Geologist, Deptt. Of Mines & Geology***, (2004) 2 SCC 783, the apex Court held that 'Penalty' is a liability imposed as a punishment on the party committing the breach.

18. In ***Pratibha Processors v. Union of India***, AIR 1997 SC 138, the apex Court observed that penalty is ordinarily levied on an assessee for some contumacious conduct or for a deliberate violation of the provisions of the particular statute.

19. In ***Associated Cement Co. Ltd. v. Commercial Tax Officer***, (1981) 4 SCC 578, the apex Court held that 'penalty' ordinarily becomes payable when it is found that an assessee has wilfully violated any of the provisions of the taxing statute.

20. In view of the meaning attached to the word 'penalty' under different provisions of different taxing statute, as discussed above, in an unequivocal term it can be said that the penalty ordinarily becomes payable when it is found that an assessee has wilfully violated any of the provisions of the taxing statute.

21. In ***Maruti Suzuki Ltd. v. Commissioner of Central Excise. Delhi-III***, 2009 (240) E.L.T. 641 (SC) and also in the case of ***Commissioner of C. Ex. v. Gujarat Narmada Fertilizers Co. Ltd.***, 2009 (240) E.L.T. 661 (SC), it is held that no entry tax is leviable on imported goods and even if entry tax is leviable on imported machineries, no penalty should have been imposed by the Assessing Authority.

22. In ***CIT v. Gokuldas Harivallabhdas*** (1958) 34 ITR 98, and in the case of ***CIT v. Anwar Ali***, (1970) 76 ITR 696 (SC), it has been laid down by the apex Court that there are certain fundamental principles with reference to levy of penalty which must be looked into and considered before the levy of any penalty. The first principles is that penalty proceedings being quasi-criminal in nature, are quite distinct, separate and independent of the assessment proceedings and consequently the findings recorded in the assessment order are not conclusive for levy of penalty. While imposing such penalty the principle of natural justice has to be complied with by giving opportunity of being heard. Thereby, the levy of penalty can never be automatic irrespective of the facts and circumstances of the case. The discretion is vested in the taxing authority and the same must be exercised judiciously after considering the facts and circumstances of the case and, as such, the imposition of penalty without assigning any reason for which the penalty has been imposed, ought to have been held to be illegal, arbitrary and excessive one.

23. In view of the fact that in the instant case the petitioner has already paid the tax and so far as payment of tax is concerned there is no dispute. Since there is no violation or deviation in payment of tax, as a consequence thereof, the petitioner is not liable to pay the penalty. Accordingly, the question no.3 is answered in favour of the petitioner and against the Revenue. As a consequence thereof, the impugned orders passed by the Assessing Authority, First Appellate Authority and the Sales Tax Tribunal, Cuttack, so far as imposition of penalty under Section 7(5) of the O.E.T. Act is concerned, are hereby quashed.

24. The revision is thus allowed. However, there shall be no order as to costs.

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**2023 (I) ILR - CUT- 972**

**Dr. B.R.SARANGI, J & M.S.RAMAN, J.**

W.P(C) NO. 8090 OF 2015

**BALADEVJEW POWERLOOM WEAVERS COOPERATIVE SOCIETY LTD, KENDRAPARA & ANR.** .....Petitioners

-V-

**PRESIDING OFFICER, LABOUR COURT, BHUBANESWAR & ORS.** .....Opp.Parties

**INDUSTRIAL DISPUTES ACT, 1947 – Section 33(C)(2) – The Opp.Party No(s). 2 to 11 after taking voluntary retirement filed industrial dispute before the Labour Court U/s. 33(c)(2) of the 1947 Act claiming some arrear salary and bonus – Whether the Presiding Officer, Labour Court has jurisdiction to entertain the application U/s. 33(c)(2) of the I.D.Act for computation of monetary benefits in favour of Opp.Party No(s). 2 to 11 after lapse of more than 8 years ? – Held, Yes – The pre-requisite for computation U/s. 33(c)(2) being dependent upon a pre-existing right, on the basis of admitted calculation by the Official Liquidator and oral admission of the witness to the effect that the claimed amount is purely based on such calculations, the application before the Labour Court is maintainable.** (Paras 14 – 16)

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

1. (2008) 4 SCC 241 : H.P.State Electricity Board v. Ranjeet Singh.
2. 2001 LIC 79 : State Bank of India v. Ram Chandra Dubey and others.
3. AIR 2005 SC 1918 : (2005) 3 SCC 88 : State Bank of Patiala v. Phulpati.
4. (1997) 4 SCC 280 : Power Finance Corporation Ltd. v. Pramod Kumar Bhatia.
5. (1989) 1 LLT 14: ILR 1989 (1) Kerala 138 : Pappu and Ors v. Raja Tile and Match Works.
6. 1986 LIC 1055: AIR 1986 Bom 340 : Kohinoor Tobacco Products Pvt. Ltd v. Presiding Officer, Second Labour Court.
7. (1963) II L.L.J 89 (S.C) : Central Bank of India Ltd. v. P.S. Rajagopalan.
8. (1962) I L.L.J 234 (S.C.) : Punjab National Bank v. K.L.Kharbanda.
9. (1963) II L.L.J. 608 (S.C.) : Bombay Gas Co. Ltd v. Gopal Bhiva.
10. (1969) II L.L.J. 728 (SC) : U.P. Electricity Supply Company Ltd v. R.K. Shukla.

For Petitioners :M/s. Sidheswar Mallik & P.C. Das.

For Opp.Parties :Mr. P.K. Muduli, A.G.A. (O.P. No.1)

M/s. Nitish Kumar Mishra, A.K. Roy, A. Mishra, P. Dash & S. Pradhan. (O.Ps. No. 2 to 11)

JUDGMENT Date of Hearing and Judgment : 11.04.2023

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

This is a writ petition in which challenge has been made by the employer-petitioners to the order dated 31.12.2014 passed in I.D. Misc. Case No. 25 of 2010 under Annexure-3, by which the Presiding Officer, Labour Court, Bhubaneswar has held that the applicant-opposite parties no.2 to 11 are entitled to get Rs.8,00,237.00.

2. The factual matrix of the case, in brief, is that Sri Baladevjew Powerloom Weavers' Cooperative Society-petitioner no.1, a society registered under the Odisha Cooperative Societies Act, 1962, ceased to function w.e.f. 01.10.1996 due to accumulated loss. As there was no scope for its revival, the Director of Textiles-Cum-Additional Registrar, Cooperative Society, Odisha passed an order on 18.09.1998 to wind up the society in exercise of power conferred under Section 73 (1) of the Odisha Cooperative Societies Act, 1962 with a direction that any person having any claim against the society shall make the same before the Official Liquidator as per Rule 86 of the Odisha Cooperative Societies Rules, 1965. The management of M/s. Baladevjew Powerloom Weavers Co-operative Society Limited was taken over by petitioner no.2-SPINFED Limited, Odisha, Bhubaneswar with effect from 29.04.1992, in view of the prevailing sickness in the establishment, under orders of the State Government. Petitioner no.1 being a public sector cooperative society under the State Government, in order to extend some financial benefits to its employees, the Government of Odisha introduced a Model Voluntary Retirement Scheme, vide resolution no.3165 dated 21.9.2001, for the public sector undertakings. All the employees of the cooperative societies were allowed voluntary retirement by availing the benefits declared under the said Scheme. Although the powerloom was ceased to operate w.e.f. 01.10.1996 and the cooperative society was wound up w.e.f. 18.09.1998, the opposite parties no.2 to 11 were allowed voluntary retirement benefits under the Scheme till they were relieved on 30.11.2001.

2.1 Subsequently, an Official Liquidator was appointed to examine and settle the employment status of the workmen and to attend their genuine grievances for early satisfaction of their respective claims. The said Official Liquidator in such capacity calculated the amounts due in respect of each ex-workman of the establishment, including opposite parties no.2 to 11, and submitted to the authorities for sanction and payment. Although several ex-workmen had taken voluntary retirement from the petitioners' establishment and their dues had been calculated, sanctioned and disbursed, yet a substantial portion of the admitted dues of the opposite parties no.2 to 11 was to be considered for payment. After taking voluntary retirement, the opposite parties no.2 to 11 filed Industrial Dispute Misc Case No.25 of 2010 before the Labour Court, Bhubaneswar under Section 33-C(2) of the Industrial Disputes Act, 1947 (hereinafter to be referred as "I.D. Act, 1947" for short), claiming some arrear salary and bonus. To support the aforesaid statement of the opposite parties no. 2 to 11, a copy of the VRS calculation sheet in respect of the opposite parties no. 2 to 11 vis-a-vis the other erstwhile employees of petitioner

no.1-society, as complied with by the Official Liquidator, was also attached as Enclosure-1 to the application submitted under Section 33C (2) of the I.D. Act, 1947.

2.2 Opposite parties no.2 to 11, having received some amounts out of the calculation as made by the Official Liquidator, are entitled to get the balance amount which mostly relate to the unpaid salary/wages and unpaid bonus besides interest @ 18% over and above the said amount due to them till actual payment. The specific amount, which the opposite parties no.2 to 11 were entitled to, was placed on record as Enclosure-2.

2.3 Pursuant to the notice issued to the petitioners by the Presiding Officer, Labour Court, the petitioners filed their reply stating inter alia that petitioner no.2 was an independent body registered under the Odisha Cooperative Societies Act, 1962 having its own Board of management to look after day to day affairs of the Society. The role of petitioner no.2-organisation was to provide required assistance and advisory services in the field of technical guidance, managerial assistance and marketing support to its member units for its viable and efficient function. As such, petitioner no.2 was not the employer of the opposite parties no.2 to 11. Rather opposite parties no.2 to 11 were the employees of petitioner no.1 and their dues, if any, was the liability of that Society and the organisation of petitioner no.2 was no way connected with the day-to-day administration and financial management of the unit. Petitioner no.1 unit had ceased its operation since 1996 due to heavy loss. The working capital was completely eroded. The cash credit availed from various banks were not paid back by the Society. The Odisha State Financial Corporation had seized the property both moveable and immoveable of the unit for recovery of the loan. The Registrar of Co-operative Societies, Odisha appointed Official Liquidator to settle the assets and liabilities. The Government had decided to extend financial assistance to State Public Undertakings, Co-operative Enterprises under DFID Funded Assistance Reform Programme and introduced Voluntary Retirement Scheme. The petitioner no.1-society having ceased its operation with effect from 01.10.1996 and since then no workmen were in work during non-operation period, hence the opposite parties no. 2 to 11 were not entitled for wages. As a welfare measure, the service benefits, such as, gratuity and ex-gratia had been extended till the cut off date of their service, i.e., up to 30.11.2001. The present claim raised by the opposite parties no.2 to 11 was devoid of merit. As petitioner no.1- society became defunct, the management of the said Society was tagged to a member Spinning Mill of petitioner no.2 vide letter dated 09.03.1992 of the Government. This arrangement had been made only to exercise supervisory control and provide necessary support to Powerloom Society by providing technical, managerial guidance and marketing support to the Society. The claim of the opposite parties no.2 to 11 was barred by limitation as the application was filed after about 8 years. Therefore, the petitioners claimed for dismissal of the application filed under

Section 33-C(2) of the I.D. Act, 1947 for computation of money due to them from the petitioners.

2.4 Petitioner no.1 filed a separate objection contending therein that it was registered under the provisions of the O.C.S. Act and Rules framed thereunder and its management business and functioning were governed under the provisions of said statute. The Powerloom unit ceased its operation since 1996. The cash credit availed by the Powerloom from different Banks were not paid back by the Society. Thereby, the O.S.F.C. seized the moveable and immoveable property of the unit for recovery of its loan. The Powerloom was put under liquidation vide order no. 20687 dated 18.09.1998. The liquidation proceeding was in process in accordance with the provisions of O.C.S. Act and Rules framed thereunder. As per the provisions of the statute and the procedure prescribed, the employees of the Powerloom were relieved of their duties from the date of winding up of the Society. Thereby, opposite parties no.2 to 11 are not entitled for any wages or salary from the date of winding up. The Official Liquidator is liable to clear the Government liabilities and statutory liabilities in order of preference, for which the claim of opposite parties no.2 to 11 was lacking consideration. The Government must get their investment first and thereafter the other claims are to be considered. The Government had decided to extend financial assistance to the State Public Sector Undertaking and Co-operative Enterprises under DFID Funded Assistance Reform Programme and introduced Voluntary Retirement Scheme. The financial assistance offered by the Government was available to those PSU and Cooperative Societies which were sick and unviable. As a welfare measure the service benefits, such as, gratuity, ex-gratia were extended till the cut off date of their service i.e. up to 30.11.2001. The amount entitled by the employees was paid to the concerned employees after availing financial assistance by the concerned units from the Government under the scheme. Thereby, the present claim of the opposite parties no.2 to 11 is barred by Laws of Limitation which should be rejected.

2.5 To substantiate their claim, the opposite parties no.2 to 11 exhibited documents under Exts. 1 to 4 and examined two witnesses as A.W.1 and A.W.2. Per contra, the petitioners examined two witnesses, i.e., one P.K. Barik as O.P.W. No.2 and Bharat Chandra Mallick as O.P.W.1. On the basis of the pleadings available on record and examining the documents and evidences adduced by the parties, the Presiding Officer, Labour Court, Bhubaneswar, vide order dated 31.12.2014, allowed the application filed under Section 33-C(2) of the I.D. Act, 1947 and came to a conclusion that the opposite parties 2 to 11 are entitled to get Rs.8,00,237/- only. Hence, this writ petition.

3. Mr. Sidheswar Mallick, learned counsel for the petitioner vehemently contended that the order dated 31.12.2014 so passed by the Presiding Officer, Labour Court, Bhubaneswar in I.D. Misc. Case No. 25 of 2010, being without jurisdiction, can not be sustained in the eye of law. It is further contended that

Section 7 of the I.D. Act, 1947 deals with the Labour Court. In Sub-section (1) of Section-7 of the Act, it has been specified that the appropriate Government may, by notification in the Official Gazette, constitute one or more Industrial Tribunals for the adjudication of industrial disputes relating to any matter specified in the Second Schedule and for performing such other functions as may be assigned to them under this Act. It is contended that the Second Schedule of the Industrial Dispute Act specifies the matters within the jurisdiction of Labour Courts. Clause-6 states that all matters other than those specified in the Third Schedule can be adjudicated by the Labour Court. As per Clause-1 to 5, the question of consideration of bonus does not include in the Second Schedule. Thereby, the Presiding Officer, Labour Court has no jurisdiction to entertain the application filed under Section 33-C(2) of the I.D. Act, 1947 for computation of monetary benefits in favour of opposite parties no.2 to 11. It is further contended that the claim made by the opposite parties no.2 to 11 is a stale claim. Therefore, the order so passed by the Presiding Officer, Labour Court allowing such stale claim cannot be sustain in the eye of law and the same is liable to be set aside. To substantiate his contention, reliance has been placed on ***H.P. State Electricity Board v. Ranjeet Singh***, (2008) 4 SCC 241.

4. Mr. P.K. Muduli, learned Addl. Government Advocate appearing for the opposite party no.1 contended that the petitioners are precluded to raise any such objection at this point of time. In support of such contention, he has relied upon the objection filed by the petitioners before the Labour Court which has been placed on record as Annexure-6, wherein the question of jurisdiction was never raised by the present petitioners. As such, question of jurisdiction could have been raised at the first instance. But, without raising such objection before the Labour Court, the petitioners are precluded to raise such question at this point of time. Therefore, seeks for dismissal of the writ petition.

5. Mr. A. Mishra, learned counsel appearing for opposite parties no.2 to 11 vehemently contended that the order, which has been passed by the Labour Court under Section 33-C(2), is well within its jurisdiction and, as such, the pre-requisite for computation under Section 33-C(2) being dependent upon a pre-existing right, on the basis of the admitted calculation by the Official Liquidator and oral admission of the witnesses to the effect that the claimed amount is purely based on such calculations, thereby, the Labour Court has jurisdiction to entertain such application filed under Section 33-C(2) of the I.D. Act, 1947 to make such computation, More particularly, when the witnesses during cross-examination have also otherwise admitted the claim of the opposite parties no.2 to 11, there is no iota of evidence to deny such claim. Therefore, the objection so raised on the question of jurisdiction cannot be sustained in the eye of law.

5.1 It is further contended that there is no dispute that the arrear of salary has been claimed on the admitted employment and salary. The petitioners have further

admitted the cut off date for accumulation of service benefits of the opposite parties no. 2 to 11 along with other similarly situated employees, which has been taken as 30.11.2001 for calculation of the dues. In that view of the matter, even though bonus is one amongst other claims, that *ipso facto* cannot oust the jurisdiction of the Labour Court for computation under Section 33-C(2) of the I.D. Act, 1947. Thereby, the application so filed for computation of monetary benefits for opposite parties no.2 to 11 before the Labour Court is well justified and is coming within its jurisdiction. Consequentially, the writ petition so filed cannot be sustained in the eye of law and the same is liable to be dismissed.

5.2 It is further contended that the claim of the opposite parties no.1 to 11 is not stale one, rather it is continuous demand of the opposite parties no.2 to 11. Therefore, this benefit is admissible to the opposite parties no.2 to 11 because of the calculation made by the Official Liquidator in course of payment of dues to similarly situated employees. Thereby, the Presiding Officer, Labour Court is well within its jurisdiction to make computation of such benefit under Section 33-C(2) of the I.D. Act, 1947, which is payable to the opposite parties no.2 to 11.

5.3. To substantiate his contention, he has placed reliance on ***State Bank of India v. Ram Chandra Dubey and others***, 2001 LIC 79; ***State Bank of Patiala v. Phulpati***, AIR 2005 SC 1918 : (2005) 3 SCC 88; ***Power Finance Corporation Ltd. v. Pramod Kumar Bhatia***, (1997) 4 SCC 280; ***Pappu and Ors v. Raja Tile and Match Works***, (1989) 1 LLT 14: ILR 1989 (1) Kerala 138; ***Kohinoor Tobacco Products Pvt. Ltd v. Presiding Officer, Second Labour Court***, 1986 LIC 1055: AIR 1986 Bom 340.

6. This Court heard Mr. Sidheswar Mallick, learned counsel appearing for the petitioners, Mr. P.K. Muduli, learned Addl. Government Advocate appearing for opposite party no.1 and Mr. A. Mishra, learned counsel appearing for opposite parties no.2 to 11 in hybrid mode and perused the records. Pleadings have been exchanged between the parties and with the consent of learned Counsel for the parties, the writ petition is being disposed of finally at the stage of admission.

7. Before delving into the merits of the case, the provisions contained in Section 33-C(1) and 33-C(2) of the Industrial Disputes Act, 1947 are to be referred to:-

> *"33C. Recovery of money due from an employer.- (1) Where any money is due to a workman from an employer under a settlement or an award or under the provisions of Chapter V-A or Chapter V-B], the workman himself or any other person authorised by him in writing in this behalf, or, in the case of the death of the workman, his assignee or heirs may, without prejudice to any other mode of recovery, make an application to the appropriate Government for the recovery of the money due to him, and if the appropriate Government is satisfied that any money is so due, it shall issue a certificate for that amount to the Collector who shall proceed to recover the same in the same manner as an arrear of land revenue: Provided that every such application shall be made within one year from the date on which*

*the money became due to the workman from the employer : Provided further that any such application may be entertained after the expiry of the said period of one year, if the appropriate Government is satisfied that the applicant had sufficient cause for not making the application within the said period.*

*(2) Where any workman is entitled to receive from the employer any money or any benefit which is capable of being computed in terms of money and if any question arises as to the amount of money due or as to the amount at which such benefit should be computed, then the question may, subject to any rules that may be made under this Act, be decided by such Labour Court as may be specified in this behalf by the appropriate Government within a period not exceeding three months:*

*Provided that where the presiding officer of a Labour Court considers it necessary or expedient so to do, he may, for reasons to be recorded in writing, extend such period by such further period as he may think fit."*

8. On perusal of the aforementioned provisions, it is made clear that Section 33-C(2) is wider than Section 33-C (1). In this connection, the legislative intention disclosed by the language used in these two sub-sections is fairly clear. Under Sub-section (2) it is provided that where any workman is entitled to receive from the employer any money or any benefit which is capable of being computed in terms of money and if any question arises as to the amount of money due or as to the amount at which the benefit should be computed, the question has to be decided by the Labour Court.

9. In ***Central Bank of India Ltd. v. P.S. Rajagopalan*** (1963) II L.L.J 89 (S.C), the apex Court noticed that Sub-section (2) does not contain the words of limitation as used in Sub-section (1) which deals with cases where any money is due under a settlement or an award or under the provisions of Chapter V-A. Thus a claim made under Sub-section (1), by itself, could only be a claim referable to a settlement, award, or the relevant provisions of Chapter V-A. The three categories of claims mentioned in Section 33-C(1) fall under Section 33-C(2) and in that sense Section 33-C(2) could itself be deemed to be a kind of execution proceeding but it is possible that claims, not based on settlement, awards or made under the provisions of Chapter V-A, might also be competent under Section 33-C(2).

10. In ***Punjab National Bank v. K. L. Kharbanda***, (1962) I L.L.J 234 (S.C.), the Court said that the observations that Section 33-C is a provision in the nature of execution "should not be interpreted to mean that the scope of S.33C(2) is exactly the same as S.33C (1)". This was also reiterated in ***Bombay Gas Co. Ltd v. Gopal Bhiva***, (1963) II L.L.J. 608 (S.C.).

11. In ***U.P. Electricity Supply Company Ltd v. R.K. Shukla***, (1969) II L.L.J. 728 (SC), the Court again stated the distinction between the two sub-sections as follows:-

*"The legislative intention disclosed by Ss. 33C( I) and 33C(2) is fairly clear. Under S. 33C(1) where any money is due to a workman from an employer under a settlement or an*

*award or under the provisions of Chapter V-A, the workman himself, or any other person authorized by him in writing in that behalf, may make an application to the appropriate Government to recover the money due to him. Where the workman who is entitled to receive from the employer any money or any benefit which is capable of being computed in terms of money, applies in that behalf, the Labour Court may under S. 33C(2) decide the questions arising as to the amount of money due or as to the amount at which such benefit shall he computed. S. 33C(2) is wider than S. 33C(1). Matters which do not fall within the terms of S. 33C(1) may, if the workman is shown to be entitled to receive the benefits, fall within the terms of S. 33C(2)."*

12. Therefore, for the nature of claim made by the opposite parties no.2 to 11, their employer is coming under the provisions of Section 33-C(2) of the I.D. Act, 1947, which can only be adjudicated and computed by the Labour Court.

Much reliance was placed on Second Schedule contained in Section 7 and Third Schedule contained in Section 7A. Clause (6) of Second Schedule of Section 7 makes it clear that all matters, other than those specified in the Third Schedule, can be adjudicated by the Labour Court. The nature of claim made in the application before the Labour Court falls within the ambit of Clause-6 of the Second Schedule. Thereby, it is well within the jurisdiction of the Labour Court for adjudication. Although Section 7(A), which refers to Third Schedule, prescribes that the matters to come within the jurisdiction of Industrial Tribunal, and Clause (5) thereof refers to bonus, but opposite parties no. 2 to 11 have not confined their monetary benefits to bonus only, rather their claim is based on the report of the Official Liquidator with regard to the monetary benefits admissible to them, which may include bonus, but that *ipso facto* cannot oust the jurisdiction of the Labour Court for adjudication as it falls under Clause-6 of the Second Schedule. Thereby, the order so passed by the Labour Court is well justified and comes within its jurisdiction, which does not require any interference by this Court. As such, the application is maintainable.

13. In ***H.P. State Electricity Board*** (supra), as has been referred to by the petitioners, while considering the entitlement to bonus, the apex Court referring to Schedule II, Item 6 and Schedule III Item 5 under Section 33-C(2), which shows the nature and scope of pre-condition for application and jurisdiction of Labour Court so far as entitlement to bonus is concerned, it has been specifically mentioned that this does not come under Second Schedule, therefore, bonus which appears as Item 5 in the Third Schedule, could not have been decided by the Labour Court. But the ratio decided in the said case is not applicable to the present case, in view of the fact that the claim is based on arrear salary and other benefits, which is based on the report of the Official Liquidator, therefore, covers under clause-6 of the Second Schedule. Thereby, the Labour Court has jurisdiction to entertain such application.

14. On the basis of the factual matrix, as has been available on record, the pre-requisite for computation under Section 33-C(2) being dependent upon a pre-existing right, on the basis of the admitted calculation by the Official Liquidator and oral admission of the witnesses to the effect that the claimed amount is purely

based on such calculations, the application before the Labour Court is maintainable. The witnesses during cross-examination have also otherwise admitted the claim of opposite parties no.2 to 11. Thereby, there is no iota of evidence to deny the claim of opposite parties no.2 to 11.

15. In ***Ram Chandra Dubey*** (supra), it has been held that whenever a workman is entitled to receive from his employer any money or any benefit which is capable of being computed in terms of money and which he is entitled to receive from his employer and is denied of such benefit can approach the Labour Court under Section 33-C(2) of the I.D. Act, 1947. The benefit sought to be enforced under Section 33-C(2) of the I.D. Act, 1947 is necessarily a pre-existing benefit or one flowing from a pre-existing right. The difference between a pre-existing right or benefit on one hand and the right or benefit, which is considered, just and fair on the other hand is vital. The former falls within jurisdiction of Labour Court exercising powers under Section 33C(2) of the I.D. Act, 1947 while the latter does not.

Therefore, applying the said principle to the present case, it is made clear that on the basis of the calculation of Official Liquidator and oral admission of the witnesses, the opposite parties no.2 to 11 have satisfied the pre-requisite for computation under Section 33-C(2) of the I.D. Act, 1947 and the claim made by opposite parties no.2 to 11 being necessarily a pre-existing benefit, the Labour Court has got jurisdiction to decide the same.

16. It is not in dispute that the arrear of salary has been claimed on admitted employment and salary, and the petitioners have further admitted the cut off date, for accumulation of service benefits of the opposite parties no.2 to 11 along with other similarly situated employees, which has been taken as 30.11.2001 for calculation of the dues. While there is no denial of the fact that salary has remained unpaid for entire period of claim, to deny the same to the opposite parties no.2 to 11 by the petitioners on the plea of closure and non-production cannot sustain. As such, no such plea being proved or established in the course of hearing, the claim for arrear salaries and other benefits is legal, justified and tenable. Thereby, under Section 33-C(2) of the I.D. Act, 1947, the Labour Court is competent to make such computation of money claim, which cannot be said to be without jurisdiction or stale claim by the opposite parties no.2 to 11.

17. In ***Power Finance Corporation*** (supra), it is held that unless the employee is relieved of the duty, after acceptance of the offer of voluntary retirement or resignation, jural relationship of the employee and the employer does not come to an end. The same view has also been taken by the apex Court in ***Phoolpati*** (supra) and also ***Raja Tile and Match Works*** (supra).

18. It is no doubt true that the present petitioners have sought to escape their liability, but in view of the decision of this Court in OJC No. 76 of 1993, wherein the Union as well as some of the opposite parties no. 2 to 11 were the petitioners,

before any decision could be taken on behalf of petitioner no.1, the opposite parties no.2 to 11 have been separated and their applications have been processed by petitioner no.1 through petitioner no. 2, the petitioners cannot escape their liability and consequentially they are jointly and severally liable to pay the dues of the opposite parties no.2 to 11.

19. In ***Kohinoor Tobacco*** (supra), the Bombay High Court had taken into consideration the claim relating to unpaid bonus while considering Section 21 of the Payment of Bonus Act, 1965. Applying the ratio decided therein to the present contest, it is made clear that the claim relating to unpaid bonus has been admitted by the petitioners and as per Section 10 of the Payment of Bonus Act, 1965, the petitioners are liable to pay statutory bonus as claimed irrespective of any allocable surplus for the accounting year. Apparently, there is no dispute over entitlement and being a pre-existing right is computable under Section 33-C(2). In view of Section 21 of the Payment of Bonus Act, 1965, statutory bonus can be claimed in an application under Section 33-C(2) of the I.D. Act, 1947 before the Labour Court. There is no dispute that the liquidation process is still underway and the claim of the workers is live and it is a case of continuing wrong for which, no bar under limitation can be claimed. Even otherwise, the opposite parties no.2 to 11 having diligently pursued their remedy before the Government, as a last resort approached the Labour Court for determination of monetary benefits which is legally due to them. Consequentially, no illegality or irregularity has been committed by the Labour Court in passing the order impugned so as to cause interference by this Court.

20. In view of analysis of facts and law, as made above, this Court arrives at the conclusion that the Presiding Officer, Labour Court, Bhubaneswar is justified in passing the order impugned under Section 33-C(2) of the I.D. Act, 1947 determining the monetary benefits in favour of opposite parties no.2 to 11 and this Court does not find and reason to interfere with the same. As a consequence thereof, it is directed that the order of the Labour Court, which is impugned herein, shall be complied with by the petitioners as expeditiously as possible, preferably within a period of three months from the date of receipt of this judgment, by extending the benefit to the opposite parties no.2 to 11.

21. The writ petition is thus dismissed. However, there shall be no order as to costs.

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**2023 (I) ILR - CUT-982**

**ARINDAM SINHA, J & SANJAY KUMAR MISHRA, J.**

W.P.(C) NO.11904 OF 2022

**THE MANAGEMENT, NEELACHAL HOSPITAL PVT. LTD. BBSR.** .....Petitioner

-V-

**PRAFULLA KU. SARANGI & ORS.** .....Opp.Parties

**SERVICE LAW – Domestic Inquiry – The management imposed major penalty without conducting any inquiry – Duty of the Court below – Held, the inquiry could be held in the reference, if it is so prayed for by the management – The employer shall have to be given a chance to adduce evidence before the Tribunal for justifying its action.**

(Paras 10, 12)

For Petitioner : Mr. Lalit Mohan Nanda & Mr. S. L. Kumar

For Opp.Parties : Mr. S. Mohanty, Mr. A. U. Senapati, Mr. B. S. Rayguru, Mr. B. Mishra & Mr. P. Ch. Khuntia

JUDGMENT Date of Judgment : 05.01.2023

***ARINDAM SINHA, J.***

**1.** Mr. Nanda, learned advocate appears on behalf of petitioner(Management). He had moved the writ petition before us on 11th November, 2022. Text of order made that day is reproduced below.

> *"1. Mr. Nanda, learned advocate appears on behalf of petitioner. He submits, his client is the Management. His client has another writ petition against wife of the workman. By impugned award dated 30th March, 2022, back wages and retirement benefits were directed to be given to the workman (husband).*
>
> *2. He submits, on 3rd June 2019, in the morning shift, opposite party-workman created disturbance in the premises and locked main gate. This untoward situation was not conducive to hold enquiry. The workman was dismissed not amounting to retrenchment under section 2(oo) in Industrial Disputes Act, 1947.*
>
> *3. He submits, the labour Court ought to have allowed his client to lead evidence in the circumstances. This was not done and hence, impugned award be set aside.*
>
> *4. Mr. Mohanty, learned advocate appears on behalf of the workman. He supports finding in the award that the Management did not take any step to lead independent evidence, to prove the charge on merit as well as to prove its action of passing the order of dismissal, dispensing with conducting domestic enquiry.*
>
> *5. Leave is granted for parties to file additional affidavits disclosing depositions and exhibits in the reference. Copies are to be exchanged. The affidavits will be accepted on adjourned date.*
>
> *6. List on 5th December, 2022."*

**2.** The writ petition has been called on for hearing today. Mr. Nanda submits, I.A. no.17436 of 2022 has been filed by his client disclosing the written statement and evidence adduced by and on behalf of the Management. He submits, in the written statement there were pleadings stating that it was not possible to conduct inquiry because of the extraordinary situation created, inter alia, by opposite party no.1 (workman). He submits, the workman indulged in disorderly conduct on 3rd June, 2019 by bringing goons into the hospital premises and locking the main gate. On the very next date, i.e., 4th June, 2019 his client dismissed the workman. It was absolutely necessary to do so for restoring order and normalcy in the hospital premises. On query from Court he draws attention to prayers in the written statement, quoted below.

> *"Under the above circumstance, it is respectfully prayed by the First Party-Management that the learned Court may gracious enough*
> *(i) to entitle the management to straight away adduce evidence before the Tribunal justifying its action,*
> *(ii) to consider that evidence so adduced before it on merits, and*
> *(iii) give a reasoned decision thereon.*
> *for which act of kindness as in duty-bound the First Party shall ever pray."*

**3.** He submits, in spite of there having been on record such pleadings and evidence, the Court below disregarded same to say that surprisingly his client did not take any step to lead independent evidence to prove the charge on merit as well as to prove its action of passing the order of dismissal while dispensing with conduct of domestic inquiry. On that basis impugned award dated 30th March, 2022 was made directing payment of back wages and all entitlements in view of the workman having achieved age of superannuation.

**4.** Mr. Mohanty submits, there was no inquiry conducted. In the circumstances, it cannot be said that his client is guilty of any misconduct. He reiterates finding in the award that the Management did not take any step to lead independent evidence, to prove the charge on merit as well as to prove its action of passing the order of dismissal, dispensing with conducting domestic enquiry. By impugned award the Court below correctly found in favour of his client and directed accordingly. There should not be interference. (He submits further, assuming though not admitting the Management had adduced evidence, such was through interested Management witnesses, not independent witnesses.

**5.** On query from Court Mr. Mohanty hands up evidence adduced by his client, sole witness in support of his case in the Court below. On further query from Court regarding omission by his client to even refer therein to the dismissal order and its grounds, being that his client had indulged in disorderly conduct on 3rd June, 2019, Mr. Mohanty prays for adjournment to file additional affidavit. The prayer is rejected since, under no circumstances can his client say that the evidence he seeks now to produce was, notwithstanding exercise of due diligence, not within his knowledge at the time of the proceeding.

**6.** Question to be answered by this Court is whether the award is perverse in not having taken into account relevant evidence available in the materials on record before the Court below. For the purpose the facts need to be looked at. The dismissal order is dated 4th June, 2019. There is no dispute regarding existence of it. Two paragraphs from the dismissal order are extracted and reproduced below.

> *"WHEREAS on 03.06.2019 morning shift, you along with 4-5 goons/anti-socials and accompanied by your spouse, Kailash Kumari Tripathy. Ward Attendant, (who is incidentally a co-employee, and for whom separate Charges are being framed) hurled abusive language and threatened Shri Subhendu Pattanaik, Security Guard, and Shri Ashok Nayak, Security Supervisor with dire consequence and locked the Main Entrance Gate of the Hospital thus causing serious disruption in entry/exit, and creating a commotion in and around the Hospital premises."*
>
> *"AND WHEREAS in view of the extraordinary situation created by you, the Management finds that it is not reasonably practical to hold an enquiry since holding of the enquiry will take some time and with this attitude of yours, the Management is convinced that you will also continue to indulge in such violent activities in future, which may seriously disrupt the functioning of the Hospital apart from endangering the life and property of the organisation."*

The evidence on affidavit, filed by the workman in the proceeding, was notarized on 29th November, 2021. Cross-examination by the management on the affidavit evidence took place on 21st December, 2021. As aforesaid, there is no statement in the affidavit regarding allegation of gross misconduct committed on 3rd June, 2019 nor the dismissal order of the next date (4th June, 2019). Deposition in cross-examination of the workman is reproduced below.

> *"17. I joined under the management as Attendant on 7th May, 2007. Prior to that I was working as paper hawker. I got married to Kailash Tripathy 35 years ago. I knew her prior to my service under the management. I never take liquor. I take betel. There was no dispute between Kailash Tripathy and the management at any point of time. I had never quarreled with the management on 3.6.2019. I had approached the management for 20 days in connection with this case.* ***Since 4.6.2019 I am unemployed. I am not engaged anywhere****. I have no source of income.*
>
> *18. It is not a fact that I am deposing falsehood."* (emphasis supplied)

**7.** The Management produced three witnesses (MWs). MW-1 was working as security supervisor. MW-2 was working as security in-charge and MW-3 as sanitation (sweeper) supervisor. All three claimed to have been eye witnesses to the incident happened on 3rd June, 2019. Their affidavit evidence could not be shaken in cross-examination by the workman.

**8.** The incident of misconduct was alleged in the dismissal order dated 4th June, 2019, to have happened the day before on 3rd June, 2019. It does appear from deposition in cross-examination of the workman that he claimed to have been unemployed since 4th June, 2019. Therefore, this was good evidence that the dismissal order was effective on the date of it. The affidavit evidence of the workman had been notarized on 29th November, 2021. It is clear that the omission to

mention the incident of 3rd June, 2019 as well as the dismissal order dated 4th June, 2019, containing allegations about it, was deliberate. In the circumstances, where the workman did not deal with the ground alleged for his dismissal that, itself, was clear admission and good evidence of the incident before the Court below. No cross-examination was necessary. On the top of that there were three management witnesses, who had stated before the Court below to have been eye witnesses of the incident. The workman having cross-examined them and on perusal of the depositions we find, he could not elicit a contradiction to try and shake their testimony.

**9.** The two separate allegations of the management were that there was gross misconduct committed by the workman on 3rd June, 2019 and secondly, it was not possible to hold inquiry and, therefore, dismissal the next day on 4th June, 2019. Both were clearly alleged in the dismissal order, as would appear therefrom, extracted and reproduced above. We are convinced that same was relevant material for the Court below to have considered. So far as contention of the workman on requirement of proof of the allegation of misconduct by independent evidence is concerned, the requirement was not adverted to by the Court below in making the remark regarding independent evidence. There is no finding that the Management witnesses were or appeared to be interested witnesses and thus their evidence was not of value, relevance or weight. When the three management witnesses had deposed on affidavit to have been eye witnesses and such deposition could not be contradicted or shaken in cross-examination, it became good evidence before the Court below.

**10.** Law is well settled that where there has not been domestic inquiry by the management in the matter of award of major penalty, the inquiry could be held in the reference, if it is so prayed for by the Management. The prayer was there and the Court below referred to the controversy regarding it but did not take into account the evidence that was there before it.

**11.** In light of the facts and evidence before the Court below, it coming to finding that the Management did not take any step to lead independent evidence to prove the charge on merit as well as prove its action of passing order of dismissal while dispensing with conducting domestic inquiry, appears to be result of complete non-application of mind leading to perversity in the award. We extract and reproduce the paragraph from impugned award.

> *"Though the first party management in its written statement has requested this Court to conduct an inquiry into the matter and arrive at a reasonable decision, but surprisingly did not take any step to lead independent evidence to prove the charge on merit as well as to prove its action of passing the order of dismissal while dispensing with the conducting of domestic enquiry as per the mandates of the Hon'ble Apex Court in the above cases."*

**12.** Several judgments of the Supreme Court were referred to and relied upon in impugned award, for the Court below to have inferred two mandates. Firstly, failure to make inquiry before dismissal or discharge of workman can be justified by leading evidence before the Labour Court. Secondly, where no inquiry was held or inquiry was found to be defective, the employer shall have to be given a chance to adduce evidence before the Tribunal for justifying its action provided the employer asks for the permission of the Tribunal to adduce fresh evidence to justify its action. As such, there was no judgment referred to or relied upon by the Court below saying that a management in seeking to justify its action by adducing evidence in the reference had to do so by independent witnesses, in the context to mean, persons not connected with the Management.

**13.** Impugned award is found to be perverse. It is set aside and quashed.

**14.** Considering entire facts and circumstances discussed above, including that the workman lost about 12 years of service, we are inclined and direct the Management to pay Rs.50,000/- (rupees fifty thousand) in addition to statutory dues payable to him. This direction for payment of Rs.50,000/-(rupees fifty thousand), apart from the statutory dues, must be complied with by 20th January, 2023, failing which the award will be deemed to have not been interfered with.

**15.** The writ petition is allowed and disposed of.

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## 2023 (I) ILR - CUT-986

**ARINDAM SINHA, J.**

W.P.(C) NO. 34606 OF 2021

**GOURAHARI LENKA** .....Petitioner

-V-

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

**CONSTITUTION OF INDIA, 1950 – Articles 226, 227 – Petitioner's prayers in the writ application to execute the direction given in the earlier writ petition – Whether a writ petition is maintainable to enforce the order made in a previous writ petition ? – Held, Yes – Case laws discussed.** (Para 5)

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

1. 2003 (3) Calcutta High Court Notes (CHN) 148 : 2003 SCC Online Cal 236 : Indrapuri Studio v. State of West Bengal.

For Petitioner : Mr. Subhransu Bhusan Mohanty
For Opp.Parties : Ms. Suman Pattanayak, AGA.

JUDGMENT Date of Judgment : 06.01.2023

***ARINDAM SINHA, J.***

1. Mr. Mohanty, learned advocate appears on behalf of petitioner and submits, his client was included as a beneficiary in the housing scheme, under serial no.OR 1533285. The information obtained from the website was downloaded on 20th May, 2020, print of which is at page 11. He refers to order dated 22nd June, 2021 of co-ordinate Bench made in his client's earlier writ petition no.16682 of 2021. Two paragraphs from the order are extracted and reproduced below.

> *"Regard being had to the facts and submissions and the nature of relief sought for, the writ petition is disposed of directing the Collector, Balasore-Opposite Party no.2 to dispose of the representation of the petitioner vide Annexure-6 within a period of two months from the date of receipt of the certified copy or soft copy of this order.*
>
> *Before parting with the order, I am constrained to say that there has always been alteration, addition and modification etc. in the selection list for Pradhan Mantri Awas Yojana with an ulterior or political motive, such action should be arrested by the bureaucrats courageously. I hope and trust that, the Collector, Balasore shall do well to help the petitioner in the best way possible."*

2. The Collector purportedly acting pursuant to said order made impugned order dated 30th August, 2021 dismissing claim of petitioner to get the benefit.

3. Ms. Pattanayak, learned advocate, Additional Government Advocate appears on behalf of State and relies upon impugned order. A paragraph therefrom is extracted and reproduced below.

> *"Although in SECC list Sri Gourahari Lenka and two of his sons namely – Narahari Lenka (elder Married), Ramahari Lenka (younger unmarried) claim to be three deferent families, but in actual they all live as one family with common mess. Hence, Sri Lenka and his sons should be considered as one family. One PMAY – G house has been allocated in the name of Sri Lenka's elder son Sri Narahari Lenka. As per PMAY(G) guidelines, since one of the family members of Sri Lenka has already got a PMAY (G) house, rest of the family members become ineligible to get another PMAY(G) house. Upon verification Ration Card and Electricity Bill it is detected that Sri Lenka and his sons, including Sri Narahari Lenka who has already got a PMAY – G house are covered under one ration card and also they have only one electricity connection. Based on the above verified facts, Sri Gourahari Lenka is ineligible to get a PMAY – G house."*

Without prejudice she submits further, portal on the housing scheme has since been closed.

4. It cannot be disputed that petitioner's name was included as a beneficiary and the information was duly obtained by petitioner on 20th May, 2020. Furthermore, there was clear direction by co-ordinate Bench to arrest action of altering the beneficiaries list. Nevertheless, the Collector made impugned order.

There is no question here of adding petitioner's name and, therefore, the portal being closed at present time has no bearing on the controversy. Prayers in this writ petition are, therefore, to give effect to the earlier direction.

5. A writ petition is maintainable to enforce order made in a previous writ petition was view taken in **Indrapuri Studio v. State of West Bengal**, reported in **2003 (3) Calcutta High Court Notes (CHN) 148**. Paragraphs 35 to 37 of the judgment available at **2003 SCC Online Cal 236** are reproduced below.

> *"**35.** This writ petition is virtually a petition before this Court for enforcement of the order passed by this Court in the earlier writ petition. A second writ petition for enforcement of the earlier order is very much maintainable.*
>
> ***36.** In the case of Bibekananda Mondal v. State of West Bengal, reported in (2003) 1 WBLR (Cal) 213, this Hon'ble Court specifically held that without initiating a proceeding for contempt, the Court can quash any order or proceeding done in disregard of such order which may also tantamount to contempt. The relevant portion from paragraph 6 of the said judgment is quoted hereunder:*
>
> *"6. It is therefore, settled law that the second writ application is maintainable for implementation of an earlier order of the writ Court. This Court must issue proper directions for proper implementation of previous directions. Where there has been an order, the order must be complied with. An act done is wilful disobedience of a Court Order is not only contempt, but also, an illegal and invalid act. The language used in Article 226 of the Constitution of India is couched in comprehensive phraseology and the said Article recognizes a very wide power on the High Courts to remedy injustice wherever it is found."*
>
> ***37.** The Supreme Court in the case of Devaki Nandan Prasad v. State of Bihar, reported in AIR 1983 SC 1134, entertained a second writ application under Article 32 of the Constitution of India and passed specific order directing the authority to do what was earlier directed by the Supreme Court on the first writ application."*

Enforcement is necessary since the authority has acted in teeth of said order dated 22nd June, 2021, having directed the Collector to help petitioner in the best way possible. The direction was made in petitioner's earlier writ petition, where he prayed for implementing the benefit. The administration not having taken resort to law, of preferring appeal against it, said order has become final and direction made upon the authority, binding. Court is not inclined to enquire as to how initially petitioner's name was included in the beneficiary list. Information had regarding the inclusion was never disputed and cannot now be disputed in the manner resorted to by the authority.

6. Impugned order is set aside and quashed. Opposite party no.2 is directed to forthwith cause benefit under the scheme be extended to petitioner. The process must commence on action taken within four weeks of communication.

7. The writ petition is disposed of.

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**2023 (I) ILR - CUT-989**

**D. DASH, J.**

RSA NO. 57 OF 2006

**NARAYAN CH. SAHOO @NARAYAN CH. SAHU & ORS.** ..... Appellants

-V-

**RAGHUNATH DAS & ORS.** .....Respondents

**ORISSA CO-OPERATIVE SOCIETIES ACT, 1962 – Section 121 – The suit filed in the year 1987, questioning the validity of the sale conducted by the statutory authority under the O.C.S. Act way back in the year 1975 – Whether suit is maintainable ? – Held, No – Suit is barred as provided in section 121 of the Act.** (Para 13)

For Appellants : M/s.R.K. Mohanty, Sr. Adv.
D.K. Mohanty, S.N. Biswal, A.P.Bose, S.K. Mohanty, P.K. Samanatary, S. Mohanty & M.R. Dash.

For Respondents: M/s.B. Baug (R.2 to 4, 6 to 9, 12 to 18 and 20)

JUDGMENT Date of Judgment : 29.03.2023

***D. DASH, J.***

The Appellants, by filing this Appeal, under Section-100 of the Code of Civil Procedure, 1908 (for short, 'the Code') have assailed the judgment and decree passed by the learned Additional District Judge, Bhadrak in Title Appeal No.1 of 1998. By the same, the Appeal filed by the Respondent Nos.1 to 10 under section 96 of the Code has been allowed and these Respondents being the Plaintiffs when had been non-suited by the Trial Court; their suit has been decreed in the First Appeal. Therefore, these Appellants being the aggrieved Defendant Nos.4 to 13 are in the Second Appeal before this Court.

It may be stated here that the original Appellant No.1 having died during pendency of the Appeal, in presence of other Appellants, no further substitution has been made.

Raghunath Das, the original Plaintiff No.1 having died during pendency of the First Appeal in presence of rest of the Plaintiffs, his legal heirs have not been substituted and the petition filed to that effected had been rejected on 17.08.2004.

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

**3.** Plaintiffs case is that the disputed properties in schedule 'Kha' of the plaint situated in two Mouza, namely, Kusunpur and Suanpada measures Ac.3.07 dec. as

per the current settlement record of right belonged to one Chakradhar Das, the father of the Plaintiff No.1. It is stated that the Plaintiff No.1, Laxman and Plaintiff Nos.19 to 20 as well as the grandfather of other remaining Plaintiffs belong to one family. It is also the case of the Plaintiff that the deceased Chakradhar, his sons and his grandsons are the shareholders-cum-members of Bhadrak Co-operative Land Development Bank (Defendant No.1). They had mortgaged the disputed property in favour of the Defendant No.1-Bank by executing simple mortgage deed on 02.06.1969 for a sum of Rs.4,000/-, agreeing therein, inter alia to pay interest @ 9.1% per annum within a period of 19 years with an annual instalments of Rs.630.40 paise and that on failure to pay the instalment, the mortgagee would take the mortgage properties to Khass possession and pay up the mortgage dues from the usufructs of the mortgaged property. It is further stated that on the allegation that annual instalment amount was not paid by the mortgagers, the mortgaged property was sold by the Sale Officer (Defendant No.3) for a sum of Rs.5,269.40 in an auction held pursuant to the order passed in Execution Proceeding Case No.30/1974-75 on 31.05.1975 and it is purported therein to have been purchased by the wife of Defendant No.2, who then sold the said property to her husband, the Defendant No.2 under a registered sale deed. The wife of Defendant No.2 died few months prior to the suit. According to the case of the Plaintiffs, the delivery of possession of the suit land although is merely is shown to have been taken on 05.12.1975, that is however not in reality. It is stated that the notice under section 91 of the Orissa Co-operative Societies Act, 1962 (for short called as 'O.C.S. Act') in writing requiring payment of mortgaged money or part thereof from the persons who have got interest in the said mortgaged property or who has got right to redeem the same is required and according to Rule 141 of the Orissa Co-operative Societies Rules, 1965 (for short, 'the O.C.S. Rules'), the Sale Officer only upon the expiry of three months from the date of the notice under section 91 of the O.C.S. Act has the power to sale the mortgaged property after giving due notice in writing to all the persons having interest in the mortgaged property. The Plaintiffs alleges that the mandatory provisions of section 91 of the O.C.S. Act and rule 141 of the O.C.S, Rules as to giving of three months notice have not at all been complied with. It is also stated that the Sale Officer has no jurisdiction to initiate the proceeding for sale. The Plaintiffs alleged that the Bank-Defendant No.1 has not served any notice under section 91 of the O.C.S. Act upon anyone but only asked the Sale Officer to sale the mortgaged property, which is void and in violation of the provision of section 91 of the O.C.S. Act and rule 141 of the O.C.S. Rules. According to the Plaintiffs, no notice by registered post has been served in connection with the sale of the said mortgaged property indicating the specified amount for which the property would be sold nor the Sale Officer has made the sale proclamation as required under sub-rule (5) of the rule 141 of the O.C.S. Rules, by beat of drums in the village where the mortgaged property situates nor had sent the copy of the proclamation to Revenue Officer, Bhadrak for affixing the sale in their notice board; also no copy of the said proclamation

to any of the Plaintiffs has been served. It is the further case of the Plaintiffs that the Sale Officer on 30.08.1974, having found that no bidder turned up in contravention of the provisions contained in rule 141(6) of the O.C.S. Rules instead of adjourning/postponing the sale to any specified date, again on 01.05.1975 after lapse of eight months, fixed the sale date to 31.05.1975 but then no fresh proclamation was issued as required under Rule 141(6) of the O.C.S. Rules. According to the Plaintiffs as no fresh proclamation was issued, no other bidder could participate in the said bid except that Saraswati and her bid was accepted. The property sold would have been more than the value at which it was sold. It is stated that the Sale Officer has failed to exercise the power vested in him under sub-rule 6 of rule 141 of the O.C.S. Rules in issuing fresh proclamation in seeking participation of adequate number of bidders. It is also stated that there has been deliberate violation of statutory provisions of the O.C.S. Act and the Rules made thereunder and thus said sale is attacked as invalid and as such it is said that the auction purchaser has not acquired right, title and interest over the property under that invalid sale. It is stated that the delivery of possession of the disputed property as noted pursuant to the auction sale to have been given to the auction purchaser only reflected in the paper but not in the field when the facts remain that the Plaintiffs have been in possession of the property and paying the rent. It is also stated that when Saraswati, the auction purchaser could not possess the disputed property and as the Plaintiffs remained in possession as before, she had lodged an F.I.R. against the Plaintiffs alleging commission of offence under section 379, I.P.C. and that case ended in favour of the Plaintiffs. It is stated that after such acquittal, said auction purchaser with the help of some persons came upon the suit land one fine morning in the month of December, 1984 and forcibly cut and removed the paddy and since then said auction purchaser remained in possession of the suit land till her death.

It is next stated that Plaintiff Nos.3,4,7,8,9,10,14 and 15 were minors when the disputed property was mortgaged to the Defendant-Bank by their father guardian. They also say that the mortgage for the above reason is illegal as the minors were not the members of the society. It is also said that the mortgage of the property where the minors had their interest without the permission of the learned District Judge could not have been made. According to the Plaintiffs, Chakradhar having died in the year 1972, the interest of the Plaintiffs Nos.11,12,16,17,18,19 and 20 are not affected by the said auction sale and as such neither the auction purchaser or her transferee have no right, title and interest over the suit property. They having forcibly dispossessed the Plaintiffs from the disputed property, the suit came to be filed after serving notice as required under section 127 of the O.C.S. Act.

**4**. The Defendant Nos.1 and 3 did not file any written statement. The auction purchaser Saraswati having died, her husband, the Defendant No.2 filed the written statement and other legal representatives have been impleaded as Defendant Nos.4 to 13. The Defendant Nos. 4,5,8,10 and 11 have filed an additional written statement

indicating that it was also on behalf of Defendant Nos.3,4,7,9,10,11 and 12. The Defendant No.6 has filed another written statement and the contesting Defendant Nos.2 and 8 have filed an additional written statement along with Defendant No.9. The Defendant No.2 and other L.Rs. of Sawaswati although have filed three sets of written statement, from all practical points of view, those remains the same.

**5.** The contesting Defendants plead that the Plaintiffs have no cause of action; the suit is barred by limitation and the Plaintiffs are not entitled to get any relief which they claim since the title of the auction purchaser in the auction has been confirmed under section 103 of the O.C.S. Act which is not questionable in Civil Court. It is stated that the R.O.Rs. granted by the Consolidation Authority finally deciding the right, title and interest of the parties is no more amenable to challenge. It is also stated that the suit is hit by the principles of res judicata as the Plaintiffs having duly contested the Consolidation Proceedings concerning the suit land in Objection Case No.775 /52,776 and 777 of 1986 before the Consolidation Officer and also in Consolidation Appeal No.96/86 before the Deputy Director, Consolidation, Bhadrak, there has been a finality on the question of right, title and interest of Saraswati, the auction purchaser over the said land. Therefore, it is no more in dispute that Saraswati purchased the suit land in the auction sale. The Defendant denied the averments taken in the plaint about the mortgage and the terms and conditions of mortgage and the allegation of non-payment of instalments. According to them, Saraswati was the title holder being the auction purchaser of the land and as such was in possession of the same till her death, which came to her LRs. The non-observance of the provision of section 91 of the O.C.S. Act and rule 141 of the O.C.S. Rules has been denied. They also deny the fact that the delivery of possession of the auction property in favour of the auction purchaser was merely on the paper and to have not been physically made. It is stated that the suit property having been recorded in favour of the Saraswati in the consolidation R.O.R., her possession over the suit land as the auction purchaser is established. They state that when some of the Plaintiffs created disturbance in their possession over the suit property of the auction purchaser there having arisen the apprehension of breach of peace, proceeding under section 144, Cr.P.C. had been initiated against the Plaintiffs which came to be numbered as Misc. Case No.34/80 and 56/81 before the Sub-Divisional Magistrate, Bhadrak. It is stated that the auction purchaser possessed the land since 1975 and remained in cultivating possession of the same till her death. After her, the Defendant No.2 and other LRs. are in possession of the same land under Consolidation Khata No.29 and 163 and have been harvesting crops over there. They state that the F.I.R. lodged by Saraswati was not based on false facts. It is also stated that the acquittal order passed therein was not on the ground of non-proving of the actual delivery of possession. They also denied to have taken possession of the suit land forcibly with the help of other persons. According to them, the right of the father was there as the Karta of the family to mortgage the joint family property and there was no necessity for him to take permission from the

learned District Judge for mortgaging the same. They denied that the thereby any interest of Plaintiff Nos.11,12,16 and 20 has ever been affected. According to them, Saraswati had duly purchased the property in auction and was put in possession of the said purchased land and since then, the Plaintiffs are never in possession of the said land. It is stated that the Plaintiffs had full knowledge regarding the execution proceeding before the Assistant Registrar of Co-operative Societies, Bhadrak and although Subarna, the Plaintiff No.13 had filed a petition to set aside the same in Execution Proceeding No.30/1974-75 after inquiry it was dismissed and the sale was confirmed. It is stated that Subarna had again filed Revision Case No.35/75 before the Additional Registrar of Co-operative Societies, Bhubaneswar and by order dated 12.05.1977, the Revision was dismissed and the order of the ARCS has been confirmed. The Plaintiffs thus having failed in all their attempts to get the sale nullified, the Consolidation Authorities have rightly recorded the land in suit.

**6**. On the above rival pleadings, the Trial Court in total framed eight issues. Answering the crucial issues, i.e., Issue Nos.4,5 and 6 which relate to the auction purchaser taking delivery of possession, right of Chakradhar to mortgage the property and the right, title and interest as claimed by the Plaintiffs over 'Kha' schedule land, the Trial Court upon examination of evidence and their evaluation, has answered as under:-

> (a) though the suit properties originally belonged to Chakradhar, the predecessor-in-interest of the Plaintiffs, the Plaintiffs have lost title in view of the auction sale and its confirmation by means of which Saraswati acquired title and has been put in possession of the suit properties;
>
> (b) Chakradhar had the right to mortgage the interest of the minor Plaintiffs and they had no right over the mortgage the property;
>
> (c) the auction purchaser had taken delivery of possession of the mortgage property in the auction sale;
>
> (d) the suit is barred by limitation as the auction sale was held and confirmed on 10.09.1975 when the suit has been filed on 27.11.1987;
>
> (e) the claim of the Plaintiffs that they were dispossessed on 05.12.1985 is false in view of the evidence on record; and
>
> (f) the Consolidation Authority have recorded the land in favour of the auction purchaser namely, Saraswati.

Having found all these above, the Trial Court dismissed the suit.

**7**. The unsuccessful Plaintiffs having filed the Appeal, the First Appellate Court has held as follows :-

> (i) the sale certificate and auction proceeding along with the consolidation R.O.R. are illegal;
>
> (ii) the delivery of possession of the auction property to the auction purchaser is symbolic.

Having said all these above, the First Appellate Court has passed the following order:-

"The sale certificate and the sale proceeding are declared illegal and so also the consolidation R.O.Rs. The right, title and interest of the Plaintiffs over the suit lands is hereby declared and confirmed. The delivery of possession to the auction purchaser is held as a symbolic paper transaction as the land is now lying fellow. The possession of the Plaintiffs is confirmed. The auction Purchaser-Defendant and the Bank are restrained from entering into or disturbing in any manner in the peaceful possession of the Plaintiffs over the suit land."

**8**. The instant Second Appeal having been filed by the aggrieved Defendants, the same has been admitted to answer the substantial questions of law as indicated in Ground Nos.(C) (D) and (E) of the Memorandum of Appeal, which are:-

(**I**) Whether the jurisdiction of the Civil Court is barred in the instant case?

(a) In view of Section of 121 of the Co-operative Societies Act, specifically ousting the Civil Court's jurisdiction to interfere with any proceeding, order, decision, determination or award under the said Act.

(b) In view of Section 94 of the Co-operative Societies Act , which specifically mandates that the auction purchasers (Defendant-Appellants) title cannot be questioned on the ground of notice and the Plaintiff/Respondent Nos.1 to 20 are only entitled to damages.

(c) In view of section 9 of the C.P.C. barring the jurisdiction of Civil Court where statutory remedies are available. (N.B.- In the instant case the Plaintiffs/Respondents 1 to 20 have unsuccessfully exhausted all statutory remedies under the Co-Operative Societies Act).

(**II**) Whether the Plaintiffs' suit can be decreed in the absence of proper specification of the suit property as required under Order-7, Rule 3, C.P.C.?

(a) When the mortgaged property has undergone statutory transformation under the provisions of the OCH & PFL Act and has merged with other lands forming new chakas in favour of the Defendant/Appellants.

(b) When the persons who have been allotted chakas inclusive of the mortgaged property are not parties to the suit.

(c) When no executable decree can be passed in the absence of any nexus between the alleged mortgaged property and the present property allotted by way of chakas to the Defendant-Appellants.

(**III**) Whether the mortgage in question can be nullified, particularly after being subjected lawfully to the provision of the Act?

(a) When the suit mortgage deed clearly authorizing the Bank to auction.

(b) When The suit mortgage has been executed by the father/karta of the family who is authorized to do so under Article 236 of the Old Hindu Law and section 85(A) of the Orissa Co-operative Societies Act;

(c) When there is no allegation that the suit mortgage was not for the benefit of the family so as to bring the suit within the extended limitation prescribed under Article 60 of the Limitation Act.

**9**. Mr. R.K. Mohanty, learned Senior Counsel for the Appellants (Defendants) submitted that the provision contained in section 121 of the O.C.S. Act specifically bars the jurisdiction of the Civil Court or Revenue Court in respect of any proceeding under the Act. According to him, the loanee has a right under rule 103(4) of the O.C.S. Rules to apply for setting aside the sale before the Sale Officer and the

aggrieved party is given the right of appeal and revision. He thus submitted that as in the instant case, there was a prayer from the side of the Plaintiffs to set aside the sale in Execution Case No.30 of 1974-75 and as no fraud is pleaded and proved when one of the Plaintiffs as it reveals from Ext.G, challenged the auction sale by taking recourse to set aside the auction sale in different forums, which was rejected, Therefore, he submitted that the Plaintiffs are not entitled to question the validity of sale conducted by the statutory authority under the O.C.S. Act in the present suit after long lapse of time. In this connection, he has also referred to Ext.H, the order of the Revisional Authority and submitted that as against that there being no further move under section 113 of the O.C.S. Act, it is clear that the sale was then accepted by surrendering to the orders of the statutory authorities. He thus submitted that the bar contained in section 121 of the OCS Act squarely stands against the entitlement of the suit. He further submitted that section 85(A) of the O.C.S. Act authorizes the Manager of the joint Hindu family to execute the mortgage in favour of the Bank and in such a case it shall be binding on all the members. It was also submitted that as provided in Article 236 of the old Hindu Law, the father as the Karta is empowered to execute mortgage on behalf of the joint family and in the instant case, the Plaintiffs when have never made out a case that the mortgage was not for the benefit of the family and Chakaradhar had no authority at all to mortgage the property in question, the findings of the First Appellate Court cannot be sustain and must yield to quashment. He submitted that when section 94 of the O.C.S. Act provides a statutory protection to a bonafide purchaser who having participated in the process in the statutory proceeding has lawfully acquired the property through court auction on payment of valuable consideration and when the said provision mandates that a sale shall not be questioned on the ground provided therein including the lack of notice, it was incumbent upon the aggrieved Plaintiffs to satisfy the statutory authorities on the invalidity and they having failed successively before the statutory forums, cannot question the title of the auction purchaser in the present suit when the only remedy available to them is to claim damages against the Defendant-Bank which has not been so advanced in the instant case. It was further submitted that even the plea of non-service of notice has not been substantiated through any documentary evidence, save and except the bald statement taken in the plaint which is not the proof. In this regard, he submitted that the Plaintiffs having filed an application under Order 11, Rule 14 of the Code on 20.03.1989 to direct the Sale Officer to produce documents although it had been allowed on 23.06.1989 thereafter they having not taken the step under Order 16, Rule 10 of the Code to cause production of the documents in the manner prescribed therein, the presumption under section 114(g) of the Evidence Act stands drawn that the documents if would have been so tendered in evidence would have gone against the Plaintiffs. He, therefore, submitted that for such inaction on the part of the of the Plaintiffs, adverse inference to their case is bound to be drawn, which the First Appellate Court has totally overlooked.

He then submitted that the decision of the Consolidation Authority on the question of title which ultimately has culminated in publication of the ROR, operates as res judicata. According to him, the Plaintiffs having failed to get their title established before the Consolidation Authorities which has finally resulted in publication of the consolidation R.O.R. and as the decision of the Original Consolidation Authorities shows that the pleas taken by the Plaintiffs in the suit had been taken there and turned down, they raising the same plea for adjudication and decision afresh cannot succeed in the suit. In this connection, he has referred to the decision in case of Srinibas Jena & Others Vrs. Jandardan Jena & Others, AIR, 1981 Orissa 1, wherein it has been held that finality is attached to the decision of the Consolidation Authorities and, therefore, the same shall not be called in question in any Court of law and that once the parties work out their rights before the Consolidation Authorities and exhaust the remedies under the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 (for short, the OCH & PFL Act), cannot agitate the same question over and again before the Civil Court and, therefore, the Consolidation Authorities decision would operate as res judicata. He also submitted that the Plaintiffs suit is liable to be dismissed for lack of proper identification of the suit properties in as much as the Plaintiffs have not provided the details of the changed specifications brought about in the Consolidation Proceedings, which under the changed situation was obligated upon. According to him, the original mortgaged property has in the meantime been converted into the Chakas with new boundaries being amalgamated with other properties as would be evident from Ext.A and B. Therefore, as no executable decree can be passed in favour of the Plaintiffs as per the specifications of the land provided in the plaint which have become the extinct after the closure of the consolidation operation and publication of the record of right vide Exts.A and B, the suit on that ground alone is bound to to fail.

**10.** Mr. B. Baug, learned counsel for the Respondent Nos.2 to 4, 6 to 9, 12 to 18 and 20 submitted that Chakradhar having expired in the year 1972, the execution proceeding initiated in the year 1974-75 against Chakradhar alone though he was not the sole mortgager and the order passed therein is a nullity. He further submitted that there being complete violation of the mandatory provisions contained in section 91 of the O.C.S. Act and rule 141 of the O.C.S. Rules, the sale is void ab initio. It was also submitted that when the lands were mortgaged, some of the mortgagers were minors and, therefore, their interest could not have been sold in execution proceeding. Therefore, according to him, the sale of mortgaged property in which the minors have the interest is illegal and void which the First Appellate Court has rightly held. It was submitted that since the provisions of the O.C.S. Act and Rules which are mandatory in nature have been violated, the Civil Court has the jurisdiction to entertain the suit and the provision of section 121 of the O.C.S. Act will not stand as a bar for this suit with the reliefs claimed. He submitted that the provision of section 51 of the O.C.H. & P.F.L. Act would not come on the way of

the suit since the Consolidation Authorities had no jurisdiction to set aside the auction sale and merely because objections were filed by some of the Plaintiffs and they had carried the Appeal, the decision of the Consolidation Authorities would not operate as res judicata. He further submitted that some properties which had not mortgaged at all have been sold in that Execution Proceeding Case vide Ext.6 and, therefore, the Execution Proceeding in which the sale has been made is null and void.

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

**12**. Section 121 of the O.C.S. Act as it stands after amendment vide Orissa Act No.28 of 1991 which came into force with effect from 01.05.1993 reads as under:

> 121. Save as provided in this Act no Civil or Revenue Court shall have any jurisdiction on any ground whatsoever in in respect of any proceeding under this Act and Rules or any order, decision, determination of award, by whatever expression called, made or given thereunder.
>
> This provision prior to the above amendment read as follows:-
>
> 121(**1**) Save as provided in this Act, no Civil or Revenue Court shall have any jurisdiction in respect of–
>
> (a) the registration of a society or bye-laws or of an amendment of a by-law;
>
> (b) the removal of a committee ;
>
> (c) any dispute required under section 68 to be referred to the Registrar; and
>
> (d) any matter concerning the winding up and the dissolution of a society.
>
> (**2**) While a society is being wound up, no suit or other legal proceedings relating to business of such society shall be proceeded with, or instituted against the liquidator as such or against the society or any member thereof, except by leave of the Registrar and subject to such terms as he may impose.
>
> (**3**) Save as provided in this Act, no order, decision or award made under this Act shall be questioned in any Court on any ground whatsoever.

The provision as to the bar as it stands after amendment would have its play as it had come to the statute by the time the decision was rendered by the Trial Court on 03.10.1997.

**13**. The loanee has a right as provided in Rule 103(4) of the O.C.S. Rules to apply for setting aside the sale before the Sale Officer. The party aggrieved by the said decision has been given the right of Appeal and Revision. In the instant case, a prayer to set aside the sale was made in Execution Proceeding Case No.35/1974-75. Thus, there was a contest from the side of the Plaintiffs to the auction sale. Ext.G reveals that one of the Plaintiffs had taken recourse to set aside the auction sale in question by presenting an application which was rejected on 10.09.1975. He then had preferred an Appeal before the Deputy Registrar of Co-operative Societies which stood numbered as Appeal Case No. 38 of 1975 and then a Revision being

carried out, it was numbered as Revision No.35 of 1975. Those having been dismissed, as evident from Ext.G and Ext.H, the orders passed, although a right of further Revision before the State Government under section 113 of the Act was available, the same has not been availed of. Therefore, the present suit filed in the year 1987 questioning the validity of the sale conducted by the statutory authority under the O.C.S. Act way back in 1975, in my view would be barred as provided in section 121 of the O.C.S. Act. Having said above, this Court finds no further need to discuss to the decisions in cases of Ugramadhab Joshi Vs. the Assistant Registrar, Co-operative Societies and Ors., MANU/OR/0211/1983; Kela Gouda Vs. Krishna Panigrahi & Ors., AIR 1987 Orissa 243 and Iswar Chandra Beura & after him Dilip Kumar Beura & Ors. Vs. Ghanashyam Swain & Ors., 72 (1991) C.L.T. 420, which discuss on the invalidity of auction sale for noncompliance of the relevant provision of OCS Act and Rules in seisin of writ proceedings carried to the High Court in assailing the orders passed in those proceedings by the statutory Authorities but not in subsequent suit being instituted projecting those grounds seeking the relief of declaration of the auction sale as void.

**14**. In the given case, it further appears that the Plaintiffs in spite of their attempt have failed to obtain a decision on their title in respect of the suit land before the Consolidation Authorities both in the Original and Appellate forum. Finally, the Consolidation Record of Right has been published. The Plaintiffs as it reveals from Ext.5, the decision of the original Consolidation Authority having raised the pleas which they have taken in the present suit, those have been turned down. The Appellate Authority being approached by these Plaintiffs, the move in that regard has also been unsuccessful as would be evident from Exts.K and L. In consequence thereof, the Record of Rights have been issued in favour of the Defendants under Ext.A and B. The Consolidation Authority being empowered to decide the title, in order to rule upon the same concerning the suit lands, which were the subject matter of the auction in E.P. Case No.35 of 1974-75, the power was squarely then resting with said Authorities to decide as to whether in that auction sale, the title in respect of the property auctioned had passed on to the hands of the auction purchaser, i.e., Saraswati keeping in view the very claim of the Plaintiffs that said auction is void in view of non-compliance of mandatory provisions of OCS Act and Rules as also involvement of the interest of the minors over the property so mortgaged and auctioned which they attack on that ground too as void.

That apart, the description of the suit properties are found to be not in consonance with the said specifications of the lands as per the Consolidation Record of Right and the fact remains that the properties which were the subject matter of the auction sale have in the meantime in the Consolidation Operation being amalgamated with other lands have been converted to Chakas with new boundaries, taking new identities and that too have been mingled with other properties losing their identity as before and thus have undergone sea change in the field, which are wholly irreversible.

For all these aforesaid, this Court is of the view that not only that the provision of section 51 of the O.C.H & P.F.L. Act would stand as a bar for the present suit but also the suit is also liable to be dismissed on the ground that no executable decree can be passed in view of such massive changes concerning the said auctioned land in the field which are totally irreversible.

The substantial questions of law are accordingly answered against the Plaintiffs. Therefore, it is held that the judgment and decree passed by the First Appellate Court are liable to be set aside and the Plaintiffs suit as laid for the reliefs claimed is liable to be dismissed.

**15**. In the result, the Appeal is allowed and the judgment and decree passed by the First Appellate Court being set aside; those passed by the Trial Court, non-suiting the Plaintiffs stand restored. No order as to cost.

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## 2023 (I) ILR - CUT-999

### D. DASH, J.

RSA NO. 125 OF 2020

**BINAY RANJAN SAHU & ANR**. ..... Appellants

-V-

**KUSUMLATA DEI & ORS.** .....Respondents

**(A) CODE OF CIVIL PROCEDURE, 1908 – Section 100 – Whether a finding of fact can be set aside in Second Appeal – Held, Yes – Detailed conditions discussed.** (Para 18)

**(B) ADOPTION – Burden of Proof – Held, the burden is on one who claims to have been adopted to dispel the same beyond reasonable doubt – Case laws discussed.** (Para 17 to 17.4)

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

1. AIR 1915 PC 7 : Bal Gangadhar Tilak v. Srinivas Pandit.
2. AIR 1933 PC 155 : Amareadra Mausing v. Sana-tan Singh.
3. AIR 1963 SC 185 : V.T.S.Chandrasekhara v. Kulandaivela.
4. AIR 1954 SC 581 : Hem Singh v. Harnam Singh.
5. (1987) 2 SCC 338 : Rahasa Pandiari (Dead) by LRs vrs. Gokulananda Panda & Ors.
6. AIR 1959 SC 504 : Kishori Lal vrs. Mt.Chaltibai.
7. 1989 OLR (I) 425 : Prafulla Kumar Biswal vrs. Sashi Beura & Ors.
8. AIR 1971 Orissa 299 : Sulei Bewa & Ors. vrs. Gurubari Rana.
9. AIR 1999 Orissa 32 : Arjun Banchhar vrs. Bacchi Banchhar.
10. AIR 1961 S.C. 1378 : R.Lakshman Singh Kothari vrs. Smt. Rupa Kanwar.
11. AIR 1970 SC 1286 : L.Debhi Prasad (dead) by L.Rs. vrs. Smt. Tribeni Devi & Ors.

12. 1974 (1) CWR 403 : Bauri Devi -V- Dasarathi Sahu.
13. AIR 4988 SC 1858 : Dilbagrai Punjabi v. Shavad Chandra.

For Appellants : Mr. M. Sinha
For Respondents: Mr.D.Tripathy (for R.1)

JUDGMENT Date of Hearing : 21.02.2023 : Date of Judgment : 29.03.2023

***D. DASH, J.***

The Appellants, by filing this Appeal under Section 100 of the Code of Civil Procedure, 1908 (for short, 'the Code'), have assailed the judgment and decree dated 21.12.2019 & 04.01.2020 respectively passed by the learned 2nd Additional District Judge, Bhubaneswar, in R.F.A. No.61 of 2013.

**2.** The Respondent No.1, as the Plaintiff had filed T.S. No.109/385 of 2011/1994 seeking declaration that the Appellant No.1 (Defendant No.2) is not the adopted son of Jayaram Sahu and Kunja Sahu and that the deed of gift dated 28.12.1992 in favour of Appellant No.1 (Defendant No.2) as well as the registered sale deed dated 30.12.1992 in favour of Appellant No.2 (Defendant No.1) are void and illegal. Prayer was also made for passing of a preliminary decree entitling her with 1/3rd share and the Defendants 3 and 4 to 1/3rd share each. The Trial Court dismissed the suit.

**3.** The Respondent No.1, as the Plaintiff, thus being non-suited by the Trial Court, having carried the First Appeal under section 96 of the code, has been successful in the said move. In the First Appeal, the following order has been passed:-

> "The appeal is allowed, the judgment and decree passed in T.S. Case No.109/385 of 2011/1994 is hereby set aside. This Court declares that the Defendant No.2 is not the adopted son of Jayaram Sahu and Kunja Sahu and the gift deed no.1669 dated 28.12.1992 and registered sale deed dated 1417 dated 30.12.1992 are void and illegal. The suit is preliminarily decreed with 1/3rd share each to the plaintiff and defendant Nos.3 & 4. The parties are directed to effect partition within a period of 3 months in default of which any of the parties can approach the court below for initiation of final decree proceeding".

**4.** Being aggrieved by the aforesaid decision of the First Appellate Court, the Defendant Nos.1 and 2 as well as their sister, who came to be arraigned as a party in the First Appeal, upon death of her mother, the original Defendant No.3, have filed this Appeal.

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

**6. <u>Plaintiff's Case:-</u>**

Plaintiff and the Defendant No.3 are the two daughters of Jayaram, who died on 25.05.1993 leaving behind his widow (Defendant No.4) and two daughters, who are Plaintiff and Defendant No.3. The Defendant No.1 is the husband of Defendant No.3 and Defendant No.2 is the son of Defendant No.3.

The suit properties in schedule-B & C are said to be the ancestral property of Jayaram. After his death, the Plaintiff, Defendant Nos.3 and 4 succeeded to the same. It is stated that Defendant No.1 obtained a fraudulent sale deed dated 30.10.1992 purported to have been executed by Jayaram in his favour, which is in respect of the land described in Schedule-B of the plaint. It is further stated that the property described in Schedule-C of the plaint is said to have been gifted away on 28.12.1992 by Jayaram in favour of Defendant No.2, who was then a minor being falsely representing through his adoptive mother (Defendant No.4) is the outcome of fraud.

Jayaram, after giving his two daughters in marriage, had absolutely no one and was managing himself decently. He had incurred no loan and there was no necessity on his part to arrange money by sale or otherwise. It is stated that due to extreme old age, when Jayaram was not in a fit state of health and mind, taking the advantage of that, the Defendant No.2, being the son-in-law, has obtained the registered sale in his favour in respect of Schedule-B property without payment of consideration. So, it is said that Defendant No.1 has not derived any right, title and interest in respect of Schedule-B properties by said fraudulent sale deed, which is said to be a sham transaction when Jayaram too had never parted with the possession of the said land in favour of Defendant No.1 and rather, he continued to remain in possession till his death.

It is next stated that Defendant No.1, two months after obtaining the said sale deed, created another fraudulent deed of gift purported to have been executed by Jayaram in favour of Binay, his minor son (Defendant No.2) in respect of the entire balance property including the house and homestead and leaving absolutely no provision for himself and his wife (Defendant No.4) even for their future shelter and sentence. It is said that the recitals in the so-called deed of gift is that Defendant No.2 was adopted by Jayaram since his childhood is totally false when no such adoption of Defendant No.2 had ever taken place. It is also stated that Defendant No.2, being the only son of Defendant Nos.1 & 3, he could not have been given on adoption and taken as such. Thus, it is said that the registered sale deed as well as the gift deed are the outcome of fraudulent activities carried out by Defendant No.1 in connivance with Defendant No.3 in order to deprive the Plaintiff, who is the elder daughter of Jayaram. The Plaintiff, being the elder daughter of Jayaram, is entitled to 1/3$^{rd}$ share over Schedule-B & C properties. The Defendant Nos.1 to 3, having denied to part with the property as per her entitlement in favour of the Plaintiff, she filed the suit for declaration that the registered sale deed dated 30.10.1992 and the registered gift deed dated 2 8.12.1992 are invalid and inoperative and conveyed no

title. It was also prayed that it be declared that the Defendant No.2 is not the adopted son of Jayaram. With the above, the Plaintiff prayed for partition entitling her with 1/3rd share over Schedule-B & C properties.

**7.** The Defendants 1 & 3, in their joint written statement, while traversing the plaint averments, have stated that Jayaram died on 25.05.1993. It is also said that the Defendant No.2 was taken on adoption by Jayaram from Defendants 1 and 3 and the adoption was a valid one. It is stated that Defendant No.2, being the adopted son of Jayaram, whatever properties were left by Jayaram, were succeeded by the Plaintiff and Defendants 1, 3 and 4. It is further stated that major portion of the suit land were the self-acquired properties of Jayaram and he was at liberty to deal with the same as per his own will and desire. The registered sale deed dated 30.10.1992 standing in favour of Defendant No.1 is said to be valid and genuine. It is further stated that Jayaram had only 21 gunthas of properties which included the homestead, bari, tank and cultivable land. He, during his younger days, had acquired Ac.1.25 decimals of land from his own income. In order to perform the marriage ceremony of his two daughters as well as to attend the other functions of the relations, Jayaram, due to paucity of fund, he had borrowed money from different persons and the loan gradually mounted up when thereafter due to illness of Jayaram, he also further incurred loans. The house of Jayaram, without being properly repaired also gradually got damaged. So, he wanted to alienate the property and then the Defendant No.1 being the son-in-law of Jayaram, purchased the same from him by paying consideration of Rs.20,000/- to Jayaram and he took delivery possession of the said land. The Plaintiff, being the daughter of Jayaram, had never come to help and assist Jayaram and now with an ulterior motive, has advanced a false claim over suit property.

It is again stated that Jayaram and Defendant No.4 have no issue of their own. So, they had adopted the Defendant No.2 since his childhood when the Plaintiff refused to give her son in adoption. It is stated that since the time of adoption, Defendant No.2 resided under the care and custody of Jayaram and his wife (Defendant No.4). Jayaram had executed deed of gift in respect of his landed properties in favour of Defendant No.2 which is valid.

**8.** The Defendant No.5, in his written statement, while traversing the plaint averments, has specifically pleaded that Jayaram had never adopted the Defendant No.2. He further stated that two daughters of Jayaram, i.e., Plaintiff and Defendant No.3 with the widow (Defendant No.4) of Jayaram have succeeded to the properties of Jayaram. It is his case that Jayaram and he were in joint possession of the entire property and after the death of Jayaram, he is staying with Defendant No.4. The suit property, having not been partitioned in metes and bounds, he claimed half share over the said property by way of a counter claim.

**9.** The Defendants 1 to 4, in their written statement to the counter claim of the Defendant No.5, have stated that the Plaintiff, Defendant Nos.1, 3, 4 & 5, have got no share in the property measuring Ac.0.20 decimals covered under Khata No.229 as the same has been gifted away to Defendant No.2 to the extent of Ac.0.10 decimals which the Defendant No.2 has got mutated in the year 1995 and is paying the rent to the State.

**10.** The Trial Court, on the above rival pleadings, has framed seven issues. Answering the crucial issues, i.e., issue nos.3, 4, 5 & 6 together, which mainly concern with adoption of Defendant No.2 by Jayaram, validity of the registered sale deed and gift deed dated 30.10.1992 and 28.10.1992 respectively as well as the share to which the parties are entitled to, upon examination of the evidence and their analysis, has held that the Defendant No.2 is the adopted son of Jayaram. On further discussion of the evidence, the gift deed and the sale deed have been held to be valid. With these findings, the Trial Court dismissed the suit as well as the counter claim.

**11.** The Plaintiff, thus being non-suited, filed the First Appeal. The First Appellate Court, upon detail discussion of the evidence and their examination at its level, has held that the Defendant No.2 had never been adopted by Jayaram and Defendant No.4. Then, coming to the validity of the gift as well as the sale deed, the answers have been rendered that those are the outcome of fraud and undue influence and it is the Defendant No.1, who has played the mischief by obtaining these two deeds from Jayaram making him totally landless and homeless and in order to deprive other legal heirs and successors of Jayaram.

**12.** Learned counsel for the Appellants submitted that the findings of the First Appellate Court in holding that the Defendant No.2 is not the adopted the son of Jayaram and Defendant No.4 is wholly contrary to the weight of the evidence on record. According to him, on the face of the overwhelming evidence in support of the factum of adoption both oral and documentary, the First Appellate Court ought to have held that Defendant No.2 is the adopted son of Jayaram and Defendant No.4. He also submitted that the First Appellate Court has not properly appreciated the documentary evidence let in by the Defendants. The deed of adoption, according to him, has been unjustifiably kept out of consideration.

He submitted that in the absence of any evidence that Defendant No.1 practiced fraud upon Jayaram in obtaining the gift deed in favour of Defendant No.2 and the sale deed in his favour, the finding of the First Appellate Court against said registered documents cannot be sustained. He, therefore, urged for admission of this Appeal to answer the above as the substantial questions of law.

**13.** Learned counsel for the Respondent No.1, assisting the Court in the matter of admission, submitted all in favour of the findings returned by the First Appellate

Court. According to him, upon a detail discussion of the evidence on record and their analysis from all possible angles, the First Appellate Court, keeping in view the settled position of law, has rightly recorded the finding contrary to those returned by the Trial Court. It was his further submission that the First Appellate Court is right in ultimately holding that behind all these activities of obtaining the sale deed, deed of gift and the so-called deed of adoption, the Defendant No.1 is the master mind and the purpose behind is to grab Jayaram's property in entirety, wholly to the exclusion of other legal heirs and successors.

**14.** Keeping in view the submissions made, I have carefully read the judgments passed by the Courts below.

**15.** The Plaintiff and Defendant No.3 are the two daughters of Jayaram and Kunja (Defendant No.4). The Defendant No.4, the widow of Jayaram, has died during pendency of the First Appeal. The Defendant No.2 is the natural son of Defendant No.1 and Defendant No.3. Jayaram, the maternal grandfather of Defendant No.2 and it is said that Jayaram and Defendant No.4 had adopted Defendant No.2, which is disputed by the Plaintiff and Defendant No.5.

**16.** Before proceeding further at this place, it would be worth noting the observation made by this Court in case of Raghunath Behera -V- Balaram Behera & Another; 1995 (II) OLR 135, at paragraphs 5 6, which are as follows :-

> "5. As Manu stated, he whom his father and mother give to another as his son, provided that the donee have no issue, if the boy be of the same class, and affectionately disposed is considered as a son given, the gift being confirmed by pouring water. Adoption is the admission of a stranger by birth to the privileges of a child by a recognised form of affiliation. The Hindu Adoptions and Maintenance Act, 1956 (in short, the 'Act') amends and codifies the law relating to adoptions and maintenance and gives overriding application to the provisions on the two subjects contained in it. In the law of adoption it brings about some fundamental and important changes and the result is that immediately on the coming into operation of the Act the law on the subjects of adoptions and maintenance hitherto applicable to Hindus whether by virtue of any text, rule or interpretation of Hindu Law or any custom or usage having force of law ceases to have effect with respect to all matters dealt with in it. The requirements of a valid adoption under the Act are: -
>
> (i) the person adopting must have the right to take and be lawfully capable of taking a son or daughter in adoption (Sections 7 and 8);
>
> (ii) the person giving in adoption must be lawfully capable of doing so (Section 9);
>
> (iii) the person adopted must be lawfully capable of being taken in adoption (Section 10); and
>
> (iv) the conditions relating to adoption including actual giving and taking of the child with the intention of transferring the child from the family of its birth must be complied with (Section 11).
>
> 6. Adoption is the legalized recognition of a person as one's son. According to Hindu notions, a son is necessary to a person not only to continue the lineage but also to offer oblation to the means or the ancestors to the fourth degree. The soul of a person dying issueless will not be saved. So this institution has been founded on the Hindu law. The person adopted has all the privileges of a natural born son except that there is a reduction in the share of property,

different according to the various schools of Hindu Law, if a natural son is born subsequent to the adoption. Certain caremonies are necessary for adoption. There are five kinds of adopted sons of which Dattaka and Kritrima are the two forms ordinarily found in India. The object of adoption in the context of personal law has always been spiritual as well as temporal. Not only adoption results in de jure transference of person from one family to another, but confers on adopted son rights like natural or legitimate son, in adoptive family. The origin of the custom of adoption is lost in antiquity. The ancient Hindu Jaw recognised twelve kinds of sons; of whom, as stated above, five were adopted. The old law of adoptions among Hindus was developed by the ancient commentaries like Dattaka Mimamsa and Dattaka Chandrika. It is peculiar only to Hindus and not recognised by other religions like Muslims or Christians. The object of old Hindu law of adoption was based more on secular reasons and religious motives as pointed out by the Privy Council in Bal Gangadhar Tilak v. Srinivas Pandit, AIR 1915 PC 7 and Amareadra Mausing v. Sana-tan Singh, AIR 1933 PC 155, In V. T. S. Chandrasekhara v. Kulandaivela, "AIR 1963 SC 185 apex Court observed that it may be safely held that the validity of adoption has to be judged by spiritual rather than temporal considerations and the devolution of property is only of secondary importance. In Hem Singh v. Harnam Singh, AIR 1954 SC 581 it was observed that under the Hindu Law adoption is primarily a religious act intended to confer spiritual benefit on the adopter and some of the rules have therefore been held to be mandatory and compliance with them regarded as a condition_of the validity of the adoption. The theory of adoption is that it makes the adopted boy to all intents and purposes the son of his adoptive father as completely as if he had begotten him in lawful wedlock.

**17.** In case of an adoption, which stands questioned, the position of law is quite well settled that since an adoption diverts the normal & natural course of succession; the Court has to be extremely alert & vigilant to guard against being ensnared by schemers who indulge in unscrupulous practice out of their lust for property. If there are only suspicious circumstances, just as the propounder of the Will is obliged to dispel the cloud of. suspicion, the burden is on one who claims to have been adopted to dispel the same beyond reasonable doubt. (Rahasa Pandiari (Dead) by LRs & others vrs. Gokulananda Panda & ors, (1987) 2 S.C.C. 338.

**17.1.** The Apex Court in case of Kishori Lal vrs. Mt. Chaltibai AIR 1959 S.C. 504, has also held that an an adoption results in changing the course of succession depriving wives & daughters of their rights & transferring properties to comparative stranger or more remote relations, it is necessary that evidence to support it should be such that, it is free from all suspicion of fraud & so consistent & probable as to leave no occasion for doubting its truth. This Court in the cases of Prafulla Kumar Biswal vrs. Sashi Beura & ors, 1989 OLR (I) 425**,** Sulei Bewa & ors. vrs. Gurubari Rana, AIR 1971 Orissa 299 & Arjun Banchhar vrs. Bacchi Banchhar AIR 1999 Orissa 32 has also authoritatively held that as an adoption displaces natural succession, the burden to establish the adoption is squarely on the person who propounds & that burden is heavy."

**17.2**. Furthermore, in R. Lakshman Singh Kothari vrs. Smt. Rupa Kanwar, AIR 1961 S.C. 1378 it has been held by the Hon'ble Apex Court that under the Hindu Law whether among the regenerate caste or among sudras, there cannot be a valid

adoption unless the adoptive boy is transferred from one family to another & that can be done only by the ceremony of giving & taking. The object of the corporeal giving & receiving in adoption is to secure publicity. To achieve this object, it is essential to have a formal ceremony. No particular from is prescribed for the ceremony but the law requires that the natural parents shall hand over the adoptive boy & the adoptive parents shall receive him. The nature of the ceremony may vary depending upon the circumstances of each case. But a ceremony there shall be, & giving & taking shall be part of its. The exigencies of the situation arising out of diverse circumstances necessitated the introduction of the doctrine delegation & therefore, the parents after exercising their volition to give & take the boy in adoption, may both or either of them delegate the physical act of handing over the boy & receiving him as the case may be to a third party.

**17.3** In the case of L. Debhi Prasad (dead) by L.Rs. vrs. Smt. Tribeni Devi & ors. AIR 1970 SC 1286, it has also been held that giving & receiving are absolutely necessary to the validity of an adoption & they are the operative part of the ceremony being that part of it which transfers the boy from one family to anywhere.

Thus, the ceremony of giving & taking is very essential to be proved by clear, cogent & acceptable evidence dispelling all such suspicions whatsoever in that connection for deciding the validity of an adoption as in the present case, where adoption is not projected as an ancient one & instead evidence has been led, inasmuch as, by examining the persons in whose presence the ceremony took place being then available to testify.

**17.4** It has been held in the case of Bauri Devi -V- Dasarathi Sahu; 1974 (1) CWR 403 that creation of documents is no substitute for the fact of giving and taking which must be proved independently de hors any document. Omission of the day or date of adoption is very vital and the deed of acknowledgment of adoption loses all its significances.

**18.** Under the amended provisions of Section 100 of the Code a second appeal lies only on a substantial question of law and a substantial question of law has to be formulated. Questions of law and fact are some-times difficult to disentangle. The expression "fact" means and includes (a) anything, state of things, or relation of things capable of being perceived by the senses, and (b) any mental condition of which any person is conscious. A question whether any such fact exists or does not exist is a question of fact and a finding therein is a finding of fact. An inference of fact must be distinguished from an inference of Law. Where from evidentiary facts and documents an inference is drawn as to the existence or non-existence of another fact, then the inference is one of fact; and the question as to the inference a question of fact. But when the question is whether certain facts give rise to a legal right or liability, the inference is one of law, and the question of such inference, a question of law. The relevancy of evidence is a question of law. Where there is evidence from

which a conclusion of fact can be drawn, the weight of the evidence or the sufficiency of proof is a question of fact and the finding of the lower court is not to be interfered with in second appeal. Sections 100 and 101 of the Code taken together distinctly prohibit second appeals on questions of fact unless in the process of arriving at a finding of fact the Court has committed an error of law or a substantial error of procedure. It may be that the evidence is unsatisfactory or insufficient, or that it has not been properly appreciated it may be that the High Court is inclined to take a different view or that the decision is open to doubt it may even be that the finding may seem to be grossly and inexcusably erroneous, still if there is some legal evidence for the finding, and there is no such error or defect as enumerated in Section 100 of the Code, the High Court cannot interfere. A finding of fact can be set aside in second appeal, (a) where it is not based on any evidence or on legal evidence or on a judicial consideration of the evidence adduced,.(b) where the evidence is disbelieved "for no reason, (c) where it is based on a misconception of the real point in controversy in the case, (d) where the conclusion of fact is not warranted by the facts on which it is based or is inconsistent with other findings in the case or is opposed to the case set up by the party in whose favour it is drawn, or is contrary to pleadings and evidence in the case, (e) where it is contrary to the facts found or is inconsistent with the statement of reasons therefor in the judgment or is based on quaint reasoning, or is vague, or indefinite or ambiguous, (f) where it is arbitrary or vitiated by prejudice, or is based on a distorted view of the evidence, or is based on surmises or extraneous considerations or where no reasons have been given for the finding, (g) where material facts or evidence have been ignored in arriving at the conclusion of fact and (h) where finding is perverse in the sense that no normal person could have arrived at that finding. It is true, as observed by the apex, Court in Dilbagrai Punjabi v. Shavad Chandra, AIR 4988 SC 1858 High Court while hearing appeal under Section 100 of the Code has no jurisdiction to reappraise the evidence and reverse the conclusion, arrived at by the lower court. The lower appellate court is under a duty to examine the entire relevant evidence having direct bearing on the disputed issue and if the error which arises is of a magnitude that it gives birth to a substantial question of law, the High Court will be fully justified in setting aside the finding.

**19.** Adverting to the given case, one circumstance against the adoption is that Defendant No.2, being the only son of Defendant Nos.1 & 3, he could not have been given on adoption when the relationship between Defendant No.2 and Jayaram was of Virudha Sambandha. The Plaintiff, being the natural daughter of Jayaram having challenged the factum of adoption, the burden of proof of said fact was heavily resting on the shoulders of the Defendants 1 and 3 to establish the same by providing higher degree of proof through clear, cogent and acceptable evidence. The burden of proof in such event is heavy on them as by the same, serious deprivation is caused to the other legal heir and successors. For the purpose, all such suspicious circumstances

standing against that claim of adoption are required to be satisfactorily explained and thus removed.

**20.** The written statement being gone through, it is seen that the Defendants have not pleaded the detail requirements in order to set up and succeed in their claim of adoption of Defendant No.2 by Jayaram. The date, place and time of adoption, having not been given; nothing is also stated with regard to the giving and taking ceremony in the said adoption, which is mandatory as also there is no further pleading as to the performance of any other act/s at the time of adoption. The deed (Ext.C), which is said to be the deed of adoption has in fact come into being long after the adoption and there also, most importantly, the date of adoption does not find mention, which casts serious doubt to strongly infer that the parties had even no such certainty as to adoption and the deed has come into being for providing some support to the said plea, which is an afterthought with obvious motive. It is not stated that Defendant No.4, being the wife of Jayaram had her consent to such adoption. The date of adoption has been disclosed for the first time when the Defendant No.1 has filed his affidavit as his evidence in chief and it is then stated that there was performance of giving and taking ceremony, but then again he is not stating the exact age of his son when he was so adopted. This evidence being not backed by pleadings which ought to have contained all said important facts are thus liable to be eschewed from the arena of consideration. Therefore, the First Appellate Court is right in not considering such evidence when the foundations on those scores are not there in the pleadings.

**21.** The Defendant No.1 examined as D.W.1 in the affidavit as his evidence-in-chief has stated that since infant age of Defendant No.2, he was kept by Jayaram and Kunja (Defendant No.4) with an intent to adopt him as their son and the actual giving and taking ceremony took place on 24.05.1991 in presence of the relatives and co-villagers. Nothing is stated as to why despite having the intent, Jayaram and Kunja (Defendant No.4) they preferred to defer the performance of the adoption ceremony. This witness has also stated that his son was aged about three years when he was kept by Jayaram. But then he has not been able to disclose during cross-examination, the date, month and year of adoption either as per Odia Calender and English. He when states that he and his wife handed over the child to Jayaram and Kunja, who had accepted the child (Defendant No.2) is stating that there was no giving and taking ceremony. It is his further evidence that his son (Defendant No.2) was allowed to reside with Jayaram when he was aged about three years.

The deposition of D.W.1, being read from top to bottom, gives an impression in mind that he has no any idea about the giving and taking ceremony; much less to say that he was ever a party to it at any given time. It is the evidence of Kunja (D.W.2) that she decided to adopt a son, seven to eight years before her deposing in Court which comes around the 2000-2001. She is not able to say the

year of birth of the first child of Defendant No.3. She too is not saying as to the date, month and year when she asked Defendant No.3 for adoption. According to her, the Defendant No.2, when adopted, was six years old, which is in great variance with the evidence of D.W.1. The natural father's name of Defendant No.2 appears in the public records. Interestingly enough, it has been stated by Defendant No.1 that Defendant No.2, who is said to be the adopted son of Jayaram, is still living as his son and the villagers also know that Defendant No.2 is his son. Thus, as per his own evidence on oath, it stands clear that the Defendant No.2 has no recognition as the adopted son of Jayaram but is known and recognized by all to be his own son.

The D.W.2, who is Defendant No.4 and widow of Jayaram, who is said to be the adoptive mother, during her examination, has further stated to have taken a decision to adopt the son only 7 to 8 years before her examination in Court. It is her evidence that at the time giving and taking ceremony, those who were present on the road, had seen that Defendant No.2 was with them and one month thereafter, puja ceremony was performed in their house which rather exposes that although being tutored or coerced, she having come to the witness box to avoid the drawal of adverse inference, has not been able to so succeed in suppressing the truth and thereby successfully painting the falsehood as truth. This Defendant No.4, having tendered the evidence, as above, the same does not help the Defendant Nos.1, 2 & 3 in establishing the factum of adoption and rather creates serious doubt in mind on that factum of adoption. The Defendant No.2, being examined as D.W.3, has clearly admitted that in all on academic records, his natural father's name, i.e., the name of the Defendant No.1 finds mention. He has also not been able to say the death anniversary of Jayaram, which as the son of Jayaram is ordinarily expected to remember. He has completely destroyed the case of adoption, as projected when he has said that he along, have been staying with his natural parents under one roof. The evidence of the priest, who is said to have performed the giving and taking ceremony, having been discussed by the First Appellate Court, is found to have been rightly disbelieved for the good reasons as assigned.

**22.** With such oral evidence on record, the deed of adoption (Ext.C), being gone through, it is found that it has come into being on 28.12.1992. First of all, it is not stated that when adoption had already taken on 24.05.1991 as stated by D.W.1 why again arose the need to have a document after one and half year. This gives rise to further suspicion in mind that lest it would be difficult to establish the projected adoption in future, the document be also kept ready and for that, it was brought into being. The recitals in Ext.C do not disclose the date of performance of giving and taking ceremony. So, the factum of performance of giving and taking ceremony in the so-called adoption is found to have not been proved at all with that degree of proof as is required under law. This deed (Ext.C) thus cannot come to the aid of the Defendant No.2 and it has been rightly so held by the First Appellate Court.

The First Appellate Court has noted the overwhelming evidence on record to show that the adopted child (Defendant No.2) has been residing that the Defendant No.1 and Defendant No.3. It has also taken note of the fact that in almost all the public records, the Defendant No.2 has been described to be the son of his natural father which also finds reflected in the voter list of the year 2005. To add to this, there stands the version of Defendant No.1 on oath that his neighbors know the Defendant No.2 as his son.

An interesting feature at this stage comes to strike the mind that the Defendant No.4, who is the so-called adoptive mother of Defendant No.2, in her evidence, has stated to have no knowledge about the averments made in the written statement as well as the contents of the affidavit which has been tendered as her evidence in chief. She too is not stating about any special reason as to why this daughter's son (Defendant No.3's son) was chosen for being adopted and that is also not stated by any of the witnesses and what was that special affinity of Jayaram and Kuna towards them, that they did not divert their attention to others. Moreover, nothing is stated as to what persuaded the natural parents of Defendant No.2 to give their eldest child (son) in adoption and what was the special reason for the same; that too why Jayaram and Kunja decided to take that eldest son of Defendant Nos.1 and 3 on adoption leaving the other when the Defendant Nos.1 & 3 are also stating that then by consenting for giving in adoption of Defendant No.2, they did not do any grave injustice to the surviving son. The Defendant No.4 has also nowhere stated that she had her consent for such adoption and it was voluntary. Therefore, this Court is of the view of the First Appellant Court is absolutely right in rectifying the grave mistakes committed by the Trial court in appreciating the evidence on record as regards the proof of the factum of adoption without being alive to the settled position of law holding in mind in finally negating the case/claim of adoption of Defendant No.2 by Jayaram and Kunja.

**23.** Coming to the deed of gift and sale deed, it is seen that the deed of gift as projected to be the document of title in respect of the land covered under it in favour of Defendant No.2 is a registered one and its certified copy has been marked as Ext.5 from the side of the Plaintiff whereas the Defendants have proved the original as Ext.AA/18. Giving a careful reading to the recitals, it reveals that the donee has been described therein as the adopted son. The recitals being read in entirety clearly lead to say that the assumed fact of adoption is the reason and motive of gift and a condition of it. The recitals do not indicate that it was with an intention to benefit the so called donee as persona designata and the narration of his relationship as adopted son is merely a description so as to say that the gift would prevail over even if the adoption, has not been proved. This being the conclusion, when the adoption has failed, the move to sustain the gift under Ext.AA/18 is bound of fail and the First Appellate Court's finding on that score is well in order.

**24.** Now, arise the matter as to the validity of the sale deed. It is seen that the First Appellate Court, on thread bare discussion of the evidence on record, has rightly arrived at a conclusion that the said sale deed has been fraudulently obtained from Jayaram and that gets reinforced when one views as to how the Defendant Nos.1 to 3 have acted all through in projecting the claim of adoption of Defendant No.2 and then again claiming further under a deed of gift which they have failed to sustain. First having projected the Defendant No2 as the adopted son of Jayaram and Kunja with a view to make an entry as one of the person to inherit the property, the next step has been to obtain a gift so that it would be an additional bonanza and then rest property is brought under the coverage of the sale deed and this time in favour of the son-in-law, i.e., the Defendant No.1. The adoption has been negated, the gift has failed to sustain and now the last one is the sale deed. All these being cumulatively viewed, grave doubt arises in mind that what was/were the so special reason or cause for Jayaram and Kunja to be so annoyed with and disgusted towards others including the other daughter, the Plaintiff that they would not leave an inch of their property to go to the hands of other legal heir/s except the Defendant Nos.1 to 3 which is not normally expected to be adopted by the parents, as here nothing surfaces that there was any such animosity with others.

For the aforesaid discussion and reasons; this Court finds no such infirmity at all much less to say any perversity with the findings of the First Appellate Court, which are based on sound appreciation of evidence in the backdrop of the settled position of law holding the field.

**25.** For all those aforesaid, the submission of the learned counsel for the Appellants that the Appeal merits admission to answer the substantial questions of law, as pointed out, fails.

**26.** In the result, the Appeal stands dismissed. No order as to costs.

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## 2023 (I) ILR - CUT-1011

## BISWANATH RATH, J.

W.P(C) NO. 34544 OF 2022

**SMT. RAJESWARI SENAPATI** ..... Petitioner

-V-

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

**ORISSA GRAMA PANCHAYAT ACT, 1964 – Sections 25(1)(v), 26(1) – Maintainability of the application – Whether, a proceeding U/s. 26 of the Act is maintainable on the basis of application filed by any person, who**

**is not a Sarpanch, Naib Sarpanch or a member of the Grama Panchayat ? Held, yes – The Collector exercising the *suo motu* power is not debarred from obtaining information and materials from various sources.** (Para 10)

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

1. 2011(Supp.II) OLR 594 : Smt. Mithila Seth vrs. The Collector, Bolangir.
2. 2007 (Supp.I) OLR 400 : Chandrakanti Bhoi vrs. The Collector, Balanghir & Anr.
3. 2014 (I) OLR (FB) 867 : Debaki Jani vrs. The Collector & Anr.

For Petitioner : M/s. S.K.Nanda, A.Nanda & S.Das

For Opp.Parties: Mr.S.Mishra, Addl.Standing Counsel
Mr.J.N.Panda

JUDGMENT Date of Hearing : 17.02.2023 : Date of Judgment : 23.02.2023

***BISWANATH RATH, J.***

**1.** This is a Writ Petition at the instance of the return candidate questioning the order dated 18.11.2022, vide Annexure-2 passed by the Collector-cum-District Magistrate, Kalahandi in G.P. Case No.5/2022 thereby deciding a question on the entertainability of the Application therein being raised by the return candidate in favour of the Election Petitioner.

**2.** Factual background involving the case is the General Election for the Office of Sarapanch held in the year 2022. The Petitioner contesting the election was elected as Sarapanch of Saplahara Grama Panchayat under Kalahandi District. The Petitioner while continuing as such, an Application under the provisions of Sub-Section (1)(v) of Section 25 of the Orissa Grama Panchayat Act, 1064 (herein after in short, "the Act") was brought before the Collector, a Quashi Judicial Authority for considering a complain, if the return candidate, the Petitioner herein was eligible to contest the election involved, for the Petitioner surviving with her husband and four children to them requiring attachment of disqualification Clause under Section 25 of the Act ? The private O.P.4 herein in the Application prayed for disqualifying the Petitioner from holding the post of Sarapanch in attraction of the provision of Sub-Section (1) of Section 26 of the Act. The Application was registered as G.P. Case No.5 of 2022. Notice being served, the Petitioner appeared and filed show cause. On 4.11.2022, present Petitioner, the return candidate, filed an Application praying for dropping of the proceeding in the premises that following the provision at Sub-Section (1) of Section 26 of the Act, O.P.4, the Petitioner therein, was not entitled to bring such Application. The matter entering into argument was decided, vide Annexure-2 holding them Application maintainable resulting in filing of the present Writ Petition.

**3.** Mr.Nanda, learned counsel for the Petitioner reading through the provision of Section 26 of the Act contended, there are two scopes for bringing such Application, (1) Either the Sarapanch itself or the Naib Sarapanch or any other Member shall apply to the Collector for a decision involving such election or the Collector may so motu or receipt of an Application under Sub-Section (1) determination of the question involved therein ? It is in the premises, O.P.4 is neither a Ward Member nor a Naib Sarapanch, Mr.Nanda, learned counsel for the Petitioner further contended, as such O.P.4, who was not competent to initiate such proceeding nor such Application could have been treated under the provision of Sub-Section (1) of Section 25 of the Act requiring initiation of a suo motu proceeding. In his attempt to oppose the reasoning in the impugned order in rejecting the claim of the Petitioner on the entertainability of the Application, Mr.Nanda also relied upon some decisions in ***Smt. Mithila Seth vrs. The Collector, Bolangir*** : 2011(Supp.II) OLR 594, ***Chandrakanti Bhoi vrs. The Collector, Balanghir & anr.*** : 2007 (Supp.I) OLR 400 (Division Bench) and a Full Bench decision of this Court in ***Debaki Jani vrs. The Collector & anr.*** : 2014(I) OLR (FB)-867. For the above factual background, the legal position and the law set in motion, Mr.Nanda, learned counsel for the Petitioner attempted to oppose the impugned order and requested this Court for interfering with the impugned order and setting aside the same thereby declaring the proceeding pending before the Collector, Kalahandi becomes redundant.

**4.** Mr.Panda, learned counsel for O.P.4 (contesting Party) taking this Court to the nature of complain submitted, vide Annexure-1 and further taking support of the provision of Section 26 of the Act contended, there is clear entertainability of the Application involved requiring adjudication by the Quashi Judicial Authority. In such view of the matter, Mr.Panda attempted to support the reasoning involving the impugned order. Mr.Panda also through some decisions taken support by the learned counsel for the Petitioner also took support of the very same decisions to find support to the impugned order.

**5.** Mr. Mishra, learned Additional Standing Counsel for the State in his attempt to support the impugned order supported the submission of Mr.Panda, learned counsel for O.P.4.

**6.** Considering the rival contentions of the Parties, this Court finds, the moot questions requiring to be decided here is that looking to the position of the Petitioner, if she is entitled to bring a complain under the provision of Sub-Section (1)(v) of Section of Section 25 of the Act ? and if such complain could have been registered for giving a decision on the issue therein ?

**7.** Undisputed fact remains to be the election for the post of Sarapanch in Women Category for Saplahara Grama Panchayat in Kalahandi District held in 2022. The Petitioner here though was a candidate and selected, O.P.4 was not a candidate but however a Member in the Grama Panchayat involved. The dispute

brought, vide Annexure-1 is an Application under Sub-Section (I)(v) of Section 25 of the Act requiring adjudication of the proceeding under Section 26(1) of the Act. Keeping in view the question presented originally to bring such complain reading herewith the provision at Section 25 of the Act dealing with disqualification for membership of Grama Panchayat, this Court finds, the provision of Sub-Section (I)(v) of Section 25 of the Act reads as follows :-

> "25-Disqualifiction for membership of Grama Panchayat
>
> xxx xxx xxx
>
> (I)(v)- has more than two children."

There is no dispute that the matter involving disqualification of an elected Sarapanch or Naib Sarapanch or any other Member of the Grama Panchayat can be brought for adjudication under Section 26 of the Act.

**8.** Now coming to the initiation of proceeding, this Court finds, both the Parties relied upon the provisions at Section 26 of the Act for the purpose, this Court finds, Section 26 of the Act reads as follows :-

> "26. Procedure of giving effect to disqualification :– (1) Whenever it is alleged that any Sarpanch or Naib-Sarpanch or any other member is or has become disqualified or whenever any such person is himself in doubt whether or not he is or has become so disqualified such person or any other member may, and the Sarpanch at the request of the Grama Panchayat shall, apply to the Collector for a decision on the allegation of doubt.
>
> (2) The Collector may suo motu or on receipt of an application under Sub-Section (1), make such enquiry as he considers necessary and after giving the person whose disqualification is in question is or has become disqualified and make an order in that behalf which shall be final and conclusive.
>
> (3) Where the Collector decides that the Sarpanch, Naib-Sarpanch or any other member is or has become disqualified such decision shall be forthwith published by him on his notice-board and with effect from the date of such Publication the Sarpanch, Naib-Sarpanch or such other member, as the case may be, shall be deemed to have vacated Office, and till the date of such Publication he shall be entitled to act, as if he was not disqualified."

**9.** Reading through the provision at Section 26(1) of the Act, this provision makes it clear in two parts; (1) The proceeding must involve allegation against the Sarapanch or Naib Sarapanch or any other Member becomes disqualified and the proceeding to declare the above persons disqualified, such person or any other Member may and the Sarapanch at the request of the Grama Panchayat shall apply to the Collector for a decision on the allegation of doubt under Sub-Clause (1) of Section 26 of the Act. This Court at this stage going through Section 4 of Chapter-II of the Act finds, Sub-Section (1) of Section 4 reads as follows :-

> "4. Constitution and incorporation of Grama Sasan :– (1) For every Grama there shall be a Grama Sasan which shall be composed of all persons registered by virtue of the Representation of the People Act, 1950 (43 of 1950) in so much of the Electoral Roll for any Assembly Constituency for the time being in force as relates to the Grama 1[and unless the

> Election Commission directs otherwise] of the roll shall be deemed to be the Electoral Roll in respect of the Grama."

Then this Court takes into consideration the provision at Sub-Section (1) of Section 10 of the Act, which reads as follows :-

> "10. Constitution of Grama Panchayat :– (1) Every Grama Panchayat shall be composed of the following members, namely :
>
> (a) a member to be elected by the persons referred to in SubSection (1) of Section 4 from amongst themselves who shall be the Sarpanch; and
>
> (b) a member to be elected from each of the Wards by the persons on the Electoral Roll for the Ward from amongst themselves;
>
> [(c) * * *]"

From the above two provisions, this Court finds, a Member in the Electoral Roll of the Grama Panchayat is involved in the constitution of the Grama Panchayat. Reading both the aforesaid provisions coupled with the provision at Section 26(1) of the Act, for there is no doubt that the dispute already involved disqualification of a Sarapanch, the Ward Member in the proceeding of given effect to disqualification under Section 26 of the Act may relates to the Members in the elected panchayat but however keeping in view the scope under Sub-Section (2) of Section 26 of the Act, this Court finds, for the undisputed fact involving the case at hand not involving a complain by ordinary member of the Grama Panchayat bringing such complain by way of Application, provision at Section 26(2) of the Act empowers the Collector even may suo motu make such enquiry. This Court finds, there is a foundation through the complain registered before the Collector authorized to also suo motu proceed to examine such complain. In such event, this Court finds, there is no difficulty in entertaining the Application at Annexure-1 herein for undertaking the exercise under Section 26(1) of the Act.

**10.** Coming to the citations at Bar, particularly the decision of the Full Bench in Debaki Jani (supra), this Court finds, there is already exercise of considering the scope for suo motu initiation by the Collector for undertaking an exercise under Section 26 of the Act by the Full Bench and the Full Bench recorded the question referred to therein as follows :-

> "2. The following question of law has been referred for our decision.
>
> Whether a proceeding under Section 26 of the Orissa Grama Panchayats Act is maintainable on the basis of application filed by any person, who is not a Sarpanch, Naib Sarpanch or a member of the Grama Panchayat."

Answering such reference, the Full Bench, vide Paragraph-9 came to observe as follows :-

> "9. While under sub-section (1) of Section 26 of the Act, the categories of persons enumerated therein apply to the Collector for a decision on the allegation or doubt whether or not he is or has become so disqualified; under sub-section (2) the Collector may suo motu or

> on receipt of an application under sub-section (1), make an enquiry as he considers necessary. The power of the Collector to enquire into the matter suo motu cannot be cabined, cribbed or confined. The power is wide enough. But then the same cannot be exercised in a routine manner. The power has to be exercised with great care and circumspection. In the elegant words of Benjamin N. Cardozo in the legal classic "The Nature of the Judicial Process":
>
> "The Judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knighterrant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life". Wide enough in all conscience is the field of discretion that remains".
>
> The Collector has to prima facie satisfy himself and apply his mind before issuing any notice to the person whose disqualification is in question. The only rider is to observe principles of natural justice. The legislature in its wisdom thought it proper to grant ample power to the Collector to see that purity and sanctity in the election process is maintained and no unqualified person holds the post. The same also does not exclude any other person to bring the notice of the Collector about the disqualification incurred by any Sarpanch or Naib-Sarpanch or any other member of the Grama Panchayat. The Collector exercising the suo motu power is not debarred from obtaining information and materials from various sources."

After the observation of the Full Bench through Paragraph-9 on answering the question, there is no doubt in the maintainability of the Application involved herein and also there is no infirmity in the impugned order. It be made clear that the other two decisions referred to by the Petitioner through Chandrakanti Bhoi (supra) and Smt. Mithila Seth (supra), through the decisions taken note herein above, the Full Bench in Paragraph-10 has already declared both the decisions as bad in law.

**11.** In the circumstance, this Court finds, there is no strength in the submission of the learned counsel for the Petitioner requiring any interference in the impugned order. While declining to interfere with the impugned order and confirming the same, this Court dismisses the Writ Petition. However, there is no order as to cost.

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## 2023 (I) ILR - CUT-1016

**BISWANATH RATH, J & M.S.SAHOO, J.**

W.P(C) NO. 13332 OF 2004

**PARADIP PORT TRUST** .....Petitioner

-V-

**DY.CHIEF LABOUR COMMISSIONER & ORS.** .....Opp.Parties

**CONTRACT LABOUR (REGULATION AND ABOLITION) CENTRAL RULES, 1971 – Rule 25(2)(v)(a) – The contractors used to supply labourers to the Port Trust – The Dy. Chief Labour Commissioner (Central), Dhanbad exercising power under Rule 25(2)(v)(a) of 1971 Rule, directed the Principal Employer/Chairman, Paradip Port Trust to implement the order on various issues, i.e., determination of wages, leave with wages, holidays, bonus, annual wage increase and employees' provident fund – Whether, the order of Labour Commissioner sustainable ? – Held, No – Reason indicated.** (Para 9)

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

1. (1996) 10 SCC 599 : Hindustan Steel Works Construction Ltd. v. Commissioner of Labour and others.
2. (2019) 7 SCC 658 (Para-37 of SCC) : SAIL v. Jaggu.

For Petitioner : Mr. S.K. Padhi, Sr. Adv. alongwith Mr. S. Sharma

For Opp.Parties: Mr. Mr. B.S. Rayaguru, CGC (O.P.Nos.1&2)

None (O.P.No. 3)

JUDGMENT Date of Hearing : 13.03.2023 : Date of Judgment : 23.03.2023

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

By filing the present writ petition, the petitioner-Paradip Port Trust has challenged the order no.35(1)/2003-DYCLC, dated 10 November, 2004, passed by the Deputy Chief Labour Commissioner (Central), Dhanbad (opp.party no.1 herein), exercising the powers under Rule 25 (2) (v) (a) of the Contract Labour (Regulation & Abolition) Central Rules, 1971, (hereinafter referred to as the "Central Rules, 1971").

*Brief Background*

**2**. The listed contractors of the Port Trust used to supply the labourers such as unskilled, Semi-skilled, Skilled and Highly Skilled, who used to work in different areas of the Port Trust. It is contended by the petitioner that the Port Trust ensures the workers are paid not less than minimum wages as fixed by the Ministry of Labour, Government of India from time to time.

Opp.Party no.3 – Workers' Union had approached the Deputy Chief Labour Commissioner (Central), Dhanbad, vide letter dated 11.04.2004 which was forwarded to the Port Trust for comments vide letter dated 30.04.2003 and the Port Trust furnished its comments vide letter dated 23.05.2003 (Annexure-4 series). Pursuant to the letter dated 31.12.2003 of the Deputy Chief Labour Commissioner, the Port Trust furnished the desired information vide its letter dated 16.08.2004 (Annexures-5 & 6).

The learned Deputy Chief Labour Commissioner (Central) visited the different working areas of the Port Trust where the Contractor's labourers were working during the month of August 2004 and submitted his report vide letter dated 13th September, 2004 (Annexure-7).

On receipt of the said report under Annexure-7, the Port Trust vide letter dated 28/29th September, 2004 requested the learned Deputy Chief Labour Commissioner (Central) for three months time to examine the report and collect facts and figures from various departments concerned and to submit its reply and prayed that the matter be heard at Paradip (Annexure-8).

The petitioner-Port Trust also pointed out to the Deputy Chief Labour Commissioner (Central) in its reply under Annexure-8 that a principled decision had been taken to discontinue the practice of contract labourers as far as possible and in effect the workers engaged were disengaged with effect from 01.09.2004.

The Deputy Chief Labour Commissioner (Central), Dhanbad (opp.party no.1) after making a determination on various issues, i.e., *determination of wages, leave with wages, holidays, bonus, annual wage increase and employees provident fund* had further directed following :

> *"... ...The Chairman of Paradip Port Trust is directed to implement the aforesaid order with effect from 1st November 2004 onwards*."

*The Challenge*

**3.** The order dated 10.11.2004 passed by the Deputy Chief Labour Commissioner (Central), Dhanbad (opp.party no.1) directing the petitioner to implement the order w.e.f. 1.11.2004 is impugned in the present writ petition.

This Court by order dated 21.12.2004 issued notice to the opp. parties and directed stay of operation of the order dated 10.11.2004 passed by the Deputy Chief Labour Commissioner (Central), Dhanbad (opp.party no.1) in Annexure-9 and the order impugned has remained stayed throughout the present proceeding.

**4**. Pursuant to the notices issued by this Court, opposite parties have appeared through their counsel. When the matter was heard today, apart from the learned Central Government Counsel appearing for the opposite party nos.1 and 2, no one was present for opp.party no.3-Union though the notice was sufficient. Pleadings having been complete the matter was heard and disposed of as agreed by the learned counsel for the appearing parties.

*Submissions*

**5**. Mr. Padhi, learned Senior Counsel appearing for Paradip Port Trust relies on the decision rendered by the Hon'ble Supreme Court in ***Hindustan Steel Works Construction Ltd. v. Commissioner of Labour and others : (1996) 10 SCC 599***

wherein the Hon'ble Supreme Court dealt with a *pari materia* provision i.e., Rule 25 of the A.P. Contract Labour (Regulation and Abolition) Rules, 1971 to contend that the direction issued to the Chairman, Paradip Port Trust is unsustainable in law, in view of the statutory provision as interpreted by the Hon'ble Supreme Court in ***Hindustan Steel*** *(supra)*.

The relevant paragraphs of ***Hindustan Steel*** *(supra)* are quoted herein :

*"11. Under Section 35 of the said Act the appropriate Government is entitled to make rules for carrying out the purposes of this Act. Accordingly, the Government of Andhra Pradesh has framed The Andhra Pradesh Contract Labour (Regulation and Abolition) Rules, 1971. Rule 21 of these rides requires; that every application by a contractor for the grant of a licence shall be made in the manner prescribed in that rule. Rule 25 provides that every licence granted under sub-section (1) of Section 12 shall be in Form VI and shall be subject to the conditions specified in Rule 25. Condition (v)(a) is as follows ;*

*"Rule 25(v)(a) in cases where the workmen employed by the contractor perform the same or similar kind of work as the workmen directly employed by the principal employer of the establishment, the wage rates, holidays, hours of work and other conditions of service of the workmen of the constructor shall be the same as applicable to the workmen directly employed by the principal employer of the establishment on the same or similar kind of work :*

*Provided that in the case of any disagreement with regard to the type of work, the same shall be decided by the Commissioner of Labour, Andhra Pradesh, whose decision shall be final."*

*13. The short question that arises for determination is whether the appellant who is the principal employer is liable to pay to the contract workers any amount which constitutes the difference between the wages payable to the contract labour by the contractor and the wages paid by the appellant to its own employees doing similar work. The Division Bench seems to have relied upon Section 21(4) of the said Act for this purpose. Section 21(1), however, provides that the contractor shall be responsible for the payment of wages to each worker employed by his. Section 21(4) provides that if the contractor fails to make this payment or any part thereof, the principal employer is liable to make this payment and may recover the same from the contractor as set out in that sub-section. Looking to the definition of Wages Under the said Act read with the definition of wages in the Payment of Wages Act, which we have set out earlier, it is clear that Section 21 Only deals with the payment of contractual wages by the contractor to each of his worker. The definition of wages would cover within its scope, inter alia, also those amounts which the contractor is liable to pay to his workers under any award, settlement or order of court as Well as other amounts falling within the definition of "wages" under the Payment of Wages Act. Sub-section (2) provides for a representative of the principal employer supervising this payment. Clearly, therefore, the wages which are the subject-matter of Section 21 are specified sums which are payable in praesenti by the contractor under the terms of his contract of employment with each worker as well as under any existing award, settlement or order of the court. Section 21 does not deal with, nor does it cover the obligations which are imposed upon a contractor under the provisions such as the Andhra Pradesh Contract Labour (Regulation and Abolition) Rules, 1971. Hence Section 21(4) will not apply to such obligations of the contractor which may be the subject-matter of dispute between the contractor and his workers at time of disbursement of wages and which do not fall within the definition of "wages" under the Act.*

*14. Rule 25 of the Andhra Pradesh Contract Labour (Regulation and Abolition) Rules, 1971 imposes on the contractor certain conditions subject to which a licence is granted to*

*him. One such condition is to the effect that the contractor shall not pay to the contract labour in his employment wages which are lower than the wages paid by the principal employer to his own workers which do the same or similar kind of work. This is a condition of the contractor's licence. There is no provision under these rules by which the principal employer is made liable for payment in the event of non- compliance by the contractor with this condition. If the contractor commits a breach of the conditions of his licence he alone will "take the consequences. The right of the workers to recover any additional wages which may be so determined would be against the contractor, Section 21(4) has no application to a :situation where a contractor may have paid the wages but has not complied with the condition imposed by Rule 25(v)(a) of the Andhra Pradesh, Contract Labour (Regulation and Abolition) Rules, 1971, The definition of wages under Section 2 of Contract Labour (Regulation and Abolition) Act, 1970 read with the definition of wages under the Payment of Wages Act, 1936, does not cover any additional amount found payable under Rule 25(v)(a) if the principal employer has its own workers doing similar work, If the principal employer does not have any employees doing: similar work that question will not arise.*

*xx xx xx*

*15. In the result, the appeal is allowed as above. The direction of the Division Bench insofar as it directs the appellant to pay additional wages as per the provisions of Rule 25(v)(a) of the Andhra Pradesh Contract Labour (Regulation and Abolition) Rules. 1971, is set aside. In the circumstances, however, there will be no order as to costs."*

*[Emphasis supplied]*

**6.** To fortify the submissions, learned senior counsel refers to the award dated 27.03.2008 passed by the learned Central Industrial Tribunal-cum-Labour Court which ended in dismissal of the claim of the second party-Union therein. The dispute referred by the Government of India, in the Ministry of Labour by order dated 09.08.2002 under the provisions of the Industrial Disputes Act, 1947 was the following :

*"Whether the action of the Management of Paradip Port Trust by not considering the wages of DLRs at par with the regular employees of PPT is justified ? If not, what relief the DLRs are entitled to ?"*

It is contended that in view of the dismissal of the claim of the daily labour rated workers similar to those who were dealt with by the Deputy Chief Labour Commissioner (Central), Dhanbad by his order dated 10.11.2004, the present writ petition challenging the order of the Deputy Chief Labour Commissioner (Central), Dhanbad should also succeed.

*Analysis & Conclusion*

**7**. The relevant provision of law, i.e., Rule 25(2)(v)(a) of the 1971 Rules is quoted herein for reference :

*"Rule-25 (2)(v)(a) in cases where the workmen employed by the contractor perform the same or similar kind of work as the workmen directly employed by the principal employer of the establishment, the wage rates, holidays, hours of work and other conditions of service of the workmen of the contractor shall be the same as applicable to the workmen directly employed by the principal employer of the establishment on the same or similar kind of work.*

*Provided that in the case of any disagreement with regard to the type of work the same shall be decided by the Deputy Chief Labour Commissioner (Central)"*

**8**. It is noticed by us that the principles laid down in ***Hindustan Steel*** (*supra*) have been reiterated by the Hon'ble Supreme Court in ***SAIL v. Jaggu*** : ***(2019) 7 SCC 658*** (Para-37 of SCC).

**9**. Applying the principles laid down in ***Hindustan Steel*** *(supra)* to the present case, this Court is of the considered opinion that there is no provision under the Central Rules, 1971, by which the principal employer is made liable for payment in the event of non-compliance by the contractor with the condition as specified in Rule 25 (2) (v)(a) of the Contract Labour (Regulation and Abolition) Act, 1971. The Rule may require the payment of wages by the contractor but as far as between the contractor and the principal employer, the principal employer cannot be directed to pay the additional wages as per the provisions of the Rules.

**10**. In view of the discussions above, the writ petition is allowed. The order dated 10 November, 2004, passed by the Deputy Chief Labour Commissioner (Central), Dhanbad is set aside.

On being asked by the Court, learned Senior Counsel appearing for the Port Trust fairly submits that the issue regarding claim of the workers qua the contractor is not a subject matter of the present challenge. Accordingly, issue pertaining to the claim of the workers, if any, qua the contractor under whom they were engaged is left open. In the facts and circumstances of the case, there shall be no order as to costs.

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**2023 (I) ILR - CUT-1021**

**S.K. SAHOO, J.**

JCRLA NO. 83 OF 2019

**JAGANNATH OJHA @ JAGA @ JAGUNI @ JATIA @ POTALA @ DHUNA** ..... Appellant

-V-

**STATE OF ODISHA** .....Respondent

JCRLA No.84 of 2019

MAHAVIR RANA ..... Appellant

-V-

STATE OF ODISHA ..... Respondent

**CRIMINAL TRIAL – Offence U/s.376(1) of the I.P.C – Appeal against the conviction – There is no evidence from the star witness of the prosecution, i.e, the victim – The medical evidence is completely silent**

**and the other oral evidence adduced by the prosecution is not that clinching and does not point to the guilt of the appellants – There is absence of evidence how the seized articles were kept before sending to DNA Test as well as Chemical Test – Effect of – Held, it is very difficult to hold that the prosecution has successfully proved the guilt of both the appellant beyond all reasonable doubt by adducing cogent and clinching evidence, therefore, the judgment and order of conviction of the appellants is not sustainable in the eyes of law.**

(Para 10)

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

1. A.I.R. 1960 Supreme Court 490 : State of Delhi -Vrs. Shri Ram Lohia.
2. (2023) 1 Supreme Court Cases 83 : Rahul -Vrs-. State of Delhi.

For Appellant : Ms. Anima Kumari Dei, Amicus Curiae
For Respondent: Mr. Rajesh Tripathy, Addl. Standing Counsel

JUDGMENT Date of Hearing and Judgment : 22.02.2023

***S.K. SAHOO, J.***

The appellant Jagannath Ojha @ Jaga @ Jaguni @ Jatia @ Potala @ Dhuna in JCRLA No.83 of 2019 and appellant Mahavir Rana in JCRLA No.84 of 2019 faced trial in the Court of learned 1st Additional Sessions Judge, Puri in S.T. Case No.73/26/356 of 2015 for commission of offence punishable under section 376(D) of the Indian Penal Code on the accusation that on 24.06.2015 at about 4.15 a.m. in front of Lions Gate, Shyamakali Club lane, Puri, they committed gang rape on the victim.

The learned trial Court vide impugned judgment and order dated 27.09.2019 found the appellants guilty of the offence charged and sentenced each of them to undergo R.I. for a period of twenty years and to pay a fine of Rs.10,000/- (rupees ten thousand) each, in default, to suffer further R.I. for two months.

Since both the criminal appeals arise out of same judgment, with the consent of learned counsel for the respective parties, those were heard analogously and disposed of by this common judgment.

2. The first information report was lodged by P.W.18 Bamadev Swain, S.I. of Police, Singhadwar police station before the Inspector in-charge, Singhadwar police station (P.W.19) on 24.06.2015 wherein it is stated that on that day at about 6.00 a.m., he received information that at Shyamakali club lane, one lady was sexually assaulted by some unknown culprits. He entered the facts in S.D. Entry vide No.499 dated 24.06.2015 and informed the matter to the Inspector in-charge Krushna Chandra Sethi (P.W.19) and proceeded to the spot. On the way, he met one Biju Bhola (P.W.2), who was working in the shoe stand near Emar Math chakada and he told P.W.18 that on the same day at about 4.15 a.m., when he parked his motorcycle

at Shyamakali club lane, he heard shouting coming from an under construction house and accordingly, when he proceeded to the said house, he found appellant Mahavir Rana along with two others and on seeing him (P.W.2), those three persons fled away from the spot and that he noticed one lady wearing a grey colour napkin and grey colour check shirt was sitting in the said under construction house. The lady was under tremendous fear and P.W.2 asked the said lady regarding her identity and also enquired about any kind of assault or misbehaviour towards her to which the lady did not give any reply and remained silent. However, P.W.2 presumed that the lady had been sexually assaulted by those three persons including the appellant Mahavir Rana. On hearing from P.W.2, P.W.18 proceeded to the spot and noticed a lady was wearing a grey colour check shirt and one napkin and he interrogated the lady regarding her address and identity, but the lady remained silent and she was highly frightened and did not disclose anything to P.W.18, who engaged the staff to guard the lady and came to the police station and drew up the plain paper F.I.R. and presented the same before the I.I.C. of Singhadwar police station.

P.W.19 on receipt of the written report from P.W.18, registered Singhadwar P.S. Case No.65 dated 24.06.2015 at 7.30 a.m. against the appellant Mahavir Rana under section 376(D) of the Indian Penal Code and took up investigation. During course of investigation, P.W.19 examined the informant and recorded his statement. He issued requisition to City D.S.P., Puri to depute a lady officer to record the statement of the victim and accordingly, the City D.S.P. allowed women Sub-Inspector Nishamani Das Mohapatra (P.W.5) to record the statement of the victim girl. The Investigating Officer examined P.W.2 and recorded his statement. He visited the spot, prepared the spot map (Ext.21) and also examined other witnesses. P.W.19 sought for the assistance of an interpreter for recording the statement of the victim lady as she was unable to speak and from her gesture and posture, P.W.19 could not understand anything. Supriya Pattnaik (P.W.4), Assistant Counsellor of Vijaya Swadha came and made conversion with the victim and thereafter, P.W.19 recorded the statement of P.W.4. The appellant Mahavir Rana was apprehended on 24.06.2015 and he was sent for medical examination. The victim was also sent for medical examination. The Investigating Officer (P.W.19) received biological samples as well as the wearing apparels of the victim lady on production of lady constables and those were seized as per seizure list Ext.5. Similarly, the escort party produced the biological samples and wearing apparels of the appellant Mahavir Rana, which were seized as per seizure list Ext.4. Though attempt was taken for recording the 164 Cr.P.C. statement of the victim, but it could not be made successful as the victim was not able to answer anything to the questions put by the Court. The victim was kept in a short stay home i.e. Vijaya Sudhar and on 25.06.2015, the appellant Mahavir Rana was forwarded to the Court. The Investigating Officer received the medical examination report of the victim as well as of the appellant Mahavir Rana. On 05.08.2015, the Investigating Officer made a prayer before the learned S.D.J.M., Puri for forwarding the exhibits to S.F.S.L.,

Rasulgarh, Bhubaneswar and accordingly, the Court passed order and the exhibits were sent to Director, S.F.S.L., Rasulgarh, Bhubaneswar. On the prayer of the Investigating Officer, the finger prints of the victim lady were collected. The Investigating Officer produced the victim lady for medical examination on 22.08.2015 at D.H.H., Puri and the doctor on examination opined that the victim has conceived for three to four months. On the prayer made by the Investigating Officer, the victim was also examined by the Assistant Professor, S.C.B. Medical College and Hospital, Cuttack, who also found that the victim was pregnant and she had a single life intrauterine foetus of fifteen weeks and four days. The victim was left at Vijaya Sudhar Gruha, Puri. The Investigating Officer received the chemical examination report from S.F.S.L., Rasulgarh. A prayer was made to collect the blood group of the appellant Mahavir Rana and accordingly, the Medical Officer, District Jail, Puri collected the blood of appellant Mahavir Rana. On coming to know that the appellant Jagannath Ojha is in judicial custody in connection with another case, the Investigating Officer submitted a remand report against him, however, when information was received that appellant Jagannath Ojha has been released on bail, he was arrested on 03.10.2015 and thereafter, he was sent for medical examination to D.H.H., Puri and also for his blood grouping test. Steps were taken for D.N.A. profiling test of the victim and both the appellants generated completely from FTA cards. The Investigating Officer also received the medical examination report of the appellant Jagannath Ojha. On completion of investigation, P.W.19 submitted first charge sheet on 15.10.2015 against both the appellants under section 376(D)(2)(i) of the Indian Penal Code keeping the investigation open as per section 173(8) of Cr.P.C. and on completion of investigation after receipt of D.N.A. test report, he submitted final charge sheet on 01.11.2016.

3. After submission of charge sheet, the case of the appellant was committed to the Court of Session after observing due committal procedure and the case was made over to the learned trial Court for disposal in accordance with law where the learned trial Judge charged the appellants under sections 376(D) of the Indian Penal Code on 19.01.2017 and since the appellants refuted the charge, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prosecute them and establish their guilt.

4. During course of trial, in order to prove its case, the prosecution has examined as many as twenty witnesses.

P.W.1 Dr. Sanat Kumar Mohapatra, who was working as Assistant Surgeon at Puri District Jail Hospital, stated that he collected blood sample of appellant Mahavir Rana on 01.10.2015 and proved his report marked as Ext.1.

P.W.2 Biju Bhola is an independent witness and though he first informed S.I. of Police Bamadev Swain (P.W.18), Singhadwar police station regarding the incident, but did not fully support the prosecution case for which he was declared hostile by the prosecution.

P.W.3 Kashinath Subudhi did not support the prosecution case for which he was declared hostile by the prosecution.

P.W.4 Supriya Pattnaik was working as Assistant Counsellor of Vijaya Sudhar Gruha, Dattatota, Puri, who was counselling the victim in order to ascertain the actual fact and submitted her report and she proved her report marked as Ext.3.

P.W.5 Nishamani Das Mohapatra, who was working as S.I. of Police, Singhadwar police station stated that as per direction of the I.I.C. of Singhadwar police station, she examined the victim.

P.W.6 Jambeswar Choudhury and P.W.8 K.T. Satyabadi Das were the constables attached to Singhadwar police station and also the witnesses to the seizure of wearing apparels and biological sample of the appellant Mahavir Rana as per seizure lists Exts.4 and 5.

P.W.7 Rasmita Parida was working as Sign Language Interpreter at the N.G.O., namely Shree Nrusingha Dev Anchalika Yuba Parishad, Puri and she proved her report marked as Ext.6.

P.W.9 Dr. Somya Mishra, who was working as Medical Officer, D.H.H., Puri, examined the victim on 24.06.2015 and proved her report marked as Ext.7.

P.W.10 Rajashree Pattnaik was working as Pathologist at D.H.H., Puri, who conducted pathological test of the appellants and the victim and proved her report marked as Exts.10, 11 and 8 respectively.

P.W.11 Dr. Santosh Kumar Mishra, who was working as Medical Officer, D.H.H., Puri, examined the appellant Jagannath Ojha on 03.10.2015 and proved his report marked as Ext.13. He also proved his final opinion on the backside of the requisition marked as Ext.14.

P.W.12 Dr. Srikanta Sahoo, who was working as Medical Officer, D.H.H., Puri, examined the appellant Mahavir Rana on 24.06.2015 and proved his report marked as Ext.15.

P.W.13 Jhunupriya Pujapanda, who was the Assistant Superintendent of Vijaya Swadhar, an N.G.O. stated that the victim was quite abnormal in her attitude.

P.W.14 Bijaya Kumar Mallik was the constable attached to Singhadwar police station and also a witness to the seizure of biological samples of the appellant Jagannath Ojha as per seizure list Ext.18.

P.W.15 Alok Kumar Barik and P.W.16 Sudeshi Pradhan are the hearsay witnesses, who stated that they saw the appellants standing near the spot and also met P.W.2 and heard about the incident from him.

P.W.17 Surendra Sahu did not support the prosecution case for which he was declared hostile by the prosecution.

P.W.18 Bamadev Swain, who was working as S.I. of Police, Singhadwar police station, is the informant in the case and supported the prosecution case.

P.W.19 Krushna Chandra Sethi was the Inspector in-charge of Singhadwar police station, who is the Investigating Officer in the case.

P.W.20 is the victim whose deposition could not be recorded as she was found to be not mentally sound.

The prosecution exhibited forty one numbers of documents. Ext.1 is the medical examination report of appellant Mahavir Rana, Ext.2 is the 164 Cr.P.C. statement of P.W.2, Ext.3 is the counseling report, Ext.4 is the seizure list of a full shirt, one green colour pant and biological materials, Ext.5 is the seizure list of one napkin and one ganjee, Ext.6 is the counseling report, Ext.7 is the medical examination report of the victim, Ext.8 is the requisition to pathology specialist, Ext.8/2 is the pathological report of the victim, Ext.9 is the forwarding report of P.W.9, Ext.10 is the seminal fluid analysis report of appellant Mahavir Rana, Ext.10/2 is the requisition issued by P.W.11, Ext.11 is the blood examination report of appellant Jagannath Ojha, Ext.11/2 is the requisition issued by P.W.11, Ext.12 is the requisition for collection of blood of the appellants, Ext.13 is the medical examination report of appellant Jagannath Ojha, Ext.14 is the final opinion of P.W.11, Ext.15 is the medical examination report of appellant Mahavir Rana, Ext.16 is the requisition issued by P.W.12 to pathology specialist, Ext.17 is the letter dated 24.06.2015 of P.W.12, Ext.18 is the seizure list of biological samples of appellant Jagannath Ojha, Ext.19 is the D.N.A. test report, Ext.20 is the F.I.R., Ext.20/2 is the formal F.I.R., Ext.21 is the spot map, Ext.22 is the requisition issued by P.W.19 for medical examination of the victim, Ext.23 is the requisition issued by P.W.19 for medical examination of the appellant Mahavir Rana, Ext.24 is the prayer of P.W.19, Ext.25 is the prayer of P.W.19, Ext.26 is the prayer of P.W.19, Ext.27 is the extract of order dated 25.06.2015, Ext.28 is the Court order dated 03.07.2015, Ext.29 is the forwarding report to S.F.S.L., Rasulgarh, Ext.30 is the forwarding letter no.1853 dated 05.08.2015, Ext.31 is the acknowledgement receipt, Ext.32 is the medical report of the victim, Ext.33 is the S.D. Entry dated 24.06.2015, Ext.34 is the chemical examination report of S.F.S.L., Rasulgarh, Ext.35 is the prayer of P.W.19, Ext.36 is the forwarding letter vide memo no.2513 dated 06.10.2015, Ext.37 is the acknowledgement receipt, Ext.38 is the identification form of appellant Jagannath Ojha, Ext.39 is the identification form of appellant Mahavir Rana, Ext.40 is the identification form of the victim lady and Ext.41 is the forwarding letter no.2532 dated 08.10.2015.

The prosecution also proved six material objects. M.O.I is the seized napkin of victim lady, M.O.II is the seized print shirt of the victim, M.O.III is the seized maroon colour sleeveless vest of appellant Mahavir Rana, M.O. IV is the seized green

colour full pant of appellant Mahavir Rana, M.O.V is the seized gray colour short pant and M.O.VI is the seized sky colour full shirt of appellant Jagannath Ojha.

No witness was examined on behalf of the defence.

5. The defence plea of the appellants is one of denial and it is pleaded that they have been falsely implicated in the case.

6. The learned trial Court after analyzing the oral as well as documentary evidence on record has been pleased to hold that the victim (P.W.20) being mentally unsound has not stated anything against the appellants. The doctor (P.W.9), who examined the victim on 24.06.2015 stated that the victim was capable of committing sexual intercourse and she was pregnant. It was further held that the testimonies of P.W.2, P.W.15, P.W.16 and P.W.18 are credible, corroborative and reliable and the false explanation by the appellants that they have not committed the offence and that they were not present at the spot on 24.06.2015 morning at 4.30 a.m. are the circumstances proving the fact of rape, which has been proved by the medical evidence. The learned trial Court further held that in view of the oral as well as documentary evidence coupled with the D.N.A. test report, it was of the considered opinion that offence of rape has been committed on the victim by the appellants and accordingly, held both the appellants guilty under section 376(D) of the Indian Penal Code.

7. Miss Anima Kumari Dei, learned Amicus Curiae appearing for the appellant Jagannath Ojha in JCRLA No.83 of 2019 and Mr. Biswajit Ranjan Tripathy, learned Amicus Curiae appearing for the appellant Mahavir Rana in JCRLA No.84 of 2019 urged that when the victim (P.W.20) being examined in the learned trial Court could not able to say anything about the incident, could not identify the appellants present in the dock and her evidence could not be recorded as she was found to be not mentally sound. The medical evidence which has been adduced by P.W.9 indicates that there was no injury on the private parts on the body of the victim, there was no matting of pubic hair and no old or new injuries on the person or private parts of the victim even though the victim was examined on the date of alleged occurrence itself. P.W.2, who is a vital witness on behalf of the prosecution, has not supported the prosecution case for which he was declared hostile. It is urged that the learned trial Court should not have held the appellants guilty relying on the D.N.A. profile test report which has been marked as Ext.19. Learned Amicus Curiae for the appellants urged that the wearing apparels of the appellant Mahavir Rana was seized on 24.06.2015 so also that of the victim but it was sent for chemical analysis on 05.08.2015 and there is no evidence as to in what condition the wearing apparels were kept and therefore, no reliance can be placed on the D.N.A. test report as well as the chemical examination report marked as Ext.34 and it is a fit case where benefit of doubt should be extended in favour of the appellants and the impugned judgment and order of conviction of the appellants should be set aside.

Mr. Rajesh Tripathy, learned Additional Standing Counsel for the State of Odisha, on the other hand, supported the impugned judgment and contended that even though the victim could not be examined on account of her mental unsoundness and the doctor (P.W.9) could not find any sign or symptom of rape on the victim but the D.N.A. profile generated from the vaginal swab of the victim matched with the D.N.A. profile generated from the blood sample of the appellant Mahavir Rana as well as from his full pant, D.N.A. profile generated from the napkin of the victim matched with sample blood of both the appellants collected on FTA card and the D.N.A. profile generated from full shirt of the victim matched with the D.N.A. profile generated from sample blood of appellant Jagannath Ojha collected on FTA card and the learned trial Court has rightly held that D.N.A. test report deserved to be accepted, unless it is absolutely dented and for non-acceptance of the same, it is to be established that there had been no quality control or quality assurance. It is urged that when the sampling was proper and there was no evidence of tampering with the sample, the D.N.A. test report is to be accepted. It is urged that the manner in which the crime has been committed on a mentally retarded lady and in view of the evidence adduced by the prosecution, both the Jail Criminal Appeals should be dismissed.

8. Adverting to the contentions raised by the learned counsel for the respective parties and coming to the evidence of the victim (P.W.20), it appears that when she was produced by the Investigating Officer before the learned trial Court on 15.05.2018 for recording of her evidence, on being asked, she could not tell her father's name and address, she talked incoherently and unable to say anything about the incident, she even could not even identify the appellants, who were present in the dock and unable to say anything about the occurrence. The victim appeared to the Court to be not mentally sound for which her deposition could not be recorded and she was discharged. In a case of this nature, undoubtedly the victim is the star witness and there is no evidence from her side.

The doctor (P.W.9), who examined the victim on 24.06.2015 at D.H.H., Puri on police requisition, found that there was no injury on her private parts and body, no matting of pubic hair, no foreign particles found and there were no old or new injuries on her person or private parts. The victim was found to be pregnant and her age was approximately eighteen to twenty five years. The doctor specifically stated that the normal examination finding neither refuted nor confirmed recent forcible sexual intercourse. Therefore, the medical evidence is no way helpful to the prosecution to prove its case.

Another important witness examined on behalf of the prosecution is P.W.2 on whom the learned trial Court has placed reliance. P.W.2 has stated that on 24.06.2015 at about 4.30 a.m. (early morning), while he was coming to open his shoe stand through Shyamakali club lane, he saw one woman was lying on the ground near Shyamakali temple and two persons were sitting near her and one of

them fled away seeing him and he went near the woman and saw that she had covered a towel and check shirt and when he asked her as to why she was sitting there, she did not give any reply. He further stated that the appellant Rana fled away from the spot where the victim was lying. The witness was declared hostile by the prosecution. Leading questions were put to P.W.2 about his previous statement recorded under section 164 Cr.P.C. and he admitted that he had stated before the Magistrate that at Shyamakali lane, he heard about the shout of one woman and when he proceeded near her, he saw in an open shop, three persons had pounced over that woman and that when they saw him, they fled away and that he knew the culprit Rana, who was working as a daily labourer at Bada Danda. P.W.2 admitted in the cross-examination by the defence counsel that he had not stated before police that two culprits fled away from the spot and that she knew one culprit Rana from them. Law is well settled that the statement recorded under section 164 of Cr.P.C. is not substantive evidence in a case and cannot be made use of except to corroborate or contradict the witness. An admission by a witness that a statement of his was recorded under section 164 Cr.P.C. and that what he had stated there was true would not make the entire statement admissible much less than any part of it could be used as substantive evidence in the case. (**Ref:- A.I.R. 1960 Supreme Court 490, (State of Delhi -Vrs. Shri Ram Lohia**). Therefore, the evidence of P.W.2 is also no way helpful to prove the accusation of gang rape against the appellants.

Though the learned trial Court has placed reliance on the evidence of P.W.15, P.W.16 and P.W.18, but it appears that P.W.15 has simply stated that while he was sleeping near cloth store at Laxmi Mandap Chhak and woke up, he found the appellants were standing there and that he met P.W.2 on the way who told him that while he was going to park his two wheeler, he heard crying sound of a lady coming out near Mangu Math side and that he found the appellants were running from that place. P.W.2 has not stated to have disclosed anything to P.W.15 and he himself has not even whispered the name of appellant Jagannath Ojha. Therefore, the evidence of P.W.15 is a hearsay one. Hearsay evidence is that evidence which a witness is merely reporting not what he himself saw or heard, not what has come under the immediate observation of his own bodily senses, but what he had learnt respecting the fact through the medium of a third person. Hearsay, therefore, properly speaking is secondary evidence of any oral statement. Thus the evidence of P.W.15 is no way helpful to the prosecution.

Similar is the statement of P.W.16 who stated to have heard from P.W.2 that the appellants were running away from the spot. Since the evidence of P.W.2 is silent that he made any such disclosure before P.W.16, the evidence of P.W.16 is not admissible being a hearsay one.

P.W.18, who is the S.I. of Police of Singhadwar police station has also made similar statement like P.W.15 and P.W.16 that P.W.2 has disclosed before him that on 24.06.2015 at about 4.15 a.m. that while he parked his motorcycle at Shyamakali

club lane, he heard shouting and when he proceeded to an under construction house, the appellant Mahavir Rana along with two others who were present there fled away. P.W.2 has not stated anything to have disclosed before P.W.18. Therefore, the evidence of P.W.18 cannot be acted upon to hold the appellants guilty of the offence charged.

9. Coming to the D.N.A. test reports, it appears that the wearing apparels of the appellant Mahavir Rana was seized on 24.06.2015 so also that of the victim, but those were sent for chemical analysis on 05.08.2015 and there is no evidence as to in what condition, the wearing apparels were kept and with whom. There is absolutely no evidence that after seizure of the wearing apparels, those were kept in sealed condition in safe custody.

In case of **Rahul -Vrs-. State of Delhi reported in (2023) 1 Supreme Court Cases 83**, the Hon'ble Supreme Court held as follows:-

> "37. xxx xxx xxx
>
> 18. Deoxyribonucleic acid, or DNA, is a molecule that encodes the genetic information in all living organisms. DNA genotype can be obtained from any biological material such as bone, blood, semen, saliva, hair, skin, etc. Now, for several years, DNA profile has also shown a tremendous impact on forensic investigation. Generally, when DNA profile of a sample found at the scene of crime matches with the DNA profile of the suspect, it can generally be concluded that both the samples have the same biological origin. DNA profile is valid and reliable, but variance in a particular result depends on the quality control and quality procedure in the laboratory.
>
> 38. It is true that P.W.23 Dr. B.K. Mohapatra, Senior Scientific Officer (Biology) of CFSL, New Delhi had stepped into the witness box and his report regarding DNA profiling was exhibited as Ext. PW 23/A, however mere exhibiting a document, would not prove its contents. The record shows that all the samples relating to the accused and relating to the deceased were seized by the Investigating Officer on 14.02.2012 and 16.02.2012; and they were sent to CFSL for examination on 27.02.2012. During this period, they remained in the Malkhana of the police station. Under the circumstances, the possibility of tampering with the samples collected also could not be ruled out. Neither the trial Court nor the High Court has examined the underlying basis of the findings in the DNA reports nor have they examined the fact whether the techniques were reliably applied by the expert. In the absence of such evidence on record, all the reports with regard to the DNA profiling become highly vulnerable, more particularly when the collection and sealing of the samples sent for examination were also not free from suspicion."

In absence of any evidence of proper preservation of the seized wearing apparels and samples, the chance of tampering with the same cannot be ruled out. The Scientific Officer has not been examined to prove the D.N.A. profiling test report vide Ext.19. Therefore, it would be very risky to convict the appellants on the basis of such report.

10. In view of the foregoing discussions and having regard to the totality of the circumstances and evidence on record, when there is no evidence from the star witness of the prosecution i.e. the victim and the medical evidence is completely

silent and the other oral evidence adduced by the prosecution is not that clinching and does not point to the guilt of the appellants and in absence of any evidence in keeping the seized articles in a safe custody before those were sent for D.N.A. test as well as chemical test, it is very difficult to hold that the prosecution has successfully proved the guilt of both the appellants beyond all reasonable doubt by adducing cogent and clinching evidence and therefore, the judgment and order of conviction of the appellants is not sustainable in the eye of law.

Accordingly, both the Jail Criminal Appeals are allowed. The impugned judgment and order of conviction of the appellants under section 376(D) of the Indian Penal Code and the sentence passed thereunder is hereby set aside and both the appellants are acquitted of such charge. They shall be set at liberty forthwith, if their detention is not otherwise required in any other case.

From the impugned judgment, it appears that the learned trial Court has directed the matter to be placed before the D.L.S.A., Puri for deciding the quantum of compensation to be paid to the victim and disbursement. If no compensation has been paid to the victim in the meantime, keeping in view the Odisha Victim Compensation (Amendment) Scheme, 2018 as per the notification dated 20.10.2018 of Government of Odisha, Home Department, the District Legal Services Authority, Puri shall examine the case of the victim after conducting necessary enquiry in accordance with law for grant of compensation amount to the victim.

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 Anima Kumari Dei, learned Amicus Curiae on behalf of the appellant Jagannath Ojha @ Jaga @ Jaguni @ Jatia @ Potala @ Dhuna in JCRLA No.83 of 2019 and Mr. Biswajit Ranjan Tripathy, learned Amicus Curiae on behalf of the appellant Mahavir Rana in JCRLA No.84 of 2019 for rendering their valuable help and assistance towards arriving at the decision above mentioned. Each of the learned Amicus Curiae shall be entitled to their professional fees which is fixed at Rs.7,500/- (rupees seven thousand five hundred only) each.

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**2023 (I) ILR - CUT-1031**

**S.K. SAHOO, J.**

CRLA NO. 404 OF 2011

**MAHENDRA MAHARANA** ..... Appellant

-V-

**REPUBLIC OF INDIA (CBI)** .....Respondent

**PREVENTION OF CORRUPTION ACT, 1988 – Section 19 – Offences under section 7, 13(2) r/w 13(1)(d) of the Act – Requirement of law for having relevant material placed before the sanctioning authority by the prosecution to grant sanction under the P.C.Act – Indicated with reference to case laws.** (Para 16)

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

1. (2009) 43 Orissa Criminal Reports (SC) 48 : C.M. Girish Babu -Vrs.- C.B.I.
2. (2009) 43 Orissa Criminal Reports (SC) 92 : Krishna Ram -Vrs.- State of Rajasthan.
3. (2009) 44 Orissa Criminal Reports (SC) 425 : State of Maharashtra -Vrs.- Dnyaneshwar Laxman Rao Wankhede.
4. (2015) 10 S.C.C. 152 : P.Satyanarayana Murthy -Vrs.- District Inspector of Police.
5. 2015 Criminal Law Journal 3168 (S.C) : D. Velayutham -Vrs.- State.
6. (2016) 64 Orissa Criminal Reports (SC) 364 : V.Sejappa -Vrs.- The State.
7. (2017) 68 Orissa Criminal Reports 795 : Satyananda Pani -Vrs.- State of Orissa (Vig).
8. (2016) 3 Supreme Court Cases 108 : Krishan Chander -Vrs.- State of Delhi.
9. (2023) 1 Supreme Court Cases 329 : Vijay Rajmohan -Vrs.- C.B.I.
10. (2014) 14 Supreme Court Cases 295 : C.B.I. -Vrs.- Ashok Kumar Aggarwal.

For Appellant : Mr. Devashis Panda, Mr. Sudipto Panda.
For Respondent: Mr. Sarthak Nayak, Special Public Prosecutor

JUDGMENT Date of Hearing : 02.03.2023 : Date of Judgment : 03.04.2023

***S.K. SAHOO, J.***

The appellant Mahendra Maharana faced trial in the Court of learned Special Judge (C.B.I.), Bhubaneswar in T.R. No.14 of 2006 for offences punishable under section 7 and section 13(2) read with section 13(1)(d) of the Prevention of Corruption Act, 1988 (hereafter '1988 Act') on the accusation that he being a public servant functioning as UDC in the Office of the Regional Labour Commissioner (Central), Sector-5, Rourkela on 22.03.2006 at Laxmi Market, Sector-4, Rourkela demanded and accepted bribe of Rs.2,000/- (rupees two thousand) from Basudev Mohanty (P.W.4) as gratification other than legal remuneration for processing the file for issuing the gratuity sanction order to the M/s. Essel Mining and Industries Limited Jilling (hereafter 'the Company').

The learned trial Court vide impugned judgment and order dated 29.06.2011 found the appellant guilty of the offences charged and sentenced him to undergo rigorous imprisonment for six months and to pay a fine of Rs.1,000/- (rupees one thousand), in default, to undergo rigorous imprisonment for one month more for the offence under section 7 of the 1988 Act and to undergo rigorous imprisonment for one year and to pay a fine of Rs.5,000/- (rupees five thousand), in default, to undergo rigorous imprisonment for three months more for the offence under section 13(2) read with section 13(1)(d) of the 1988 Act and both the sentences were directed to run concurrently.

2. The first information report (Ext.12) was lodged by P.W.4 Basudev Mohanty on 21.03.2006 at C.B.I. Rourkela branch office wherein it is stated that he was working in the Company and when he was removed from service in an illegal manner, he filed a case before the Controlling Authority -cum- Assistant Labour Commissioner (Central), Bhubaneswar and on 17.02.2006, final order was passed for payment of Rs.50,005/- (rupees fifty thousand five) in his favour within a period of one month from the date of order. P.W.4 approached the appellant, who was the UDC in the Office of the Assistant Labour Commissioner, Sector-5, Rourkela for processing the file for issuing the gratuity sanction order to the Company.

It is the further prosecution case as per the first information report that on 21.03.2006 in his office, the appellant demanded illegal gratification of Rs.2,000/- (rupees two thousand) from P.W.4 which was to be paid by 22.03.2006. Since P.W.4 was not willing to pay the bribe, he lodged the first information report wherein he mentioned that the appellant told him to pay bribe of Rs.2,000/- (rupees two thousand) on 22.03.2006 at Laxmi Market, Sector-4 near a hotel and he has to make telephonic communication with the appellant in that respect.

On the basis of such report, the Superintendent of Police, C.B.I., Bhubaneswar registered a case under section 7 of the 1988 Act against the appellant and entrusted the case to Shri D.K. Kabi (P.W.7), Inspector, C.B.I., Rourkela Unit for investigation.

P.W.7 constituted a trap team and they appeared at the C.B.I. Office, Rourkela on 22.03.2006 at about 2.30 p.m. and P.W.4 also came to the C.B.I. Office with four five hundred rupees currency notes as per the instruction given earlier by P.W.7. The numbers of the notes were noted down in a paper, which was signed by the witnesses. The notes were treated with phenolphthalein powder and P.W.6 G.V. Srinivas was asked to handle the same and his hand wash turned pink when it was taken in sodium carbonate solution and it was preserved in one bottle M.O.I and sealed. The money was kept in the left chest pocket of P.W.4 and he was instructed to hand over the money to the appellant only on demand. P.W.1 Govinda Chandra Das was asked to accompany P.W.4 and to act as over hearing witness. Other witnesses were instructed to remain in the vicinities awaiting signal from P.W.1. Pre-trap memorandum (Ext.2) was prepared and then P.W.1 and P.W.4 went in a motorcycle to Laxmi Market and other members of the team also followed them in a vehicle. The team reached at Laxmi Market, Rourkela and took position. P.W.4 ranged up the appellant from a telephone booth and the appellant came to the spot. When P.W.4 came near him, the appellant demanded money. P.W.4 paid the tainted notes to the appellant who received the same in his right hand and kept the money in his left side chest shirt pocket. At that stage, P.W.7 rushed to the spot and challenged the appellant to have taken bribe. The right hand wash of the appellant taken in sodium carbonate solution turned pink but the left hand wash did not change colour. The hand washes were preserved in separate bottles i.e. M.O.II and M.O. III and

sealed. The tainted notes were recovered from the shirt pocket of the appellant and the numbers of the notes were compared with the numbers earlier noted and it tallied. The money was kept in an envelope and sealed. The shirt pocket of the appellant was washed in sodium carbonate solution and it also turned pink and the same was preserved in a bottle (M.O.V). The shirt was kept in a packet and sealed and thereafter, post-trap memorandum (Ext.3) was prepared. The appellant was arrested and spot map (Ext.15) was prepared. P.W.8 took over charge of investigation from P.W.7 on 23.04.2006 as per the orders of the Superintendent of Police, C.B.I. During course of investigation, he examined witnesses and scrutinized the documents which he had received from P.W.7. He seized certain documents. The seized exhibits were sent to C.F.S.L., Kolkata and the C.E. Report vide Ext.16 was received and on completion of investigation, charge sheet was submitted against the appellant under section 7 and section 13(2) read with section 13(1)(d) of the 1988 Act.

3. The defence plea of the appellant is one of denial and it is pleaded that he was not dealing with the file of P.W.4 relating to gratuity matter and as such, there was no occasion for him to demand bribe from him nor he had ever demanded any bribe from P.W.4 either on 21.03.2006 or 22.03.2006. The further plea of the appellant was that one G.Y. Rao was working as Steno to Regional Labour Commissioner, Rourkela and he had close acquaintance with P.W.4 and that the appellant was working as Secretary General of Staff Association of Labour Department and that G.Y. Rao was not pulling on well with the appellant on account of his leadership and that the appellant had complained against G.Y. Rao for his transfer prior to 21.03.2006. It is further pleaded that the final order dated 17.02.2006 of the Controlling Officer -cum- Asst. Labour Commissioner vide Ext.8 passed in favour of P.W.4 was received by Narendra Maharana (D.W.1), a clerk in the office of the Regional Labour Commissioner, Rourkela on 20.03.2006 from Smt. Asima Mishra, Asst. Labour Commissioner (Central), Bhubaneswar at Camp Court, Rourkela and on 21.03.2006 D.W.1 handed over the copy of the order to P.W.4 with instruction to approach the Company authorities and also sent a copy of the order to the Company on the very same day. It is further pleaded by the appellant that P.W.4 had no occasion to approach him for processing any file in the matter and P.W.4 has foisted the false case at the instance of G.Y. Rao. It is pleaded in the accused statement that P.W.4 forcefully tried to insert tainted notes in his pocket to which he pushed back the hand of P.W.4 but another person caught hold of the right hand of the appellant and some gum like substance stuck to the hand of the appellant. It is pleaded that P.W.7 carried phenolphthalein powder with the constable and the same was used at the time of detection.

4. In order to prove its case, the prosecution examined eight witnesses.

P.W.1 Govinda Chandra Das was the Sr. TA(G) in the department of GMTD, BSNL, Rourkela and he was a member of the trap party who was present at

the time of preparation of the trap. He stated about the demand and acceptance of tainted G.C. notes by the appellant from P.W.4 at Laxmi market, Sector-IV, Rourkela and keeping the same inside the left chest pocket of his shirt. He further stated about finger wash of right hand of the appellant changed its colour when it was taken in sodium carbonate solution and also taking of finger wash of left hand of the appellant taken in sodium carbonate solution in another glass tumbler which did not change any colour. He further stated about the preparation of the post-trap memorandum (Ext.3) and preparation of material objects.

P.W.2 Debarchan Pradhan was the Asst. Labour Commissioner (Central), Rourkela under whom the appellant was working as UDC. He is a witness to the documents as per seizure list Ext.4, Ext.5/1. He has also proved the file relating to the case of P.W.4 as per Ext.8 and also proved the entry in the dispatch register regarding sending of two letters addressed to P.W.4 and the Vice-president of the Company as per Ext.9.

P.W.3 Kulamani Mahakud was the Jr. Officer, Personnel, M/s. Essel Mining & Industries Limited is a witness to the seizure of certain documents from the office of D.G.M. (P & A) as per seizure list Ext.10. He proved the order of the A.L.O. vide Ext.8/2 & the letter sent to P.W.4 for collecting dues as per Ext.11.

P.W.4 Basudev Mohanty is the informant of the case and he has stated in detail relating to demand of bribe by the appellant, lodging of the written report, preparation for the trap, demand and acceptance of bribe money by the appellant, change of colour of right hand fingers of the appellant on putting inside the solution and no change of colour on putting his left hand fingers inside the solution so also preparation of the post-trap memorandum.

P.W.5 Lallan Singh was working as the Deputy Chief Labour Commissioner (Central), Bhubaneswar who had accorded sanction for launching prosecution against the appellant as per Ext.13.

P.W.6 G.V. Srinivas was working as Lancer -cum- Gas Cutter in F.S.N.L., R.S.P. and he was a member of the trap party who was present at the time of preparation of the trap. He is a witness to the preparation of pre-trap memorandum as per Ext.2. He stated about the acceptance of tainted G.C. notes by the appellant from P.W.4 at Laxmi market, Sector-IV, Rourkela and keeping the same inside his left chest pocket of the shirt. He further stated about wash of the fingers of right hand of the appellant changing its colour when taken in solution and also putting the fingers of his left hand in another glass tumbler containing solution which did not change any colour. He further stated about the preparation of the post-trap memorandum (Ext.3) and preparation of material objects.

P.W.7 Deepak Kumar Kabi, was the Inspector of Police, C.B.I. who laid the trap and he was the initial Investigating Officer of the case.

P.W.8 L.T. Salu who was the Inspector of C.B.I., Rourkela Unit took over charge of investigation of the case from P.W.7 as per the order of Superintendent of Police, C.B.I. and on completion of investigation, he submitted charge sheet.

The prosecution exhibited sixteen documents. Ext.1 is the paper containing number of the G.C. notes, Ext.2 is the pre-trap memorandum, Ext.3 is the post-trap memorandum, Exts. 4 & 10 are the seizure lists, Ext.5 is the personal file of the appellant, Ext.6 is the service book of the appellant, Ext.7 is the true copy of office order regarding allocation of work, Ext.8 is the file relating to the payment of gratuity amount of the informant, Ext.8/2 is the order dated 17.02.2016 passed by the Controlling Authority, Ext.9 is the two letters addressed to Basudev Mohanty and Vice-president of the Company on 21.03.2006, Ext.11 is the letter sent to the informant, Ext.12 is the F.I.R., Ext.13 is the Sanction order, Ext.14 is the formal F.I.R., Ext.15 is the spot map and Ext.16 is the C.E. report.

Six material objects were proved by the prosecution. M.O.I is the bottle containing sample hand wash of P.W.6 collected during pre-trap demonstration, M.O.II is the bottle containing right hand wash of appellant, M.O.III is the bottle containing left hand wash of the appellant, M.O.IV is the envelope containing G.C. notes, M.O.V is the bottle containing pocket wash of the appellant and M.O.VI is the shirt of the appellant.

5. In order to substantiate the defence plea, the appellant examined four witnesses.

D.W.1 Narendra Moharana was working as Clerk in the office of the Regional Labour Commissioner, Rourkela. He proved Ext.8, the final order passed in Gratuity Case no.36(37) of 2005-RKL/A. He stated that the appellant was working as Secretary General of Staff Association of Labour Department. He also stated that Mr. G.Y. Rao was the steno to the Regional Labour Commissioner and he was not pulling on well with the appellant because of the leadership of the appellant and the appellant had complained against Sri Rao for his transfer prior to 21.03.2006. He further stated that Mr. Rao was instigating the informant (P.W.4) to institute a case against the appellant in the C.B.I. He further stated that there was a quarrel between the appellant and Mr. Rao always concerning the Union matters. He further stated that the appellant was having no involvement in the matter of dispatch of the order vide Ext.8/2.

D.W.2 Sarat Chandra Das who had a betel shop at Laxmi market, Rourkela stated that he heard a noise near a tree situated near China Restaurant and he saw one old man and two other persons caught hold of the appellant and the old man was inserting some currency notes into the shirt pocket of the appellant and another person had caught hold of the appellant and he saw the appellant was crying for help. He further stated that when he enquired into the matter from the appellant, he told that Mahanty Babu was inserting some currency notes into his pocket and the

C.B.I. staffs were implicating him in a false case. He further stated that when he protested, he was threatened that they were C.B.I. people and would implicate him in the case.

D.W.3 Pravakar Sahu was another shop owner having an electronic shop in Laxmi market, Sector-IV, Rourkela and he stated that on 22.03.2006 at about 3.45 p.m., he saw one person was catching hold of the hands of the appellant and other persons were dragging him. He further stated that about four numbers of 500 G.C. notes were lying on the ground and on being ascertained from the appellant, he came to learn that one middle aged person was forcibly thrusting some money into his pocket.

D.W.4 is the appellant himself. He stated that he was an active leader of All India Staff Association Central Industrial Relations Machinery. He proved the bye-law of the staff association as per Ext.F. He further stated that he had an ill-feeling with Mr. G.Y. Rao relating to his involvement in union matters and that on 10.07.2005, he lodged a complaint against Mr. Rao relating to his activity in his office as per Ext.G. He further stated that he was not dealing with gratuity cases at Rourkela office and further stated how P.W.4 calling him over phone to Laxmi Market for a cup of tea attempted to thrust currency notes to his body to which he pushed him away and another person caught hold of his right hand for which there was scuffle between them and the currency notes fell on the ground.

The defence exhibited six documents. Ext.A is the letter of the Company to Asst. Labour Commissioner (Central-I) dated 03.01.2006, Ext.B is the order of the Asst. Labour Commissioner, Ext.C is the signature of the informant on the office copy of the order (Ext.8/2), Ext.D is the office order of R.S.P. relating to allotment of shop to D.W.2 at Laxmi Market, Ext.E is the office order of R.S.P. relating to allotment of shop to D.W.3 at Laxmi Market and Ext.F is the Bye-law.

6. The learned trial Court formulated the following points for determination:-

(i) Whether on 21.03.2006 and 22.03.2006 the accused had demanded bribe of Rs.2,000/- from the informant for processing the file for issuing the gratuity sanction order to the Company?

(ii) Whether the accused had accepted/obtained Rs.2,000/- from the informant for processing the file for issuing the gratuity sanction order to the Company?

(iii) Whether the accused obtained or received the bribe to show official favour to the informant and the amount was not his official remuneration?

(iv) Whether the accused was a public servant and there was valid sanction for launching prosecution against him?

7. The learned trial Court after assessing the evidence on record has been pleased to hold that the prosecution has succeeded in establishing the fact beyond reasonable doubt that the appellant had demanded bribe of Rs.2,000/- (rupees two thousand) from the decoy (P.W. 4) for processing the gratuity file and sending the

copy of the final order to the employer. It is further held that the prosecution has established beyond reasonable doubt that the appellant had voluntarily and consciously accepted illegal gratification of Rs.2,000/- (rupees two thousand) from the decoy for processing the gratuity file and sending a copy of the final order to the employer and the amount was not his legal remuneration. With regard to valid sanction for launching prosecution against the appellant, it is held that the Court is not to act as an appellate authority while considering the genuineness of a sanction order and accordingly, it was held that there was valid sanction for launching such prosecution.

8. Mr. Devashis Panda, learned counsel appearing for the appellant being ably assisted by Mr. Sudipto Panda, Advocate in his imitable style contended that there is no clinching evidence on record relating to demand of bribe money by the appellant from P.W.4 and the statements of the prosecution witnesses relating to the demand aspect are highly discrepant in nature.

Learned counsel argued that P.W.2, Asst. Labour Commissioner has testified that P.W.4 submitted application (Ext.8/1) for payment of gratuity on 05.10.2005 and Ext.8 is the file relating to his case and payment order was passed by Asst. Labour Commissioner on 09.02.2006 and the dispatch register shows that on 21.03.2006, two letters were addressed to P.W.4 & Vice President of the Company shown to be dispatched vide entry Ext.9. D.W.1 Narendra Maharana, who was working as a clerk in the office of the R.L.C., Rourkela at the time of incident was dealing with diary, dispatch & cash and he testified to have received Ext.8, the final order for payment of gratuity from the Asst. Labour Commissioner (Central), Bhubaneswar on 20.03.2006 at Camp Court, Rourkela and was instructed to hand over the copy of the order to P.W.4 if he was present and if not, to dispatch the copies to P.W.4 as well as the Vice President of the Company, accordingly, on 21.03.2006, he handed over copy of the order to P.W.4 after obtaining his signature on the office copy vide Ext.C and he instructed the appellant to approach his employer to receive gratuity and other benefits and that he also issued a copy of the order on 21.03.2006 to P.W.4's employer showing its dispatch vide Ext.C/1 in the dispatch register in which he had made entries to that effect. Mr. Panda argued that the evidence of P.W.2 coupled with the evidence of D.W.1 as well as documents vide Exts.9, 10, C and C/1 conclusively establish that the appellant was not dealing with the file of P.W.4 and the order has been communicated to the employer of P.W.4 on 21.03.2006 itself by D.W.1 before the trap. It is argued that the appellant needed to have power to exercise over the matter for which he allegedly demanded illegal gratification or bribe while in the present case, it has been established that appellant had no role to play in dealing with the file of P.W.4 relating to payment of his gratuity which D.W.1 had already forwarded to the Company as well as handed over a copy to P.W.4 and therefore, it is clear from the oral and documentary evidence on record that P.W.4's work was already over on 21.03.2006 and there was

no occasion for the appellant to demand and receive the bribe on 21.03.2006 and 22.03.2006 respectively. He argued that the emphasis laid by the learned trial Court on processing of the file of P.W.4 for payment of gratuity is equally misconceived since the order was required to be communicated only and no processing was to be done or had been done.

Learned counsel further argued that the finding of the learned trial Court that the appellant had voluntarily and consciously accepted illegal gratification from the decoy (P.W.4) and the plea of the appellant relating to forcible thrusting of money into his pocket is an afterthought one and presumption under sections 20 and 4(1) of 1988 Act are attracted in full force is an erroneous one. It is contended that the learned trial Court has committed illegality in rejecting the defence plea. D.W.1 has testified about the strained relationship between the appellant and G.Y. Rao, the Steno to R.L.C. with whom P.W.4 had good relationship and whom he had met on 21.03.2006 where G.Y. Rao instigated P.W.4 to institute a case against the appellant with C.B.I.

Learned counsel further argued that the finding of the learned trial Court that there is no dispute with regard to correctness of the C.E. report (Ext.16) relating to the tests of hand and pocket washes of appellant is erroneous since Ext.16 does not corroborate the evidence with regard to acceptance of bribe and detection thereof as narrated by P.Ws.1, 4, 6 and 7. He further urged that these witnesses have testified that during the pre-trap preparation, the sample hand wash (M.O.I) of P.W.1 marked as 'D' by trap laying officer (P.W.7) was tested with sodium carbonate solution after he handled phenolphthalein treated tainted money which contained pink colour liquid with white sediment as noted in Ext.16, the right hand wash (M.O.II) of the appellant marked as 'R', the left hand wash (M.O.III) of the appellant marked as 'L' and the pocket wash (M.O.V) of the appellant marked as 'P' by P.W.7, all contained pink colour liquid with white sediments as noted in Ext.16 were found to be containing phenolphthalein, sodium carbonate and water on chemical analysis. According to Mr. Panda, if the version of the witnesses is believed that the bribe money was accepted by the appellant with his right hand, not counted by him by using both the hands but put straight in his left side chest pocket from where it was brought it out on being instructed by P.W.7 after the hand washes of the appellant were taken separately, the left hand wash (M.O.III) should have remained colourless and not 'faint pink' and would not have found containing phenolphthalein as stated in Ext.16.

It is argued that the learned trial Court erroneously held that there was valid sanction for launching prosecution against the appellant. Ext.13 is the sanction order signed by P.W.5 wherein a detailed description has been given, but in the cross-examination, P.W.5 has stated that the petition of the I.O. was not accompanied by documents and has further stated that the Ext.13 does not specifically reveal that he had perused the F.I.R. and that there is no specific mention on Ext.13 about the

documents and statements of witnesses and that he had not personally talked with P.W.4. It is argued that P.W.8, the I.O. has not testified to have met P.W.5 or held pre-sanction discussion with him before submission of charge sheet and has admitted to have no discussion at all with the sanctioning authority but had only submitted documents. He further submitted that the sanction order Ext.13 runs into thirteen pages containing all the details of the trap as well as pre-trap and post-trap formalities but does not indicate what documents were perused by P.W.5 before he accorded sanction. Learned counsel further argued that there is also no endorsement in the sanction order as to whether it was prepared by P.W.5 himself and then signed nor contained any endorsement of any person indicating that it had been typed out to the dictation of P.W.5.

Placing reliance in the cases of **C.M. Girish Babu -Vrs.- C.B.I. reported in (2009) 43 Orissa Criminal Reports (SC) 48**, **Krishna Ram -Vrs.- State of Rajasthan reported in (2009) 43 Orissa Criminal Reports (SC) 92**, **State of Maharashtra -Vrs.- Dnyaneshwar Laxman Rao Wankhede reported in (2009) 44 Orissa Criminal Reports (SC) 425**, **P. Satyanarayana Murthy -Vrs.- District Inspector of Police reported in (2015) 10 Supreme Court Cases 152**, it is urged that it is a fit case where benefit of doubt should be extended in favour of the appellant.

9. Mr. Sarthak Nayak, learned Special Public Prosecutor appearing for the C.B.I., on the other hand, contended that there is no infirmity or illegality in the impugned judgment of the learned trial Court and the prosecution has proved all the three aspects i.e. demand, acceptance and recovery of bribe money by way of cogent evidence and the learned trial Court has rightly held that there was valid sanction for prosecution of the appellant as P.W.5 Lallan Singh who was working as Deputy Chief Labour Commissioner (Central), Bhubaneswar was competent to remove the appellant and he has stated that he perused the documents and statements of witnesses and being satisfied accorded sanction vide Ext.13 and the defence plea has not been established even by preponderance of probability as there are material discrepancies in the evidence of defence witnesses and therefore, the appeal should be dismissed. He placed reliance in the case of **D. Velayutham -Vrs.- State reported in 2015 Criminal Law Journal 3168 (S.C.)**.

10. In order to establish the charge under section 7 of the 1988 Act, the essential ingredients are as follows:-

> (i) that the accused at the time of the commission of the alleged offence was or expected to be a public servant;
>
> (ii) that he accepted or obtained or agreed to accept, or attempted to obtain from some person as gratification;
>
> (iii) that such gratification was not legal remuneration due to him; and
>
> (iv) that he accepted the gratification in question as a motive or reward for

a) doing or forbearing to do an official act; or
b) showing or forbearing to show favour or disfavour to someone in the exercise of his official function; or
c) for rendering or attempting to render any service.

Similarly, for establishing charges under section 13(2) read with section 13(1)(d) of the 1988 Act, the prosecution has to establish the following ingredients:-

(i) that the accused had demanded a bribe;
(ii) that the accused had accepted/obtained a bribe; and
(iii) that the accused obtained/accepted the amount as illegal gratification and it was not his legal remuneration.

Law is well settled that mere receipt of the amount by the accused is not sufficient to fasten guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification. In order to constitute an offence under section 7 of 1988 Act, proof of demand is a sine qua non. (**Ref:- V. Sejappa - Vrs.- The State** : **(2016) 64 Orissa Criminal Reports (SC) 364**). The burden rests on the accused to displace the statutory presumption raised under section 20 of the 1988 Act by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in section 7 of the 1988 Act. While invoking the provisions of section 20 of the 1988 Act, the Court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt. For arriving at the conclusion as to whether all the ingredients of the offence i.e. demand, acceptance and recovery of illegal gratification have been satisfied or not, the Court must take into consideration the facts and circumstances brought on the record in its entirety. The standard of burden of proof on the accused vis-à-vis the standard of burden of proof on the prosecution would differ. The proof of demand of illegal gratification is the gravamen of the offence under sections 7 and 13(1)(d)(i) and (ii) of 1988 Act and in absence thereof, unmistakably the charge therefore, would fail. Mere acceptance of any amount allegedly by way of illegal gratification or recovery thereof, dehors the proof of demand, ipso facto, would thus not be sufficient to bring home the charge under these two sections of the Act. As a corollary, failure of the prosecution to prove the demand for illegal gratification would be fatal and mere recovery of the amount from the person accused of the offence under sections 7 or 13 of the Act would not entail his conviction thereunder. The evidence of the informant should be corroborated in material particulars and the informant cannot be placed on any better footing than that of an accomplice and corroboration in material particulars connecting the accused with the crime has to be insisted upon. (**Ref:- Satyananda Pani -Vrs.- State of Orissa (Vig.)** : **(2017) 68 Orissa Criminal Reports 795**.

In case of **Krishan Chander -Vrs.- State of Delhi reported in (2016) 3 Supreme Court Cases 108**, it is held that the demand for the bribe money is sine

qua non to convict the accused for the offences punishable under sections 7 and 13(1)(d) read with section 13(2) of the 1988 Act. In case of **P. Satyanarayana Murthy** (supra), it is held that the proof of demand has been held to be an indispensable essentiality and of permeating mandate for an offence under sections 7 and 13 of the Act. Qua section 20 of the Act, which permits a presumption as envisaged therein, it has been held that while it is extendable only to an offence under section 7 and not to those under section 13(1)(d)(i) & (ii) of the Act, it is contingent as well on the proof of acceptance of illegal gratification for doing or forbearing to do any official act. Such proof of acceptance of illegal gratification, it was emphasized, could follow only if there was proof of demand. Axiomatically, it was held that in absence of proof of demand, such legal presumption under section 20 of the Act would also not arise.

In the case of **C.M. Girish Babu** (supra), it is held that it is well settled that the presumption to be drawn under section 20 is not an inviolable one. The accused charged with the offence could rebut it either through the cross-examination of the witnesses cited against him or by adducing reliable evidence. If the accused fails to disprove the presumption, the same would stick and then it can be held by the Court that the prosecution has proved that the accused received the amount towards gratification. In the case of **Krishna Ram** (supra), it is held that once it is proved that the money was recovered from the possession of the appellant, the burden of presumption as contemplated under section 20 of the 1988 Act shifts upon the appellant, which he could not rebut through cross-examination of the prosecution witnesses or by adducing reliable and convincing evidence. In the case of **Dnyaneshwar Laxman Rao Wankhede** (supra), it is held that for arriving at the conclusion as to whether all the ingredients of an offence, viz., demand, acceptance and recovery of the amount of illegal gratification have been satisfied or not, the Court must take into consideration the facts and circumstances brought on the record in their entirety. For the said purpose, indisputably, the presumptive evidence, as is laid down in Section 20 of the Act, must also be taken into consideration but then in respect thereof, it is trite, the standard of burden of proof on the accused vis-à-vis the standard of burden of proof on the prosecution would differ. Before, however, the accused is called upon to explain as to how the amount in question was found in his possession, the foundational facts must be established by the prosecution. Even while invoking the provisions of Section 20 of the Act, the Court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt.

**Whether any work of the decoy (P.W.4) was pending with the appellant as on the date of trap**:

11. Keeping in view the ratio laid down in the aforesaid decisions, let me analyse the evidence on record to find out whether any work of P.W.4 was pending with the appellant as on the date of trap to make a demand of bribe.

According to Mr. Panda, no work of the decoy (P.W.4) was pending with the appellant as on the date of trap and hence the question of demand did not arise.

However, according to Mr. Nayak, the work of the P.W.4 that was pending with the appellant was to communicate the order of the Asst. Labour Commissioner vide Ext.8/2 to the employer of P.W.4.

P.W.2 who was the Regional Labour Commissioner at the relevant time has categorically stated in his examination-in-chief that the order of the Asst. Labour Commissioner vide Ext.8/2 was dispatched on 21.03.2006 and the entry (Ext.9) in the dispatch register shows dispatch of two letters, one addressed to P.W.4 and the other to the Vice President of the Company. He has stated in the cross-examination that all correspondence of the office were being dispatched through the dispatch section and a clerk was posted for that work and that the appellant was never been entrusted with any work of dispatch during his (P.W.2's) tenure. P.W.4 himself has stated that on 21.03.2006 he came to know about disposal of his application by the Asst. Labour Commissioner and he received the copy of the order on 21.03.2006 by putting his signature on the order sheet. D.W.1, the clerk working in the office of Regional Labour Commissioner has stated that he received the final order in the gratuity case of P.W.4 vide Ext.8 on 20.03.2006 and was instructed to issue copies to P.W.4, the informant and the Vice President of the Company and he was also instructed to hand over the copies of order by hand to P.W.4 if he was present and any representative of the Company or to dispatch the copies by registered post. D.W.1 further stated that on 21.03.2006, he handed over the copy of the order to P.W.4 and obtained his signature on the office copy vide Ext.C. and on 21.03.2006 also, he sent the copy of the order to the Company and had shown dispatch on the office copy vide Ext.C/1 and he had made entries in the register on 21.03.2006 showing dispatch of the copy to the company. He has denied the suggestion put forth by the learned Special Public Prosecutor in the cross-examination that he himself as well as the appellant was involved in the dispatch of Ext.8/2 on 21.03.2006. Though Mr. Nayak contended that D.W.1 has admitted in the cross-examination that the appellant was the dealing Asst. of T-1 section on 21.03.2006 and that he was to deal with the matter relating to pension and gratuity on 21.03.2006, but such statement would not be sufficient to discard the evidence on record that P.W.4 received the order Ext.8/2 himself on 21.03.2006 by putting his signature Ext.C on the office copy and the order was also issued to the Company on the very day which would be evident from the endorsement Ext.C/1 made on Ext.8/2.

Thus, on a conjoint reading of the evidence of P.W.2, P.W.4 and D.W.1 so also the documentary evidence Ext. 9, Exts. C and C/1 made on Ext.8/2 indicate that

final order in the gratuity case of P.W.4 vide Ext.8/2 was received on 20.03.2006 by D.W.1, a copy of the same was handed over to P.W.4 on 21.03.2006 by D.W.1 and another copy was issued to the Company by D.W.1 on the very day. Therefore, the submission of Mr. Panda that no work of the decoy (P.W.4) was pending with the appellant as on the date of trap has got sufficient force. The evidence of P.W.4 that he received the copy of the order from the appellant is not believable.

Mr. Nayak, learned Special Public Prosecutor contended that the dispatch of the order vide Ext.8 might not be within the knowledge of P.W.4 and he must be under impression that only on fulfillment of demand of bribe of Rs.2,000/- raised by the appellant, the copy of the order would be sent to his employer. If that be so, then the prosecution was required to adduce specific evidence in that respect that in spite of dispatch of the order (Ext.8/2) to the employer on 21.03.2006, the same was not within the knowledge of P.W.4. The evidence of P.W.4 is completely silent in that respect. Therefore, there was no occasion of the appellant to demand bribe from P.W.4 as on the date of trap i.e. on 22.03.2006, as by 21.03.2006, as per the instruction given by Asst. Labour Commissioner, not only the copy of the gratuity order was handed over to P.W.4 but the same was also dispatched to the employer of P.W.4 by D.W.1. Had the appellant fixed the date of receipt of bribe to 22.03.2006 and he was in charge of dispatch of the order to the employer of P.W.4, he would have certainly seen that the order was not dispatched on 21.03.2006 and at least he would have waited till 22.03.2006 for dispatching the same only on getting the bribe money. The issuance of order to the Company on 21.03.2006 speaks for itself that there was no expectation of the appellant from P.W.4 and no condition like payment of bribe money was fixed for dispatching the order.

I am of the humble view that the learned trial Court has not considered the evidence of P.W.2, P.W.4 and D.W.1 so also Ext.9, the entry in the dispatch register and Exts.C and C/1 appearing on Ext.8/2 in its proper perspective which proves that the gratuity order passed in favour of P.W.4 by the Asst. Labour Commissioner vide Ext.8/2 was dispatched to the employer of P.W.4 on 21.03.2006 after handing over a copy to P.W.4 and therefore, no work of the decoy (P.W.4) was pending with the appellant as on the date of trap.

**Demand of bribe by the appellant on 21.03.2006**:

12. With regard to the point no.(i) as formulated by the learned trial Court regarding demand of bribe of Rs.2,000/- (rupees two thousand) by the appellant on 21.03.2006 and 22.03.2006 from P.W.4 for processing the file for issuing the gratuity sanction order to the Company, P.W.4 has stated that on 21.03.2006, the appellant gave him a copy of the order when he met him and asked him to give Rs.2,000/- for the purpose of sending the copy of the order to the employer and that the appellant demanded a sum of Rs.2,000/- as bribe. The demand is stated to be made in the office of Regional Labour Commissioner Central, Sector-5, Rourkela

and it is only P.W.4 who has stated about the same. P.W.4 admits that there is no mention on the document that he received the copy of the order in presence of the appellant. He further stated that only one old man was present in the office on the day of receipt of the copy. He further admits that he had not lodged any written report regarding illegal demand of bribe from him to any of the Senior Officers of the office. He further stated that he knew the then Regional Labour Commissioner, but he had not given any written complaint to RLC. In absence of any corroboration to the evidence of P.W.4 that on 21.03.2006, the appellant demanded a sum of Rs.2,000/- as bribe and in view of his conduct in not complaining before any seniors of the appellant or to RLC and particularly when no work of P.W.4 was pending with the appellant as discussed in the previous paragraph, the prosecution evidence relating to demand on 21.03.2006 is a doubtful feature.

**Demand of bribe by the appellant on 22.03.2006 at Laxmi Market**:

13. The next demand stated to have been made by the appellant to P.W.4 was on 22.03.2006 at Laxmi Market, Sector-4, Rourkela in the afternoon. The relevant witnesses on this aspect are P.W.1, P.W.4, P.W.6 and P.W.7.

P.W.1 has stated that on the telephonic call of P.W.4, the appellant came to Laxmi Market on a motor cycle and asked P.W.4 whether he had brought the money asked for and when P.W.4 said 'yes', then the appellant asked for the same by stretching his right hand. P.W.4 handed over the tainted notes to the appellant and the appellant accepted the same in his right hand and kept the tainted notes inside the left chest pocket of his shirt. P.W.1 has further stated that the C.B.I. team had taken powder for test to the place of detection, which makes the conduct of P.W.7 suspicious. There was no justification to take phenolphthalein powder to the spot.

P.W.4 has stated that after he reached Laxmi Market, he called the appellant from a telephone booth and told him (appellant) that he should come as he (P.W.4) had brought the cash with him. P.W.4 further stated that after the appellant arrived, he (appellant) asked him whether he (P.W.4) had brought money to which he (P.W.4) answered in the affirmative and then the appellant asked for the same and he (P.W.4) brought out the tainted notes from his pocket and handed it over to the appellant which he (appellant) accepted and kept it inside the right side chest pocket of the shirt. P.W.4 stated in the cross-examination that there was only one pocket in the banian of the appellant. The shirt of the appellant which was marked as M.O.VI was called for during argument from the trial Court and the sealed cover was opened and it was found that M.O.VI was having only one left side chest pocket. Therefore, the evidence of P.W.4 that the appellant kept the tainted notes inside the right side chest pocket of his shirt cannot be accepted. There are discrepancies in the evidence of P.W.1 and P.W.4 as to in which side of the chest pocket of the shirt, the appellant kept the tainted money after receiving the same from P.W.4. P.W.4 has stated that he called the appellant from the telephone booth and told him that he (appellant) should

come as he (P.W.4) had brought the cash with him. If P.W.4 had already communicated to the appellant that he had brought the cash and receiving such communication, the appellant came to the spot just to receive the cash, what was the occasion for the appellant to make a query to P.W.4 again as to whether he (P.W.4) had brought the money? The evidence on record that the appellant asked P.W.4 whether he (P.W.4) had brought money would rather suggest that P.W.4 had not told the appellant from the telephone booth that he (P.W.4) had brought the cash with him for making payment to the appellant. In other words, if P.W.4 had already communicated to the appellant that he (P.W.4) had brought the cash with him and called the appellant to the spot, then the query and demand made by the appellant at Laxmi Market is not acceptable. P.W.4 has also stated like P.W.1 that the C.B.I. authority had kept the unused powder in their custody.

The evidence of P.W.6 that in the Laxmi Market, the appellant asked P.W.4 about the money and the evidence of P.W.7 that the appellant demanded money from P.W.4 is also very difficult to be accepted as per the same reason assigned in the previous sub-paragraph inasmuch as according to P.W.4, he had already told the appellant from the telephone booth that he had brought money with him for making payment. Therefore, the demand of bribe by the appellant on 22.03.2006 at Laxmi Market is also a doubtful feature.

**Finding of C.E. Report (Ext.16) regarding left hand wash of the appellant**:

14. The evidence of all the relevant witnesses indicate that the appellant used his right hand in accepting the tainted money from P.W.4 and no one has stated that the appellant counted the money by using his left hand before putting it in his shirt pocket. If that be so, then how the left hand wash of the appellant when taken in sodium carbonate solution which was collected in a glass bottle (M.O.III) and sealed and labeled as 'L' was found on chemical examination to have contained faint white colour liquid with white sediments. The evidence of P.W.1 is that the C.B.I. team had taken powder for test to the place of detection. P.W.4 has also stated that the C.B.I. authority had kept the unused powder in their custody. Such oral evidence coupled with the chemical examination report (Ext.16) finding that in the left hand wash of the appellant, faint white colour liquid with white sediments was found makes the prosecution case suspicious.

**Discrepancies in evidence regarding recovery of tainted money from shirt pocket of appellant**:

15. P.W.4 has stated that the appellant himself brought out the money from his pocket and put it on a piece of paper and then the hand wash of the appellant was taken in the prepared solution. In my humble view, the hand wash of the appellant should have been taken first before asking him to bring out the tainted money from his pocket, otherwise it would be natural that his hand wash would change colour

after he handled it. On this particular point, there are discrepancies in the statements of witnesses. P.W.1 has stated that P.W.7 brought out the tainted notes from the pocket of the appellant. P.W.6 has stated that the appellant brought out the money and gave the same to P.W.7. The evidence of P.W.7 is completely silent as to who brought out the tainted notes from the pocket of the appellant and he has simply stated that the money was recovered from the shirt pocket of the appellant.

In the case of **D. Velayutham** (supra), it is held that Courts are not to be swayed by the semantics of describing the trap witnesses as antecedently "interested" or "partisan" in their testimonies. Rather, their testimonies can only be so stigmatised, and suffer the evidentiary consequence of necessary corroboration, on a casuistic basis, that is to say, whether corroboration is necessary or not will be within the discretion of the Court, depending upon the facts and circumstances of each case.

Thus, even though the evidence of the trap witnesses will not be rejected only on the ground that they are interested witnesses but it appears that there is no corroboration in the statements of these witnesses on the recovery of tainted money rather each of them give a different version which weakens the prosecution case.

**Other suspicious features of prosecution case**:

16. P.W.7 D.K. Kabi, the Inspector, C.B.I., Rourkela branch has deposed that on 21.03.2006, F.I.R. (Ext.12) was lodged by P.W.4 which was sent to Bhubaneswar for registration of the case. He has further stated that S.P., C.B.I. is alone competent to register the case and there is no endorsement on the body of the F.I.R. or any letter of Rourkela C.B.I. Unit Office showing dispatch of F.I.R. to S.P., C.B.I., Bhubaneswar. The formal F.I.R. (Ext.14) contains signature of S.P., C.B.I., Bhubaneswar marked as Ext.14/1. On perusal of Ext.14, it appears to have been received at C.B.I. P.S., Bhubaneswar on 22.03.2006 and accordingly, SDE No.140 dated 22.03.2006 was made at 13:00 hrs and S.P., C.B.I., Bhubaneswar after registration of the case entrusted P.W.7 for investigation. If after registration of F.I.R. at 1.00 p.m. on 22.03.2006, P.W.7 was asked to investigate, then how within such a short span of time, the decoy and other official witnesses assembled at C.B.I. Office, Rourkela for preparation of trap. P.W.7 states that he requisitioned the service of G.C. Das (P.W.1) and G.V. Srinivasan (P.W.6) and in the cross-examination, he has stated that requisition was made telephonically without any written letter and he admits that there is no endorsement anywhere that requisition was made telephonically to the official witnesses. P.W.7 states that he had no prior acquaintance with P.W.1 and P.W.6. It is not understood as to why and how those two official witnesses immediately responded to P.W.7 and leaving all their work, assembled at C.B.I. Office. P.W.1 has stated that his higher authority ordered to report before C.B.I. Office, however he has stated that he could not produce any written order to show that he was so directed. P.W.6 has also stated that he had not

filed any document showing that he was directed to report before C.B.I. Inspector. Pre-trap memorandum (Ext.2) dated 22.03.2006 is a three pages computer typed document which indicates that pre-trap memorandum exercise commenced at 14.30 hours and closed at 15.30 hours which means after registration of the F.I.R. at 1.00 p.m. on 22.03.2006 at Bhubaneswar, everything was done in a hurried manner at Rourkela but to that effect no document is forthcoming.

P.W.4 has not stated in his evidence that the appellant told him on 21.03.2006 to give Rs.2,000/- on 22.03.2006 and that too at Laxmi Market though in the F.I.R., he has mentioned in that respect. P.W.4 stated in his chief examination that post-trap memorandum vide Ext.3 was prepared at the spot, however in the cross-examination, he has stated that he had not signed in any paper at Laxmi Bazar, but he signed in the C.B.I. office and further stated that he could not say the contents of the papers and number of papers in which he had signed in C.B.I. Office. Therefore, it is doubtful whether the post-trap memorandum (Ext.3) dated 22.03.2006 which is a four pages computer typed document and shows that post-trap memorandum commenced at 16.15 hours and completed at about 17.15 hours, was prepared at Laxmi Market itself or at C.B.I. Office, Rourkela.

**Whether the prosecution has proved that the sanction order (Ext.13) was valid?**:

17. Mr. Panda, learned counsel for the appellant contended that there is no valid sanction for launching prosecution against the appellant. Ext.13 is the sanction order signed by P.W.5 who has stated that the petition of the I.O. was not accompanied by documents and has further stated that the Ext.13 did not specifically reveal that he had perused the F.I.R. and that there is no specific mention in Ext.13 about the documents and statements of witnesses. It is argued that P.W.8, the I.O. has admitted to have no discussion at all with the sanctioning authority but had only submitted documents. The sanction order Ext.13 runs into thirteen pages containing all the details of the trap as well as pre-trap and post-trap formalities but does not indicate what documents were perused by P.W.5 before he accorded sanction. It is argued that the sanctioning authority without application of mind has accorded sanction vide Ext.13.

Mr. Nayak, learned Special Public Prosecutor on the other hand argued that there was valid sanction for prosecution of the appellant as P.W.5 Lallan Singh who was working as Deputy Chief Labour Commissioner (Central), Bhubaneswar was competent to remove the appellant and he has stated that he perused the documents and statements of witnesses and being satisfied accorded sanction vide Ext.13.

In the case of **Vijay Rajmohan -Vrs.- C.B.I. reported in (2023) 1 Supreme Court Cases 329**, it is held that section 19 of the P.C. Act provides for a requirement of sanction before prosecution. The requirement of law for having relevant material placed before the sanctioning authority, as well as the independent

application of mind by the said authority, applies with equal vigour to sanction under the P.C. Act.

In the case of **C.B.I. -Vrs.- Ashok Kumar Aggarwal reported in (2014) 14 Supreme Court Cases 295**, while discussing section 19 of the 1988 Act, it is held as follows:-

> "13. The prosecution has to satisfy the court that at the time of sending the matter for grant of sanction by the competent authority, adequate material for such grant was made available to the said authority. This may also be evident from the sanction order, in case it is extremely comprehensive, as all the facts and circumstances of the case may be spelt out in the sanction order. However, in every individual case, the court has to find out whether there has been an application of mind on the part of the sanctioning authority concerned on the material placed before it. It is so necessary for the reason that there is an obligation on the sanctioning authority to discharge its duty to give or withhold sanction only after having full knowledge of the material facts of the case. Grant of sanction is not a mere formality. Therefore, the provisions in regard to the sanction must be observed with complete strictness keeping in mind the public interest and the protection available to the accused against whom the sanction is sought.
>
> 14. It is to be kept in mind that sanction lifts the bar for prosecution. Therefore, it is not an acrimonious exercise but a solemn and sacrosanct act which affords protection to the government servant against frivolous prosecution. Further, it is a weapon to discourage vexatious prosecution and is a safeguard for the innocent, though not a shield for the guilty.
>
> 15. Consideration of the material implies application of mind. Therefore, the order of sanction must ex facie disclose that the sanctioning authority had considered the evidence and other material placed before it. In every individual case, the prosecution has to establish and satisfy the court by leading evidence that those facts were placed before the sanctioning authority and the authority had applied its mind on the same. If the sanction order on its face indicates that all relevant material i.e. F.I.R., disclosure statements, recovery memos, draft charge sheet and other materials on record were placed before the sanctioning authority and if it is further discernible from the recital of the sanction order that the sanctioning authority perused all the material, an inference may be drawn that the sanction had been granted in accordance with law. This becomes necessary in case the court is to examine the validity of the order of sanction inter-alia on the ground that the order suffers from the vice of total non-application of mind.
>
> (Vide: Gokulchand Dwarkadas Morarka v. King : A.I.R. 1949 P.C. 82; Jaswant Singh v. State of Punjab : A.I.R. 1958 S.C. 124; Mohd. Iqbal Ahmed v. State of A.P. : A.I.R. 1979 S.C. 677; State through Anti-Corruption Bureau, Govt of Maharashtra v. Krishanchand Khushalchand Jagtiani : A.I.R. 1996 S.C. 1910; State of Punjab v. Mohd. Iqbal Bhatti : (2009) 17 S.C.C. 92; Satyavir Singh Rathi, ACP v. State : A.I.R. 2011 S.C. 1748 and State of Maharashtra v. Mahesh G. Jain : (2013) 8 S.C.C. 119).
>
> 16. In view of the above, the legal propositions can be summarised as under:
>
> 16.1.The prosecution must send the entire relevant record to the sanctioning authority including the F.I.R., disclosure statements, statements of witnesses, recovery memos, draft charge sheet and all other relevant material. The record so sent should also contain the material/document, if any, which may tilt the balance in favour of the accused and on the basis of which, the competent authority may refuse sanction.
>
> 16.2. The authority itself has to do complete and conscious scrutiny of the whole record so produced by the prosecution independently applying its mind and taking into consideration

all the relevant facts before grant of sanction while discharging its duty to give or withhold the sanction.

16.3. The power to grant sanction is to be exercised strictly keeping in mind the public interest and the protection available to the accused against whom the sanction is sought.

16.4. The order of sanction should make it evident that the authority had been aware of all relevant facts/materials and had applied its mind to all the relevant material.

16.5. In every individual case, the prosecution has to establish and satisfy the court by leading evidence that the entire relevant facts had been placed before the sanctioning authority and the authority had applied its mind on the same and that the sanction had been granted in accordance with law."

P.W.5, the sanctioning authority though stated in the chief examination that he perused the documents and statements of the witnesses and being satisfied, accorded sanction and he also proved the sanction order (Ext.13), but in the cross-examination, he has stated that the petition of the I.O. for a prayer to accord sanction was not accompanied by documents. He admits that Ext.13 specifically did not reveal that he perused the F.I.R. and there is no specific mention in Ext.13 about the documents and statements of witnesses which he had perused. P.W.8, the I.O. has stated that he had no discussion with the sanctioning authority. Though P.W.8 has stated that he had presented material documents, but in view the evidence of P.W.5 that the petition of the I.O. was not accompanied by documents, it is very difficult to accept the evidence of the I.O. in that respect. In view of the evidence of P.W.5 and P.W.8, it cannot be said that the entire relevant facts were placed before the sanctioning authority (P.W.5) and that he had applied his mind on the same and that the sanction had been granted in accordance with law.

**Conclusion**:

18. Though several other points including the materials on record to substantiate the defence plea were urged by the learned counsel for the appellant, but in my humble view, it is not necessary to discuss all those points in a threadbare manner which would unnecessarily make the judgment lengthy. In view of the foregoing discussions, when no work of the decoy (P.W.4) was pending with the appellant as on the date of trap and the demand of bribe by the appellant on 21.03.2006 so also on 22.03.2006 is a doubtful feature, the finding of C.E. Report (Ext.16) regarding left hand wash of the appellant makes the prosecution case suspicious, there are discrepancies and suspicious features in the case and the application of mind by the sanctioning authority (P.W.5) to all the relevant facts before according sanction is also a doubtful feature in the case, it cannot be said that the prosecution has succeeded in establishing the charges against the appellant beyond all reasonable doubt.

In the result, the criminal appeal is allowed. The impugned judgment and order of conviction of the appellant under section 7 and section 13(2) read with section 13(1)(d) of the 1988 Act and the sentence passed thereunder is hereby set

aside and the appellant is acquitted of all the charges. The appellant is on bail by virtue of the order of this Court. He is discharged from liability of his bail bond. The personal bond and the surety bond stand cancelled.

Trial Court records with a copy of this judgment be sent down to the learned trial Court forthwith for information.

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## 2023 (I) ILR - CUT-1051

### KRUSHNA RAM MOHAPATRA, J.

W.P.(C) NO. 13508 OF 2022

**VARSHA PRIYADARSHINI** ..... Petitioner

-V-

**GOVT.OF INDIA & ORS.** .....Opp.Parties

**CONSTITUTION OF INDIA, 1950 – Article 226 – Maintainability of writ petition against a private person – The petitioner prays for a direction against a private individual for issuance of prohibitory order in the matter of publication of contents relating to matrimonial dispute between the parties in print, electronic and social media – Whether writ is maintainable ? – Held, No – No material is placed before this Court to infer that the petitioner had no efficacious remedy for redressal of her grievance, when the alternative remedy is equally available, the writ court should be slow to intervene in the matter.** (Para 10.3)

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

1. (2007) 8 SCC 449 : Prestige Lights Ltd. Vs. State Bank of India.
2. (2008) 1 SCC 560 : Udyami Evam Khadi Gramodyog Welfare Sanstha and another Vs. State of Uttar Pradesh & Ors.
3. AIR 2017 SC 4161 : Justice K.S.Puttaswamy (retd.) & Anr. Vs. Union of India & Ors.
4. 2021 SCC Online 985 : Manohar Lal Sharma Vs. Union of India & Ors.
5. AIR 1999 SC 753 : U.P. State Co-operative Land Development Bank Ltd. Vs. Chandra Bhan Dubey & Ors.
6. AIR 2005 SC 2677 : Zee Tele films Ltd. and another Vs. Union of India & Ors.
7. AIR 2012 SC 3829 : Sahara India Real Estate Corp. Ltd. & Ors. Vs. Securities&Exchange Board of India & Anr
8. (2005) 5 SCC 733 : Noise Pollution (v), In Re Vs. Union of India and another
9. 2007 SCC OnLine Del 1424 : Indu Jain Vs. Forbes Incorporated.
10. 2021 SCC OnLine Madras 2896 : Raptakos Brett and Co. Ltd. Vs. Raptakos Brett Employees Union (Rep by its General Secretary) and Another.
11. (1989) 2 SCC 691 : Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahostav Smarak Trust & Ors. Vs. V.R. Rudani & Ors.
12. (1994) 1 SCC 1 : S.P.Chengalvaraya Naidu Vs. Jagannath and others.

13. (1992) 3 SCC 637 : Life Insurance Corporation of India Vs. Prof. Manubhai D. Shah.
14. (2006) 2 LW 377 : R.Rajagopal @ R.R.Gopal (a) Nakkheeran Gopal Vs. J.Jayalalitha.

For Petitioner : Ms. Sujata Jena

For Opp.Parties: Mr. Prasanna Kumar Parhi,
Deputy Solicitor General of India for Odisha,
being assisted by Mr. B. Panda, CGC (O.P.Nos.1 & 2)

Ms. Geeta Luthra, Senior Advocate
being assisted by Mr. Lalitendu Mishra (O.P.No. 4)

JUDGMENT Date of Hearing : 06.01.2023 : Date of Judgment : 22.03.2023

***KRUSHNA RAM MOHAPATRA, J.***

***1.*** This matter is taken up by virtual/physical mode and heard counsel for respective parties.

***2.*** This writ petition has been filed with a prayer to direct the Opposite Party Nos.1 and 2, i.e., the Ministry of Information and Broadcasting, Government of India and Registrar of Newspapers of India respectively to instruct the Print and Electronic Media not to publish and circulate any news item in the matter pertaining to marital dispute between the Petitioner and Opposite Party No.4. Further prayer has been made to take action against Opposite Party No.4 in making derogatory remarks against the Petitioner which violates her right to privacy and to live with dignity.

***2.1*** Contents of the writ petition reveals that both the Petitioner and Opposite Party No.4 are reputed actors of Odia Film Industry and Opposite Party No.4 is also a Member of Parliament from Kendrapara Parliamentary Constituency. There is a marital discord between them for which CP No.312 of 2020 and CP No.246 of 2021 are pending before learned Judge, Family Court, Cuttack. Further, a proceeding under the Protection of Women from Domestic Violence Act, 2005 in DV Case No.94 of 2020 is also pending before learned Sub-Divisional Judicial Magistrate, Sadar Cuttack.

***2.2*** Initially the Opposite Party No.4 filed HMA No.267 of 2020 praying, *inter alia*, for dissolution of their marriage by a decree of divorce, which was subsequently transferred to the Family Court, Cuttack as per the direction of the Hon'ble Supreme Court and registered as CP No.246 of 2021. Similarly, the Petitioner has also filed an application under Section 9 of the Hindu Marriage Act, 1955 for restoration of their conjugal life in CP No.312 of 2020, which is also pending before the said Family Court, Cuttack.

***2.3*** It is alleged in the writ petition that soon after the aforesaid cases were filed, the Opposite Party No.4 started giving statements in print and electronic media about their personal life, which were published in different newspapers and also

telecast in print and electronic media. Such publications and telecast seriously infringe the private life of the Petitioner so also her right to live with dignity.

***2.4*** In DV Case No.94 of 2020, learned SDJM was pleased to pass an order restraining the Opposite Party No.4 from entering into the room of the Petitioner where she was staying and also not to interfere with her personal life. Looking at the situation two women Police personnel were also deployed at the house where the Petitioner was staying. Due to the alleged derogatory remarks and release of videos, Petitioner's dignity was lowered in the society and she had to face a lot of queries from her fans and friends. In the writ petition, the Petitioner also annexed the videos played in You Tube channel in a pen drive, statements made by Opposite Party No.4 in social media for his fans and followers, and the complaint dated 22nd May, 2022 lodged before You Tube Channel by the Petitioner, as Annexures-1 to 4. Viewing the release of videos in You Tube Channel people started giving their derogatory opinions. The said Videos and statements in You Tube Channel became such that the Petitioner was scared of going outside and continue her social activities. The conduct of the Opposite Party No.4 is not only violates Article 21 of the Constitution but also frustrate the purpose of Section 22 of the Hindu Marriage Act, 1955. The act and action of Opposite Party No.4 being intolerable, the Petitioner reported the matter to the Inspector in-charge of Purighat Police Station (Annexure-5) requesting him to enquire into the matter and take appropriate action, but to no effect. As such, the Petitioner finding no other alternative has filed this Writ Petition.

***3.*** A detailed counter affidavit has been filed by the Opposite Party No.4 raising preliminary objection with regard to maintainability of the writ petition. It is contented, *inter alia*, that the writ petition involves serious disputed questions of fact. The prayers made therein are also vague and omnibus and no writ can be issued under Article 226 of the Constitution of India against an individual granting such prayers. As a counter-blast to the petition filed by Opposite Party No.4 for dissolution of marriage, the Petitioner filed DV Case No.94 of 2020 before learned SDJM, Cuttack Sadar, lodged FIR in Purighat PS under Section 498A, 506 and 34 IPC. In order to gain sympathy, the Petitioner also filed a petition for restoration of conjugal right. It is also alleged, *inter alia*, that the Petitioner has left no stone unturned to see that Opposite Party No.4 withdraws the petition for dissolution of marriage. It is also stated in the counter affidavit that learned SDJM, Sadar Cuttack in the aforesaid DV Case, vide order dated 5th February, 2021 along with certain directions to the Opposite Party No.4 also, directed the present Petitioner not to prevent the Opposite Party No.4 accessing the share household including drawing room and kitchen situated in the first floor and not to lock the entrance of the said floor. The Opposite Party No.4 had never broadcast his statement relating to the case pending in the Family Court, Cuttack by making derogatory remarks against the Petitioner, as alleged. To the contrary, Opposite Party No.4 had filed an interim application in C.P. No. 246 of 2021 praying, *inter alia*, to direct the media not to

telecast anything about the Family Court proceedings. Petitioner objected to the said petition by filing her objection before learned Judge, Family Court, Cuttack stating that the media platform is an independent process of the present society of developing countries and the mouth of the media should not be gagged by a judicial order. Learned Judge, Family Court, Cuttack rejected the application filed by Opposite party No.4 vide order dated 15th July, 2021 observing that the Press **is** the 4th pillar of democracy. Importance of the role of media in our day-to-day life is pretty evidence. It was also observed therein that the media must act as 3rd eye to keep the citizens aware of what is happening around the world and thus the right of 4th pillar of democracy to print and publish, cannot be snatched away. In view of the stand of the Petitioner before the learned Judge, Family Court, Cuttack she is estopped from making any claim before this Court more particularly as sought for in this writ petition. These facts were deliberately suppressed by the Petitioner in the writ petition. In the counter affidavit, Opposite Party No.4 also relied upon the observations of the Hon'ble Supreme Court in the case of ***Prestige Lights Ltd. Vs. State Bank of India***, reported in (2007) 8 SCC 449 and ***Udyami Evam Khadi Gramodyog Welfare Sanstha and another Vs. State of Uttar Pradesh and others***, reported in (2008) 1 SCC 560 and contended that while claiming relief of equity, the applicant must come to the Court with clean hands. It is, therefore, contended that the Writ Petition suffers from suppression of aforesaid material facts and thus is liable to be dismissed.

***4.*** So far as publication of video is concerned, it was contended that Opposite Party No.4 had up-loaded some videos expressing the gratitude to his fans for supporting him in his hard time on his own personal and private You Tube channel. Sharing someone's own thought and freedom of speech expression is very much protected and guaranteed under the Constitution and the Opposite party No.4 has only exercised his right to speech without defaming and demeaning anyone including the Petitioner. The Opposite Party No.4 also alleged that publication and telecast of news item regarding their marital discord is without his knowledge. In order to save his image as a law maker and to protect his reputation being tarnished on daily basis in media, he released the video on 21st May, 2022 disclosing his case details and the cases filed by the Petitioner. On the other hand, the Petitioner is playing a victim card by filing the present petition only to draw attention of the media and public. The Opposite Party No.4 also wrote to the Hon'ble Speaker, Lok Sabha to refrain media from publishing news about their marital discord, which is *sub judice* before different courts vide his letters dated 11th September, 2020 and 12th February, 2022 (Annexures-D/4 and E/4) respectively. The Opposite Party No.4 also denied all other allegations the writ petition and prayed for dismissal of the same.

***5.*** Mrs. Jena, learned counsel buttressing the case of the Petitioner, submitted that this Court has ample jurisdiction under Article-226 of the Constitution to issue direction to print and electronic media not to publish / broadcast / telecast any

derogatory news items concerning the marital discord between the Petitioner and Opposite Party No.4. Narrating the facts in detail, she further submitted that every citizen of the country, as the Petitioner, has right to privacy. Every citizen has fundamental right of expression, but said fundamental right should not infringe the dignity and integrity of any other person. Otherwise, it would amount to misuse of right of expression. In support of her submission, she relied upon the observation of the Hon'ble Supreme Court in the case of ***Justice K S Puttaswamy (retd.) and Anr. Vs. Union of India and Ors.***, reported in AIR 2017 SC 4161 in which it is held as under:-

> *".... the right to privacy is as sacrosanct as human existence and is inalienable to human dignity and autonomy. Privacy is a constitutionally protected right which emerges primarily from the guarantee of life and personal liberty in Article 21 of the Constitution...."*
> *Xxx xxx xxx xxx*
> *"Every individual is entitled to perform his actions in private. In other words, she is entitled to be in a state of repose and to work without being disturbed, or otherwise observed or spied upon. The entitlement to such a condition is not confined only to intimate spaces such as the bedroom or the washroom but goes with a person wherever he is, even in a public place....."*

She also relied upon a decision of the Hon'ble Supreme Court in the case of ***Manohar Lal Sharma Vs. Union Of India and others*** reported in 2021 SCC Online 985, wherein it is held as under:-

> *"34. Members of a civilized democratic society have reasonable expectation of privacy. Privacy is not a singular concern of journalists or social activists. Every citizen of India ought to be protected against violations of privacy. It is expectation which enables us to exercise our choices, liberties and freedom....."*

In the light of the aforesaid observation, Mrs. Jena, learned counsel submitted that since the right to privacy has been encroached upon by the conduct of Opposite Party No.4 in giving statements and releasing videos which violates the fundamental right of the Petitioner, a writ petition to protect fundamental right of the Petitioner is maintainable.

***5.1*** Although an interim order was passed by Hon'ble Vacation Bench on 27th May, 2022 and the matter was posted to 4th July, 2022, but the Opposite Party No.4 proceeded to release videos and statements touching the integrity and dignity of the Petitioner as well as infringing her privacy. As such, the Petitioner also filed CONTC No.3983 of 2022 before this Court for violation of order dated 27th May, 2022 and to punish the Opposite Party No.4 suitably.

***6.*** With regard to maintainability of the writ petition, Mrs. Jena, learned counsel for the Petitioner also cited different case laws which are as under:-

i) AIR 1999 SC 753
(***U.P. State Co-operative Land Development Bank Ltd. Vs. Chandra Bhan Dubey & Ors***.)

ii) AIR 2005 SC 2677
(***Zee Tele films Ltd. and another Vs. Union of India and others.)***

iii) AIR 2012 SC 3829
(***Sahara India Real Estate Corp. Ltd. & Ors. Vs. Securities & Exchange Board of India & anr.***

iv) AIR 2017 SC 4161
***(Justice K S Puttaswamy (retd.) and another Vs. Union of India and others.***

v) (2005) 5 SCC 733
***(Noise Pollution (v), In Re Vs. Union of India and another)***

She, therefore, submits that the scope of Article 51A (e) of the Constitution clearly provides that it is the duty of every citizen to renounce practices derogatory to the dignity of women. In case of any violation of provision of the Constitution, this Court has ample power to exercise its jurisdiction under Article 226 of the Constitution to interfere with the same. She further submits that no doubt, the Petitioner has a remedy in common law forum, but that does not prevent her from filing the writ petition before this Court in view of rules of the Hon'ble Supreme Court in ***Justice K S Puttaswamy (retd.) (supra).*** She therefore prays for grant of the relief as aforesaid.

***7.*** Mrs. Luthra, learned Senior Advocate appearing on behalf of Opposite Party No.4 also made lengthy arguments on the facts as well as law involved in this writ petition. Denying allegations made in the writ petition in detail she submits that the writ petition under Article 226 of the Constitution is not maintainable against private individual. In this regard, she relied upon decision in the case of ***Indu Jain Vs. Forbes Incorporated***, reported in 2007 SCC OnLine Del 1424, in para-57, it has been observed as follows:-

> *"57. From the constitutional scheme and a reading of the foregoing pronouncements, it is apparent that in order to seek enforcement of a fundamental right, the dispute must not be between two private individuals but must be between an individual and the State. Even enforcement of the fundamental right of freedom of expression under Article 19(1) has to be enforced against the State. It is well settled that other than violation of Articles 17, 23 and 24 by private parties other, disputes between two private parties cannot be urged to be an invasion of a fundamental right."*

In ***Raptakos Brett and Co. Ltd. Vs. Raptakos Brett Employees Union Rep by its General Secretary and Another***, reported in 2021 SCC OnLine Madras 2896, in para-8 it has been observed as under:-

> *"8. Since it has been admitted by the appellant that CCTVs have been installed in the men dress changing room, the second respondent also in his letter dated 29.10.2013 directed the appellant to abide by the customs prevailing in Tamil Nadu in the interest of industrial peace. Since paragraph-12 of the counter affidavit filed by the appellant in the writ petition before the learned single Judge admits the fact of installation of the CCTV even inside the rest room, which is not only objectionable but also impermissible in law, in the light of the legal position settled by the nine-Judge Bench of the Hon'ble Supreme Court in the case of Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1 holding that the right to privacy is a fundamental right that does not need to be separately articulated, but can be derived from Articles 14, 19 & 21 of the Constitution of India; that it is a natural right that subsists as an integral part to the right to life and liberty; that it is a fundamental and inalienable right and*

> *attaches to the person covering all information about that person and the choices that he/she makes; that it protects an individual from the scrutiny of the State in their home, of their movements and over their reproductive choices, choice of partners, food habits, etc., therefore, any action by the State that results in an infringement of the right of privacy is subject to judicial review, in the case on hand, since there is no infringement of privacy by the State, the first respondent/writ petitioner cannot lay their claim before this Court under Article 226 of the Constitution of India. In the judgment of the Hon'ble Apex Court in Justice K.S. Puttaswamy (Retd.) v. Union of India (supra), Hon'ble Justice Sanjay Kishan Kaul (in his separate opinion) recognizing the breach of privacy committed by private individuals/private entities/non-State actors, called upon the legislature to legislate on this issue and ensure privacy of individuals against other citizens as well. Since the Constitution of India states that fundamental rights enshrined in Part III can only be enforced against State as defined in Article 12, we are of the considered opinion that the writ of mandamus issued by the learned single Judge against the private factory management is not legally sustainable, hence, the first respondent-Union has to work out their remedy before the appropriate forum……."*

Ms. Luthra, learned Senior Advocate submitted that issue concerning matrimonial proceeding between the Petitioner and Opposite Party No.4 being reported in print, electronic and social media already set at rest by the learned Judge, Family Court in its order dated 15th July, 2021. Petitioner deliberately suppressing the said fact has approached this Court with the selfsame relief, but in different words. It is just like 'old wine in new bottle'. She also pressed into service the order dated 15th July, 2021 passed by learned Judge, Family Court, Cuttack. She therefore submitted that the writ petition is not maintainable both on fact and law. In the case of ***Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahostav Smarak Trust and others Vs. V.R. Rudani and others***, reported in (1989) 2 SCC 691, at para-15 of which, Hon'ble Supreme Court held as under:-

> *"If the rights are purely of a private character no mandamus can issue. If the management of the college is purely a private body with no public duty mandamus will not lie...."*

In course of her submission, she reiterated that the relief sought for in this writ petition is a relief of equity. Hence, the Applicant must come to the Court with clean hands. Since the Petitioner herself suppressed material fact that she had contested the application filed by Opposite Party No.4 to restrain her from making a publication in the print, electronic as well as social media taking a contrary stand, is stopped to raise a negative plea in this writ petition. While contesting the application filed by Opposite Party No.4, the Petitioner had argued that the media must be allowed to report on matrimonial discord. Taking note of her submission, and the case law, learned Judge Family Court rejected the application filed by Opposite Party No.4. Thus, the writ petition is not maintainable as by suppressing material fact the Petitioner has played fraud on the Court. In support of her submission, she relied upon a decision in the case of ***S.P.Chengalvaraya Naidu Vs. Jagannath and others***, reported in (1994) 1 SCC 1, wherein it is held as under;-

> "*.....A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain*

*advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party."*

In all fairness, the Petitioner ought to have disclosed the fact of filing of petition by Opposite Party No.4 and her objection to the said application as well as order passed therein.

***7.1*** It is also her submission that an individual has a legal right to use the media to answer the criticism level against him. The Opposite Party No.4 being a popular actor in Odia Film Industry has a large number of fans and followers. He is also an elected Member of Parliament from Kendrapara Parliamentary Constituency. Thus, the statement made by the Petitioner in social, print as well as electronic media also tarnished his image in the society. Such statements also infringed his liberty. In support of her submission, she relied upon a case law in the case of ***Life Insurance Corporation of India Vs. Prof. Manubhai D. Shah***, reported in (1992) 3 SCC 637, wherein it is held as under:-

*"8. ....Once it is conceded, and it cannot indeed be disputed, that freedom of speech and expression includes freedom of circulation and propagations of ideas, there can be no doubt that the right extends to the citizen being permitted to use the media to answer the criticism levelled against the view propagated by him....."*

She also submitted that the Petitioner has already filed a defamation case against Opposite Party No.4 under Section 501 of the IPC and Section 67 of the Information Technology Act. The Opposite Party No.4 has already been summoned in the said case, which is registered as ICC No.377 of 2022 pending in the Court of learned SDJM, Sadar Cuttack. She therefore contended that a blanket order of injunction should not have been imposed on the Opposite Party No.4, which curtails his fundamental right of free speech and expression, especially when a defamation case has already been filed against him. In support of her submission, Ms. Luthra, learned Senior Advocate relied upon the case law in the case of ***R.Rajagopal @ R.R.Gopal (a) Nakkheeran Gopal Vs. J.Jayalalitha,*** reported in (2006) 2 LW 377, wherein High Court of Madras has held as under:-

*".....The freedom of speech and expression of opinion is of paramount importance under a democratic constitution which envisages changes in the composition of legislatures and governments and must be preserved. The interim order granted by the learned single Judge is a blanket injunction. The order virtually amounts to a gag order or censorship of press. Such censorship cannot be countenanced in the scheme of our constitutional framework. Even assuming that the articles published by the appellants amount to character assassination of the respondents, there is no justification for granting a blanket injunction restraining the appellants from publishing any articles, in future. It would not be appropriate for us to examine the articles at this stage on the touchstone of defamation, but what we do observe is that they are not of such a nature warranting a restraint order, especially when the appellants are willing to face the consequences in a trial in case the same are held to be defamatory, and the plea of the appellants of truth is yet to be analysed by the Court."*

She therefore submitted that entertaining the writ petition during pendency of a criminal defamation case will amount to abuse of process of Court and utilizing the Court to take revenge on the Opposite Party No.4 to settle her score. She accordingly prays for dismissal of the writ petition with cost.

***8.*** Heard learned counsel for the parties at length. They were also requested to file their written note of arguments along with citations. Basing upon the arguments advance by learned counsel for the parties and perusing the materials on record, this Court finds that following three points are required to be answered in this writ petition.

i) *Whether the Petitioner has any cause of action to file the writ petition;*
*ii) Whether the writ petition in its present form is maintainable; and*
*iii) To what relief, if any, the Petitioner entitled to.*

**Findings;**

***9. Cause of action***:-

On perusal of the writ petition and upon hearing learned counsel for the Petitioner, namely, Mrs. Jena, it transpires that the Petitioner had lodged FIR before Purighat Police Station with regard to alleged derogatory remarks about her character and that of her family members by Opposite Party No.4 in public. The said remarks were allegedly made by Opposite Party No.4 in public on day-to-day basis by uploading videos himself or with help of his followers. When it became un-bearable and for such action the Petitioner had to undergo mental trauma and her reputation was tarnished, she finding no other alternative had to move this Court by filing the present writ petition.

***9.1*** It is alleged by Ms. Luthra, learned Senior Advocate appearing on behalf of Opposite Party No.4 that the Petitioner has no cause of action to file the writ petition, inasmuch as similar such application was filed by the Opposite Party No.4 before learned Judge, Family Court, Cuttack in CP No.246 of 2021 on 6th July, 2020, when the matter was pending before learned Principal Judge, Family Court, Patiala House, New Delhi. In the said application, the Opposite Party No.4 had made a prayer to prohibit the Petitioner from publishing contents of petition, pleadings, provisions, documents and any part thereof in the media platform. The Petitioner had filed her objection to the said petition stating that the Opposite Party No.4 himself initially published the information relating their marital dispute in the electronic, print as well as social media. It is from the said sources, the Petitioner could know filing of a case for dissolution of their marriage by decree of divorce in the Court of Principal Judge, Family Court, Patiala House, New Delhi. Thus, the Petitioner filed a transfer petition before Hon'ble Supreme Court and pursuant to the direction of the Hon'ble Court, the matter was transferred to the Court of learned Judge, Family Court, Cuttack and registered as CP No.246 of 2021. It is further contended in her objection that since the Opp.Party No. 4 initially made publication

of matters relating to their marital dispute in the print, electronic as well as social media, he would not be prejudiced if the Petitioner published information about their marital dispute as well as day-to-day progress of the proceeding in the media. Considering the rival contentions of the parties, learned Judge Family Court observing that the Press being the fourth pillar of democracy important role of media in our day today life is pretty evident. Thus, the right of the fourth pillar of democracy to publish and print cannot be snatched away when it has been disclosed before them by the parties or by their respective learned counsel. It was further observed that at the same time, such electronic, print and social media cannot be permitted to scan day-to-day proceedings of the Court so also pronounce pre-trial judgment on the oral version of the parties so also their respective counsels, right of which is vested in Court only. As such, the petition filed by the Opposite Party No.4 was rejected vide order dated 15th July, 2021 (Annexure-C/4 to the Counter Affidavit filed by Opposite Party No.4). The case record also reveals that the Petitioner has filed a case in ICC No.377 of 2022 before learned SDJM, Sadar, Cuttack under Section 501 IPC and 67 of Information and Technology Act. Such material facts were not disclosed in the instant writ petition. Propriety demands that the Petitioner should disclose all relevant and material facts relating to the case in her pleadings for just adjudication of her claim.

***9.2*** Miss Luthra, learned Senior Advocate harped upon the same and submitted that the Petitioner has committed fraud on Court by suppressing aforesaid material facts. Thus, the question that cropped up for consideration as to whether the Petitioner has still any cause of action to seek for the aforesaid relief in the present writ petition.

***9.3*** No doubt, the Petitioner has not disclosed about filing of similar nature of application by Opposite Party No.4 before learned Judge, Family Court, Cuttack and also filing of a criminal proceeding, which is pending in the Court of learned SDJM, Sadar Cuttack. It further appears that order dated 15th July, 2021 passed by learned Judge, Family Court, Cuttack in CP No.246 of 2021 has not yet been varied or set aside by any higher forum. In the above factual backdrop, it has to be considered whether the Petitioner has still any cause of action to agitate her grievance before this Court. On perusal of the writ petition, it discloses that inaction on the FIR filed by the Petitioner in Purighat PS at Cuttack and publication of derogatory remarks on the character of the Petitioner as well as her family members is the cause of action to file the writ petition. No material has been produced before this Court to arrive at a conclusion that filing of either the petition by Opposite Party No.4 before learned Judge, Family Court or filing of a criminal defamation case by the Petitioner, which is pending before learned SDJM, Sadar Cuttack was filed on the cause of action of the writ petition. On the other hand, it appears that cause of action for filing of the petition either before learned Judge, Family Court or complaint before learned SDJM, Sadar Cuttack are quite different than in the present writ petition. Cause of

action is a bundle of facts and the Petitioner can bring a legal action on any one of such fact. Thus, this Court is of the considered opinion that in view of either suppression of material fact or filing of the petitions before different Courts, as stated above, cannot be a ground to throw away the present Writ Petition on the ground of lack of cause of action. Thus, this Court holds that the Petitioner has cause of action to file the present writ petition.

***10. Maintainability of the writ petition****:-*

Maintainability of the writ petition is vital issue to be considered in this writ petition. Broadly speaking case of the Petitioner is that in the facts and circumstances of a particular case, a writ of maintenance can be issued against a private individual restraining him from doing any act which violates his/her fundamental right. On the other hand, the stand of Opposite Party No.4 is that a writ petition under Article-226 is not maintainable against a private individual for issuance of a prohibitory order in the matter of publication of contents relating to matrimonial dispute between the parties in print, electronic and social media. In the case of ***Chandra Bhan Dubey (supra),*** it is held that the expensive and extraordinary power of High Courts under Article 226 is as wide as the amplitude of the language used indicates and so can affect any person, even a private individual and be available for any (other) purpose, even one for which another remedy may exist. It is also held therein that *"But it is one thing to affirm the jurisdiction, another authorizes its free exercise like a bull in a china shop. This Court has spelt out wise and clear restraints on the use of this extra-ordinary remedy and the High Courts will not go beyond the monstrosity of the situation or other exceptional circumstances cry for timely judicial interdict or mandate. The mentor of law is justice and a potent drug should be judiciously administered speaking in critical retrospect and portentous prospect, the writ power has, by and large, being the people's sentinel on the qui vive and to cut back on or liquidate that power may cast a peril to human rights."* Further, in ***Zee Tele films Ltd. (supra),*** it is held that any violation of a fundamental right will have the claim against the State and unlike the rights under Articles-17 and 21, which can be claimed against a non-state actors including individuals, the right under Article 19(1)(g) cannot be claimed against an individual or a non state entity. In ***Sahara India Real Estate Corp. Ltd. (supra),*** it is held that the right under Article 21 to a fair trial and all that it comprehends would be entitled to approach an appropriate writ Court and seek an order of postponement of the offending publication/broadcast or postponement of reporting of certain phases of the trial. From the above it transpires that the writ court under Article 226 of the Constitution is not denuded of the power to entertain a writ petition where there is violation of Articles 17 and 21 of the Constitution. But that should be exercised in an exceptional case and that too with circumspection. For that the aggrieved person (the writ Petitioner) must make out a strong case to satisfy the Court that he/she has an indefeasible right to invoke writ jurisdiction under Article 226 of the Constitution against a non-state entity, i.e., a private individual.

***10.1*** In the instant case, perusal of the prayer made in the writ petition makes it abundantly clear that the Petitioner has sought for a direction to Opposite Party Nos.1 and 2 to instruct the print, electronic and social media operators not to publish any material with regard to matrimonial proceedings pending in different Courts between the Petitioner and Opposite Party No.4.

***10.2*** In course of hearing, this Court made a query to Mrs. Jena, learned counsel for the Petitioner to satisfy the Court that if the Opposite Party Nos.1 and 2 have any statutory/legal and legal obligation to issue the instruction as prayed for. But it could not be satisfactorily replied by learned counsel for the Petitioner. Moreover, the learned counsel for the Petitioner could not satisfy the Court as to whether Opposite Party No.2 as described in the writ petition, namely, Registrar of Newspapers of India, Ministry of Information and Broadcasting is really existing or not.

***10.3*** Ms. Luthra, learned Senior Advocate relying upon the aforesaid case laws as detailed herein above stating that the prayer sought for in the writ petition cannot be granted in exercise of power granted under Article 226 of the Constitution. The case law cited by Ms. Luthra, learned Senior Advocate has also bearing in adjudication of the case. The general principle that a writ petition is not maintainable against a private individual cannot be brushed aside completely. As discussed above, the Petitioner has to make out a strong case for issuance of a direction as sought for. No case is made out by the Petitioner in this writ petition to call for an immediate intervention of this Court. No material is placed before this Court to infer that the Petitioner had no efficacious remedy for redressal of her grievance. No doubt, a writ petition is maintainable even if an alternative remedy is available. But when the alternative remedy is equally efficacious the writ Court should be slow to intervene in the matter.

***10.4*** In addition to the above, the allegations and counter allegations require factual adjudication by receiving evidence from the parties. A competent Civil Court has jurisdiction to delve and adjudicate the issue involved in the instant writ petition. It has also the power to grant any interim relief as sought for in the present writ petition. Thus, in my considered opinion the writ petition, in the facts and circumstances of the case, is not maintainable.

***11. What relief the Petitioner is entitled to:-***

In the facts and circumstances of the case, when this Court is of the considered opinion that the writ petition as laid down is not maintainable, the Petitioner is not entitled to any relief as prayed for. But the same does not take away her right to work out her remedy before a common law forum in accordance with law.

***12***. While parting with the case, this Court feels and expects that both Petitioner and Opposite Party No.4 should maintain self-restraint and mutual respect in asserting their legal and constitutional right.

***12.1.*** With the observations, as aforesaid, the writ petition stands dismissed, but in the facts and circumstances, there shall be no order as to costs.

***13.*** The Interim Order dated 27th May, 2022 passed in IA No.7125 of 2022 stands vacated.

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## 2023 (I) ILR - CUT-1063

## KRUSHNA RAM MOHAPATRA, J.

W.P.(C) NO. 11147 OF 2022

**JALANDHAR SWAIN** ..... Petitioner

-V-

**PRIYADARSHI BISWAL & ANR.** .....Opp.Parties

**FAMILY COURT ACT, 1964 – Procedure for admission of electronic document by the Family Court – Indicated with reference to case laws.**
(Para 6)

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

1. AIR 2019 Ker 85 : Pramod E.K. vs. Louna V.C.
2. [CRP (PD) (MD) Nos.386 & 387 of 2021 and CMP (MD) No.2114 of 2021 disposed of 6th August, 2021] : Subulakshmi Vs. Amirtharajan.
3. 2010 (Supp.I) OLR 986 : Sagarika Debata @Satpathy Vs. Satyanarayan Debata & Anr.
4. (2018)1 Mah LJ 944 : Deepali Santosh Lokhande Vs. Santosh Vasantrao Lokhande.
5. [R/First Appeal No. 728 of 2020 With Civil Application (For Stay) No. 1 of 2020, In R/First Appeal No. 726 of 2020, disposed of on 25th January 2023] : Dharmendra Babubhai Prajapati Vs. Khushaliben D/o Maheshbhai Patel.

For Petitioner : Mr. Susanta Sekhar Parida

For Opp.Parties: Mr. Goutam Mukherji, Sr. Adv.
being assisted by Mr. Anam C. Panda

JUDGMENT Heard and Disposed of on : 29.03.2023

***K.R. MOHAPATRA, J.***

***1.*** This matter is taken up through Hybrid mode.

***2.*** Order dated 12th April, 2022 (Annexure-4) passed by learned Judge, Family Court, Keonjhar in CP No.93/143 of 2021-20 is under challenge in this writ petition, whereby learned Family Court has sent electronic documents like DVD, Mobile Phone, Pen Drive, Still photographs, chatting records (nine in numbers) to the State Forensic Science Laboratory, Rasulgarh, Bhubaneswar (SFSL) for expert opinion.

***3.*** Mr. Parida learned counsel for the Petitioner submits that the Opposite Party being the husband filed an application under Section 13 (1) of the Hindu Marriage Act, 1955 for dissolution of marriage with the Proforma Opposite Party by a decree of divorce. It is alleged by the Opposite Party along with other allegations that the Proforma Opposite Party is living in adultery with the Petitioner, the alleged paramour. In order to prove the case, nine electronic documents were filed before the Family Court for admission in evidence. The Petitioner raised objection to the same on the ground that the digital evidence submitted by the Opposite Party can be entertained only by examining the mobile phones of the proforma Opposite Party and other mobile of the Opposite Party by which the data were allegedly downloaded. Those documents are required to be examined by laboratory to be proved. Learned Family Court entertaining such application sent all the nine electronic documents to SFSL, Bhubaneswar for expert opinion. The said order is under challenge in this writ petition.

***4.*** It is submitted by learned counsel for the Petitioner that before admitting the aforesaid nine documents in evidence learned Family Court could not have sent the same for scientific investigation. A document admitted in evidence by a party if objected by the adversary with regard to its authenticity may be sent for scientific examination, if the Court feels it necessary. In the instant case, the electronic documents have not yet been admitted in evidence. Thus, those could not have been sent to SFSL for scientific investigation. He, therefore, prays for setting aside the impugned order and all orders passed subsequent thereto.

***4.1*** In support of his case, Mr. Parida, learned counsel for the Petitioner placed reliance on a decision of the Kerala High Court in the case of ***Pramod E.K. vs. Louna V.C***. reported in AIR 2019 Ker 85, wherein at para-16, it is held as under:-

> *"16. The purported voice of respondent extracted in the CD in our opinion has to be proved in the same manner as a tape recorded conversation. The petitioner can succeed in proving the alleged riotous dialogue in the CD only when the identity of the speaker is also proved. Proof of the accuracy of the statement recorded is another essential requirement in the matter of proof of a tape recorded conservation. The court accepting the evidence must rule out that no tampering was made while the statement was recorded. These are only some of the guidelines in the matter of proof of contents of the CD. Elaborate discussion as to how a tape recorded conservation could be proved is decipherable from Ram Singh and others V. Col.Ram Singh, (AIR 1986 SC 3), Yusufalli Esmail Nagree (AIR 1968 SC 147) and Sunil Panchal Vs. State of Rajasthan. Unless all the essential conditions above are satisfied, contents of the CD produced by the petitioner cannot be said to be proved despite its admission in evidence by the mere force of Section 14 of the Act."*

***4.2*** He also relied upon a decision of the Madres High Court in the case of ***Subulakshmi Vs. Amirtharajan*** [CRP (PD) (MD) Nos.386 and 387 of 2021 and CMP (MD) No.2114 of 2021 disposed of 6th August, 2021], wherein at para-16, it is held as under:-

> *"16. In view of the mandate of Sections 14 and Section 20 of the Family Courts Act, the trial Judge, if he is of the opinion that the documents produced would assist the Court to deal with the matter effectually, then he has no other option but to admit the same and thereafter, to see whether the document is genuine and the contents of the same are true, since it is the bounden duty of the parties to prove the genuineness of the documents as well as its contents. Considering the above, this Court has no other option, but to hold that the decision of the learned trial Judge in rejecting the reliefs is not good in law and as such the same is liable to be set aside. The learned trial Judge is to be directed that the documents in question be taken on record and that thereafter, permitting the parties to prove the genuineness of the documents as well its contents."*

He, therefore, submits before admitting a document it could not have been sent to SFSL either for expert opinion or scientific investigation. As such, the impugned order is not sustainable and hence liable to be set aside.

***5.*** Mr. Mukherji, learned Senior Advocate appearing on behalf of the Opposite Party vehemently objected to the above submission and contends that it is only on the submission of the Petitioner as well as proforma Opposite Party, the documents were sent to the SFSL for examination. It is his submission that Sections 14 and 20 of Family Courts Act make it abundantly clear that the procedure for admission of a document under the provisions of the Evidence Act, 1872, is not strictly applicable to a proceeding in the Family Court. Once a document is taken on record, the Court may deal with the same to testify its authenticity. Since pursuant to objection raised by the Petitioner as well as proforma Opposite Party, the documents were sent to SFSL for its expert opinion, the impugned order warrants no interference.

***5.1*** In support of his submission, Mr. Mukherjee, learned Senior Advocate relied upon a decision in the case of ***Sagarika Debata alias Satpathy Vs. Satyanarayan Debata and another***, reported in 2010 (Supp. I) OLR 986, wherein this Court at para-10 held as under:-

> *"10. One of the objectives in enacting Family Courts Act, 1984 was stated to be to simplify the rules of evidence and procedure so as to enable a Family Court to deal effectively with a dispute. As has been pointed out in the impugned judgment, Section 14 of the Family Courts Act provides that a Family Court may receive as evidence any report, statement, documents, information or matter that may, in its opinion, assist it to deal effectually with a dispute, whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act, 1872 (1 of 1872). Thus, consideration of evidence by a Family Court is not restricted by the rules of relevancy or admissibility provided under the Indian Evidence Act. In the present case, finding of adultery on the part of the appellant recorded by the learned trial Court is substantially based on evidence of respondent No.1 relating to admission made by the appellant in course of the proceeding against respondent No.2 in the Court of Enquiry and in her statement Ext. 1. Appellant did not deny the factum of such admissions but took the plea to have been coerced into making such admissions. Evidence of respondent No. 1 is corroborated by contents of documents in the record of the proceeding received from the Air Force Station, Secunderabad and contents of Ext. 1. Learned trial Court also has taken note of contemporaneous conduct of appellant's father O. P. W. 1 during the relevant period. Appellant appears to have categorically admitted regarding her relationship with respondent No.2 in course of the proceeding before the Court of Enquiry. She never raised complaint before the authorities conducting the Court of Enquiry of having been coerced to make such*

*admissions Rather, in categorical terms she made admissions regarding adultery. We do not find any infirmity in the finding of the learned trial Court that the appellant herself admitted of adultery with respondent No.2"*

***5.2*** He also relied upon a decision of Bombay High Court in the case of ***Deepali Santosh Lokhande Vs. Santosh Vasantrao Lokhande***, reported in (2018)1 Mah LJ 944*, it is held as under:-*

*7. When Section 14 stipulates and says that the Family Court can receive a document in evidence irrespective of the same being relevant or admissible in evidence under the Evidence Act, it signifies two important facets namely that the Family Court at the threshold cannot reject a document on the ground that the document is not legally admissible in evidence and secondly the test and rigor of relevancy and admissibility of the document can be dispensed with by the Family Court if the Family Court is of the opinion that any evidence would assist it to deal effectively with the dispute. It cannot be disputed that admissibility presupposes relevancy as admissibility is founded on law whereas relevancy is determined by Court using judicial skills, logic and experience. Admissibility does not signify that a particular fact stands proved but merely that such a fact is received by the Court for the purpose of being weighed. The learned Judge overlooked that merely because the documents are marked as Exhibits and the same also becoming available for cross-examination, is neither an admission as to documents nor can be treated as an admission of its contents.*

*xx xx xx*

*11. Thus, in my opinion, even if there is any electronic record for which certificate under Section 65B of the Evidence Act is necessary, it would not preclude the learned Judge of the Family Court to exhibit such documents and receive such documents in evidence, on forming an opinion as to whether the documents would assist the Court, to deal effectively with the dispute in hand. Such exercise has not been undertaken in passing the impugned order."*

***5.3*** He further relied upon the decision of the High Court of Gujarat at Ahmedabad in the case of ***Dharmendra Babubhai Prajapati Vs. Khushaliben D/o Maheshbhai Patel***, [R/First Appeal No. 728 of 2020 With Civil Application (For Stay) No. 1 of 2020, In R/First Appeal No. 726 of 2020, disposed of on 25th January 2023]

"*5.5.2 The object of the above provision was explained by the Bombay High Court in **Deepali Santosh Lokhande vs. Santosh Vasantrao Lokhande**[2018(1) Mh LJ 944] in paragraph 6 as under,*

*"The object, effect and consequence of this provision is to remove any embargo on the Family Court to first examine the relevancy or admissibility of the documents under Indian Evidence Act in considering such documents in adjudication of the matrimonial dispute. The Statement of Object and Reasons leading to the enactment of the Family Court's Act would also become a guiding factor so as to ascertain the intention of the legislature in framing Section 14 when it uses the above words. One of the objects of the legislation as Clause 2 (h) of the Statement of Object and Reasons would provide is "simplify the rules of evidence and procedure so as to enable a Family Court to deal effectively with a dispute". This clearly manifests the intention of the legislature to remove complexities in the application of rules of evidence to make the procedure more comprehensible so as to enable a Family Court to deal effectively with a matrimonial dispute under the Family Courts Act, which is a special Act."*

*xxxx xxxx xxxx*

> *5.5.3 Thus the position emerges is that the Family Court may receive the document even if not legally admissible in evidence and consider such facts out of the rigour of the relevancy or admissibility under the Evidence Act if the Family Court is of the opinion that such document, material or such fact in issue would assist to deal with the dispute effectively.*
>
> *5.5.4 The following observations in* ***Deepali Santosh Lokhande (supra)*** *become more relevant in the facts obtained in this case, extracted from paragraph 10,*
>
> *"In matrimonial cases, the Family Court is expected to adopt standards as to how a prudent person would gauge the realities of life and a situation of commotion and turmoil between the parties and applying the principle of preponderance of probabilities, consider whether a particular fact is proved. Thus, the approach of the Family Court is required to be realistic and rational to the facts in hand rather than technical and narrow. It cannot be overlooked that matrimonial disputes involve human problems which are required to be dealt with utmost human sensitivity by using all intelligible skills to judge such issues. The Family Court has a special feature where in a given case there may not be legal representation of the parties."*
>
> *5.5.5 The very proposition of section 14 read with section 20 of the Act in permitting the court dealing with matrimonial disputes to consider the evidence irrespective of its admissibility and relevance and thus, in a way distancing from strict rules of evidence, is intended to facilitate the adjudication of matrimonial disputes in right direction. It is rather wisdom of facts and not the insensitive corners of law which should guide the Family Court and the Courts dealing with matrimonial disputes in its decision making process."*

He, therefore, submits that learned Family Court has not committed any error in sending the documents to SFSL for its opinion. At present the report of the SFSL has already been received by the Court and it is pending for consideration.

***6.*** Upon hearing learned counsel for the parties and keeping in mind the provision of law under Section 14 and 20 of the Family Courts Act, this Court is of the considered opinion that the rigors of the procedure for admission of a document under Evidence Act, 1872 is not applicable to a proceeding under the Family Courts Act. In the instant case, it is not clear as to whether nine documents have been admitted in evidence or not. However, when a document is presented by the Opposite Party, it should not normally be refused to be admitted in evidence in a proceeding under the Family Courts Act. Thus, the electronic documents which are produced by the Opposite Party are presumed to have been admitted in evidence. Further, the Petitioner and proforma Opposite Party raised objection to its admissibility on the ground that unless those documents are compared with the documents from/by which those were downloaded, the same cannot be taken into consideration. It is also submitted that to prove its authenticity, it should be sent to the laboratory. Accordingly, learned Judge, Family Court entertaining the objection raised by the Petitioner and the proforma Opposite Party sent the aforesaid nine electronic documents to SFSL for examination. Law is well-settled that the report of the SFSL is not by itself proves the contents thereof. The onus is still on the party who relies upon the same, to prove it in accordance with law. Thus, in my opinion, learned Judge, Family Court committed no error in sending the documents to SFSL for its opinion. Accordingly, this Court finds no infirmity in the impugned order.

*7.* Hence, the writ petition being devoid of any merit stands dismissed. However, learned Judge, Family Court should proceed with the matter in accordance with law.

*8.* Interim order dated 29th June, 2022 passed in IA No.5786 of 2022 stands vacated.

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**2023 (I) ILR - CUT-1068**

**B.P. ROUTRAY, J.**

MACA NO. 1130 OF 2016

**LATIKA SAHOO & ORS.** ..... Appellants

-V-

**RAMESH NAYAK & ORS.** .....Respondents

**(A) CLAIM OF COMPENSATION – The deceased was invited by the driver-cum-owner of the offending vehicle to help him for retrieving the offending vehicle from the ditch and in course of such retrievation, the accident took place as the offending truck capsized on the deceased – Whether, the death of deceased can be said arising out of use of motor vehicle & the claim application under section 166 of the M.V. Act is maintainable ? – Held, yes.** (Para 11)

**(B) MOTOR VEHICLE ACT, 1988 – Section 165 – The word "Use of motor vehicle" under the section – Scope & Implication of – Explain with reference to case laws.** (Paras 8 – 11)

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

1. AIR 1991 S.C. 1769 : Shivaji Dayanu Patil and Another v. Smt. Vatschala Uttam More.
2. AIR 1993 Ori 89 : Kanhei Rana and another v. Gangadhar Swain and Others.
3. 2009 (1) T.A.C. 914 (Ori.) : Branch Manager, National Insurance Co. Ltd. v. Khus Jahan and Others.

For Appellants : Mr. D.K.Mohapatra

For Respondents: None

JUDGMENT Date of Judgment : 12.04.2023

***B.P. ROUTRAY, J.***

1. The matter is taken up through Hybrid mode.

2. Heard Mr. D.K. Mohapatra, learned counsel for the claimant – Appellants. None appears on call for the Respondents despite a set of names of Lawyers are indicated in the list.

3. Present appeal by the claimant - Appellants is directed against the impugned judgment dated 20th August, 2016 of learned 3rd MACT, Jagatsinghpur passed in MAC Case No.197 of 2009, wherein the tribunal has dismissed the claim application filed under Section 166 of MV Act.

4. The facts of the case are that the alleged offending truck bearing registration number OR-H-3350 was moving loaded with grocery articles on 15th May, 2009 followed by another truck. The offending truck by negligent driving of its driver fell into a roadside ditch. Thereafter in order to retrieve the offending truck and the goods loaded therein, its driver requested the labourers of the second truck for help. The deceased, one of the labourer of the 2nd truck proceeded with other labourers to retrieve the 1st truck from the ditch and in the process of unloading the goods from the offending truck, it capsized resulting injuries on 2 persons including the present deceased. Both of them succumbed to the injuries in the hospital. The claimants are the dependents of deceased namely, Trilochan Sahoo, who have preferred the claim application for compensation under Section 166 of the MV Act.

5. Admittedly the offending truck was not insured with any insurance company on the date of accident. The owner of the offending truck did not come to adduce evidence and was set ex parte.

6. The tribunal considering the facts of the case came to the conclusion that the alleged accident resulting death of the deceased cannot be considered due to any negligent act of the driver of offending truck since at the time of accident the offending vehicle was in static position.

7. In view of background facts of the case as stated above, the question falls for determination is that, whether in the circumstances the accident resulting death of the deceased can be said arising out of use of motor vehicle to maintain the claim application under Section 166 of the MV Act ?

8. The accident is dated 15th May, 2009. Section 166 of the MV Act authorizes a victim of an accident of the nature specified in Sub-Section (1) of Section 165 to claim for compensation. Explanation-I of Section 165 prescribes that the expression "claims for compensation in respect of accidents involving the death of or bodily injury to persons arising out of the use of motor vehicles" includes claims for compensation under section 140 and Section 163A also. The words to be emphasized here in Section 165 are "arising out of the use of motor vehicles".

9. In the case at hand, admittedly the offending truck was in immobile condition as fell into the ditch. The driver of the offending vehicle was the owner and he requested the deceased to help him for retrieving the vehicle from the ditch. Hon'ble Supreme Court in the case of ***Shivaji Dayanu Patil and Another v. Smt. Vatschala Uttam More, AIR 1991 S.C. 1769,*** where the offending truck was in a standing position on account of breakdown, have held that the death of the deceased falls within the purview of the clause "use of motor vehicle".

In the case of ***Kanhei Rana and another v. Gangadhar Swain and Others, AIR 1993 Ori 89,*** this court have clarified that, the expression 'use of a motor vehicle' covers accidents which occur both when the vehicle is in motion and when it is stationary, and the word 'use' has a wider connotation to cover the period when the vehicle is not in motion and is stationary. The vehicle does not cease to be in use when it is rendered immobile on account of a breakdown or mechanical defect or accident.

10. In the case of ***Branch Manager, National Insurance Co. Ltd. v. Khus Jahan and Others 2009 (1) T.A.C. 914 (Ori.),*** where the deceased, who is a motor mechanic, died while repairing a stationary truck, this court held that the accident is arising out of use of vehicle.

11. In the instant case at hand undisputedly the deceased was invited by the driver-cum-owner of the offending vehicle to help him for retrieving the offending vehicle from the ditch and in course of such retrievation the accident took place as the offending truck capsized on the deceased. Therefore keeping in view the extended explanation of the clause "use of motor vehicle", it is concluded that the deceased died out of such injuries arising out of the use of the offending truck bearing registration number OR-H-3350. The conclusion arrived by the tribunal to the contrary is set aside.

12. In the result the impugned award is set aside and the matter is remitted back to the tribunal for determination of the claim application afresh by adducing fresh opportunities of hearing to all the parties including present Respondent No.2, 3 and 5. The tribunal shall decide the matter in accordance with law as per the discussions made hereinabove on the point of negligence of the driver of the offending truck. The Appellants are directed to appear before the learned tribunal on 1st May, 2023 along with a certified copy of this order. The tribunal shall do well for disposing of the claim application as expeditiously as possible.

13. The appeal is accordingly disposed of.

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**2023 (I) ILR - CUT-1070**

**B.P. ROUTRAY, J.**

FAO NO. 182 OF 2020

**BHAKTA BHUE & ANR.** ..... Appellants

-V-

**UNION OF INDIA** .....Respondent

**CLAIM OF COMPENSATION – The deceased fell down from the running train while travelling from Cuttack to Aluva in Shalimar-Trivandrum super fast train - The doubt raised on the timing of recovery of the dead body and the timing when the train crossed the station – Tribunal disbelieved the case of the claimants and refused to grant any compensation on the basis of statement of Keyman as recorded in the DRM's report that he did not notice the dead body of the deceased during his first visit at 00.00 hrs – Whether finding of Tribunal sustainable ? – Held, No – When no materials has been produced before the Tribunal and even no witness was examined from the side of Railways, complete reliance placed by the Tribunal on the statement of Keyman as per DRM's report is against the approved principle of evidence – Hence the claimants are entitled to compensation.**

(Paras 6 – 7)

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

1. (2019) 3 SCC 572 : Union of India vs. Rina Devi.

For Appellants : Ms. Deepali Mohapatra
For Respondents: Ms. A.Routray, Sr.Panel Counsel.

JUDGMENT Date of Judgment : 20.04.2023

***B.P. ROUTRAY, J.***

1. Heard Ms.Mohapatra, learned counsel for the Appellants and Mr.Routray, learned Senior Panel Counsel for Respondent-Union of India.

2. Present appeal by the claimants, who are parents of the deceased namely Siban Bhue @ Suban Bhue, is directed against impugned judgment dated 8th January, 2020 passed by learned Railway Claims Tribunal, Bhubaneswar Bench, Bhubaneswar in Case No.OA-II/138/2016, wherein the Tribunal has refused to grant any compensation by disbelieving the case of the claimants.

3. According to the claimants, the deceased travelled in Shalimar-Trivendrum Super Fast Train No.22642 from Cuttack to Aluva. But on the way in the yard of railway station Ganavaram, he fell down accidentally from the running train in course of his journey. His dead body was found in the up-railway track by the Keyman in early morning on 24th November 2015. The claimants examined one witness on their behalf who is the father of the deceased and claimant no.1. They have also produced the journey ticket in original along with copies of the police papers.

4. On the other hand, the Railways did not examine any witness nor adduce any evidence, but they filed the statutory report of the DRM.

5. Learned Tribunal upon adjudication came to the finding that the original ticket produced was unquestioned and the journey of the deceased in the train is admitted. But the journey of the deceased in the same Shalimar-Trivendrum Super Fast Train No.22642 is doubtful. The doubt is raised in view of the timing of finding of the dead body. According to DRM's report, Train No.22642 crossed GWM station at 20.39 hours on 23rd November 2015 whereas the dead body of the deceased was noticed by the Keyman at 05.53 hours on 24th November 2015 during his second round visit. As per the report of the Keyman recorded in DRM's report, he did not notice the dead body of the deceased during his first round visit at 00.00 hours on 24th November 2015. In view of such statement recorded in DRM's report, the Tribunal disbelieved the case of the claimants and refused to grant any compensation.

6. The circumstances as brought on record from the side of the claimants reveals that production of journey ticket in respect of the deceased is not disputed. The journey of the deceased in Train No.22642 as stated by claimant no.1 in his evidence has been supported by production of the journey ticket and also by recovery of the dead body from the Railway track at GWM station. The only question remains is whether the doubt raised in DRM's report and believed by the Tribunal is corresponding to Train No.22642 ? Admittedly, Train No.22642 passed GWM station at 20.39 hours on 23rd November, 2015 as per record. The dead body was noticed at 05.53 hours on the next morning on 24th November, 2015 by the Keyman. To believe the statement of Keyman as recorded in the DRM's report that he did not notice the dead body of the deceased during his first visit at 00.00 hours, no material has been produced before the Tribunal and even no witness was examined from the side of the Railways. Therefore the statement of the Keyman as per DRM's report cannot be taken truthful to the extent that the dead body of the deceased was not lying there near the Railway track at 00.00 hours. There may be many possibilities to skip noticing the dead body by the Keyman during his first round visit, may be due to darkness or otherwise. Therefore, complete reliance placed by the Tribunal on the statement of the Keyman as per DRM's report is against the approved principles of evidence.

7. Moreover, no dispute is there with regard to holding of inquest and finding of such injuries on the dead body consistent with fall from running train. So, in view of the circumstances brought on record and the statements made by Applicant No.1, it is established that the deceased was a valid passenger of Train No.22642 and his death is due to an untoward incident in course of his journey. The claimants being the parents of the deceased are entitled for compensation as per scheduled amount.

8. In the result, the appeal is allowed and the Respondent-Union of India is directed to pay compensation of Rs.4,00,000/- (Four lakhs) along with interest @ 6% per annum from the date of accident or Rs.8,00,000/- (eight lakhs), whichever is

the higher, in terms of the decision rendered in the case of ***Union of India vs. Rina Devi, (2019) 3 SCC 572,*** within a period of four months from today, where-after the same shall be disbursed in favour of the claimants in equal proportion by keeping 50% of their shares in fixed deposits separately in their names respectively in any Nationalized bank for a period of five years.

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**2023 (I) ILR - CUT-1073**

**Dr. S.K. PANIGRAHI, J.**

CMP NO. 768 OF 2022

**MANILAL AGRAWAL** ..... Petitioner

-V-

**GHANASHYAM DAS AGRAWAL & ORS.** .....Opp.Parties

**DOCTRINE OF RES-JUDICATA – Principles for determination – Discussed with reference to case laws.** (Paras 19 - 21)

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

1. (1999) 5 SCC 590 : Hope Plantations Ltd. -Vrs- Taluk Land Board Preemade & Anr.
2. 1991 (II) OLR 395 : Dolagovinda Pradhan & Anr. -Vrs.- Bhartruhari Mahatab.
3. 1977 SCR (1) 320 : Y.B. Patil & Ors. -Vrs- Y.L. Patil.
4. 1960 AIR 941 : Satyadhyan Ghosal & Ors. -Vrs- Deorajin Debi (Smt.) & Anr.

For Petitioner : Mr. Mr. Upendra Kumar Samal

For Opp.Parties: Mrs. S. Mohanty (O.P.No.1)

JUDGMENT Date of Hearing : 20.10.2022 : Date of Judgment : 31.01.2023

***Dr. S.K.PANIGRAHI, J.***

1. The Petitioner (defendant no.1 in court below) through this petition has challenged the order dated 28.07.2022 passed by the learned Civil Judge (Senior Division), Kantabanji in C.S. No.56/6 of 97-13 in allowing the application filed by the Opposite Party (plaintiff) wherein the defendant No.17 has been directed to produce the document and depose evidence before the Court. The defendant No.17 has already been examined by the plaintiff and cross examined by the defendants. After the closure of the evidence of Defendant No.17, the plaintiff has filed the application to call for the document from the defendant No.17 and to examine the defendant No.17. The petitioner has alleged that the order passed by the learned Civil Judge (Senior Division), Kantabanji is illegal, erroneous, contrary to law and hence needs interference of this Court.

**I. Factual Matrix of the Case:**

2. Shorn of unnecessary details, the factual matrix of the case in short is that the Opp. Party No.1 being the plaintiff has filed the Title Suit No. 56/1997 in the Court of learned Civil Judge (Sr. Division), Titilagarh for partition against the petitioner and the Opp. Party No. 2 to 22. In the said suit, the Opposite Party no.1 had inter alia stated that the father of the Opposite Party no.1, Kundanlal Agrawal was staying at Kanhoor of Haryana and in search of better livelihood he had migrated to Odisha and finally settled at Kantabanji in the year 1957. The said Kundanlal had partitioned the joint family properties between him and his brothers, Kundanlal had also purchased some properties in the name of his son from his income. The properties mentioned in Schedule B to D are the joint family properties. Even if the RoR stands recorded either separately or jointly in the name of co-sharer but the properties are the joint family properties. Kundanlal died on 09.05.1996.

3. The Opposite Party No.1 alleged in the court below that the Petitioner taking advantages of the simplicity of the Opposite party no.1 started giving ill advice to his junior brother to exchange the land in favour of others. Therefore, the Opposite Party No.1 demanded for partition of the joint family properties. Due to non-cooperation of the Defendants and abnormal activities in refusing the partition of the joint family properties, the Opposite Party No.1 filed the suit.

4. The Defendant No.1 to Defendant No.8 jointly filed their written statement in denying the averments made in the plaint. Substantial properties mentioned in the Schedule are the self-acquired property and the joint family have already partitioned between the parties. Therefore, there are no cause of action for filing of the suit and the suit was undervalued. However, in the guise of partition suit the plaintiff had also made prayer seeking declaration of some sale transaction as void and no advolerum court fee was paid. The Defendants filed an application under Order 7 Rule 11 CPC for rejection of the plaint as the court fees were not paid. The said application was rejected. The present petitioner had filed CRP NO.3 of 2006 before this Court challenging the rejection of the petition filed under Order 7 Rule 11(C) CPC. After hearing the parties this Court had allowed the revision and directed the learned Trial Court to decide regarding payment of ad valorem court fee as per the decision of this Court reported in AIR 1962 Orissa 102 and other cases.

5. Though the suit was filed in the court of the learned Civil Judge (Senior Division), Titilagarh, but, the same was transferred to the court of the learned Civil Judge, (Senior Division), Kantabanjhi in the year 2013 after opening of the court at Kantabanji. While the matter stood thus, the Opposite Party No.1 filed an application under Order 16 Rule 1 and 6 of CPC praying therein seeking direction to the defendant No.17 for production of the book of account of 2001 and resolution dated 08.02.2016. The defendant No.1 had filed his objection to the said petition. After hearing the parties the learned Civil Judge (Senior Division), Kantabanji vide order dated 08.02.2018 rejected the said petition with the following order.-

> *"The High Court of Orissa in a decision reported in 1991 (11) OLR 385 has held that "while the court giving direction for production of documents during the pendency of the suit, it must be satisfied that (a) the documents which are called for to be produce which is power and possession of a party against whom the order made (B) those documents relate to the matter in question (s) the suit. The documents must be such that they throw some light into the case and must be in possession of the party. Perused the plaint, written statement it reveals that nowhere the defendant no. 17 has based his dependance upon the documents mentioned in the petition filed by the plaintiff such as the resolution books and accounts. So when the defendant no. 17 has not based his defence upon the documents or relied upon such documents, plaintiffs has also not relied upon those documents in his plaint. So at this juncture the petition filed by the plaintiff for giving direction to produce those documents cannot be maintainable. Accordingly the petition dated 05.02.2018 filed by the plaintiff for giving direction to the defendant no.17 for produce the aforesaid documents being devoid of any merit stand rejected. Put up on 16.2.2018 for evidence on side of the plaintiff."*

6. Challenging the order dated 08.02.2018, the Opposite Party No.1 had filed CMP No.290 of 2018 before this Court. This Court after hearing the learned counsel were pleased to pass the following order on 19.02.2019:

> *"Mr. Mohanty, learned counsel for the petitioner submits that plaintiff has filed application to summon defendant no. 17 as a witness. But the trial court did not dealt with the same. Plaintiff can examine any of the defendants as witnesses on his behalf.*
>
> *In view of the same, the petition is allowed. The plaintiff shall file requisite fees to summon defendant no. 17 to examine as a witness on his behalf."*

7. On 08.11.2021, the plaintiff filed an application to direct the defendant No.17 to produce the document and to depose before the court on behalf of the plaintiff. In the said petition the Opposite Party No.1 has stated that, the defendant No.17 though examined as P.W.2 on behalf of the plaintiff but not in the capacity of defendant No.17. Though the similar petition was rejected on 08.02.2018 but the CMP No. 290/2018 has been allowed. The Opposite Party No.1 had also filed a similar application on 24.09.2021. In the said petition it has been stated that the order passed by the learned trial court on 08.07.2018 has been set aside vide order dated 19.02.2019 passed by this Court. Accordingly, the Opposite Party No.1 had prayed to pass an order for summoning the defendant No.17.

## II. Petitioner's Submissions:

8. Learned counsel for the Petitioner earnestly made the following submissions in support of his contentions:

9. The petitioner has filed his objection to the petition dated 08.11.2021. In the objection it has been stated that the averments made in the petition is false, frivolous and vexatious. The similar petition has been rejected by the court vide order dated 08.02.2018. The High Court vide order dated 19.02.2019 in CMP No.290 of 2018 has given liberty to the plaintiff to examine any of the defendants as witnesses on his behalf. The Opposite Party No.1 has already examined the defendant No.17 as P.W.2. The court has disallowed the defendant No. 17 to produce and exhibit the

resolution. The petition is not maintainable. The defendant No.17 has already been examined, cross examined and discharged, the present petition to summon the Secretary for his examination and production of documents is legally not tenable and thus liable to be dismissed in liminee.

10. Moreover, the plaintiff has neither relied upon the documents sought to be proved nor pleaded in his pleading about the effect of the same as envisaged under Order 6 Rule 9 of CPC. The defendant will be highly prejudiced if the document is called for by this Court. Law is well settled that the court should not permit a party to introduce and prove documents which were neither pleaded nor produced at its proper stage.

11. He has further submitted that the learned Trial Court misinterpreted the order passed by this Court. In fact, this Court did not set aside the order dated 08.02.2018 passed by the learned Trial Court and only allowed the Opposite Party No.1 to examine the defendant No.17 as witnesses and the learned Trial Court had rejected the petition filed by the plaintiff under Order 16 Rule 1 and 6 to call for the document and to examine the defendant No.17. In the impugned order dated 28.07.2022, the learned Trial Court allowed the petition by holding that the High Court has not debarred the Opposite Party No.1 to call for the documents. It has been further observed by learned Trial Court that "*so in view of the above and having high regards to the order of the Hon'ble Court, the petition is allowed.*" The learned Trial Court passed the order dated 28.07.2022 as if the learned Civil Judge (Senior Division), Kantabanjhi is sitting over the order of this Court as an appellate authority. Hence the order dated 28.07.2022 is illegal, erroneous, contrary to law, suffers from legal mala fide and the same is liable to be set aside.

12. He has further relied on the case of ***Hope Plantations Ltd. Versus Taluk Land Board Preemade and another***[1] wherein it has been held that:

> *"It is settled law that the principles of estoppel and res-judicata are based on public policy and justice. Doctrine of res-judicata is often treated as a branch of the law of estoppel though these two doctrines differ in some essential particulars. Rule of res-judicata prevents the parties to a judicial determination from litigating the same question over again even though the determination may even be demonstratedly wrong. When the proceedings have attained finality: parties are bound by the judgment and are estopped from questioning it. They cannot litigatge again on the same cause of action nor can they litigate any issue which was necessary for decision in the earlier litigation. These two aspects are "cause of action estoppel" and "issue estoppel". These two terms are common law origin. Again once an issue has been finally determined. Their only remedy is to approach the higher forum if available. The determination of the issue between the parties gives rise to, as noted above, an issue estoppel. It operates in any subsequent proceedings in the same suit in which the issue had been determined. It also operates in subsequent suits between the same parties in which the same issue arises. Section 11 of the Code of Civil Procedure contains provisions of res judicata but these are not exhaustive of the general doctrine of res judicata. Legal principles*

[1] (1999) 5 Supreme Court Cases 590

*of estoppel and res judicata are equally applicable ion proceedings before administrative authorities as they are based on public policy and justice."*

## III. Opposite Parties Submissions:

13. *Per contra*, learned counsel for the Opp. Party intently made the following submissions:

14. The Opposite Party No.1/plaintiff has already specifically pleaded in para 17(b)(d)(e) of the plaint regarding exchange of joint family property with Goshala / defendant No.17 (described as schedule E of plaint) and subsequent RSD dated 16.03.2001. The defendant No. 17/Goshala has also based his defence upon the Resolution Book regarding exchange of schedule E. Therefore, the production of the Resolution Book has relevancy and, material to the merit of the Produced suit and the same is to be provided in terms of Rule 6 of the order 16 CPC.

15. The petition was filed in terms of this Court's order praying to summon the present Secretary of defendant No.17 to produce the Resolution copy particularly when, a) The CMP was allowed in its entirety thereby not debarring the plaintiff/ O.P. No.1 to call for document. b) Prayer in petition is to summon the present Secretary to call for the documents which are in his power and possession. P.W.2 namely Rajkumar Agrawal was examined on behalf of plaintiff O.P. No.1 who was the then Secretary of Goshala / defendant No.17 when the sale deed was executed in the year 2001 i.e. during pendency of suit but now the said documents are in the possession of the present Secretary of defendant No.17 which relates to the matter in question so far as the exchange of suit land is concerned. This prayer was allowed by this Court when CMP No.290/2018 was allowed on 19.02.2019 as the order impugned therein was both to summon the Secretary of defendant No.17 as witness as well as to call for the documents. So far as the earlier examination of PW-2 is concerned, the same was in course of examination of witnesses for the plaintiff. But now after the order in CMP, part compliance of examination of the present Secretary is complied. However, there remains that part of the prayer of O.P. No.1 to call for the documents which can only be proved through such new Secretary of defendant No.17. Hence the earlier rejection has no bearing on the present prayer for proving of documents in the custody of the new Secretary. Therefore the production of the same is imperative in view of the decision in ***Dolagovinda Pradhan and Anr. –vrs.- Bhartruhari Mahatab***[2] particularly when the defendants will not be prejudiced by the production of the said documents.

16. Hence, the present CMP is to be dismissed as the same is devoid of any merit.

## IV. Court's Reasoning and Analysis:

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[2] 1991 (II) OLR 395

17. The contention of the Petitioner is that this Court did not set aside the order dated 08.02.2018 passed by the learned Trial Court and only allowed the Opposite Party No.1 to examine the defendant No.17 as witnesses. The learned Trial Court had rejected the petition filed by the plaintiff under Order 16 Rule 1 and 6 to call for the document and to examine the defendant No.17. In the impugned order dated 28.07.2022, the learned Trial Court allowed the petition by holding that the High Court has not debarred the Opposite Party No.1 to call for the documents. Thus, the issue before this court is to determine whether the impugned order dated 28.07.2022 of the learned Trial Court is violative of the principle of res judicata.

18. The Opposite Party No.1 has contended that P.W.2 namely Rajkumar Agrawal was examined on behalf of plaintiff O.P. No.1 who was the then Secretary of Goshala / defendant No.17 when the sale deed was executed in the year 2001 i.e. during pendency of suit but now the said documents are in the possession of the present Secretary of defendant No.17 which relates to the matter in question so far as the exchange of suit land is concerned. This prayer was allowed by this Court when CMP No.290 of 2018 was allowed on 19.02.2019 as the order impugned therein was both to summon the Secretary of defendant No.17 as witness as well as to call for the documents. So far as the earlier examination of P.W.2 is concerned, the same was in course of examination of witnesses for the plaintiff. But now after the order in CMP part compliance of examination of the present Secretary is done. However, that part of the prayer of O.P. No.1 to call for the documents which can only be proved through such new Secretary of defendant No.17. Hence, the earlier rejection has no bearing on the present prayer for proving of documents which is in the custody of the new Secretary.

19. It is settled law that the principles of estoppel and res-judicata are based on public policy and justice. Doctrine of res-judicata is often treated as a branch of the law of estoppel and though these two doctrines differ in some essential particulars. Rule of res-judicata prevents the parties to a judicial determination from litigating the same question over again even though the determination may even be demonstratedly wrong. When the proceedings have attained finality, parties are bound by the judgment and are estopped from questioning it. Similar sentiment has been echoed in catena of judgments pronounced by the Apex Court.

20. In the case of ***Y.B. Patil And Ors. vs Y.L. Patil***[3], the Supreme Court held that:

> *"It is well settled that principles of res judicata can be invoked not only in separate subsequent proceedings, they also get attracted in subsequent stage of the same proceedings. Once an order made in the course of a proceeding becomes final, it would be binding at the subsequent stage of that proceeding."*

[3] 1977 SCR (1) 320

21. Similarly, in ***Satyadhyan Ghosal and others v. Deorajin Debi (Smt.) and another***[4], this principle was discussed in detail and the same is extracted herein below:

> *"7. The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter whether on a question of fact or a question of law has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of res judicata is embodied in relation to suits in Section 11 of the Code of Civil Procedure; but even where Section 11 does not apply, the principle of res judicata has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct.*
>
> *8. The principle of res judicata applies also as between two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings. ..."*

22. In this case, the issue regarding the examination and cross-examination of defendant No.17 and production of documents was already settled by order dated 08.02.2018 passed by the learned Trial Court and later by this Court vide order dated on 19.02.2019. Therefore, the question of law have been decided between two parties and the impugned order dated 28.07.2022 of the learned Trial Court is violative of the principle of res judicata considering that the issue has already been finalised.

23. In light of the aforesaid discussion and having regard to the present position of law, this Court is inclined to quash the order dated 28.07.2022 passed by the learned Civil Judge (Senior Division), Kantabanji in C.S. No.56/6 of 97-13.

24. Accordingly, this CMP is disposed of.

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## 2023 (I) ILR - CUT-1079

**Dr. S.K. PANIGRAHI, J.**

WPC(OAC) NO. 2544 OF 2014

**SMT. LABANYA DUBEY** ..... Petitioner

-V-

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

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[4] 1960 AIR 941

**ORISSA CIVIL SERVICES PENSION RULE, 1992 – The petitioner approached the Court for arrear pension, family pension after lapse of one decade – Whether, the law of limitation is applicable in case of pension ? – Held, No – Reason indicated with case laws.** (Paras 17 - 23)

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

1. Civil Appeal No. 4100/2022 (S.C) : M.I. Patil (Dead) through LRS v. State of Goa.
2. Civil Appeal No. 399/2021 (S.C) : State of Andhra Pradesh & Anr v. Smt. Dinavahi Lakshmi Kameswari.
3. (1985) 1 SCC 429 : State of Kerala and others vs. V.Padmanabhan Nair.
4. (1999) 3 SCC 438 : Dr. Uma Agarwal v. State of U.P.

For Petitioner : Mr. Satyajit Behera

For Opp.Parties: Mr. H.K.Panigrahi, ASC (O.P.Nos.1 to 3 & 5)
Mr. P.K.Rout (O.P.No.4)

JUDGMENT Date of Hearing : 22.12.2022 : Date of Judgment : 02.03.2023

***Dr. S.K.PANIGRAHI, J.***

1. The Petitioner has filed this Writ Petition with a prayer to direct the Opposite Parties to sanction and disburse the pension of her husband with effect from October, 1994 till October, 2000 and further prays for a direction to absorb her husband into regular establishment after completion of 5 years of service in work charge establishment as has been done in the case of *Dinabandhu Satpathy*.

## I. FACTUAL MATRIX OF THE CASE:

2. The facts of the case, in a nutshell, is that the Petitioner was appointed as Mechanic Grade-III in work charge establishment under Opposite Party No.4 i.e. Executive Engineer, Store and Mechanical Division, Khatiguda in the District of Nabarangpur and joined in service on 25.03.1963. The husband of the Petitioner has served for the Department in various stations and even though the husband of the Petitioner was working under work charge establishment, but he has received the salary, increments and other benefits just like regular employee.

3. While the matter stood thus, the Opposite Party No.5 i.e. Secretary, Finance Department issued a resolution dated 22.01.1965 regarding amelioration of the condition of service of work charged employees in various Departments of Government, wherein the clause(I) stipulates that all posts sanctioned in work charged establishment under different Departments of Government which have completed 5 years of continuous existence in the date of issue of this order and are likely to continue in future and the work for which the posts have been sanctioned are of permanent nature should be brought over to the regular establishment and the incumbents of the posts, if considered suitable should also be absorbed in the corresponding posts created in regular establishment. In this instant case, the Petitioner

joined in service in 1963 and retired from service with effect from 30.09.1994 and relieved from the office of the Opposite Party No.4. However, he was not brought over to regular establishment, in view of Finance Department Resolution dated 22.01.1965, even though he was continuing against a sanctioned post. During his service period, the husband of the Petitioner approached the authority seeking to bring him over to regular establishment in view of the resolution dated 22.01.1965.

4. The Irrigation and Power Department had issued a circular dated 12.09.1983 regarding conversion of work charge posts to regular establishment and counting of work charge period of service towards pension. In the said resolution, it has been mentioned that the general principle of conversion of posts borne in work charge establishment to the regular being 5 years continued existence in work charge establishment be brought over to regular establishment. In this case, the husband of the Petitioner joined as Mechanic Grade III in the year 1963 under work charged establishment and continued till 30.09.1994 without brought over to regular establishment in view of resolution dated 12.09.1983.

5. While the matter stood thus, due to depression, the husband of the Petitioner expired on 13.10.2000. Thereafter, one Dinabandhu Satpathy, Fitter Grade-1 under work charge establishment in the office of the Opposite Party No.3 i.e. Chief Engineer, Upper Indravati Irrigation Project, Nawarangpur had filed OA No.1599 of 1999 before the Principal Bench, Bhubaneswar with a prayer to grant pension and accordingly, the Tribunal allowed the prayer and based on the order of the Tribunal, the Government vide letter dated 06.03.2010 passed an order and sanctioned pension in favour of said Dinabandhu Satpathy and subsequently, the Government vide order dated 23.06.2010 created one post of Fitter Grade-1.

6. The Petitioner after coming to know about Dinabandhu Satpathy submitted representation to the Opposite Party No.3 on 19.12.2012 with a request for sanction of family pension in her favour after death of her husband with effect from October, 1994 to February, 2000. When no action was taken, a reminder was issued on 23.01.2014 to the Opposite Party No.3. While the matter stood thus, PG & PA Department requested the Opposite Party No.3 as per letter dated 22.02.2013 intimating the Opposite Party No.3 with a request to take early action. However, till date the Petitioner deprived to get the benefits of family pension for which she approached this Court for redressal of her grievance.

## II. PETITIONER'S SUBMISSIONS:

7. Learned counsel for the Petitioner earnestly made the following submissions in support of her contentions:

8. The decision of learned Tribunal in Narusu Pradhan in O.A. No. 1189 of 2006 which was confirmed by the Apex Court in SLP(CC) No.22498/2012 dated 07.01.2013 and the Government vide order dated 09.05.2013 implemented the same

by creating supernumerary post in respect of Narusu Pradhan and sanctioned pension. Similarly, another person Pitambar Sahoo who was similarly placed like the husband of the Petitioner had filed one case before the learned Tribunal vide O.A. No.41890/2013. The learned Tribunal vide Judgment dated 18.04.2017 allowed the prayer which was confirmed by the Apex Court in SLP(Diary) No.30806/2018 vide order dated 10.09.2018.

9. The Opposite Parties have raised the point of limitation in approaching the Court. However, as per recent decision of the Apex Court in the case of ***M.I. Patil (Dead) through LRS v. State of Goa***[1] wherein it was held that as far as the pension is concerned, as it is a continuous cause of action, there is no justification at all for denying the arrear of pension.

10. In the instant case, the matter relates to sanction of family pension which is a continuous cause of action and in view of decision of the learned Tribunal in Narusu Pradhan, Pitambar Sahoo, the Petitioner is entitled for family pension with effect from November, 2000 along with arrear of pension of her husband and also she is entitled for interest of 18% for delayed payment of pension from 2000 till actual payment is made with all consequential benefits.

## III. OPPOSITE PARTIES SUBMISSIONS:

11. Per *contra*, learned counsel for the Opposite Parties intently made the following submissions:

12. The Writ Petition is grossly barred by limitation since the husband of the Petitioner has been retired from service on 30.09.1994 and also died in the year 1999 and the present Writ Petition has been filed by his wife after 20 years of his retirement, which is not maintainable in law. Hence, this petition is liable to be dismissed.

13. The Petitioner has filed this Petition seeking direction to absorb her husband in regular establishment with retrospective effect after completion of 5 years of service under the project as well as to sanction regular pension with effect from 1994 i.e. after his retirement and also grant of family pension after his death in the year 1999.

14. The Petitioner's husband who was engaged as work charged employee on 25.03.1964 retired as such on 30.09.1994 and there is no such provision in the Orissa Work Charged Employees (Appointment and Condition of Service) Instructions, 1974 and Orissa Civil Service (Pension Rules) for grant of pension and Pensionary benefits to the retired employee as well as whose service has not been regularized during the work charged period, as such he is not eligible for grant of pension and family pension etc. according to Orissa Civil Services Pension Rules. Hence, this Petition is misconceived, frivolous and liable to be dismissed.

**1. Civil Appeal No. 4100/2022 (Supreme Court)**

15. The case of the Petitioner's husband is that, he was engaged as Mechanic on 25.03.1964 at Balimela Project under Work Charged establishment and came to the control of Opposite Party No-3 on 11.09.1981 on transfer. He served under Upper Indravati Hydro Electric Project till attaining the age of retirement from service on 30.09.1994. Thereafter, he received all retiral benefits and lastly died in the year 13.10.2000.After his death, even if employer and employee relationship has been ceased, the wife of the deceased employee has raised stale claim and prayed for regularisation of her husband after completion of 5 years of continuous service under workcharged establishment. Such a stale claim after long lapse of 24 years of retirement is unsustainable.

16. The Petitioner's husband was working as Mechanic and his duty was confined to mechanical works of machines deployed in civil construction works of the Project. His wage was being paid charging to the departmental garage set-up during construction stage. The construction work of the Project has been completed since long. After completion of the construction work, the project has been handed over to Odisha Hydro Power Corporation Ltd., which has been formed by the Government to generate electricity. The Project is now at maintenance stage. After completion of the construction work, all the heavy vehicles, machinery of the Project have been declared surplus and have been sold out as scrap materials. The Departmental garage is no more functional. As such, there is absolutely no necessity of Mechanic post in the regular establishment. Hence, he also did not fulfill the condition of holding a permanent natured post during his service period.

## IV. COURT'S REASONING AND ANALYSIS:

17. It is well-settled that salaries and pensions are due as a matter of right to employees, and, as the case may be, to former employees who have served the State. Since, the Petitioner rendered his services till superannuation as a Government servant, his entitlement to the payment of salary is intrinsic to the right to life under Article 21 and to right to property which is recognized by Article 300A of the Constitution.

18. The Supreme Court in the case of ***State of Andhra Pradesh & Anr v. Smt. Dinavahi Lakshmi Kameswari***[2] observed that

> *"The direction for the payment of the deferred portions of the salaries and pensions is unexceptionable. Salaries are due to the employees of the State for services rendered. Salaries in other words constitute the rightful entitlement of the employees and are payable in accordance with law. Likewise, it is well settled that the payment of pension is for years of past service rendered by the pensioners to the State. Pensions are hence a matter of a rightful entitlement recognised by the applicable rules and regulations which govern the service of the employees of the State."*

19. In ***State of Kerala and others vs. V.Padmanabhan Nair***3, the Supreme Court held that prompt payment of retirement benefits is the duty of the Government

**2. Civil Appeal No. 399 of 2021 (Supreme Court) 3. (1985) 1 SCC 429**

and any failure in that direction will entail the Government liable to pay penal interest to the Government servant. It was further held that gratuity should be paid on the date of retirement or on the following day and pension should be paid at the expiry of the following month. The relevant paragraphs are as follows:

> *"The instant case is a glaring instance of such culpable delay in the settlement of pension and gratuity claims due to the respondent who retired on 19.5.1973. His pension and gratuity were ultimately paid to him on 14.8.1975, i.e., more than two years and 3 months after his retirement and hence after serving lawyer's notice he filed a suit mainly to recover interest by way of liquidated damages for delayed payment. The appellants put the blame on the respondent for delayed payment on the ground that he had not produced the requisite LP.C. (last pay certificate) from the Treasury Office under Rule 186 of the Treasury Code. But on a plain reading of Rule 1 86, the High Court held-and in our view rightlythat a duty was cast on the treasury Officer to grant to every retiring Government servant the last pay certificate which in this case had been delayed by the concerned officer for which neither any justification nor explanation had been given. The claim for interest was, therefore, rightly, decreed in respondent's favour.*
>
> *Unfortunately, such claim for interest that was allowed in respondent's favour by the District Court and confirmed by the High Court was at the rate of 6 per cent per annum though interest at 12 per cent had been claimed by the respondent in his suit. However, since the respondent acquiesced in his claim being decreed at 6 per cent by not preferring any cross objections in the High Court it could not be proper for us to enhance the rate to 12 per cent per annum which we were otherwise inclined to grant."*

20. In ***Dr. Uma Agarwal v. State of U.P.***[4], the Supreme Court held that:

> *"We have referred in sufficient detail to the Rules and instructions which prescribe the time-schedule for the various steps to be taken in regard to the payment of pension and other retiral benefits. This we have done to remind the various governmental departments of their duties in initiating various steps at least two years in advance of the date of retirement. If the rules/instructions are followed strictly much of the litigation can be avoided and retired government servants will not feel harassed because after all, grant of pension is not a bounty but a right of the government servant. Government is obliged to follow the Rules mentioned in the earlier part of this order in letter and in spirit. Delay in settlement of retiral benefits is frustrating and must be avoided at all costs. Such delays are occurring even in regard to family pensions for which too there is a prescribed procedure. This is indeed unfortunate. In cases where a retired government servant claims interest for delayed payment, the Court can certainly keep in mind the time-schedule prescribed in the rules/instructions apart from other relevant factors applicable to each case."*

21. Additionally, it is imperative to note that the resolution dated 22.01.1965 issued by the Secretary, Finance Department regarding Amelioration of the condition of service of work charged employees in various Departments of Government wherein clause(I) stipulates that all posts sanctioned in work charged establishment under different Departments of Government which have completed 5 years of continuous existence in the date of issue of this order and are likely to continue in future and the work for which the posts have been sanctioned are of permanent nature should be brought over to regular establishment and the incumbents

**4. (1999) 3 SCC 438.**

of the posts, if considered suitable should also be absorbed in the corresponding posts created in regular establishment. In the instant case, the Petitioner joined in service in 1963 and retired from service with effect from 30.09.1994 and relieved from the office of the Opposite Party No.4 and, therefore, he should have been brought over to regular establishment.

22. The Opposite Parties have raised the point of limitation in approaching the Court. In this regard, the Petitioner has rightfully relied on the decision of the Supreme Court in the case of ***M.I. Patil (Dead) through LRS v. State of Goa***[5] wherein it was held that:

> *"...as far as the pension is concerned, it is a continuous cause of action. There is no justification at all for denying the arrears of pension as if they would have been retired/superannuated at the age of 60 years. There is no justification at all by the High Court to deny the pension at the revised rates and payable only from 1st January, 2020. Under the circumstances, the impugned judgment and order passed by the High Court is required to be modified to the aforesaid extent".*

23. Summing up, it can be said with confidence that pension is not only compensation for loyal service rendered in the past, but pension also has a broader significance, it is a measure of socio-economic justice which inheres economic security in the fall of life when physical and mental prowess is ebbing corresponding to aging process and, therefore, one is required to fall back on savings. One such saving in kind is when one gives one's best in the hey-day of life to one's employer, in days of invalidity, economic security by way of periodical payment is assured. The term has been judicially defined as a stated allowance or stipend made in consideration of past service or a surrender of rights or emoluments to one who retires from service. Thus, the pension payable to a Government employee is earned by rendering long and efficient service and, therefore, can be said to be a deferred portion of the compensation or for service rendered. In one sentence, one can say that the most practical raison d'etre for pension is the inability to provide for oneself due to old age. One may live and avoid unemployment but not senility and penury if there is nothing to fall back upon.

24. The discernible purpose, thus, underlying pension scheme or a statute introducing the pension scheme must inform interpretative process and, accordingly, it should receive a liberal construction and the Court may not so interpret such statute as to render them inane.

25. In light of the above-mentioned facts and precedents cited hereinabove, this Court allows the petition. The Writ Petition is, accordingly, disposed of in terms of the above directions.

—— o ——

**5. Civil Appeal No. 4100/2022 (Supreme Court)**

**2023 (I) ILR - CUT-1086**

**MISS SAVITRI RATHO, J.**

CRLMC NO. 1427 OF 2023

**PAKKI SRINIBAS RAO PATTNAIK** ..... Petitioner

-V-

**STATE OF ODISHA** .....Opp.Party

**CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Whether non-bailable warrant should be issued mechanically ? – Held, No – When there is no finding that the accused was avoiding the Court's proceeding or could not be found or would harm someone if not taken into custody immediately, issuing NBW is not sustainable.** (Para 7)

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

1. (2007) 12 SCC 1 : Mohan Goswami & another vs. State of Uttaranchal & Ors.
2. (2004) 4 SCC 425 : Omwati v.State of UP & Another.
3. (1976) 3 SCC 1 : State of U.P. v. Poosu & Another.

For Petitioner : Mr. P.K.Panda

For Opp.Party : Mr. Debasish Biswal, ASC

JUDGMENT Date of Judgment : 12.04.2023

***MISS SAVITRI RATHO, J.***

This application under Section 482 of Cr.P.C. has been filed by the petitioner to quash the orders dated 29.06.2022 and 04.07.2022 passed by the learned S.D.J.M., Berhampur in G.R. Case No.469 of 2022 corresponding to Baidyanathpur P.S. Case No.60 of 2022.

2. Mr. Panda, learned counsel for the petitioner submits that the order dated 29.06.2022 is liable to be set aside as it has been passed mechanically on the prayer of the I.O. and N.B.W. has been issued on the ground that there are sufficient materials against the petitioner for commission of offences punishable under Sections 341/294/323/506 of I.P.C. which is misconceived.

3. Referring to the decision of the Apex Court in the case of ***Inder Mohan Goswami & another vs. State of Uttaranchal & others*** reported in ***(2007) 12 SCC 1***, learned counsel for the petitioner submits that N.B.W. could not have been mechanically issued when the offences alleged against the petitioner are triable by the learned Magistrate First Class.

4. Order dated 04.07.2022 reveals that after perusal of the case diary and other connected papers and being satisfied that a prima facie case exists for proceeding against the petitioner, cognizance of offences punishable under Sections 341/294/323/506 of I.P.C. has been taken.

Perusal of the FIR reveals that the petitioner has been named in the FIR and the allegations in the FIR are sufficient for taking cognizance of the offences. So, I do not find any illegality in the order dated 04.07.2022 so far as it relates to taking of cognizance of the offences.

5. The Supreme Court in the case of ***Inder Mohan Goswami*** (supra) has held as follows:

> *…"47. Before parting with this appeal, we would like to discuss an issue which is of great public importance, i.e., how and when warrants should be issued by the Court? It has come to our notice that in many cases bailable and non-bailable warrants are issued casually and mechanically. In the instant case, the court without properly comprehending the nature of controversy involved and without exhausting the available remedies issued non-bailable warrants. The trial court disregarded the settled legal position clearly enumerated in the following two cases.*
>
> *48. In* ***Omwati v.State of UP & Another (2004) 4 SCC 425****, this court dealt with a rather unusual matter wherein the High Court firstly issued bailable warrants against the appellant and thereafter by issuing non-bailable warrants put the complainant of the case behind bars without going through the facts of the case. This Court observed that the unfortunate sequel of such unmindful orders has been that the appellant was taken into custody and had to remain in jail for a few days, but without any justification whatsoever. She suffered because facts of the case were not considered in proper perspective before passing the orders. The court also observed that some degree of care is supposed to be taken before issuing warrants.*
>
> ***49.*** *In* ***State of U.P. v. Poosu & Another (1976) 3 SCC 1*** *at para 13 page 5, the Court observed:*
>
> *"13…..Whether in the circumstances of the case, the attendance of the accused respondent can be best secured by issuing a bailable warrant or non- bailable warrant, is a matter which rests entirely in the discretion of the court. Although, the discretion is exercised judicially, it is not possible to computerize and reduce into immutable formulae the diverse considerations on the basis of which this discretion is exercised. Broadly speaking, the court would take into account the various factors such as, the nature and seriousness of the offence, the character of the evidence, circumstances peculiar to the accused, possibility of his absconding, larger interest of the public and the State".*
>
> ***Personal liberty and the interest of the State***
>
> *50. Civilized countries have recognized that liberty is the most precious of all the human rights. The American Declaration of Independence 1776, French Declaration of the Rights of Men and the Citizen 1789, Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights 1966 all speak with one voice - liberty is the natural and inalienable right of every human being. Similarly, Article 21 of our Constitution proclaims that no one shall be deprived of his liberty except in accordance with the procedure prescribed by law.*
>
> *51. The issuance of non-bailable warrants involves interference with personal liberty. Arrest and imprisonment means deprivation of the most precious right of an individual. Therefore, the courts have to be extremely careful before issuing non-bailable warrants.*
>
> *52. Just as liberty is precious for an individual so is the interest of the society in maintaining law and order. Both are extremely important for the survival of a civilized society. Sometimes in the larger interest of the Public and the State it becomes absolutely*

*imperative to curtail freedom of an individual for a certain period, only then the non-bailable warrants should be issued.*

***When non-bailable warrants should be issued***

*53. Non-bailable warrants should be issued Non-bailable warrant should be issued to bring a person to court when summons of bailable warrants would be unlikely to have the desired result. This could be when:*

- *it is reasonable to believe that the person will not voluntarily appear in court; or*
- *the police authorities are unable to find the person to serve him with a summon; or*
- *it is considered that the person could harm someone if not placed into custody immediately.*

*54. As far as possible, if the court is of the opinion that a summon will suffice in getting the appearance of the accused in the court, the summon or the bailable warrants should be preferred. The warrants either bailable or non-bailable should never be issued without proper scrutiny of facts and complete application of mind, due to the extremely serious consequences and ramifications which ensue on issuance of warrants. The court must very carefully examine whether the Criminal Complaint or FIR has not been filed with an oblique motive.*".....

6. The only reason mentioned in the order dated 29.06.2022 for allowing the application of the I.O. and issuing NBW is as follows :-

*....."Perusal the case record it is found that there are sufficient materials against the above noted accused person for commission of offence u/S-341/294/323/506 IPC." ....*

7. Other than observing that there are sufficient materials for proceeding against the accused, no other reason has been given for issuing NBW. It is apparent that the said order has been passed mechanically. There is no finding that the accused was avoiding the Court's proceeding or could not be found or would harm someone if not taken into custody immediately. Considering the submissions of the counsel for the petitioners and the decision of the Supreme Court in the aforementioned case, the order dated 29.06.2022 issuing N.B.W. is not sustainable and is liable for interference.

8. The order dated 29.06.2022 issuing NBW and the portion of the order dated 04.07.2022 directing for execution of NBW passed by the learned SDJM Berhampur in G.R.Case No 469 of 2022 are accordingly set aside.

9. It is directed that if the petitioner surrenders before the learned S.D.J.M., Berhampur in the aforesaid case on or before 01.05.2023 and files an application for bail, the same shall be considered in accordance with law on the same day.

10. The CRLMC is accordingly disposed of.

—— o ——

**2023 (I) ILR - CUT-1089**

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

TRPCRL NO. 115 OF 2022

**SHYAM SUNDAR PATEL** ..... Petitioner

-V-

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

**CODE OF CRIMINAL PROCEDURE, 1973 – Section 407 – The petitioner/accused charged for commission of offences punishable U/s. 305 of the I.P.C r/w section 10 of the POCSO Act – Petitioner prays to transfer the trial of G.R. case pending before the learned ADJ-cum-PO, Special Court (POCSO) Sundergarh to any other Court – No reference is made by the accused to any such order of the leaned trial court much less to take any exception to the same – Whether the transfer of trial is permissible on the basis of apprehension and perception ? – Held, No – Principles/guidelines issued by the Apex Court referred.**

(Paras 16 - 21)

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

1. 2022 (9) SCC 81 : Manoj Pratap Singh v. State of Rajasthan.
2. (2011) 1 SCC 307 : Nahar Singh Yadav & Anr. v. Union of India & Ors.
3. (2019) 20 SCC 196 : (2020) 3 SCC (Cri) 803 : 2019 SCC OnLine SC 1637 : Anokhilal v. State of M.P.

For Petitioner : Miss. Bini Mishra

For Opp.Parties: Mr. T.K. Praharaj, Standing Counsel (O.P.No.1)
Mr. G.C. Swain (O.P.No.2)

JUDGMENT Date of Hearing and Judgment : 17.04.2023

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

The Office note dated 13.04.2023 put up by the Registry indicates that neither un-served notice nor A.D. returned back from opposite party no.2. Postal tracking report has been annexed to the brief marked as Flag-B which indicates the postal item has been delivered on 12.04.2023.

**2**. The Mr.G. C. Swain, learned Advocate submits that he has instruction to appear on behalf of opposite party no.2 and has filed Vakalatanama on 13.04.2023. Office to tag the Vakalatnama on the case brief. The name of Mr. G.C. Swain, learned counsel for opp.party no.2 be indicated in the case brief as well as the cause list.

*Brief background facts and submissions of the petitioner*

**3**. The petition under Section 407 of the Cr.P.C. has been filed by the petitioner, who is named as accused in G.R. Case No. 56 of 2022 corresponding to

Lephripada P.S. Case No.56 of 2022 for commission of offences punishable under Section 305 of the I.P.C. read with Section 10 of the POCSO Act to transfer of trial of G.R. Case No.56 of 2022 pending before the learned ADJ-cum-PO, Special Court (POCSO), Sundargarh to any other Court on the following grounds as stated in the petition which have also been argued by the learned counsel for the petitioner :

> that the case has been posted for commencement of trial and recording of evidence, however, the same has not been substantially progressed due to various factors which directly hit the right of the accused to fair trial;
>
> the mother of the deceased girl is an advocate, practicing in Sundargarh, as a result of which, lawyers of Sundargarh Bar Association have decided not to represent the petitioner and they also carry a sense of hostility to the petitioner;
>
> lawyers have expressed their personal bias in taking up the case when the petitioner approached the lawyers though there is no formal resolution to the said effect by the Sundargarh Bar Association;
>
> engagement State defence counsel will not erase existing bias in the continuance of the criminal case in the court of learned trial court;
>
> the apprehension of the petitioner being stripped off a fair trial, is based on the fact that the petitioner cannot avail a fair trial in the trial court of Sundargarh in view of the hostile environment against the present petitioner;
>
> as the victim's family will act hand in glove, there is every chance of miscarriage of justice due to lackadaisical attitude of the prosecution;
>
> the lawyers of the Sundargarh Bar Association will directly or indirectly interfere with the course of justice;
>
> the trial of the case has also delayed which is also infringed the right of the accused to speed trial; and
>
> lastly, it is contended, the transfer of the trial to any other court will have no adverse impact on the witnesses of the prosecution or on the day to day conduct of the trial.

**4**. As the learned counsel for the petitioner submits that the petitioner does not expect to get justice from the Court. On being specifically asked under which provision of Cr.P.C. such statement of the petitioner without any further supporting material is a ground to transfer the case from Special Court having jurisdiction which is proceeding with the trial or there is any decision of this court/Hon'ble Supreme Court on the said aspect, no such provision of law or any decision rendered as a precedence could be pointed out.

It is further stated that despite seeking assistance of the State defence counsel there was none to defend the accused.

**5**. It has been vehemently argued by the learned counsel that the trial has been unfair to the accused, whereas nothing has been pointed out either in the petition or

in the form of the affidavit or any order passed by the learned trial court to substantiate such plea of unfairness/bias/prejudice.

**6.** It is further submitted by the learned counsel for the petitioner that the petitioner though has not pointed out anything or stated anything in his pleadings in this petition regarding the trial being biased, this Court has to call for the records of the learned trial court to ascertain the said allegation.

**7**. Learned counsel for the opposite party no.2-informant submits on instruction that a learned counsel from the Sambalpur has already appeared on behalf of the accused before the learned trial court to act as defence counsel.

Learned counsel for the petitioner submits that she has no instruction regarding that and it may be a subsequent development after filing of the present petition before this court.

*Submissions by the Opp.Party no.1-State Counsel.*

**8**. Referring to the pleadings of the petitioner, the learned Standing Counsel for the State submits that baseless allegations against the presiding of the Special Court have been made describing him to be partial as at paragraph-11 of the petition. The said paragraph is quoted herein :

> *"11. That fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. Therefore in order to ensure that the present petitioners gets a fair trial, the instant case should be transferred to any other Court.*"

It is submitted by learned Standing Counsel for the State that there cannot be allegation that the Judge is biased on any finding of fact and the petitioner is also not yet aggrieved by any particular order passed by the learned trial judge apart from filing the present petition on the somewhat imaginary ground of bias and making allegations in the petition that he will not be treated fairly in the trial.

**9.** This Court heard the learned counsel for the petitioner at length, Mr. Swain, learned counsel for the opposite party no.2 and the learned Standing Counsel for the State-opp.party no.1.

*Analysis and Conclusion*

**10.** In considered opinion of this Court while making such allegations of unfair trial due to any order passed by the learned trial court, the minimum should have been done by the petitioner-accused to substantiate such plea or the accused may show that any such thing has happened to draw an inference. It has to be observed that this Court is under no such duty to call for the records on the basis of averments made in the petition without being substantiated by referring to any order. On the

face of it, the petitioner has also admitted that he has engaged the learned counsel who has appeared to defend him in the trial.

**11.** On a specific querry being made by the Court : whether the accused-petitioner has challenged, any order passed by the learned trial court which is prejudicial to him, before this Court, it is submitted that there is no such order that has been challenged. Apparently, apart from making bald allegations based on unfounded apprehension regarding the judicial process being biased there is no other material to support such contention.

**12**. Learned counsel for the petitioner though vehemently contended that the accused has not been granted any certified copy of any order but it is submitted no such details are available regarding any certified copy of order that was applied and granted/not granted, nor there is anything to show that when the application was made and when certified copy was granted/not granted.

**13.** Learned counsel appearing for the opposite party no.2-complainant submits that ten witnesses have been cross-examined on behalf of the accused after they were examined by the prosecution. The photo copies of certified copies of the order-sheets produced by the learned counsel for the opposite party no.2, are taken on record.

Considering the allegations made by the petitioner, from the certified copies of orders passed by the learned trial court produced by learned counsel for opposite party no.2, this Court takes note of the proceeding so far before the learned trial court and the same is indicated herein.

The P.W-1 appeared through the Vulnerable Witnesses Deposition Center, was cross-examined by the defence on behalf of the accused on 13.12.2022. P.W-2 is a minor appeared through the Vulnerable Witnesses Deposition Center *in camera* and was cross- examined by the accused on 14.12.2022. P.W-3 is the another minor who appeared through the Vulnerable Witnesses Deposition Center *in camera* and was cross-examined by the defence on behalf of the accused on 14.12.2022. P.W-4 is the minor appeared before the learned trial court and was cross-examined on behalf of the defence for the accused on 06.02.2023. P.W-5 was cross-examined on behalf of the defence for the accused on 06.02.2023. P.W-6 has been cross-examined by the defence on behalf of the accused on 27.02.2023. Similarly, P.Ws.7, 8 and 9 after their examination-in-chief have been cross-examined by the defence on behalf of the accused on 27.02.2023. P.W.10 has been examined and was cross-examined on behalf of the defence on 21.03.2023. P.W.11 on behalf of the prosecution was declared hostile by the prosecution, was cross-examined by the defence on behalf of the accused on 21.03.2023.

After going through the certified copies of the depositions, it is apparent that the trial has proceeded substantially. The defence on behalf of the accused has cross-examined the prosecution witnesses.

**14.** This Court takes note of Section 35 of the POCSO Act ;

> "***Period for recording of evidence of child and disposal of case-***
> *(1) The evidence of the child shall be recorded within a period of thirty days of the Special Court taking cognizance of the offence and reasons for delay, if any, shall be recorded by the Special Court.*
>
> *(2) The Special Court shall complete the trial, as far as possible, within a period of one year from the date of taking cognizance of the offence."*
>
> *[Emphasis Supplied]*

**15**. Section 407 of the Cr.P.C. provides as follows :

> ***"407. Power of High Court to transfer cases and appeals****- (1) Whenever it is made to appear to the High Court—*
>
> *(a)that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto, or*
>
> *(b) that some question of law of unusual difficulty is likely to arise; or*
>
> *(c) that an order under this section is required by any provision of this Code, or will tend to the general convenience of the parties or witnesses, or is expedient for the ends of justice, it may order-*
>
> *(i) that any offence be inquired into or tried by any Court not qualified under sections 177 to 185 (both inclusive), but in other respects competent to inquire into or try such offence;*
> *(ii)that any particular case, or appeal, or class of cases or appeals, be transferred from a criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction;*
> *(iii) that any particular case be committed for trial of to a Court of Session; or*
> *(iv) that any particular case or appeal be transferred to and tried before itself.*
>
> *(2) The High Court may act either on the report of the lower Court, or on the application of a party interested, or on its own initiative;*
>
> *Provided that no application shall lie to the High Court for transferring a case from one criminal Court to another criminal Court in the same sessions division, unless an application for such transfer has been made to the Sessions Judge and rejected by him.*
>
> *(3) Every application for an order under Sub-Section (1) shall be made by motion, which shall, except when the applicant is the Advocate-General of the State, be supported by affidavit or affirmation.*
>
> *(4) When such application is made by an accused person, the High Court may direct him to execute a bond, with or without sureties, for the payment of any compensation which the High Court may award under Sub-Section (7).*
>
> *(5) Every accused person making such application shall give to the Public Prosecutor notice in writing of the application, together with a copy of the grounds on which it is made; and no order shall be made on the merits of the application unless at least-twenty-four hours have elapsed between the giving of such notice and the hearing of the application.*

*(6) Where the application is for the transfer of a case of appeal from any subordinate Court, the High Court may, if it is satisfied that it is necessary so to do in the interests of justice, order that, pending the disposal of the application, the proceedings in the subordinate Court shall be stayed, on such terms as the High Court may think fit to impose;*

*Provided that such stay shall not affect the subordinate Court's power of remand under section 309.*

*(7) Where an application for an order under SubSection (1) is dismissed, the High Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of compensation to any person who has opposed the application such sum not exceeding one thousand rupees as it may consider proper in the circumstances of the case.*

*(8) When the High Court orders under Sub-Section (1) that a case be transferred from any Court for trial before itself, it shall observe in such trial the same procedure which that Court would have observed if the case had not been so transferred.*

*(9) Nothing in this section shall be deemed to affect any order of Government under section 197."*

**16.** The Hon'ble Supreme Court has considered the aspect of expeditious trial, protection of witnesses as well as the victim, who are vulnerable during trial of the accused charged with offence under the POCSO Act and the Court has issued several directions such as : having dedicated trial courts, availability of forensic science laboratories for analysis of samples, protection of witnesses, measures for expediting trial etc. Such directions and the guidelines issued by the Hon'ble Supreme Court are contained in the following decisions:

*"17.01.2020 Alarming Rise in the Number of Reported Child Rape In Re: (2020) 7 SCC 136; 16.12.2019 Alarming Rise in the Number of Reported Child Rape In Re: (2020) 7 SCC 112; 01.10.2019 Alarming Rise in the Number of Reported Child Rape In Re: (2020) 7 SCC 104; 25.07.2019 Alarming Rise in the Number of Reported Child Rape In Re: (2020) 7 SCC 87;"*

This Court takes note of the aforesaid decisions and the guidelines contained therein while deciding and disposing of the present petition.

**17**. This Court takes note of the decisions rendered by the Hon'ble Supreme Court in ***Manoj Pratap Singh v. State of Rajasthan : 2022 (9) SCC 81***, particularly paragraphs under the heading **H.** ***Procedural questions relating to investigation and trial*** and in particular paragraphs-48.3, 48.4 and 49 :

*"48.* *xxx* *xxx* *xxx*

***48.3.*** *The suggestions that the charge-sheet was filed within 12 days of his arrest and even without receipt of DNA report and that the appellant should have been given more time to study the police report stand rather at conflict with the desirability of prompt proceedings by the investigating agency and also by the trial court in such matters. The constitutional guarantees of equality before law, protection of life and personal liberty, protection in respect of conviction, and protection against the arrest and detention, do not expand into a corresponding right with an accused person to question the swiftness of investigation and expeditious proceedings of the trial or to suggest that he has to be tried at a pace of his choice. It sounds rather preposterous that an accused would question the trial proceedings*

*only because of the pace maintained by the prosecution and the trial court so as to take the trial to its logical conclusion at the earliest. While rejecting the contentions urged on behalf of the appellant, we would rather observe that the speed and pace expected in the cases like the present one, per force, require utmost expedition by the investigating agency as also by the trial court.* *[Emphasis Supplied]*

***48.4.*** *The contention that the appellant was deprived of his right of defence and he was given services of an inexperienced counsel remain too far-stretched and rather unjustified. Apart from that no such grievance was ever suggested before the trial court or even before the High Court, we find from the record that legal aid counsel was appointed at the request of the appellant himself and in fact, the trial court proceeded with the matter only after appointment of a counsel for the appellant. A perusal of the record further makes it clear that the legal aid counsel left no stone unturned to defend the appellant and thoroughly cross-examined each and every witness to the minutest and minor details. He contested every proposition of the prosecution and even the application for recalling of PW 1 (only for the purpose of identification of the clothes of the deceased, which were received later from FSL) was also thoroughly contested by him by filing a reply and contending that the prosecution was trying to fill up a lacuna in their case. Hereinbefore, we have referred to the extensive contentions urged on behalf of the appellant-accused by the legal aid counsel, as dealt with by the trial court in its judgment dated 28-9-2013 [Vide supra paras 26 and 26.1 to 26.6].*

***49.*** *Having examined the record, we find the criticism in this appeal against the conduct of case by the legal aid counsel to be unwarranted and rather unfair. The said counsel had indeed faithfully discharged his duties and had thoroughly defended the appellant. As regards the defence version, it has not been shown if the appellant ever suggested to the counsel about his desire to have one or more meetings with him or to confer with him about any particular line of defence. We are constrained to observe that the negative comments qua the said legal aid counsel cannot be countenanced and raising of such contentions in this appeal is difficult to be appreciated; these contentions are rejected in toto."*

*[Emphasis Supplied]*

**18.** Hon'ble Supreme Court in the decision, ***Nahar Singh Yadav and another – vs.-Union of India and Others; (2011) 1 SCC 307***, dealt with the provisions of Section 406 (2) Cr.P.C. which can be profitably referred to here (Paragraph-29 of SCC)

*" xxx xxx xxx*

*29. Thus, although no rigid and inflexible rule or test could be laid down to decide whether or not power under Section 406 of the Cr.P.C. should be exercised, it is manifest from a bare reading of sub-sections (2) and (3) of the said Section and on an analysis of the decisions of this Court that an order of transfer of trial is not to be passed as a matter of routine or merely because an interested party has expressed some apprehension about the proper conduct of a trial. This power has to be exercised cautiously and in exceptional situations, where it becomes necessary to do so to provide credibility to the trial. Some of the broad factors which could be kept in mind while considering an application for transfer of the trial are:-*

*(i) when it appears that the State machinery or prosecution is acting hand in glove with the accused, and there is likelihood of miscarriage of justice due to the lackadaisical attitude of the prosecution;*

*(ii) when there is material to show that the accused may influence the prosecution witnesses or cause physical harm to the complainant;*

*(iii) comparative inconvenience and hardships likely to be caused to the accused, the complainant/the prosecution and the witnesses, besides the burden to be borne by the State Exchequer in making payment of travelling and other expenses of the official and non-official witnesses;*

*(iv) a communally surcharged atmosphere, indicating some proof of inability of holding fair and impartial trial because of the accusations made and the nature of the crime committed by the accused; and*

*(v) existence of some material from which it can be inferred that the some persons are so hostile that they are interfering or are likely to interfere either directly or indirectly with the course of justice." [Emphasis Supplied]*

**19.** The Hon'ble Supreme Court dealt with a petition filed by an accused facing trial for allegations under the POCSO Act, praying for transfer of the trial alleging that the leaned Judge had made up his mind and therefore, the applicant/accused apprehended that he will not get justice from the learned Judge. The said plea was opposed by the learned counsel appearing for the victim and learned counsel appearing for the Union of India before the Hon'ble Suprme Court. The records of the proceeding as reported, are reproduced herein:

***Alarming Rise in the Number of Reported Child Rape Incidents, In re, (2020) 7 SCC 139 : (2020) 3 SCC (Cri) 123 : 2020 SCC OnLine SC 566 at page 140***

***1.*** *These applications bearing Nos. 14888 and 14891 of 2020 have been filed by the accused Birendra Singh alias Bauaa Singh for transfer of cases bearing RCs Nos. 9 and 10 of 2018 from the court of Shri Dharmesh Sharma to any other court and for impleadment. The main grievance of the petitioner is that while dealing with case bearing RC No. 8 of 2018, the learned Judge has made the following observations:*

*"(iii) Indeed, the incident of rape was not reported immediately by 'AS' nor disclosed by her in her statement under Section 164 CrPC dated 22-5-2017 before the Magistrate during investigation in FIR No. 316 of 2017 PS Makhi [RC No. 11(S) of 2018]. However, the delay of two months and 10 days in reporting the incident for the first time on 17-8-2017 vide letter, Ext. PW 9/D addressed to Hon'ble the Chief Minister, State of U.P. has been cogently and reliably explained by PW 10 victim girl 'AS', PW 8 her mother 'MS' and her uncle PW 9 Mahesh Singh.*

*(iv) That it is explained by PW 10 victim girl 'AS' as well as PW 8 'MS' and PW 9 that such facts were not disclosed by her on 22-6-2017 before the Judicial Magistrate, Unnao, U.P. as she had been threatened by accused Kuldeep Singh Sengar (A-2) to keep quite or else she and her family would not be spared, and it established on the record that no sooner the incident was reported, a vicious tirade against PW 9 Mahesh and his deceased brother 'SS' (father of victim 'AS') was orchestrated by (A-2) to keep PW 9 Mahesh Singh, uncle of victim girl 'AS' behind the bars, who was the mainstay of the family and leading to the alleged incident of beatings of 'SS' on 3-4-2018."*

***2.*** *Mr Siddhartha Dave, learned counsel for the applicant(s) submits that the aforesaid observations show that the learned Judge had made up his mind and therefore the applicant(s) apprehend that they will not get justice from the learned Judge. He, therefore, submits that the case be transferred to some other court. This plea has been opposed by the learned counsel for the victim and the learned counsel for the Union of India.*

> ***3.*** *We have gone through the entire order of the Judge and the observations at paras (iii) & (iv) were necessitated only to explain the delay in filing the complaint by the prosecutrix. These observations are not on the merits of the allegations made therein. Even the Judge is cognizant of this and therefore had recorded the following observations in para (xiv):*
>
> *"(xiv) Lastly, it is specifically provided that any observation or expression of opinion by this Court in the instant case, shall not tantamount to an expression on the merits of crime case/FIR No. 316/17 now RC No. 11(S) of 2018 or for that matter RC No. 9(S) of 2018 and RC No. 10(S) of 2018."*
>
> *xx xx xx*

The purpose of this Court referring to the observations of the Hon'ble Supreme Court, reported in (2020) 7 SCC 139 is that in the said case transfer of trial was sought by the accused and even though certain observations are made by the learned Presiding Judge, the same cannot be taken exception to in all cases by the accused to contend that the Judge is biased. The observations of the learned trial Judge has to be considered in the context in which it has been made and in the proper perspective. In the case at hand, before this Court, no such reference is made by the accused to any such order of the learned trial court much less to take any exception to the same.

**20.** As it has been contended by the learned counsel for the petitioner and also a plea is taken in the petition regarding appointment of the *amicus curie*/State Defence Counsel may lead to a situation of disadvantage to the accused, this Court refers to the observations of the Hon'ble Supreme Court in ***Anokhilal v. State of M.P.*, (2019) 20 SCC 196 : (2020) 3 SCC (Cri) 803 : 2019 SCC OnLine SC 1637** to observe that the learned trial court shall also take note of the guidelines issued by the Hon'ble Supreme Court in ***Anokhilal*** *(supra)* when the accused is represented/defended by the State Defence Counsel, the relevant paragraphs containing the observations made by the Hon'ble Supreme Court in ***Anokhilal*** *(supra)* reproduced herein:

> ***25.*** *In V.K. Sasikala v. State [V.K. Sasikala v. State, (2012) 9 SCC 771 : (2013) 1 SCC (Cri) 1010] a caution was expressed by this Court as under : (SCC p. 790, para 23.4)*
>
> *"23.4. While the anxiety to bring the trial to its earliest conclusion has to be shared it is fundamental that in the process none of the well-entrenched principles of law that have been laboriously built by illuminating judicial precedents are sacrificed or compromised. In no circumstance, can the cause of justice be made to suffer, though, undoubtedly, it is highly desirable that the finality of any trial is achieved in the quickest possible time."*
>
> ***26.*** *Expeditious disposal is undoubtedly required in criminal matters and that would naturally be part of guarantee of fair trial. However, the attempts to expedite the process should not be at the expense of the basic elements of fairness and the opportunity to the accused, on which postulates, the entire criminal administration of justice is founded. In the pursuit for expeditious disposal, the cause of justice must never be allowed to suffer or be sacrificed. What is paramount is the cause of justice and keeping the basic ingredients which secure that as a core idea and ideal, the process may be expedited, but fast tracking of process must never ever result in burying the cause of justice.*

> ***28.*** *All that we can say by way of caution is that in matters where death sentence could be one of the alternative punishments, the courts must be completely vigilant and see that full opportunity at every stage is afforded to the accused.*
>
> ***30.*** *It must be stated that the discussion by this Court was purely confined to the issue whether, while granting free legal aid, the appellant was extended real and meaningful assistance or not. The discussion in the matter shall not be taken to be a reflection on the merits of the matter, which shall be considered and gone into, uninfluenced by any observations made by us.*
>
> ***31.*** *Before we part, we must lay down certain norms so that the infirmities that we have noticed in the present matter are not repeated:*
>
> ***31.1.*** *In all cases where there is a possibility of life sentence or death sentence, learned advocates who have put in minimum of 10 years' practice at the Bar alone be considered to be appointed as Amicus Curiae or through legal services to represent an accused.*
>
> ***31.2.*** *In all matters dealt with by the High Court concerning confirmation of death sentence, Senior Advocates of the Court must first be considered to be appointed as Amicus Curiae.*
>
> ***31.3.*** *Whenever any learned counsel is appointed as Amicus Curiae, some reasonable time may be provided to enable the counsel to prepare the matter. There cannot be any hard-and-fast rule in that behalf. However, a minimum of seven days' time may normally be considered to be appropriate and adequate.*
>
> ***31.4.*** *Any learned counsel, who is appointed as Amicus Curiae on behalf of the accused must normally be granted to have meetings and discussion with the accused concerned. Such interactions may prove to be helpful as was noticed in Imtiyaz Ramzan Khan [Imtiyaz Ramzan Khan v. State of Maharashtra, (2018) 9 SCC 160 : (2018) 3 SCC (Cri) 721] .*

It is clarified that the observation of this Court as above, i.e., reference to the decisions of the Hon'ble Supreme Court is not to be construed as any reflection on the merits of the case of either of the prosecution or the defence, inasmuch as they are not within the scope of the present petition nor this Court has any occasion to deal with the same at present.

**21**. Applying the principles laid down in directions issued by the Hon'ble Supreme Court in the decisions referred above and after going through the available orders passed in the proceeding before the learned trial court, in considered view of this Court, the apprehension of the petitioner expressed in the petition is unfounded and based on his own perception. In any event an accused would have apprehension of being convicted after he faces trial, but since no other material has been brought before this Court, apart from the bald statements and baseless allegations, this Court is not inclined to grant the prayer of the transfer of the trial pending before the learned District & Sessions Judge, Sundargarh in Special G.R.Case No.56 of 2022 to any other court within the State.

In view of the above discussions, the petition is dismissed being devoid of any merit, with the further observations as indicated in the paragraphs above.

Copy of the order be transmitted to the learned ADJ-cum-P.O., Special Court (POCSO), Sundargarh and also be uploaded in the official website.

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**2023 (I) ILR - CUT-1099**

**R.K. PATTANAIK, J.**

CRLMC NO. 1207 OF 2022

**PANKAJINI SAHU & ANR.** ..... Petitioners

-V-

**JOINT DIRECTOR, ENFORCEMENT DIRECTORATE, GOI & ANR.** .....Opp.Parties

**AND**

CRLMC No.1984 of 2021

**DAKTAR @ DOCTOR @ JATINDRA SAHU & ANR.** ....Petitioners

**-Vs-**

**JOINT DIRECTOR, ENFORCEMENT DIRECTORATE, GOI & ANR.** ....Opp.Parties

**PREVENTION OF MONEY LAUNDERING ACT, 2002 – Section 44(1)(c) – Whether, it is mandatory for the PMLA Authority to seek committal of the case related to the scheduled offence and in case such an option is exercised, if the Special Court as a matter of course, bound to allow it ? – Held, section 44(1)(c) of the PMLA does not make it mandatory for committal of case of the schedule offence to the PMLA Court – The PMLA Authority should examine the plea of the petitioners applying its discretion and in the event found to be a fit case for committal, may move the learned Special Judge, Vigilance for a judicious decision in terms of section 44(1)(c) of the PMLA.** (Para 12)

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

1. Bijaya Madan Lal Choudhury Vrs. Union of India & Ors. (decided on 27th July, 2022 by the Apex Court)

For Petitioners : Mr. Pratik Dash
Ms. Deepali Mohapatra

For Opp.Parties: Mr. Bibekananda Nayak, Standing Counsel for ED

JUDGMENT Date of Judgment : 31.03.2023

***R.K.PATTANAIK, J.***

**1**. Both the petitions since involve a common question of law have been clubbed together for disposal by the following order.

**2.** Instant petitions under Section 482 Cr.P.C. are at the behest of the petitioners invoking the extra-ordinary jurisdiction of this Court for quashment of the impugned notices dated 29th September, 2021 under Annexure-6 issued by the learned District & Sessions Judge, Khurda at Bhubaneswar-cum-Special Judge, PMLA, 2002 (in short 'PMLA court') corresponding to complaint case (PMLA) No. 88 of 2020 on the grounds inter alia that such proceeding is to be analogously tried

with C.T.R. Case No. 8 of 2016 pending in the file of learned Special Judge (Vigilance), Bolangir under Section 13(2) read with 13(1)(e) of the Prevention of Corruption Act, 1988 (herein after referred to as 'the P.C. Act') and Section 109 IPC.

**3**. Heard, Mr. Das and Ms. Mohapatra, learned counsel for the respective petitioners and Mr. Nayak, learned counsel for the ED.

**4**. In the instant case, an F.I.R. was lodged by the Vigilance Department under the alleged offences of the P.C. Act and IPC against the petitioners and others in the year 2013 which led to the submission of the chargesheet on 25th February, 2016 in connection with C.T.R. Case No. 8 of 2016. In the meanwhile, summons under Section 50 of the PMLA were issued to the petitioners by the PMLA court for them to appear in complaint case (PMLA) No. 88 of 2020. The petitioners submit that the PMLA authority did not move the Vigilance court at Bolangir for committal of the case to the Special court as required in terms of Section 44(1)(c) of the Prevention of Money Laundering Act, 2022 (hereinafter referred to as 'the PMLA'). In absence of any such compliance of Section 44 of PMLA, according to the petitioners, the proceeding before the learned PMLA court and issuance of summons to them would not be in accordance with law and hence, therefore, impugned notices under Annexure-6 are liable to be quashed with consequential direction for transmission of the record in connection with Sambalpur Vigilance P.S. Case No. 54 of 2013 to the PMLA court for a joint trial and its analogous disposal.

**5**. Referring to clause(c) of Section 44(1) of the PMLA, learned counsel for the petitioners submit that the said provision demands the Special court also to try the Vigilance case which is required to be committed by the learned Special Judge, Vigilance, Bolangir. It is further submitted that the aforesaid provision begins with a non-obstante clause and on a plain reading of the same, it would appear that both the cases one in respect of the scheduled/predicate offence(s) and the other under PMLA are to be tried analogously by the learned PMLA court. While contending so, the decision of the Apex Court in **Bijaya Madan Lal Choudhury Vrs. Union of India & others** decided on 27th July, 2022 by the Apex Court is placed reliance on. It is contended that in order to accelerate trial of both the cases, Section 44(1)(c) of the PMLA stipulates that the Authority under the PMLA is to submit an application before the Special court authorized to try scheduled offences where after the proceeding pending before the said court shall be committed to the designated court under the PMLA and since no application was filed for such committal before the learned Special Judge, Vigilance, Bolangir, the proceeding under the PMLA before the designated court at Bhubaneswar should not proceed. The relevant excerpt of the judgment in **Bijaya Madan Lal Choudhury** (supra) is referred to by the learned counsel for the petitioners and it is submitted that an application under Section 44(1)(c) of the PMLA is what needed to be filed before the learned Special court trying the scheduled offences and in such view of the matter, it is incumbent on the

part of the PMLA authority to move for the same and to ensure that the Vigilance proceeding is committed to the designated court at Bhubaneswar.

**6**. Mr. Nayak, learned counsel for the ED, on the other hand, objected to the contention of the learned counsel for the petitioners and would submit that the proceeding before the PMLA court at Bhubaneswar is independent and in respect of offences punishable under Section 4 of the said Act and in so far as Section 44(1)(c) of the PMLA is concerned, it is an enabling provision and directory in nature and despite use of the word 'shall' occurring therein, it is not mandatory for the PMLA authority to move the Special court.

**7**. The decision in **Bijay Madal Lal Choudhury** (supra) is also cited by Mr. Nayak, learned counsel for the ED to suggest that the offence of money laundering is an independent offence regarding the process or activity connected with the proceeds of crime which have been derived or obtained as a result of criminal activity relating to or in relation to a scheduled offence which is to be tried by the designated court and the committal of the Vigilance proceeding by referring to Section 4(1)(c) of the PMLA is subject to discretion of the PMLA authority which again depends on the facts and circumstances each particular case and in so far as the petitioners are concerned, they do not have any locus standi to compel the PMLA authority to exercise such discretion and hence, the petitions at their behest are devoid of merit and therefore liable to be out rightly dismissed. Apart from above, Mr. Nayak, learned counsel for the ED refers to host of other decisions which are with regard to the limitations in exercise of inherent jurisdiction Section 482 Cr.P.C. contending that exercise of such power is an exception.

**8**. As per Section 44(1)(c) of the PMLA, it is specified that if the court which has taken cognizance of the scheduled offence is other than the Special court which has taken cognizance of the complaint of the offence of money laundering under clause(b), it shall, on an application by the authority authorized to file a complaint under the PMLA, commit the case to the Special court which, on receipt of the same, shall proceed to deal with it from the stage when it is committed. In view of clause(a) of sub-section (1) of Section 44 of the PMLA, an offence punishable under the said Act and any connected scheduled offence shall be triable by the designated court constituted for the area in which the offence has been committed provided that the Special court trying the scheduled offence before the commencement of the Act shall continue to try such scheduled offence. Having gone through the relevant provisions of the PMLA, it is made to understand that a complaint by an authority authorized under the PMLA to be filed before the designated court cognizance of which shall be taken under Section 3 thereof without the accused being committed to it for trial independently in respect of the scheduled offence and the proceeding before the court of competent jurisdiction shall lie, however, in view of Section 44(1)(c) of the PMLA a simultaneous trial of the offen ces under the PMLA as well as the Special Act shall be held provided the PMLA authority submits an application before the Special court.

**9**. The scheme of the PMLA indicates that the definition of money laundering as provided in Section 2(p) is referrable to Section 3 and it casts a liability on any person who directly or indirectly attempts to indulge or knowingly assists or becomes a party or is actually involved in any process or activity connected with the proceeds of crime and projecting it as untainted property shall be guilty for such an offence. Section 4 of the PMLA provides the punishment for money laundering. The object of the PMLA is to prevent money laundering and also to provide for confiscation of property derived from or involved in money laundering and for matters connected therewith or incidental thereto. The expression 'proceeds of crime' is defined in Section 2(u) of the PMLA and likewise scheduled offence stands described in Section 2(y). Under the PMLA, all the offences punishable under Section 4 shall be tried by the court constituted under Section 43 thereof. Section 43(2) of the PMLA further provides that while trying an offence under the said Act, a court shall also try an offence other than an offence referred to in sub-Section (1) with which the accused may be charged under the Code of Criminal Procedure, 1973 at the same trial. Essentially the Act suggests that the offence under the money laundering law is to be tried by the Special court and the predicate offences by the court of competent jurisdiction. The existence of proceeding for a predicate offence is sine qua non to initiate a prosecution under the PMLA. However, on a sincere reading of the PMLA and its provisions, the Court finds that the said Act does not contemplate that offence under the PMLA and the predicate/scheduled offences shall both the tried by the same designated court. There is no such provision in the PMLA to indicate that a joint trial shall have to be held for and in respect of the offences under the PMLA and P.C. Act. In fact, Section 44(1)(c) of the PMLA presupposes the existence of two separate proceedings, one before the Special court and the other with the court under the PMLA. In such a situation, Section 41(1)(c) of the PMLA confers the authority to make an application with a request to the Special court to commit the case relating to the scheduled offence to the designated court under the PMLA and unless such an application is so moved, the enquiry and trial vis-à-vis the predicate offence shall be continued in the court of competent jurisdiction.

**10**. The question is, whether, it is mandatory for the PMLA authority to seek committal of the case related to the scheduled offence and in case such an option is exercised, if the Special court as a matter of course bound to allow it?

**11**. The legislative intent does not make the provision under Section 44(1)(c) of the PMLA obligatory on the authorized officer invariably to make an application for committal. Had it been so, there would have been no reason of any committal under Section 44(1)(c) of the PMLA which again depends on an application of the PMLA authority. If such was the object and purpose of the law, then it should have been expressly made clear about a joint trial of the offences under the PMLA and the Special Act. No doubt, Section 71 of the PMLA envisages an over-riding effect

which stipulates that the Act shall prevail upon anything which is inconsistent therewith contained in any other law for the time being force. However, on a closer reading of the provisions of the PMLA, it is clear and conspicuous that the scheme of the law beyond doubt does not contemplate an analogous trial of scheduled offences and the offence under the PMLA by the designated court in each and every case. Having said that, Section 44(1)(c) of the PMLA should receive an interpretation which is to augment the purpose of the said Act. As a necessary corollary, it has to be held that the said provision does not imply that in every case, the competent authority shall be bound to make an application for committal of the case relating to the scheduled offences to the designated court under the PMLA, rather, the authorized officer competent to file a complaint is vested with a discretionary power to exercise only in appropriate cases where the committal to the designated court is unlikely to defeat the prosecution and frustrate speedy disposal of the case. Likewise, the word 'shall' appearing in Section 44(1)(c) of the PMLA following clause(b) thereof does not make it mandatory for the Special court to allow every application for committal which is to be examined on merit applying judicial discretion.

**12.** In the case at hand, the authority under the PMLA has not moved the learned Special court at Bolangir for committal of the case in respect of the scheduled offence to the PMLA court at Bhubaneswar and therefore, it has been challenged by the petitioners since the PMLA court on receiving complaint has already summoned them. After having a detailed discussion as above, the conclusion is that if an application is moved by the competent authority under the PMLA after exercising its discretion for committal of a case in view of Section 44(1)(c) of the PMLA only in appropriate cases and in the interest of justice, in and under such circumstances, the Special court shall have to examine it and take a decision for committal of the case to the designated court under the PMLA and not otherwise. Since no such discretion has been exercised by the PMLA authority in so far as the present case is concerned and for the fact that the scheme as a whole and Section 44(1)(c) of the PMLA does not make it mandatory for committal of a case of the scheduled offences to the PMLA court, the petitioners as a matter of right cannot demand such committal of the case from the file of learned Special Judge, Vigilance, Bolangir to the PMLA court at Bhubaneswar. However, in the humble view of the Court, the PMLA authority should examine the plea of the petitioners applying its discretion and in the event found to be a fit case for committal may move the learned Special Judge, Vigilance, Bolangir for a judicious decision in terms of Section 44(1)(c) of the PMLA.

**13**. Accordingly it is ordered.

**14**. In the result, the CRLMCs stand disposed of with the concluding remark.

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**2023 (I) ILR - CUT-1104**

**R.K. PATTANAIK, J.**

CRLMC NO. 1447 OF 2016

**NARAYAN BESRA @ VESRA** ..... Petitioner

-V-

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

**AND**

CRLMC No.2703 of 2016

KABIR CHAND @CHANDRA NAYAK ....Petitioners

**-Vs-**

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

**CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Petitioner have been charge-sheeted in G.R. case U/ss. 223, 294, 306 r/w Section 34 of I.P.C – Whether merely on the allegation of harassment without there being any positive action proximate to the time of occurrence on the part of the accused which led or compelled the person to commit suicide, conviction U/s. 306, I.P.C is sustainable ? – Held, not sustainable – The conduct of the petitioners to be in natural course is not quite unusual as they challenged the deceased with the allegation of corruption for which the latter being frightened or afraid of action to follow, committed suicide but to allege that it was due to any instigation or incitement would be unfair and unreasonable, like stretching things too far.** (Para 16)

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

1. 2022 Live Law (SC) 834 : Mariano Anto Bruno & Anr. Vrs. The Inspector of Police.
2. (2010) 8SCC 628 : Madan Mohan Singh Vrs. State of Gujarat and Ors.
3. (2019)10 SCC 188 : State of West Bengal Vrs. Indrajit Kundu and Ors.
4. Criminal Appeal No. 1164 of 2021 (disposed of on 5th October, 2021) : Geo Varghese Vrs. The State of Rajasthan & Anr.
5. (2001) 9 SCC 2008 : Ramesh Kumar Vrs. State of Chhattisgarh.
6. 1995 Supp (3) SCC 438 : Prahaladdas Vrs. State of M.P. and Ors.
7. (2005) 2 SCC 659 : Nitai Dutta Vrs. State of West Bengal.
8. (2018) 7 SCC 781 : Vaijnath Kondiba Khandke Vrs. State of Maharashtra and Ors.
9. Manu/OR/0073/2022 : Santanu Vrs. State of Orissa.
10. (1992) Supp(1) SCC 335 : State of Haryana & Ors. Vs. Ch. Bhajan Lal & Ors.
11. (1988)1 SCC 692 : Madhavrao Jiwajirao Scindia & Anr. Vrs. Sambhajirao Chandrojirao Angre & Ors.
12. (1997) 2 SCC 699 : State of Karnataka Vs. L.Muniswamy & Others.
13. (2010) 12 SCC 190 : S.S.Cheena Vrs. Vijay Kumar Mahajan and Anr.

For Petitioner : Mr. B.K.Routray.

For Opp.Parties: Mr. Tapas Ku.Praharaj, SC (O.P.Nos.1 to 5)
Mr. Nirmal Chandra Mohanty (O.P.No. 6)

JUDGMENT Date of Judgment : 11.04.2023

***R.K.PATTANAIK, J.***

**1**. Instant petitions under Section 482 Cr.P.C. are at the behest of the petitioners for quashment of the criminal proceeding in connection with G.R.Case No.178 of 2015 pending in the file of learned JMFC, Barpali on the grounds inter alia that the same is not tenable in law, inasmuch as, no prima facie case is made out against them vis-à-vis the alleged offences.

**2**. The petitioner in CRLMC No. 1447 of 2016 is the Headmaster of school, whereas, the other petitioners in CRLMC No. 2703 of 2016 are the teacher and the other staff of the school in question except petitioner No.5, who is an outsider. Since the petitioners have been chargesheeted in G.R. Case No. 178 of 2015 with a common allegation, so therefore, the petitions have been clubbed together for disposal by the following order.

**3**. In fact, an F.I.R. was lodged by opposite party No.6 alleging therein about the incident dated 3rd, 4th and 6th August, 2015 during and in course of which the informant's deceased husband who was also the Headmaster of the said school was allegedly detained, abused and humiliated by the petitioners in the immediate presence of the students which is with regard to the occurrences dated 3rd & 4th August, 2015 accusing him of misappropriating the school fund. The details of the allegations so made by opposite party No.6, the wife of the deceased stand described in the F.I.R. as at Annnexure-2. It has been alleged therein by opposite party No.6 that after the aforesaid incidents, the deceased husband lost his mental balance and committed suicide due to the mental and physical torture he was subjected to in the hands of the petitioners. On receipt of such report, Barpali P.S. Case No. 179 dated 7th August, 2015 was registered and investigation was commenced which finally resulted in submission of the chargesheet under Sections 223, 294 & 306 read with 34 IPC. Later to the submission of the chargesheet the learned court below took cognizance of the alleged offences in connection with G.R. Case No. 178 of 2015 vide Annexure-1 and summoned the petitioners. The taking of cognizance of the offences by the learned court below and the entire criminal proceeding is currently under challenge by the petitioners predominantly on the ground that no prima facie case is proved and established against them and more particularly, the offence under Section 306 IPC allegedly for having abetted the commission of suicide by the deceased.

**4**. Heard Mr. Routray, learned counsel for the petitioners, Mr. Praharaj, learned counsel for the State-opposite Party Nos. 1 & 5 and Mr. Mohanty, learned counsel for opposite party No.6.

**5**. Mr. Routray, learned counsel for the petitioners submits that the petitioners are not responsible for the death of the deceased and in so far as the allegations in the F.I.R. i.e. Annexure-1 are concerned, it is based on hearsay evidence. Furthermore, it is submitted that the deceased was responsible for misappropriation

of school fund as he did not handover the details of the charge and reconcile the financial irregularities, the fact which was intimated to the District Welfare Officer, Nabarangpur, who thereafter, instructed him to handover the charge and as such he was guilty of defalcation and misappropriation but unfortunately the local police failed to carry out investigation in a proper manner and ultimately chargesheeted them under the alleged offences including Section 306 IPC. It is claimed by the learned counsel for the petitioners that the deceased was directed to handover the charge between 31st July 2015 and 7th August, 2015 vide letter No. 1702 dated 29th July, 2015 of the District Welfare Officer, Nabarangpur as he had neither handed over any section wise charge list, the Utilization Certificates (U.C.) for the period of 2014-15 along with vouchers no mentioned the advance position in the original Cash Book etc. and in that connection, he had had been summoned but thereafter, for the reasons best known, he committed suicide as at no point of time, the petitioners ever ill-treated and misbehaved him, so therefore, according to Mr. Routray, learned counsel for the petitioners the investigation having not been properly conducted and concluded in perfunctory manner, the criminal proceeding in G.R. Case No. 178 of 2015 should be quashed. Apart from the above, Mr. Routray cites the following decisions of the Apex Court, such as, **Mariano Anto Bruno & Another Vrs. The Inspector of Police** 2022 **Live Law (SC) 834**; **Madan Mohan Singh Vrs. State of Gujarat and Others (2010) 8SCC 628**; **State of West Bengal Vrs. Indrajit Kundu and Others (2019)10 SCC 188; and Geo Varghese Vrs. The State of Rajasthan & Another** decided in Criminal Appeal No. 1164 of 2021 and disposed of on 5th October, 2021 besides **Ramesh Kumar Vrs. State of Chhattisgarh (2001) 9 SCC 2008**; **Prahaladdas Vrs. State of M.P. and Others 1995 Supp (3) SCC 438**; **Nitai Dutta Vrs. State of West Bengal (2005) 2 SCC 659 and Vaijnath Kondiba Khandke Vrs. State of Maharashtra and Others (2018) 7 SCC 781** including a judgment of this Court in **Santanu Vrs. State of Orissa Manu/OR/0073/2022** to contend that an offence under Section 306 IPC is not at all made out and the petitioners, in a facts and circumstances of the case, cannot be alleged of having abetted such death, the fact which was not duly considered by the learned court below while passing the order of cognizance dated 28th October, 2015. With the above submission, Mr. Routray, learned counsel for the petitioners submits that the criminal proceeding as a whole in G.R. Case No. 178 of 2015 pending before the court of learned Civil Judge, (J.D)-cum-JMFC, Barpalli should be quashed in exercise of Court's inherent jurisdiction.

**6**. On the contrary, Mr. Praharaj, learned counsel for the State-opposite party Nos. 1 to 5 submitted that the deceased husband of opposite party No.6 after he suffered humiliation in the hands of the petitioners and on being instigated committed suicide, the fact which has been vindicated by the filing of the chargesheet against them. It is contended that the manner in which the deceased was subjected to embarrassment and humiliation at the school and that too in the immediate presence of the students and thereafter by an outsider, namely, petitioner

No.5 who also abused and threatened him as well as the informants' family, since committed suicide soon thereafter, such death stands prima facie proved to have been abetted by all of them and considering the chargesheet as the learned court below has taken cognizance of the alleged offences, the petitioners shall have to face the enquiry and trial even for the offence under Section 306 IPC.

**7**. Mr. Mohanty, learned counsel for opposite party No.6 adopting the line of argument of Mr. Praharaj, learned ASC submits that the deceased husband of the informant who was an honest person and never misappropriated a single pie while serving as the Headmaster of the alleged school but then, the petitioners with ill-intention harassed him and as a result of humiliation he received from them, it triggered to take extreme step to end his life and therefore, a case under Section 306 IPC is prima facie made out besides other offences since was abused, assaulted and threatened during the alleged incidents and hence, the criminal proceeding pending before the learned court below in G.R. Case No. 17 of 2015 should not be quashed.

**8**. The death of the deceased husband of opposite party No.6 is on account of Asphyxia due to hanging. A copy of the post mortem report is made available to the Court along with the chargesheet as at Annexure-3 series. The chargesheet was filed against the petitioners under Section 306 IPC with allied offences as earlier mentioned, whereupon, the learned court below took cognizance of the same by order dated 28th October, 2015. The crux of the challenge is that even if for the sake of argument but not admitting, the incidents said to have happened with the deceased husband of opposite party No.6 but by no stretch of imagination, an offence under Section 306 IPC is proved to have been committed by them.

**9**. Mr. Routray, learned counsel for the petitioners submits that the essential ingredients of the Section 306 IPC are not fulfilled nor any of the petitioners did ever had the requisite intention or mens rea to instigate the victim and drive him to commit suicide even assuming the allegations of harassment and humiliation meted out to him to be true. The challenge is more or less confined to the offence under Section 306 IPC for which the petitioners have been chargesheeted vide Anneuxre-3. The moot question is, whether, the materials on record prima facie make out a case of abetting suicide of the deceased husband of opposite party No.6?

**10**. As far as the jurisdiction of Section 482 Cr.P.C. is concerned, it is wide and expansive and not fettered with any limitation. Time and again, it has been held and reiterated by the Apex Court about the exercise of power and the limitations too and most prominently in the landmark judgment in the case of **State of Haryana & Others. Vs. Ch. Bhajan Lal & Others** reported in **(1992) Supp(1) SCC 335**. In fact, the Apex Court in the above decision held that it may not be possible to lay down any precise, clearly defined and inflexible guidelines or rigid formulae and to specify an exhaustive list of cases where such power should be exercised, however, by way of illustrations, categorized cases wherein such power could be exercised

either to prevent abuse of the process of the Court or otherwise to secure the ends of justice. Furthermore in **Madhavrao Jiwajirao Scindia & Another Vrs. Sambhajirao Chandrojirao Angre & Others (1988)1 SCC 692,** it has been observed by the Supreme Court that the legal position is well settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied is as to whether the uncontroverted allegations prima facie establish the offence; to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. It is further held therein that the process of law cannot be utilized for any oblique purpose and where in the opinion of the Court chances of an ultimate conviction is bleak and therefore, no useful purpose is likely to be served by allowing the criminal prosecution to continue, it may quash the proceeding even though it be at a preliminary stage. With regard to exercise of extra-ordinary jurisdiction under Section 482 Cr.P.C., the Apex Court in one of its earliest judgments in **State of Karnataka Vs. L.Muniswamy & Others ( 1997) 2 SCC 699** concluded that the wholesome power under Section 482 Cr.P.C. to quash a proceeding should be exercised if a conclusion is reached at that allowing the proceeding to continue would be an abuse of process of court or that the ends of justice require that the proceeding ought to be quashed and in that regard, Courts have been invested with inherent power to achieve a salutary public purpose. It has also been held that a court proceeding ought not to be permitted to be used as a weapon of harassment or persecution and to achieve the ends of justice which is higher than the ends of mere law must be administered. So, law is well settled that the inherent jurisdiction may be exercised in a given case where it is necessary to prevent abuse of process of court or otherwise to secure the ends of justice even when a prosecution is at the threshold. In **Ch. Bhajan Lal** (supra), the Apex Court observed that if on consideration of the allegations in F.I.R. or complaint with no prima facie case made out or a cognizable offence not being disclosed or do not constitute any such cognizable offence, jurisdiction Section 482 Cr.P.C. may have to be exercised. In the instant case, the contention of the petitioners is that no offence under Section 306 IPC is established even on a bare reading and examination of the F.I.R. and considering the material evidence furnished along with chargesheet as at Annexure-3 series.

**11.** In **Geo Varghese** (supra), the Apex Court discussed the relevant provisions with regard to an offence of abetting suicide. It is held therein that suicide in itself is not an offence but an attempt to suicide is penalized under Section 309 IPC and it is abetment by anybody to be punishable under Section 306 IPC. In the said judgment, the Apex Court further observed that the IPC does not define the word 'suicide' but the ordinary dictionary means suicide is an act of self-killing, a word which is derived from a Latin term '*suicidium*', 'sui' means 'oneself' and '*cidium*' means 'killing'. Section 306 IPC penalizes abetment of suicide for being a criminal offence. The term 'abetment' is defined in Section 107 IPC, according to which, a

person abets the doing of a thing if he instigates any person to do anything or engages with one or more other persons in a conspiracy for doing of that thing etc. and intentionally aids it by any act or omission in the doing of that thing. So, if someone instigates or incites someone to do something is said to be an act of abetment so defined in Section 107 IPC and anyone for such abetment in the commission of suicide to be punishable under Section 306 IPC. The word 'instigate' has been described as to goad, urge, forward, provoke, incite or encourage doing an act. As per the judgment in **Geo Varghese**, the scope and ambit of Section 107 IPC and its co-relation with Section 306 IPC has been discussed in **S.S. Cheena Vrs. Vijay Kumar Mahajan and Another** reported in **(2010) 12 SCC 190**, wherein, it has been held that abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing and without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained. In the said judgment, it is also held that the intention of the legislature and the ratio of the cases decided by the Supreme Court is clear that in order to convict a person under Section 306 IPC, there has to be a clear mens rea to commit the offence and it also requires an active or direct act which led the deceased to commit suicide finding no other option and that act must have been intended to push the deceased into such a position that he committed suicide. So on a consideration of the aforesaid judgments, the conclusion is that unless until the act of abetment is such which instigates or incites a person to commit suicide or any act is committed as a result which the deceased is left with no option except to commit suicide, under such circumstances alone, an offence under Section 306 IPC is made out.

**12.** In the instant case, Mr. Routray, learned counsel for the petitioners submits that there is no doubt that deceased had a suicidal death but then the petitioners cannot be held responsible for having abetted such death, a conclusion which is clearly deducible from the chargesheet and the connected materials. The hosts of decisions which have been relied on by Mr. Routray are more less on the foundation that unless instigation or incitement or direct involvement is alleged or it is shown that the person has been subjected to constant instigation that he committed suicide, in such situation, an offence under Section 306 IPC would be made out.

**13.** Furthermore, in **Mariano Anto Bruno** (supra), the Apex Court held that merely on the allegation of harassment without there being any positive action proximate to the time of occurrence on the part of the accused which led or compelled the person to commit suicide, conviction under Section 306 IPC is not sustainable. In the said judgment, it is also observed that suicide is a personal tragedy that prematurely takes the life of an individual and has a continuing ripple effect dramatically affecting the lives of families and friends, however, the Court while adjudicating is not to be guided by emotion or sentiments but to base its decision considering evidence on record.

**14.** In view of the above decision, there has to have a positive action on the part of the accused which compelled the victim to commit suicide which makes out an offence abetment punishable under Section 306 IPC. If there is any harassment or any kind of allegation as to harassment is made but without any positive action proximate to the incident of suicide, conviction under Section 306 IPC cannot be maintained. In case where the victim left a suicide note, the Apex Court in **Madan Mohan Singh** (supra) was not impressed to hold that the accused therein was responsible for abetting suicide as in the said case due to a departmental action, the deceased lost his mental balance and thereafter, committed suicide and in that connection, the accused a superior officer was made to face prosecution under Section 306 IPC. In that context, the Supreme Court concluded that the prosecution cannot continue on the basis of such allegation even when the deceased left a suicide note and observed that the proceeding was rightly quashed in exercise of jurisdiction under Section 482 Cr.P.C. While dealing with the discharge application which was disallowed and reversed by the Calcutta High Court, the Supreme Court in **Indrajit Kundu** (supra) concluded that no offence under Section 306 IPC is made out as against the background facts that there was no any material to instigate or solicit the deceased to commit suicide. In case of cruelty against the husband, the Apex Court in **Ramesh Kumar** concluded that even if the ill-treatment subjected to her amounts to an offence punishable under Section 498-A IPC but that by itself does not make out an offence under Section 306 IPC in the event the wife committed suicide. Similarly in **Netai Dutta** (supra), the Apex Court considering a suicide note held that the accused was not responsible in instigating the deceased to commit the suicide as there is no allegation that he was harassing the deceased. Even though the accused in the said case was alleged to be responsible and his name was revealed in suicide note, however, the Supreme Court held that the accused cannot be fastened with the criminally liability as there is no reference of any act or incidence whereby he allegedly committed any willful act or intentionally added or instigated the deceased in committing suicide. Without elaborating further the Court is of the view that the abetment has to be established with positive acts or involvement of the accused which is to be held responsible for instigation. Mere abuse, humiliation or ill-treatment on couple of occasions without the requisite mens rea so as to drive the deceased to commit suicide cannot make out an offence under Section 306 IPC which is what has been held and observed by the Apex Court in all the above decisions.

**15.** Now considering the F.I.R. as at Anneuxre-2, the Court finds that the deceased husband opposite party No.2 in response to the intimation received from authority had been to D.W.Os office on 3rd and 4th August, 2015 and during that time, the petitioners one of whom is the school Headmaster and another a teacher besides others abused him in filthy language and was manhandled by one of them, namely, the petitioner in CRLMC No. 1447 of 2016 with the allegation that he misappropriated the school fund and such incidents happened in the presence of the

students. The said incidents have been revealed by the deceased to opposite party No.6. It is made to appear from the F.I.R. that one more incident took place on 6th August, 2015 involving petitioner No.5, an outsider and shopkeeper who had been to the house of the victim and had abused all of them. It is claimed by opposite party No.6 that the petitioners subjected the deceased husband to mental or physical torture with a threat that the act of misappropriation by him would be made public and aired in T.V. and even to report it to the Vigilance Department, whereafter, as alleged in the F.I.R, her husband said to have committed suicide during the night of 6th August, 2015 for having lost his mental balance due to the alleged overt acts committed by all the accused persons. The statements of opposite party No.6 and others recorded under Section 161 Cr.P.C. do reveal the incidents involving the petitioners who allegedly demanded money from him with the allegation that an amount of Rs. 10 lac of the school fund was misappropriated by him. The alleged incidents happened on 3rd or 4th August, 2015. As per the F.I.R. and the statement of opposite party No.6 under Section 161 Cr.P.C., the deceased was in a troubled mind and because of the ill-treatment he was subjected to by the petitioners was under stress and finally lost his mental balance and said to have committed suicide. During that time, opposite party No.6 being the wife of the deceased was at home and she found him mentally disturbed and on being asked had revealed her of the alleged mischief of the petitioners. The deceased revealed to opposite party No.6 that the petitioners confronted him and claimed that he had misappropriated the school fund while serving as its Headmaster and was threatened that such misappropriation would be reported to the Vigilance Department. Even assuming for the sake of argument that the incidents happened and the petitioners did commit the excess, the question is, whether, by such overt acts committed by them, an offence under Section 306 IPC is really made out.

**16.** As earlier discussed about the principle enunciated by the Apex Court and more elaborately in judgment in **Geo Varghese (supra)**, there has to have a positive act with the requisite mental faculty to instigate the victim to commit suicide. If there is a continuous harassment by the accused and for that the victim is pushed to a corner leaving him no other option except to commit suicide, in such a case, it can be said that there has been an act of abetment punishable under Section 306 IPC. What was the conduct of the petitioners in the present case has been narrated in the F.I.R. so also by opposite No.6 in her statement under Section 161 Cr.P.C. The deceased for the reason claimed by the petitioners had been instructed by the District Welfare Officer to attend him on 3rd or 4th August, 2015, as it appears during that time, the alleged excess was committed by the petitioners one of whom is also an outsider. Why and whose instance petitioner No.5, an outsider involved himself in the incidents is not clearly revealed from the materials on record. Whatever be the case, the Court finds that within short time after being challenged by the petitioners, the deceased committed suicide. It is not a case that the petitioners continuously chased the victim and did the mischief over a period of time that he had no option

except to end his life. For sporadic incidents or events suddenly happened or took place under peculiar circumstances during which the victim is humiliated or embarrassed and thereafter loosing mental balance or out of despair or on account of stress commits suicide, the person responsible for the alleged acts cannot be said to have instigated or aided him in committing the suicide. The case at hand is of such nature where it would be unfair to allege that the petitioners did the mischief with any bad intention instigating the deceased which resulted in his death by suicide. The conduct of the petitioners to be in natural course is not quite unusual as they challenged the deceased with the allegation of corruption for which the latter being frightened or afraid of action to follow committed suicide but to allege that it was due to any instigation or incitement would be unfair and unreasonable and like stretching things too far. Therefore, the conclusion is that the offence under Section 306 IPC considering and appreciating the materials on record cannot be said to have been committed by the petitioners though for the rest of the offences, they have to face the prosecution since it is prima facie established and accordingly, it is ordered.

**17.** In the result, the CRLMCs stand allowed in part. As a logical sequitur, the criminal proceeding in connection with G.R.Case No.178 of 2015 pending in the file of learned JMFC, Barpali is hereby quashed to extent and with reference to the offence under Section 306 IPC and not for the remainder for the reasons discussed herein above.

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## 2023 (I) ILR - CUT-1112

**SASHIKANTA MISHRA, J.**

W.P.(C) NO. 20756 OF 2017

**CHANDRASEKHAR MISHRA** ..... Petitioner

-V-

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

**ORISSA SERVICE CODE, 1939 – Rule 72(2) – Whether rule 72(2) of the code is applicable to a civil servant who voluntarily abandone his service ? – Held, No – The said rule would arise only when a Govt. Servant does not resume duty after remaining on leave for continuous period for five years.** (Para 12)

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

1. 2017 (1) OLR 615 : Karunakar Behera vs. State Orissa.
2. 105 (2008) CLT 309 : Kishore Das vs. State of Orissa.
3. 2022 (II) ILR CUT 1042 : Narahari Swain vs. State of Orissa.
4. (1979) I SCC 590 : G.T. Lad vs. Chemical and Fibers of India Limited.

For Petitioner : Mr. G.K.Nanda & K.C.Ratha.
For Opp.Parties: Mr. P.K.Panda, S C (S&ME Dept.)

JUDGMENT Date of Judgment : 04.04.2023

***SASHIKANTA MISHRA, J.***

The petitioner was appointed as a Hindi teacher in Bijatala High School, Mayurbhanj vide order dated 20.05.1975 and accordingly he joined on 25.05.1975. He was transferred to Krushna Chandra High School in the same district by order dated 16.11.1977 where he rendered service uninterruptedly till 30.06.1986. Both the aforementioned schools are aided educational institutions within the meaning of Section 3(b) of the Odisha Education Act, 1969. He claims to have submitted from mild mental disability and of undergoing medical treatment during 1985 while still performing his duties. But his health condition did not improve for which he remained on leave with effect from 01.07.1986 for one month, which was sought to be renewed for one more month by a letter submitted by his wife along with medical prescription. After his partial cure from his illness in March, 1998, when he wanted to resume his duties, the Headmaster of the school did not allow him to do so but forwarded his joining application along with the medical treatment reports to the then Inspector of schools, Mayurbhanj for approval, but no response was received. The school was taken over by the Government in the year 1994. The petitioner requested the Inspector of Schools to grant him pension and other service benefits as permissible under law but he was advised to wait till attaining the age of superannuation, i.e., till 2009. It is his case that he had remained on leave on account of his illness submitting proper application to the authority. During the period from 1986-2009 he neither resigned from service nor he was retrenched terminated by the authority. No disciplinary action was also taken against him for his long absence. On such facts the petitioner claims to be entitled to pension and other retiral benefits as he has completed the minimum qualifying service of ten years. He submitted the pension papers to the headmaster from the school, which was forwarded to the District Education Officer, Mayurbhanj. But ultimately, nothing was done for which he approached this Court in W.P.(C) No 6412 of 2016. By order dated 11.07.2016, this Court directed the District Education Officer to dispose of the representation of the petitioner within two months. Pursuant to such order, the DEO rejected the claim of the petitioner for pension. The petitioner has therefore approached this Court seeking the following prayer:-

> *"In view of the above facts and circumstances of the case, the petitioner respectfully prays that this Hon'ble Court may graciously be pleased to issue notice to the opp. Parties and after hearing, allow this writ petition directing the Controller of Accounts-O.P. No.2 and O.P. No.3 to sanction and authorize the pension and other retiral benefits/dues in favour of the petitioner within a stipulated time in view of the letters dated 17.03.2020 and 13.08.2021 of DEO, Balasore (O.P. No.3) vide Annexure-11 and 12 respectively by quashing the order dated 27.09.2016 of DEO, Balasore under Annexure-8.*

*And may any other order/orders, issue direction/directions writ/wits as this Hon'ble Court deems just and proper for ends of justice.*

*And for the said act of kindness, the petitioner shall as in duty bound ever pray."*

2. Counter affidavit has been filed by the District Education Officer (O.P. No.3). The stand of the opposite party as revealed from the counter and additional counter is that as per the service particulars of the petitioner available from his service book, he continued in service from 25.05.1975 to 12.07.1986 and thereafter he did not join in his duties. Since the schools in question were under the private management what action was taken against the petitioner for his long unauthorized absence she is not known. However, in view of the absence of the petitioner after 13.07.1986 the school management took decision to appoint another person, namely, Amulya Kumar Shee in the post after taking approval of the Director, Elementary Education by order dated 24.02.1988. It is further stated that the petitioner was not interested for employment at the relevant time as he had abandoned his service which is evident from the fact that he joined the profession of advocacy after obtaining license from the Odisha State Bar Council. Finally it is contended that the petitioner himself slept over the matter from 13.07.1986 to 17.03.2015, i.e., the date of fling of representation which is completely barred by limitation.

3. Heard Mr. J.K. Nanda, learned counsel for the petitioner and Mr. P.K. Panda, learned Standing Counsel for the School and Mass Education Department.

4. Mr. Nanda would argue that the petitioner, having admittedly worked for more than ten years uninterruptedly is entitled to pension as per Rule 8 (2)(a) of the Orissa Aided Educational Institutions' Employees Retirement Benefit Rules, 1981. He further submits that the petitioner was prevented from joining his services. Neither any Disciplinary Proceeding was initiated against him nor any show cause notice was served upon him. Therefore, the authorities cannot take the plea of abandonment of service. In any case, such plea is contrary to Rule 72 (2) of the Orissa Service Code.

In support of his contentions as above, Mr. Nanda has referred to some decisions of this Court, namely, ***Karunakar Behera vs. State Orissa***, reported in 2017 (1) OLR 615; ***Kishore Das vs. State of Orissa***, reported in 105 (2008) CLT 309; and ***Narahari Swain vs. State of Orissa***, reported in 2022 (II) ILR CUT 1042.

5. Mr. P.K.Panda, on the other hand, argued that the undisputed facts of the case would clearly show that the petitioner had voluntarily abandoned his service at the relevant time. If he was prevented from joining his duties he could have raised grievance before the competent authority at the relevant time but he chose to sleep over the matter and only because the school was taken over by the Government, he decided to stake his claim for pension and other benefits for obvious reasons. Mr. Panda further submits that voluntary abandonment of service by the petitioner is otherwise proved from the fact that he had enrolled himself as an advocate by obtaining necessary license from the Odisha State Bar Council.

6. From the rival pleadings and contentions noted above, it is evident that the following issues fall for determination in the present case;

I. Whether the petitioner can be said to have voluntarily abandoned his service with effect from 13.07.1986.

II. Whether the petitioner is entitled to pension and other retiral benefits.

7. Before proceeding to answer the questions as referred above it would be apposite to refer to the law relating to abandonment of service. The expression 'abandonment of service' has not been defined in any of the relevant statutes. In this context, the observations of the Supreme Court of India in the case of ***G.T. Lad vs. Chemical and Fibers of India Limited***, reported in (1979) I SCC 590 are noteworthy.

> *"In the Act, we do not find any definition of the expression 'abandonment of service'. In the absence of any clue as to the meaning of the said expression, we have to depend on meaning assigned to it in the dictionary of English language. In the unabridged edition of the Random House Dictionary, the word 'abandon' has been explained as meaning 'to leave completely and finally; for- sake utterly; to relinquish, renounce; to give up all concern in something'. According to the Dictionary of English Law by Earl Jowitt (1959 edition) 'abandonment' means 'relinquishment of an interest or claim'. According to Blacks Law Dictionary 'abandonment' when used in relation to an office means 'voluntary relinquishment. It must be total and under such circumstances as clearly to indicate an absolute relinquishment. The failure to perform the duties pertaining to the office must be with actual or imputed intention, on the part of the officer to abandon and relinquish the office. The intention may be inferred from the acts and conduct of the party, and is a question of fact. Temporary absence is not ordinarily sufficient to constitute an abandonment of office'.*
>
> *From the connotations reproduced above it clearly follows that to constitute abandonment, there must be total or complete giving up of duties so as to indicate an intention not to resume the same. In Buckingham Co. v. Venkatiah & Ors. it was observed by this Court that under common law an inference that an employee has abandoned or relinquished service is not easily drawn unless from the length of absence and from other surrounding circumstances an inference to that effect can be legitimately drawn and it can be assumed that the employee intended to abandon service. Abandonment or relinquishment of service is always a question of intention, and normally, such an intention cannot be attributed to an employee without adequate evidence in that behalf. Thus, whether there has been a voluntary abandonment of service or not is a question of fact which has to be determined in the light of the surrounding circumstances of each case."*

Thus, the question of voluntary abandonment of service on the part of an employee is essentially a question of fact to be determined from the surrounding circumstances of each case.

8. There is no dispute that the petitioner joined in service on 25.05.1975 in Bijatala High School from where he was transferred to K.C. High School on 01.12.1977. He served in the school till 12.07.1986. Both the schools were aided educational institutions at the relevant time being governed by private management. The petitioner claims to have suffered from mental illness for which he submitted

leave application along with medical prescriptions. However, not a scrap of paper has been produced by him before this Court or referred to in any of the documents enclosed to the writ petition in support of such claim. He claims to have submitted his joining report to the Headmaster of the school but the same was not accepted. On which date he submitted such joining report is not forthcoming. Though it is stated under paragprah-6 of the writ petition that it was in March, 1998, it is highly significant to note that the school was by then taken over by the Government. It goes without saying that refusal of employment amounts to termination of service which the petitioner could have challenged before the competent authority but he did not do so. It is further stated by him that his application was forwarded to the Inspector of School along with the medical treatment papers but no response was received. In the writ petition, it is stated as under:-

> *"xxx xxx In the meantime, the school was taken over by the Government in the year, 1994. Having not received any communication from the Inspector of Schools, the petitioner hopelessly requested the Inspector of Schools to grant his pension and other service benefits as permissible under law. However, he was advised to wait till attaining his age of superannuation, i.e. till 2009 xxx xxx"*

Two things are evident from the above averments- firstly, the plea that he was advised to wait till 2009 is patently unbelievable for being accepted and secondly, he himself requested to grant him pension and other service benefits as permissible under law. This, by itself shows that he was no longer interested in continuing in service as otherwise there was no reason for him to make such request in the year 1998, even though he had more than eleven years of service left. This is a strong circumstance suggesting a clear intention on his part to abandon his service.

9. The petitioner has claimed that he was suffering from mental illness and was under treatment but not a scrap paper was produced in support thereof. Yet another circumstance which is suggestive of his intention to abandon employment is the fact that he remained silent even when another person was appointed in his place on 24.02.1988. Again, there is clear proof that he had enrolled himself as an advocate vide enrollment No.O-791/1996 under the Odisha State Bar Council and started practice as advocate in Balasore district. There is evidence of representation being submitted by him on 17.03.2015 but the same is after an inordinately long and unexplained gap of nearly nineteen years, i.e. from 13.07.1986 to 17.03.2015 during which, he chose to remain completely silent.

10. All these facts cumulatively taken can only suggest that he had no interest or intention to continue in service but raised a claim for pension only because the institution was taken over by the Government.

11. Such being the factual position it is entirely inequitable on the part of the petitioner to invoke the provision under Rule 72 (2) of the Odisha Service Code. The said rule reads as under:-

> *"(2) Where a Government servant does not resume duty after remaining on leave for a continuous period of five years, or where a government servant after the expiry of his leave remains absent from duty otherwise than on foreign service or on account of suspensions, for any period which together with the period of the leave granted to him exceeds five years, he shall unless Government in view of the exceptional circumstances of the case otherwise determine, be removed from service after following the procedure laid down in the Odisha Civil Services (Classifications, Control and Appeal) Rules, 1962."*

12. The said rule would arise only when a Government servant does not resume duty after remaining on leave for continuous period for five years. In the instant case, there is not a shred of evidence to show that the petitioner had either applied for or was granted leave. Thus, reference to Rule 72 (2) of the Odisha Service Code is fallacious.

13. As regards the case laws relied upon by the petitioner, this Court finds that in the case of ***Karunakar Behera (supra)*** the leave period was regularized by the authority by directing the concerned Headmaster to draw the leave salary of the petitioner. The concerned employee thereafter remained on unauthorized leave for which this Court referred to the provision under Rule 72 of the Code. In the case of ***Kishari Das (supra***), the petitioner's wife had approached this Court in a writ petition claiming family pension etc., which was disposed of directing the Inspector of Schools to verify the relevant records and to pass necessary order with regard to payment of the petitioner's dues. The petitioner thereafter submitted all relevant documents before the Inspector of Schools who verified the same and recommended her case to the Director, Elementary Education for sanction of the dues and to move the Government for regularization of the leave period of her deceased husband. No such exercise was done in the present case. In the case of ***Narahari Swain (supra)***, the petitioner therein had remained on medical leave for a period of five years and two days in support of which he had submitted medical certificate regarding his evidence to resume duties. Such is not the situation in the present case.

Thus, all the cases relied upon by the petitioner can be easily distinguished from the facts of the present case.

14. From the foregoing discussion, therefore, this Court is of the considered view that the petitioner had voluntarily abandoned his service for reasons best known to him. Moreover, his claim of having made attempts to re-join employment after recovery from his purported illness also appears to be far-fetched to be believed and in any case, is by itself a matter to be held against him for not having raised any grievance before the appropriate authority at the relevant time.

15. In view of the findings as above, the question of the petitioner being entitled to pension and other retiral benefits does not arise at all.

16. For the foregoing reasons therefore, this Court finds no merit in the writ petition, which is therefore, dismissed.

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**2023 (I) ILR - CUT-1118**

**SASHIKANTA MISHRA, J.**

CRLMC NO. 2940 OF 2022

**CHINTAN JOSHI** ..... Petitioner

-V-

**NIRANJAN BEHERA** .....Opp.Party

**CODE OF CRIMINAL PROCEDURE, 1973 – Section 205 – Dispensing with personal appearance – When can be granted ? – Held, the power under section 205 is not meant to be used routinely but only when circumstances so demand – Case law discussed.** (Para 15)

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

1. (2022) SCC OnLine Jhar 1248 : Sanjay Kumar Agarwal vs. Directorate of Enforcement.
2. (2001) 7 SCC 401 : Bhaskar Industries Ltd. vs. Bhiwani Denim & Apparels Ltd.
3. (1994) 2 SCC 39 : Lily Begum v. Joy Chandra Nagbanshi.
4. (2011) 2 SCC 772 : TGN Kumar v. State of Kerala.
5. (2005) 4 SCC 173 : S.V. Muzumdar v. Gujarat State Fertilizer Co. Ltd.
6. 2022 SCC OnLine SC 929 : Vijay Madanlal Choudhary v. Union of India.
7. (2018) 11 SCC 46 : Rohit Tandon v. Directorate of Enforcement.

For Petitioner : Mr. D.Panda, S.Panda, A.Mehta & D.K.Panda.

For Opp.Party : Mr. Gopal Agarwal (E.D.)

JUDGMENT Date of Judgment : 11.04.2023

***SASHIKANTA MISHRA, J.***

The petitioner is the accused in Crl. Misc. Case (PMLA) No. 01 of 2020 pending in the Court of learned Sessions Judge, Khurdha at Bhubaneswar.

2. It appears that originally an FIR was lodged by the CID, CB, Cuttack on 30.05.2017 leading to registration of Case No. 13 of 2017 basing on a search conducted in the residential premises of the petitioner on the allegation that he was engaged in procurement of large number of Monitor Lizard hemi-penises and trading of the same online. Upon completion of investigation, charge sheet was submitted on 28.02.2018 in the Court of learned S.D.J.M., Bhubaneswar for the offences under Sections 177/182/420 of IPC read with Section 51 of the Wildlife Protection Act, 1972. The Enforcement Directorate, Bhubaneswar found that the FIR and charge sheet submitted by the CID, CB made out a prima face case of money laundering under Section 3 of the Prevention of Money Laundering Act, 2002 (in short "PMLA Act") punishable under Section 4 of the Act. Accordingly, ECIR bearing No. ECIR/BBSZO/03/2018 dated 14.06.2018 was registered against the petitioner and investigation was taken up. In course of investigation, the residential premises of the petitioner were searched again and certain incriminating materials were allegedly recovered. It was further found that the said articles had

been procured by the petitioner from the proceeds of the crime of illegal possession and sale of Monitor Lizard hemi-penises and the same had been layered as movable properties in the form of bank balances in his name and in the name of his proprietorship concern. A provisional attachment order was made on 29.09.2019 and an original complaint has also been filed before the learned adjudicating authority, PMLA, New Delhi for confirmation of attachment of properties. On such facts, the aforementioned complaint was filed in the Court of learned Sessions Judge-cum-Special Court under the PMLA Act, Khordha, Bhubaneswar.

3. Pursuant to summons issued by the Court, the petitioner entered appearance through his counsel and filed a petition under Section 205 of Cr.P.C. seeking exemption from personal appearance and representation through his counsel. Such petition was filed, inter alia, on the ground that he is the only son of his old and ailing parents, who are undergoing treatment for various ailments and that he would not be prejudiced if the trial is conducted in his absence through his counsel. However, by order dated 16.08.2022, the Court below rejected the petition taking note of the fact that money laundering is an economic offence and Section 45 of the PMLA Act, 2002 is restrictive in nature. The said order is impugned in the present application filed under Section 482 of Cr.P.C.

4. Heard Mr. D. Panda, learned counsel for the petitioner and Mr. Gopal Agarwal, learned counsel appearing for the Enforcement Directorate, Bhubaneswar.

5. Mr. Panda submits that the petitioner is the only son of his old and ailing parents, who are suffering from several ailments and require constant medical attention. Further, the petitioner is ready and willing to appear before the Court physically whenever it is felt necessary for the case. He is also ready to undertake that he shall not dispute his identity at any point of time. It is also argued by Mr. Panda that Section 45 of PMLA Act, could not have been invoked by the Court below as a ground to reject the petition under Section 205 of Cr.P.C. because the total proceeds of the crime according to the prosecution is only Rs.3,19,100/-. Referring to the first proviso to Section 45 of the PMLA Act, Mr. Panda argues that the alleged proceeds of the crime being much less than Rs.1 Crore, the rigors of the provision would not apply. Even otherwise, the amount of proceeds being so less, the finding of the Court below that it being an economic offence would have an impact on the national economy and security is quite farfetched. Mr. Panda sums up his argument by contending that the prosecution never arrested him nor sought to take him to custody during investigation. He has been released on bail in the connected case and has never misused the liberty so granted. Mr. Panda has relied upon some decisions, which would be discussed later.

6. Mr. Gopal Agarwal, on the other hand has vehemently objected to the contentions advanced by Mr. Panda by submitting that the amount of money involved in an offence as serious as money laundering is not material. It does not

become a lesser offence only because the amount of money involved is less. Mr. Agarwal further argues that it is open to the petitioner to apply for bail by physically appearing before the Court but cannot invoke the provision under Section 205 of Cr.P.C. as a substitute for bail. It is also argued that the exemption from personal attendance is not a vested right conferred on the accused but is a matter within the exclusive discretion of the concerned Court. Moreover, such power is to be exercised not routinely but in rare cases only. The petitioner being a resident of Bhubaneswar, no hardship would be caused to him by physically appearing in the Court on the date of posting of the case. The petitioner's conduct in seeking repeated adjournments does not entitle him to any relief. Mr. Agarwal sums up his arguments by submitting that the nature of accusation, the severity of punishment likely to be imposed and conduct of accused do not entitle him to the benefit under Section 205 of Cr.P.C. Mr. Agarwal has also relied upon some decisions, which would be referred to later.

7. Before proceeding to determine whether it is a fit case to grant exemption to the petitioner from personal attendance in the Court under Section 205 of Cr.P.C., it would be proper to first examine the provision under Section 45 of the PMLA Act, which the Court below has cited as a ground to reject the petition filed by the petitioner and Mr. Agarwal has also relied upon before this Court. Section 45 of PMLA Act, reads as follows:

> *"45. Offences to be cognizable and non-bailable.—(1) 1 [Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence 2 [under this Act] shall be released on bail or on his own bond unless—]*
>
> *(i) the Public Prosecutor has been given a opportunity to oppose the application for such release; and*
>
> *(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail:*
>
> *Provided that a person, who, is under the age of sixteen years, or is a woman or is sick or infirm, 3 [or is accused either on his own or along with other co-accused of money-laundering a sum of less than one crore rupees] may be released on bail, if the Special Court so directs:*
>
> *Provided further that the Special Court shall not take cognizance of any offence punishable under section 4 except upon a complaint in writing made by—*
>
> *(i) the Director; or*
>
> *(ii) any officer of the Central Government or a State Government authorised in writing in this behalf by the Central Government by a general or special order made in this behalf by that Government.*
>
> *[(1A) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), or any other provision of this Act, no police officer shall investigate into an offence under this Act unless specifically authorised, by the Central Government by a general or special order, and, subject to such conditions as may be prescribed.]*

> *(2) The limitation on granting of bail specified in 5 *** sub-section (1) is in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail."*

8. From the copy of the complaint filed by the Asst. Director (PMLA), Bhubaneswar the role of the accused is stated as follows:

> *"He was involved in illegal possession and sale of Monitor Lizard hemi-penises (Hatha Jodi) and horns of some wild animals (Shiyar Singi) in contravention of Section 39 of the Wild Life (Protection) Act, 1972 which is punishable under Section 51 of the Act and being Schedule Offence under the PMLA, 2002, which are nothing but "proceeds of crime" which amount around to Rs.3,19,100/-. The proceeds of crime derived/obtained from such criminal activity is subsequently laundered by investing in movable properties (bank balances) and hence committed an offence under Section 3 of the PMLA which is punishable under Section 4 of the PMLA."*

Thus, essentially, the allegation against the petitioner is of obtaining Rs.3,19,100/- as proceeds of the crime and if subsequently laundering the same by investing movable properties (bank balance). From a reading of the provision under Section 45, it is evident that the same is not intended to place an absolute bar for granting bail to accused under the PMLA Act. Even otherwise, an exception to the main provision is carved out in the form of a proviso. Thus, having regard to the fact that the proceeds of the crime allegedly laundered by the petitioner being much less than Rs. 1 crore, it is evident that the rigors of Section 45 would not apply. This Court would of course hasten to add that the proviso as above does not however, water down the seriousness of the offence in any manner whatsoever.

9. Mr. D. Panda has relied upon several decisions, such as **Sanjay Kumar Agarwal vs. Directorate of Enforcement,** reported in (2022) SCC OnLine Jhar 1248 and the decision of the Apex Court in the case of **Bhaskar Industries Ltd. vs. Bhiwani Denim & Apparels Ltd.** reported in (2001) 7 SCC 401.

10. In the case of **Sanjay Kumar Agarwal** (supra), a Single Judge of the Patna High Court while considering a similar matter examined the position of law relating to Section 205 of Cr.P.C., the case of **Bhaskar Industries Ltd.** (supra) and Section 45 of PMLA Act. The Hon'ble Single Judge allowed the petition under Section 205 of Cr.P.C. with certain conditions.

In the case of **Bhaskar Industries Ltd.** (supra) the Apex Court summarized its findings as follows:

> *"**19.** The position, therefore, boils down to this: it is within the powers of a Magistrate and in his judicial discretion to dispense with the personal appearance of an accused either throughout or at any particular stage of such proceedings in a summons case, if the Magistrate finds that insistence of his personal presence would itself inflict enormous suffering or tribulations on him, and the comparative advantage would be less. Such discretion need be exercised only in rare instances where due to the far distance at which the accused resides or carries on business or on account of any physical or other good reasons the Magistrate feels that dispensing with the personal attendance of the accused would only*

> *be in the interests of justice. However, the Magistrate who grants such benefit to the accused must take the precautions enumerated above, as a matter of course. We may reiterate that when an accused makes an application to a Magistrate through his duly authorised counsel praying for affording the benefit of his personal presence being dispensed with the Magistrate can consider all aspects and pass appropriate orders thereon before proceeding further." (Emphasis supplied)*

Placing reliance on the decisions cited above, Mr. D. Panda would argue that Section 205 Cr.P.C. confers discretion on the Court to grant personal exemption if situation so warrants. In the instant case, summons was issued to the petitioner and not warrant and therefore, he did not submit himself to custody of the Court. Moreover, dispensing with personal appearance will not cause prejudice to anyone.

11. On the other hand, Mr. Gopal Agarwal has relied upon the decision of the apex Court in the case of **Lily Begum v. Joy Chandra Nagbanshi,** reported in (1994) 2 SCC 39; **TGN Kumar v. State of Kerala**, reported in (2011) 2 SCC 772; S.V. **Muzumdar v. Gujarat State Fertilizer Co. Ltd.**, reported in (2005) 4 SCC 173; **Vijay Madanlal Choudhary v. Union of India,** reported in 2022 SCC OnLine SC 929**;** and **Rohit Tandon v. Directorate of Enforcement,** reported in (2018) 11 SCC 46.

12. On the basis of the decisions cited above, Mr. Agarwal, firstly submits that economic offences or white collar crimes cannot be equated with other cases because of their wide ramifications such cases have on the economic security of the country. He further argues that the petitioner has not made out any case for exemption from personal appearance as he is a resident of Bhubaneswar and can easily attend the Court without adversely affecting his business. By insisting for personal appearance, the learned Special Court has given the petitioner an opportunity to seek bail by offering sureties and executing bonds by subjecting himself to the jurisdiction of the Court through a bond to the effect that he shall cooperate with trial by abiding by the conditions imposed by the Court.

13. Having heard the parties at length, this Court would like to examine whether a case for exemption from personal appearance is made out.

14. In **Bhaskar industries Ltd.** (supra) it was held that the discretion conferred by Section 205 of Cr.P.C. on the Court is to be used only in rare cases where personal appearance of the accused would cause great hardship on him. In particular, if the accused is residing at a far-off place or has any physical ailment or is otherwise indisposed, the prayer for exemption from personal attendance can be favourbaly considered. But such discretion is not to be exercised routinely or on the mere asking.

15. In the present case, the petitioner claims that he is the only son of his aged parents, who are ill and require constant attention. No document is filed in this regard. This Court finds that the petitioner is a relatively young man, aged about 38

years. He is a resident of Bhubaneswar and also has his business in Bhubaneswar. Therefore, attending the Court can by no stretch of imagination be treated as causing undue hardship on him. As already stated, the power under Section 205 is not meant to be used routinely but only when circumstances so demand. In view of what has been stated hereinbefore, this Court finds the circumstances not justifying exercise of such power by the Court. To such extent therefore, this Court finds no infirmity much less any illegality in the impugned order so as to interfere.

16. In the result, the CRLMC is found to be devoid of any merit and is therefore, dismissed.

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**2023 (I) ILR - CUT-1123**

**A.K. MOHAPATRA, J.**

CRLMP NO. 1361 OF 2019

**SANATAN MAHAKUD** ..... Petitioner

-V-

**STATE OF ODISHA** .....Opp.Party

**(A) CODE OF CRIMINAL PROCEDURE, 1973 – Section 102(3) – Offences under Section 467/ 468/ 471/ 420/ 385/ 386 read with Section 120-B of I.P.C. was alleged against the present petitioner alongwith others – The IO freeze the bank account without following the mandatory requirement/procedure prescribed under Section 102(3) – Effect of – Held, the freezing of the bank account by the concerned IO is unsustainable in law and accordingly quashed.** (Para 46)

**(B) CODE OF CRIMINAL PROCEDURE, 1973 – Section 102(3) – Duty of I.O – Discussed with case law.**

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

1. 2012 (6) SCC 760 : N.T Enrica Lexie and another vs. Doramma & Ors.
2. 265 (2019) DLT 651 : Mukta Ben M. Mashru Vs. State of NCT of Delhi.
3. 2008 SCC Online Orissa 475 : Agrani Export Pvt. Ltd. Vs. State of Odisha.
4. 1998 Criminal Law Journal 241 : Sworan Sabharwal vs. Commisioner of Police.
5. 2000 (1) OLR 377 : State of Maharashtra Vs. Tapas D. Neogy.
6. 2013 SCC Online Madra 2629 : T. Subbulakshmi Vs. the Commissioner of Police.
7. 2019 SCC Online Bombay 1412 : Manish Khandelwal Vs. State of Maharashtra.
8. 2008 Criminal Law Journal Bombay 148 : Sashikant D. Karnik Vs. State of Maharashtra.
9. AIR Online 2020 CHH 1211 : Shree Mahalaxmi Associates Vs. State of Chhatisgarh.

For Petitioner : Mr. D. Nayak, Sr. Adv.
Mr. R.K.Mahanta & Mr. M. Dhir.

For Opp.Party : Mr. D.K. Mishra, A.G.A.

JUDGMENT Date of Hearing : 22.12.2022 : Date of Judgment : 13.01.2023

***A.K. MOHAPATRA, J.***

1. Present proceeding under Article 226 and 227 of the Constitution of India has been initiated at the instance of the above named petitioner challenging the legality and propriety of order dated 29.08.2019 passed in Criminal Revision No.21 of 2019 by the learned Additional Sessions Judge, Champua whereby he has affirmed order dated 18.04.2019 passed by the learned J.M.F.C., Barbil in CMC No.54 of 2019 filed under Section 457 Cr.P.C.

2. The petitioner who is the ex-MLA of Champua Assembly Constituency in the State of Odisha has amassed a huge wealth by illegally money from the companies located in the District of Keonjhar and further it is alleged that such companies were paying money to the petitioner out of their Corporate Social Responsibility (CSR) Fund which is meant for carrying out developmental work in and around the locality where the mining operation of such companies are going on. On such allegation an FIR was lodged implicating the petitioner as an accused and in course of investigation the bank accounts of the petitioner and various entities/ enterprises/ companies/ firms belonging directly or indirectly to the petitioner have been freezed by the Investigating Officer. As a result of which the activities of the aforesaid concerns directly or indirectly belonging to the petitioner have either been affected adversely or come to a fault. Accordingly, the petitioner moved an application under Section 457 Cr.P.C. with a prayer before the learned J.M.F.C., Barbil to defreeze such accounts and to allow the banking operation in such accounts to continue. Such application under Section 457 Cr.P.C. having been rejected by the learned J.M.F.C., Barbil a revision was preferred before the learned Sessions Judge, Champua who has also dismissed the revision. Challenging the orders passed by the learned J.M.F.C., Barbil and affirmed by the learned Additional Sessions Judge, Champua in revision, the present application has been filed before this Court by invoking the jurisdiction of this Court under Article 227 of the Constitution of India.

3. The factual background of the present case, bereft of all unnecessary details, in a nutshell, is that one Balavadra Patra, IIC Bamebari PS lodged a report against the present petitioner and the same was registered as Bamebari PS Case No.161 of 2018 for alleged commission of offences under Section 467/ 468/ 471/ 420/ 385/ 386 read with Section 120-B of I.P.C. against the present petitioner and other accused persons. Corresponding to the aforesaid FIR, a G.R. Case No.714 of 2018 has also been initiated against the petitioner and others in the Court of learned J.M.F.C., Barbil. At the outset, this Court was informed that the investigation is still continuing and the final form has not been submitted. However, in course of investigation of the

aforesaid Bamebari PS Case, the Investigating Officer being influenced by external factors and in an arbitrary and unauthorised manner freezed the bank accounts in the name of the petitioner as well as many concerns where in the petitioner is either directly or indirectly involved as a owner thereof.

4. The FIR story, in gist, is that the informant who is a stranger and is in no way connected with the mining operation/ organisation/ transportation lodged the FIR alleging that the petitioner has illegally extracted money although the informant did not have any personal knowledge about the same. In the FIR it is further alleged that the villagers of Dabuna, Purunadihi, Khajuridihi & Katupali under Badakalimati GP of Bamebari PS have contributed their lands to ESSAR Steel India Ltd. It is further alleged that the present petitioner who was then the MLA of Champua is a very influential man of locality, accordingly, entered into an illegal contract with the above named company in the year, 2013. Further, the company was given an impression that unless they agree to the terms of the petitioner, the company will not be allowed to carry on its activities in the locality. As the petitioner had engineered series of blockade/ dharana/ band/ gherau etc. by motivating the local people against the company. As a result of which, the above named company being aggrieved by the illegal demands made by the petitioner and pursuant to the illegal agreement paid a huge sum of money running into several crores of rupees to the village committee constituted by the present petitioner for the so called welfare of the villagers.

5. It is also alleged in the FIR that along with the petitioner one Raj Kishor Barik, Bibhisana Behera, Narahari Naik & Kunu Penthei singed the agreement with the company. It is also alleged that the money which was paid by the company for the welfare of the local people reached the pockets of the above named people and a major chunk of such money was going to the pocket of the present petitioner. By means of such illegal money the petitioner was managing to organizing a gang of goons locally known as “Sana Sena”. Furthermore, the aforesaid illegal money was being distributed by the petitioner to the members of “Sana Sena”. However, the rest of the villagers who were not with the Sana Sena, did not get any money. Accordingly, it is alleged that the persons who were with Sana Sena and it’s sympathizers used to get money where as no developmental work was being carried out in the locality out of the fund so received by the petitioner.

6. Finally, it is alleged that the present petitioner not only takes money from ESSAR Steel India Ltd. but almost from all other companies associated with mining activities in the locality and in return the petitioner had given assurance to such companies that there will be no blockade/ band/ protest/ dharana in their respective mines. In case any company refuses to pay money to the petitioner, the petitioner with the help of his Sana Sena and hired people of the locality used to make sure that the mining activities of the company comes to a stand steel. Additionally, it is alleged that the petitioner used to take commission from all the transporters and truck owners whose vehicles are involved in transporting the minerals. The petitioner

was also forcing some of the companies to show some of the Sana Sena employees as nominal employees of their company and to pay them the salary. Furthermore, the companies were being compelled to award contracts in favour of persons who belong to Sana Sena. In the process, the petitioner and his henchman have accumulated huge wealth in shape of bank balance, landed properties, houses, benami properties etc. at different places. Therefore, the informant namely one Balabhadra Patra has lodged the FIR on behalf of the villagers of the above noted four villages who have suffered a lot financially and in the hands of Sana Sena. Accordingly, the FIR was registered by the IIC, Bamebari PS for commission of cognizable offences under Section 467/ 468/ 471/ 420/ 506/ 385/ 386/ 120-B IPC and accordingly Bamebari PS case No.161 of 2019 was registered and the SI namely PK Mohanty was asked to take up the investigation.

7. Heard Shri Dharanidhar Nayak, learned Senior Counsel along with Mr. RK Mohanta Advocate and Mr. Manish Dhir Advocate for the petitioner and Shri DK Mishra, leaned Additional Government Advocate for the opposite parties. Perused the Case Diary, statement of the witnesses and the materials placed before this Court for consideration.

8. Mr. DD Nayak, learned Senior Counsel appearing for the petitioner at the outset attacked the very initiation of the proceedings and registration of the FIR on the ground that the petitioner is in noway connected with the alleged occurrence and further it is submitted that as per the admission of the petitioner he has lodged the FIR in his representative capacity in respect of four villages. It is further submitted that the petitioner is not directly affected by the alleged commission of crime. Therefore, the petitioner could be termed as no less than a busy-body and accordingly, the FIR at his instance should not have been registered by the local police. It is further submitted by Mr. Nayak that the present case is an outcome of political rivalry between the petitioner and the present ruling dispensation. To substantiate the said allegation, Mr. Nayak learned Senior Counsel, further submitted that the petitioner became an MLA of Champua as an independent candidate. Since, he is not cooperating with the present political dispensation, he has been falsely implicated in a criminal case by making vague, baseless and false allegations against him. It is further submitted by Mr. Nayak that pursuant to registration of the criminal case by falsely implicating the petitioner, the IO of the case has freezed almost all the bank accounts of the petitioner which has resulted in closure of all business activities carried out by the petitioner in the locality. The learned Senior Counsel, at the outset, argues that the conduct of the opposite party-State is violating the petitioner's fundamental right as has been guaranteed under Article 19 and 21 of the Constitution of India. Apart from that he also argued that a law abiding citizen of the country is being victimized by the mighty State and its machineries and the petitioner is being illegally prevented to carry on his business activities in the locality in a lawful manner.

9. It is further contended by Mr. Nayak, learned Senior Counsel for the petitioner that although serious allegations were made against the petitioner, however, so far the opposite parties have failed to bring on record any clinching material in their endeavor to establish the allegations made against the present petitioner. The very purpose of registering a false case on vague and baseless allegation was to freeze the bank accounts of the petitioner and to attach his properties so that the petitioner would yield to the pressure created by the local administration. He further submitted that although allegation of illegal extraction of money has been made, however in the FIR neither the money has been quantified nor the details of such money and bank accounts have been given. In such view of the matter, it is further contended that the nature of allegation in the FIR without any specific details gives all the more reason to believe that the petitioner is being victimized in the hands of the mighty state and the law and order machinery.

10. It is also submitted by the learned Senior Counsel appearing for the petitioner that earlier the petitioner approached this Court by filing an application under Section 482 Cr.P.C. for quashing of the FIR which was registered as CRLMC No.148 of 2019. After hearing the learned counsels for the respective parties this Court was initially pleased to issue notice to the informant and the said case is stated to be pending before this Court for final adjudication. Further, in I.A. No.116 of 2019 filed along with the application under Section 482 Cr.P.C., this Court was also pleased to direct that as an interim measure, it is directed that no coercive action shall be taken against the petitioner pursuant to Bamebari PS Case No.161 of 2018 corresponding to G.R. Case No.714 of 2018 pending in the Court of learned J.M.F.C., Barbil till the next date.

11. In the said I.A., this Court further observed "it is stated by Mr. H.S.Mishra, learned counsel for the petitioner that the petitioner's two bank accounts have been seized illegally and which has no nexus to the aforesaid case. In such premises, it is directed that if the petitioner files a petition ventilating the aforesaid grievance with a prayer for release of the amount before the learned Magistrate concerned under Section 457 Cr.P.C., the learned Magistrate shall do well by calling for the report from the police station and dispose of the same within 10 days of filing of the same in accordance with law."

12. Pursuant to the direction of this Court as has been indicated in the preceding paragraph, the petitioner filed an application under Section 457 Cr.P.C. before the learned J.M.F.C., Barbil on 09.04.2019. A report was also called for from the concerned police station. However, it is alleged that the IO has submitted an evasive report and basing upon such evasive report the learned Magistrate was not inclined to consider the application of the petitioner under Section 457 Cr.P.C. and by order dated 18.04.2019 rejected the application of the petitioner under Section 457 Cr.P.C.

13. Challenging order dated 18.04.2019 passed by the learned J.M.F.C., Barbil the petitioner approached the Additional Sessions Judge, Champua by filling Criminal Revision No.17 of 2019. However, the same was withdrawn in order to move an interlocutory application in the 482 application bearing CRLMC No.140 of 2019 pending before this Court. Accordingly, I.A. No.116 of 2019 was filed by the petitioner. This Court vide order dated 17.05.2019 dispose of the I.A. by directing the learned Trial Court to defreeze the account bearing No.5401101100008822 standing in the name of the petitioner in Bank of India, Joda Branch and further granted liberty to the petitioner to move a criminal revision challenging order of learned J.M.F.C., Barbil refusing to defreeze the other bank accounts.

14. In view of the order passed by this Court on 17.05.2019 in I.A. No.116 of 2019, the petitioner approached the Revisional Court by filing criminal revision No.21 of 2019. On 29.08.2019, the learned Court of Additional Sessions Judge, Champua, was pleased to reject the same on the ground that the petitioner could not file any document to show that the account at Serial No.1 is a loan account and other accounts against Serial Nos.3 to 9 since the investigation is still in progress and as such defreezing the said accounts may hamper the investigation of the case. Challenging the legality and propriety of order dated 29.08.2019, the present application under Article 226 and 227 of the Constitution of India have been filed by the petitioner before this Court.

15. It is submitted by Mr. Nayak learned Senior Counsel appearing for the petitioner that although four years have passed in the meantime since the date of lodging of FIR, the investigation has not progressed substantially and the IO is yet to file the final form. He further submits that so far the prosecution has not been able to substantiate the allegations made in the FIR. Important witnesses like the officials of the companies involved in the mining operation have not yet been examined by the IO. Further, it is alleged by learned Senior Counsel for the petitioner that the prosecution has shifted the burden of proof to the accused persons to the extent that the accused persons are being pressurized to disclose the source of money lying in their bank accounts and the accused persons have also been asked to prove that they are innocent as if the entire onus is on them to prove that they are not involved in the alleged crime as is the case in some of the special statutes where the onus is on the defense to prove that the accused is not guilty of the alleged offences. In this regard, Mr. Nayak further submitted that the allegation made in the FIR are in respect of commission of offences punishable under the IPC and such offences are to be tried under the Cr.P.C. by the regular Criminal Court. Therefore, the approach of the prosecution as well as the IO by insisting upon the petitioner to produce evidence by disclosing the source of income of the money which are lying in the bank accounts and thereby entirely shifting the onus to the defense/ accused person such as is approached entirely a wrong approach adopted by the prosecution in the present case. He further alleges that the prosecution has adopted such a method, as they are

very well aware of the fact that there is no material against the petitioner and the prosecution has not been able to gather any clinching evidence against the petitioner in course of investigation which is continuing for almost four years as of now. Under such circumstances, Mr. Nayak learned Senior Counsel appearing for the accused/petitioner went to the extent of saying that the petitioner is being victimized because of the political rivalry and he has been falsely implicated in the present case by registering a false and baseless FIR against the petitioner.

16. So far, the bank accounts which have been freezed in course of investigation are concerned, it is submitted by the leaned Senior Counsel appearing for the petitioner that there is no basis and as of now no material has been collected to continue with the freezing of the bank accounts which lawfully belong to the petitioner. In the said context, it was further argued that the petitioner is carrying on lawful business activities and he is an Income Tax Assessee and most of his accounts are being statutorily audited by the Chattered Accountants. It is only with the intention to paralyse the business activities of the petitioner, the present criminal case has been registered falsely implicating the petitioner. He further contended that the learned Courts below while considering the application under Section 457 Cr.P.C. have not consider the same in its proper prospective and have miserably failed to apply the law as has been provided in the Cr.P.C. Further, it is alleged that the learned courts below have also failed to appreciate the fact that there exists no material to co-relate the bank accounts of the petitioner in the alleged crime. At least the prosecution has not been able to make out a case whereby it can at least be said that there is some suspicion or doubt that the money kept in the freezed bank accounts were derived from the allegations made in the FIR.

17. Mr. Nayak, learned Senior Counsel further contended that the petitioner was not given any intimation whatsoever by the IO regarding freezing of the bank accounts, nor any seizure list has been provided to the petitioner. The petitioner came to know about the freezing of the bank account from his banker when he attempted to make some legitimate payments from such bank accounts.

18. Learned counsel for the petitioner further submitted that the exact amount of money alleged to have been received by the petitioner and deposited in his account has not yet been quantified, on the contrary only bald statements have been made in the FIR with regard to alleged illegal extraction of money from the companies. In that context, he also submits that none of the companies have come forward to lodge an FIR alleging that the petitioner who was the local MLA then, by misusing his position and exercising his influence has ever threatened them to pay any amount either to the petitioner or to any of his business concerns. These aspects of the matter although raised before the learned Court below have not been considered at all.

19. So far the freezed bank accounts are concerned the details of which has been given under Annexure-4 to the application, it is stated by learned counsel for the

petitioner that the account at serial No.2 reflects the money received by availing a loan. The freezed bank account at Serial No.3 reflects the money belonging to Jagat Janani Service Private Ltd., a private ltd. company, carrying on legitimate transport business. Therefore, the income derived from such business are kept in bank account and accumulated by legal means and the same has no nexus with the alleged offence in the FIR.

20. With regard to the freezed bank accounts against Serial Nos.4, 6, 7 & 9, it is stated that these accounts belong to partnership farms carrying on the business of transporting, loading and leveling of minerals and that the money deposited in such accounts are derived from a legitimate business operation. Therefore, such accounts have no nexus with the alleged crime and the same has not been properly appreciated by the learned Courts below while rejecting the application of the petitioner under Section 457 of Cr.P.C.

21. So far the freezed bank accounts against serial No.5 and 10 are concerned, it was contended that such accounts belong to charitable trust rendering services in various ways to the needy people in the locality. It is also contended that the said trust used to collect donation from transporting farms namely Jagat Janani Services Pvt. Ltd., Maa Kuanri Transport, Jagat Janani Services & Chaturvuja Development Committee. Contributions made to this charitable trust are from legitimate transport business. However, the IO has not investigated into that aspect of the matter and deliberately remained silent over the matter and made an attempt to suppress material information to mislead the Court and to give an impression that the petitioner has accumulated money by adopting illegal means. It is further contended that since the accounts of the charitable trust have been freezed, the poor and needy people of the locality are unable to get any help in case of emergency.

22. The freezed bank account shown against serial No.8 stands in the name of the petitioner and the petitioner used to deposit money from his personal income and the total amount shown therein includes the interest income. Therefore, the same has no nexus with the alleged crime. With regard to the freezed bank accounts at serial No.10 to 15, it was submitted that those accounts were earlier freezed in connection with Keonjar Sadar PS Case No.12 of 2018, however, the IO in the present case without considering the said aspect has again freezed those accounts in connection with the present case.

23. Finally, with regard to the point of law involved in the present case, Mr. Nayak learned Senior Counsel appearing for the petitioner would argue that the conduct of the IO in the present case is in violation of Section 103 (3) of Cr.P.C. as because after freezing the bank accounts, the IO is required to intimate said fact to the Court in seisin of the matter i.e. J.M.F.C., Barbil. However, the same is not the case here. Further, no intimation whatsoever was given to the petitioner with regard to freeze of the bank account. The petitioner came to know about the same subsequently

from his banker. Therefore, it was argued that the IO having not followed the procedure of Section 102 Cr.P.C. in the instant case, his conduct in frezzing the bank accounts belonging to the petitioner is illegal, arbitrary and in violation of law as contained in Section 102 of Cr.P.C.

24. Mr. Nayak, learned Senior Counsel further contended that the bank account of a person is his property within meaning of Section 102 Cr.P.C., thus freezing of such accounts debar the account holder to operate the said account and as such a lawful owner of the account has been prohibited to operate the account lawfully which he is otherwise entitled to. It is also contended that in the event the IO is of the opinion that seizure of the property is required in course of investigation and on the basis of the suspicion that such accounts have a nexus with the commission of alleged crimes, then he shall forthwith report the seizure to the local magistrate having jurisdiction over the matter. Such a provision of law as contained in Cr.P.C. is not only mandatory in nature, but the same is also intended to prohibit any arbitrary action by the IO in course of investigation and further the affected person shall also get an opportunity to approach the competent court for redressal of his grievance. Although such a point was raised before the learned courts below, however, the same has not been considered in its proper perspective by analyzing the law applicable to the facts of the present case. Therefore, the Mr. Nayak contended that compliance of the provision contained under Section 102 Cr.P.C. is mandatory in nature and any violation of such provision would vitiate the investigation and subsequent conduct of the IO and accordingly Mr. Nayak sought for the intervention of this Court in the present matter to prevent any abuse of process of law.

25. Per contra, Mr. D.K. Mishra, learned Addl. Government Advocate supported order dated 18.04.2019 passed in CMC No.54 of 2019, rejecting the petitioner's application under Section 457 Cr.P.C. He also defended and supported order dated 29.08.2019 passed in Criminal Revision No.21 of 2019 by the Additional Sessions Judge, Champua confirming order dated 18.04.2019 passed by learned J.M.F.C., Barbil. It is submitted by Mr. Mishra that serious allegation have been made against the petitioner in the FIR which includes serious allegation in the nature of extracting money from the industrial houses by threatening them of strike/ band/ gherau / agitation etc. against the companies which are involved in the mining operation. It is alleged by Mr. Mishra that the present petitioner who is a former MLA is a local strongman. Local people are afraid of him. Industrial houses operating in the locality are also afraid of the present petitioner and to avoid disruption in the mining activity at the instance of the present petitioner such companies are paying a huge sum of money regularly to the petitioner. It is further contended by Mr. Mishra that no doubt the FIR has been filed by a local resident, however, the affected companies, out of fear, are not coming forward to register FIR against the present petitioner. Further, in course of investigation some of the highly

placed employees of such companies have already deposed against the present petitioner and against his misdeeds. Mr. Mishra further contended that the investigation of the case is still on. He further submitted that in course of such investigation the petitioner has been requested on several occasions to explain the sources of money lying in the freezed bank accounts, however, the petitioner has not been able to explain the same as of now. Therefore, the delay in conclusion of the investigation is solely due to non-cooperation in the investigation by the petitioner.

26. Mr. Mishra further argued that in course of investigation statement of the witnesses have been recorded under 164 Cr.P.C. Such witnesses namely Santan Barik, Balabhadra Patra and one Kulamani Mohanty have corroborated the allegation made in the FIR with regard to illegal transaction and the allegation with regard to extortion of huge amount of money from different companies by a group called Sana Sena. He further contended that statement of some witnesses recorded under 161 Cr.P.C., FIR, seizure list etc. are corroborating to each other in respect of the allegation made by the prosecution. Mr. Mishra further argued that innocent villagers living in village Dumuna, Purunadihi, Khajuridihi and Katupali coming under one Grama Panchayat and those who have contributed their land for establishment of the companies are all innocent persons of the locality and they have been exploited by the present petitioner. He further alleges that the petitioner in the name of paying money to the persons who have contributed land and for overall development of such villages, has been receiving a huge amount of money on regular basis from such companies. Companies have, however, in said of utilizing the money for development and paying the same to the actual beneficiaries, the petitioner has misappropriated the same and the money has been kept in the freezed bank accounts.

27. Learned Addl. Government Advocate also argued that the present petitioner who is a strongman of the locality has formed a group known as Sana Sena" and the said group who are none other than the supporters of the present petitioners has threatened and terrorized the companies and its employees and as such they have been extracting the money from such companies over the years. In such view of the matter, learned Addl. Government Advocate submits that the petitioner has not only committed the alleged crime, he is also involved in organizing the crime by becoming a party to a criminal conspiracy. He further contented that the offences under Section 467 IPC deals with forgery of valuable security which is punishable with imprisonment for life or imprisonment for 10 years similarly, the alleged offences under Section 468 and 420 IPC are also punishable with imprisonment for 7 years and fine. Further, it was contented that for illegal extortion of money, the petitioner has been charged under Section 386 of IPC which is punishable with imprisonment for a period of 10 years and fine. Thus, it is submitted that the nature of allegation against the petitioners are very serious in nature.

28. Mr. Mishra would also argue that on a cogent reading of FIR, 164 statements and other relevant documents a clear case is made out against the petitioner under the alleged sections. Furthermore, it is also alleged by the learned Addl. Government Advocate for the State that the petitioner who is a monied man with muscle power has raised an illegal outfit comprising a large number of paid anti socials and goons styled as Sana Sena and with the help of such an illegal outfit, the petitioner has been successfully extorting money from different companies by threatening them.

29. Mr. Mishra, further contended that the petitioner is not cooperating with the investigation and despite several reminders he has not been able to produce documents to establish the source of income of the money lying in the frezeed bank accounts and in the said context Mr. Mishra also referred to the impugned rejection order dated 18.04.2019 wherein the court below has also observed that the petitioner has failed to produce supporting documents to substantiate his claim with regard to the ownership of money lying in the freezed bank accounts. He further submitted that during the pendency of the present application this court also directed and gave opportunity to the petitioner to produce the relevant documents. Further, referring to order dated 06.09.2022 Mr. Mishra submitted that this Court directed the petitioner to appear before the IO on 23.07.2022 and to produce all the relevant documents/records in support of his claim and the IO was directed to remain present of the PS and to consider the case of the petitioner. This Court also granted liberty to the IO to summon the petitioner again if the appearance of the petitioner is further required. This Court also directed that on the first date of appearance the IO shall hand over a list of documents to the petitioner which the IO wants to examine in addition to documents to be voluntarily submitted by the petitioner for examination by the IO. In the said context Mr. Mishra submitted that although the petitioner appeared, but he has not submitted all the required documents.

30. Countering the aforesaid allegation made by Mr. Mishra, Mr. D.D. Nayak learned Senior Counsel appearing for the petitioner submitted that the documents sought for by the IO have been submitted earlier. Further, the same was again resubmitted pursuant to the direction of this Court. In course of his argument Mr. Mishra also referred to some of the judgments of the Hon'ble Supreme Court. Further, upon a perusal of the impugned order this Court observed that the same has been referred to by the learned Trial Court in the context of the gravity of offence. On a perusal of record this Court also examined affidavit dated 21.06.2022 filed by the Inspector-in-Charge Bamebari PS. In the said affidavit while reiterating the allegation made against the petitioner, the inspector-in-charge has further submitted that in view of Binod Kumar Ramachandran Vs. State of Maharashtra decided on 18.03.2021 in Criminal Application No.4376 of 2009 that under Section 102 Cr.P.C. it is not required to issue any notice to a person before or simultaneously while attaching the bank accounts. On the contrary, the IO had sent requisition to different

banks to freeze the bank accounts in order to prevent the petitioner to get involved in the money trial. In the said affidavit it has also been stated that although the petitioner has accumulated a huge amount of money and using such money without proper utilization certificate and that the freezed bank accounts are being used to transfer illegally acquired money. Therefore, the money kept in the freezed bank account are required to be verified to ascertain the inflow and outflow of money to the said bank accounts. The IO has further reiterated the need to investigate into several freezed bank accounts in connection with the present crime.

31. Mr. Nayak, lerned Senior Counsel appearing for the petitioner while repelling the allegation made by the learned Addl. Government Advocate submitted that pursuant to order dated 06.09.2022, the petitioner received a notice from the IIC, Bamebari PS on 10.09.2022 and again 19.09.2022. Further, pursuant to notice under Sectioin 15 Cr.P.C. dated 28.09.2022 issued by the IIC Bamebari PS clearly indicating therein the documents required to be filed by the petitioner, the petitioner appeared before the IIC and submitted all relevant documents in his possession. Further, vide his Regd. Letter dated 04.10.2022 written by the petitioner to the IIC of Bamebari PS which was sent through regd. Post, a copy of which has already been filed before this court and the same is taken on record, wherein the petitioner has categorically stated about his appearance before the IO on different dates. In his letter dated 04.10.2022 the petitioner has also stated about the documents sought for by the IIC vide his letter dated 23.09.2022 and that such documents have already been filed before the IIC for his consideration. In the said letter the petitioner has also categorically stated that he is involved in the business of transporting, raising and loading of iron ores, fines and manganese ores. It has also been clearly stated that the petitioner does not have any agreement whatsoever with ESSAR Steel and other companies and that the CSR funds of such companies are being utilized by those companies and the petitioner has nothing to do with the utilization of CSR funds by such companies. The petitioner has also informed the IIC that he is an income tax assessee and that he has filed his annual tax statements for perusal by the IO in this case. However, the learned Addl. Government Advocate disputed the fact that the petitioner has submitted all the required documents as requested by the IO in this case.

32. At this juncture, it would be apt to mention here that some of the bank accounts of the petitioner were also freezed in connection with Keonjhar, Sadar PS case No.12 dated 12.01.2018. Applications were filed by the petitioners were in the present petitioner and directly or indirectly associated with the learned Court below rejecting the application under Section 457 filed by such petitioners in connection with Keonjhar Sadar PS case registered for commission of offence under Sections 143, 148, 351, 283, 294, 506, 149 IPC read with Section 7 of the Criminal Law Amendment Act. Since separate applications were filed for defreezing the bank accounts and the same were rejected, the petitioner in those cases approach this Court

by filing Criminal Revision No.245 of 2022 by Maa Kuanri Transport, Criminal Revision No.244 of 2022 by Chaturvuja Development Committee, Criminal Revision No.246 of 2022 by Jagat janani Services Pvt. Ltd. Criminal Revision No247 of 2022 by the present petitioner and Criminal Revision No.248 of 2022 by Jagat Janani Services. All these criminal revisions were taken up for hearing by a coordinate bench of this Court. The coordinate bench vide common judgment date 08.12.2022 disposed of all the revisions by holding that the impugned order passed by learned S.D.J.M., Keonjhar in rejecting the application filed by the petitioner under Section 457 Cr.P.C. to defreeze the bank accounts cannot be sustained in the eye of law and the same is therefore set aside and further learned S.D.J.M. was directed to pass necessary orders directing defreezing of the seized bank accounts without any further delay. Consequently, it was also directed that the petitioner shall not be required to comply with the notice dated 29.09.2022 issued by the IIC of Sadar PS Keonjhar under Section 91 Cr.P.C. Accordingly, all the criminal revisions were disposed of.

33. On a perusal of the facts involved in the above noted criminal revisions this Court is of the considered view that the same is somewhat similar to the facts of the present case. Further, the point of law that was required to be determined in the above noted criminal revisions is almost identical to the point of law involved in the present case i.e. interpretation of Section 102 Cr.P.C. and the applicability of such provision to the facts of the present case. With regard to the interpretation and applicability of Section 102 Cr.P.C., the coordinate bench in the above noted criminal revisions came to clear and cogent conclusion that Section 102 (3) of Cr.P.C. mandates that the police officer seizing the property is obliged to report such seizure to the concerned magistrate and since such requirement was not followed by the Keonjar Sadar PS in the above noted criminal revisions, the requirement of statute have not been complied with inasmuch as the fact of seizure of bank accounts were not reported to the magistrate so as to allow him to give custody thereof to any person and it is only on the basis of a report called for by the SDJM, the IO disclosed the fact of the seizure and submitted the same is required for the purpose of investigation.

34. Further, the coordinate bench accepted the view that the magistrate in question could not have rejected the prayer of the petitioner without considering whether there was compliance of the provisions contained in Section 102(3) of Cr.P.C. and vide impugned order held that the requirement under sub-Section 3 of Section 102 to report the seizure property of to the magistrate is a mandatory one. Although Mr. Mishra leanred counsel for the state submitted that the facts involved in the revisions referred to hereinabove are different, this Court upon a careful examination is of the view that the allegations are pertaining to the same person and his concers/ companies/ trust etc. However, substances of the allegation in both the cases are similar. Further, the point of law involved in both the cases are identical

and more particularly, the conduct of the Investigating Officer while freezing the bank accounts are almost similar. The cases arising out of Sadar PS case as well as the present case involved the impugned action of the IO in freezing the bank accounts of the petitioner without following the provisions contained under section 102 Cr.P.C. scrupulously. On a close scrutiny, this Court is also of the considered view that the action taken by the IO in Keonjar, PS case as well as the present case (Bamebari PS Case) are somewhat similar and both relates to the action taken under Section 102 Cr.P.C.

35. Moving on to the next question and the most pertinent question which has also been dealt by the coordinate benchg in the above noted revision application is that the action. In the present case while freezing the bank account by taking recourse to Section 102 Cr.P.C. before examining the said provision. At this juncture, it would be appropriate to extract the provisions of "Section 102 Cr.P.C".

> **Power of police officer to seize certain property**.-(1) Any police officer may seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the commission of any offence.
>
> (2) Such police officer, if subordinate to the officer in charge of a police station, shall forthwith report the seizure to that officer.
>
> (3) Every police officer acting under sub-section (1) shall forthwith report the seizure to the Magistrate having jurisdiction and where the property seized is such that it cannot be conveniently transported to the Court or where there is difficulty in securing proper accommodation for the custody of such property, or where the continued retention of the property in police custody may not be considered necessary for the purpose of investigation he may give custody thereof to any person on his executing a bond undertaking to produce the property before the Court as to the disposal of the same:
>
> Provided that where the property seized under sub-section (1) is subject to speedy and natural decay and if the person entitled to the possession of such property is unknown or absent and the value of such property is less than five hundred rupees, it may forthwith be sold by auction under the orders of the Superintendent of Police and the provisions of sections 457 and 458 shall, as nearly as may be practicable, apply to the net proceeds of such sale.

36. Mr. Nayak leaned Senior Counsel for the petitioner at this stage submitted that the petitioner is not aware of the bank accounts which have been freezed by the IO in connection with Bamebari PS case. No intimation whatsoever was given to the petitioner by the IO. He further submitted that no such intimation/report was given to the Court with regard to freezing of bank accounts of the petitioner. Therefore, it was contended by learned Senior Counsel for the petitioner that the petitioner is still in darkness with regard to those bank accounts which have been freezed in connection with the present case. He further contended that the conduct of the IO in frezzing bank accounts by taking resort to Section 102 Cr.P.C. is absolutely illegal and arbitrary. It is further contended that the bank account is a property that belong to the petitioner therefore, the petitioner who is the lawful owner of the bank accounts has been deprived of ownership and enjoyment of such property without any sanction of law and contrary to the provisions contained under article 300-A of

the Constitution of India. Therefore, Mr. Nayak contended that the action of the IO is in violation of Article 19, 21 and 300-A of the Constitution of India and as such the same is unsustainable in law.

37. So far, Section 102 Cr.P.C. is concerned learned Senior Counsel for the petitioner relying upon a judgment of the Hon'ble Supreme Court in **N.T Enrica Lexie and another vs. Doramma and others** reported in **2012 6 SCC page-760** submitted that the police officer in course of investigation can seize any property under Section 102 if such property is alleged to have been stolen or is suspected to have been stolen or is the object of the crime under investigation or has direct link with the commission of offence for which the police officer is investigating into. It has also been held by the Hon'ble Supreme Court that a property not suspected of commission of the offence which is being investigated into by the police officer cannot be seized and that under Section 102 of the Court, the police officer can only seize such property which is covered by Section 102 (1) and no other property.

38. Similarly, referring to judgments of the Delhi High Court in **Mukta Ben M. Mashru Vs. State of NCT of Delhi** reported in **265 (2019) DLT 651**, it was submitted that the Hon'ble Delhi High Court in an identical scenario under Section 102 Cr.P.C. came to a conclusion that reporting of the freezing of bank accounts is mandatory and further failure to do so, apart from other conditions, will vitiate the freezing of bank accounts as non-compliance of such mandatory requirement goes to the root of the matter. Therefore, it was further held if there is any violation in following the procedure under Section 102 Cr.P.C. the freezing of the bank accounts is unsustainable in law.

39. In **Agrani Export Pvt. Ltd. Vs. State of Odisha** reported in **2008 SCC Online Orissa 475**, this Court had an occasion to examine the provision contained in Section 102 of Cr.P.C. and it was held that Section 102 Cr.P.C. requires that the property seized and frozen must be either stolen property or it should have been found to have close nexus with the alleged offence which is under investigation by the concerned police officer.

40. Mr. Nayak learned Senior counsel further reffering to a case in **Sworan Sabharwal vs. Commisioner of Police** reported in **1998 Criminal Law Journal 241** submitted that the Delhi High Court while examining Section 102 Cr.P.C. in the context of seizure of bank account help that the police officer should have done two things; he should have informed the concerned magistrate forthwith regarding the prohibitory order and; he should have also given notice of the seizure to the petitioner and allowed her to operate the bank account subject to her executing a bond/ undertaking to produce the amounts in court as and when required or to hold them subject to such orders as the court may make regarding the disposal of the same.

41. Mr. Nayak also referred to a judgment of the Hon'ble Supreme Court in **State of Maharashtra Vs. Tapas D. Neogy 2000(1) OLR 377** submitted that the Hon'ble Supreme Court while considering Section 102 Cr.P.C. held that the bank account of the accused or any of his relation is "property" within the meaning of Section 102 of the Criminal Procedure Code and the police officer in course of investigation can seize or prohibit operation of the said account if such assets have direct links with the commission of offence for which the police officer is investigating into.

42. In **T. Subbulakshmi Vs. the Commissioner of Police** reported in **2013 SCC Online Madra 2629**, the Madra High Court taking into consideration the law laid down by the Hon'ble Supreme Court in Tapas D. Neogy's Case (supra) held that the bank account will come within the meaning of the property mention under Section 102 of Cr.P.C. and that there cannot be two different yardsticks in following the procedures to seize the property one for a bank account and another for other than the bank account. Hence the Madras High Court went on to hold that the freezing of the bank account has been done only as per the procedure laid down under Section 102 (3) of Cr.P.C. and futher observed that they are not inclined to accept the submission made by the public prosecutor that the reporting of seizure to the magistrate will not apply to the bank account. Further, in the aforesaid judgment of the Hon'ble Madras high Court it was also held that Section 102 (3) Cr.P.C. requires the reporting of seizure of the property to the concerned Magistrate forthwith, which is mandatory in nature and moreover the freezing of bank account is an act of the investigation and therefore , the duty is cast upon the investigating officer under Section 102 (3) Cr.P.C. to report the same to the magistrate, since the freezeing of the bank account prevents the person from operating the bank account pursuant to an investigation by the police in a criminal case registered against him and further held that if there is any violation in following the procedure under Section 102 Cr.P.C., the conduct of I.O. in freezing bank account cannot be legally sustained and thereafter the Hon'ble Madras High Court went on to hold that since the seizure of the bank account have not been reported to the concerned magistrate the same amounts to violation of the mandatory provisions and as such the conduct of the police officer in freezing the petitioner's bank accounts are not legally sustainable.

43. In another decision i.e. in **Manish Khandelwal Vs. State of Maharashtra** reported in **2019 SCC Online Bombay 1412**, somewhat similar view has also been taken by the Hon'ble Bombay High Court and after coming to a conclusion the freezing of the bank account by the IO was not informed to either the petitioner or reported to the leanred magistrate which is a mandatory requirement under Section 102 (3) Cr.P.C. and further the freezing of bank account is an act of investigating officer/agency and therefore a duty is cast upon the IO under sub Section 3 of Section 102 of Cr.P.C. to report the same to the leaned magistrate having jurisdiction over the matter.

44. In **Sashikant D. Karnik Vs. State of Maharashtra** reported in **2008 Criminal Law Journal Bombay 148**, the Hon'ble Bombay High Court while considering the provisions of Section 102 Cr.P.C. held that Section 102 (3) of Cr.P.C. mandates that every police officer acting under sub Section 1 shall forthwith report the seizure or attachment of accounts to the magistrate having jurisdiction. Admittedly, the same was not done in the reported case. Therefore, it was held by the Hon'ble Bombay High Court that the provisions of Sub Sections 1, 2 & 3 of Section 102 Cr.P.C. has not been complied with and consequently the petition was allowed and the impunged order was quashed. Further, in the very same judgment it was also held by Hon'ble Bombay High Court that under Section 102 (3) of Cr.P.C. stopping the operation of account and attachment or seizure is going to have same effect on the petitioner it was in any case he will not be in a position to operate the accounts.

45. Now, reverting back to the view taken by a coordinate bench of this Court in the criminal revisions referred to hereinabove i.e. **Maa Kuanri Transport Case (supra)** decided by a common judgment dated 08.12.2022, this court referring to a judgment of the Chhatisgarh High Court in **Shree Mahalaxmi Associates Vs. State of Chhatisgarh** reported in **AIR Online 2020 CHH 1211** held that from the use of the word shall in sub Section 3 of Section 102 of Cr.P.C it is evident that the police officer is mandated to report the seizure of the property to the magistrate and consequently went ahead to hold that there is non-compliance of requirement of Section 102 (3) of Cr.P.C. and that the Magistrate while considering that application under Section 467 of Cr.P.C. is duty bound to consider the impact of non-compliance of Section 102 (3) of Cr.P.C. and accordingly should have passed orders and finally this Court found that the provision of Section 102 has been infringed and as such the impugned order was set aside and the revision petitions were allowed by directing to defreeze the five bank accounts which were the subject matter of dispute in the aforesaid five Criminal Revision.

46. Having heard learned counsel for the respective parties and upon a conspectus of the background facts of the present case as well as in view of the analysis of law made hereinabove this Court is of the considered view that in view of the judgment of Hon'ble Supreme Court in **Tapas D. Neogy case (supra)** bank account is a property for the purpose of section 102 Cr.P.C. Therefore this Court is persuaded by the view taken by different high courts that while attaching /freezing/ stopping operation of the bank accounts. It is mandatory that the police officer acting under Sub-Section (1) for the purpose of the present case freezing of the bank account can very well be treated in the same way as seizure of the bank account, and accordingly the IO Should have informed the Magistrate having jurisdiction. Therefoe, the IO having failed to inform the magistrate regarding freezing of the bank account has failed in his duty and thereby infringed the mandatory requirement under Section 102(3) as a result of which this court has no hesitation to hold that the

freezing of the bank account by the concerned IO in the present case is unsustainable in law and accordingly, the impugned order under Annexure-2 dated 18.04.2019 and order dated 29.08.2019 under Annexure-3 are hereby quashed. Further, it is directed that the learned JMFC, Barbil shall pass necessary orders directing the bank to defreeze the account forthwith subject to the petitioner furnishing a bond/ undertaking before the court below to the effect that he shall deposit the money in the bank account in the event such direction is given by the court in future.

47. With the aforesaid observations/directions the CRLMP petition is allowed. There shall be no order as to cost.

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## 2023 (I) ILR - CUT-1140

### A.K. MOHAPATRA, J.

W.P.(C) NO. 25821 OF 2022

**ARUNA KUMAR PADHY** ..... Petitioner

-V-

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

**AND**

W.P.(C) NO.12123 OF 2022
RUPAK KUMAR DAS -V- STATE OF ODISHA & ORS.

W.P.(C) NO.12124 OF 2022
HIMANSU SEKHAR PANDA -V- STATE OF ODISHA & ORS.

W.P.(C) NO.12125 OF 2022
PRASANNA KUMAR DAS -V- STATE OF ODISHA & ORS.

**SERVICE LAW – Promotion – When entry in the CCR could be construed as an adverse remark ? – Held, when an entry may be "good" or "very good" created obstacle in considering the case of an employee/civil servant for promotion to a higher post, such entry could be construed as an adverse remark and the incumbent is entitled to an opportunity to make a representation against such remark for its upgradation.**

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

1. O.A. No.665 of 2006 (C.A.T, Hyderabad dt.04.12.2008) : Tejdeep Kumar Menon vrs. UOI and others
2. 1996 SCC (L&S) 519 : U.P. Jal Nigam & Ors. vrs. Prabhat Chandra Jain & Ors.
3. AIR 2008 S.C. 2513 : (2008) 8 SCC 725 : Dev Dutt vrs. Union of India & Ors.
4. (2009) 16 SCC 146 : Civil AppealNo.6227 of 2008 (Arising out of S.L.P.(C) No.26556 of 2004) : Abhijit Ghosh Dastidar vrs. Union of India & Ors.

5. (2013) 9 SCC 573 : C.A.No.5892 of 2006 decided on 23/4/2013 : Sukhdev Singh vrs. Union of India & Ors.
6. C.A.No.2021 of 2022 decided on 23/9/2022 : Union of India & Ors. vrs. G.R. Meghwal.

For Petitioner : M/s. Prasanta Ku.Mishra, K.L.Kar & J.Mishra.
M/s. Pami Rath, A. Mohanty, S. Gumansingh,
B. Takur & S. Mohanty.

For Opp.Parties : Mr. A.Behera, A.S.C.
Mr. R.N. Mishra, Addl. Govt. Advocate

JUDGMENT Date of Hearing : 03.01.2023 : Date of Judgment : 31.03.2023

***A.K. MOHAPATRA, J.***

The above noted writ petitions involve a common question of law and issue which is required to be adjudicated is based on a common set of facts. Accordingly, the writ petitions tagged and heard together and the same are being disposed by following common judgment.

**W.P.(C) No.25821 of 2022**

1. The petitioner being aggrieved by order dated 14.09.2022 passed by the Revenue Divisional Commissioner (S.D.), Berhampur-Opposite Party No.4 at Annexure-11 has knocked the door of this Court for justice, by filing the present writ application. While assailing the impugned order dated 14.09.2022 under Annexure-11 and praying for quashing the said order, the petitioner has also sought for a direction to the Opposite Parties to treat the CCR of the petitioner for the year 2015-2016, as "Outstanding" and issue a direction to the Opposite Parties to consider the case of the petitioner for promotion to "ORS Group-B" Cadre for recruitment year 2021 treating the required number of years of CCR as "Outstanding" and to promote the petitioner with all consequential and financial benefits. Shorn of all unnecessary detail, the factual matrix involved in the writ application, in a nutshell, is that the petitioner was selected by following regular process of selection for the post of Junior Clerk (Junior Revenue Assistant). After his due selection, the petitioner was appointed and accordingly, the petitioner joined as Junior Clerk (Junior Revenue Assistant). While working as such, the petitioner got promotion to the rank of Senior Clerk (Senior Revenue Assistant) on 01.07.2009. Since the date of his promotion as Senior Revenue Assistant, the petitioner has been continuing as such, till date under the Administrative Control of the Collector, Rayagada.

2. While the petitioner was continuing in service, in exercise of power conferred by the proviso to Article 309 of the Constitution of India, Governor of Odisha introduced a set of rules called as Odisha Revenue Service (Recruitment) Rules, 2011 to regulate the methods of recruitment and conditions of service of persons appointed to the Odisha Revenue Service. In view of Rule-4(a) of the 2011 Rules, 50% of the total posts are required to be filled up by direct recruitment.

Further in terms of Rule 4(b), 30% of total posts are required to be filled up by way of promotion as envisaged under Rule-6. The balance 20% posts are to be filled up by way of selection in terms of Rule-4(c).

3. While the petitioner was continuing as Senior Revenue Assistant under the Collector, Rayagada, the Board of Revenue Odisha, Cuttack-Opposite Party No.3 vide letter dated 18.11.2020 requested all RDCs, Inspector General of Registration, Director, Land Records and Survey, Director Consolidation, Odisha Cuttack to recommend the names of the officers having "Outstanding" CCR and ability, who are within 53 years of age with attested copies of five years of CCR for the recruitment year 2020 for recruitment to ORS(Group-B) by way of promotion for the recruitment year 2020 in terms of Rule, 4(b) of the Rules, 2011.

4. The Collector, Rayagda (Opposite Party No.5) vide his letter dated 15.12.2020 had recommended the names of nine eligible Senior Revenue Assistants including the name of the petitioner in a prescribed proforma strictly on the basis of seniority maintained in the district office for consideration of their cases for promotion to ORS (Group-B) Cadre. So far the petitioner is concerned, the Opposite Party No.5 had recommended his case with attested copies of the CCR of five years out of which four years with "Outstanding" remark and one year i.e. 2015-2016 with "Very Good" remark. So far the year 2015-2016 is concerned, it has been stated that although Reporting Officer had given "Outstanding" remark, which had been reviewed and the same has been modified to "Very Good" by the Reviewing Authority.

5. While the matter stood thus, the Revenue Divisional Commissioner (S.D.), Ganjam (in short 'the RDC') (Opposite Party No.4) vide his letter dated 20.12.2020 recommended the names of nine Senior Revenue Assistants including the name of the petitioner and his juniors for consideration for promotion to ORS (Group-B) for the recruitment year 2020. However, the Opposite Parties without following the rules and the guidelines selected and promoted juniors to the petitioner for promotion to ORS (Group-B) Cadre vide notification dated 29.12.2021. The petitioner was not given promotion to ORS (Group-B) Cadre despite fulfilling all the eligibility criteria as has envisaged in the Rules, 2011.

6. Later on, the petitioner came to learn that he has not been given promotion to the ORS (Group-B) Cadre as he was having "Very Good" remark for one year i.e. 2015-2016 and "Outstanding" for all other years, which were taken into consideration by the DPC. It is further stated that for the year 2015-2016 although the petitioner has been awarded "Outstanding" remark by the Reporting Officer, however, the Counter Signing Officer without assigning any reason has down-graded the remark in the CCR from "Outstanding" to "Very Good". Further it has also been stated in the writ application that while down-grading the remark given by the Reporting Officer, neither the petitioner was given any opportunity of hearing

nor any communication was given to the petitioner informing him about down grading of the written remark for the year 2015-2016. Such facts were ascertained by the petitioner by obtaining information under the Right to Information Act. After coming to know about such down grading in December, 2021, through the information received under the RTI Act, the petitioner submitted a detailed representation dated 13.12.2021 before the Opposite Party No.4 with prayer to up-grade the CCR for the year 2015-2016 from "Outstanding" to "Very Good". Hence, such a remark is an adverse remark which has a Civil consequences as the future prospects of getting promotion of the petitioner is likely to be affected adversely. The representation dated 13.12.2021 under Annxure-4 was not considered and kept pending by the Opposite Parties. Therefore, the petitioner was compelled to approach this Court earlier by filing a writ application bearing W.P.(C) No.9347 of 2022 challenging the action of the authorities in down grading the rating of the petitioner in respect of the year 2015-2016 unilaterally without communicating the same to the petitioner and without providing an opportunity to make a representation to the petitioner against such adverse remark. The Opposite Party No.4 forwarded the representation of the petitioner dated 13.12.2021 to Opposite Party No.5, who in turn vide his letter dated 10.03.2022 forwarded the representation with recommendation to consider the case as accepting officer has toned down the remark of "Outstanding" to "Very Good" without assigning any reason. It has also been observed in the letter of Opposite Party No.5 that such down grading of remark in CCR was not communicated to the petitioner as the remark "Very Good" is not considered as adverse remark.

7. While the matter stood thus, the Opposite Party No.4 vide his letter dated 02.05.2022 has mechanically rejected the representation of the petitioner without assigning any reason. Being aggrieved by the said order dated 02.05.2022, the petitioner approached this Court by filing W.P.(C) No.15758 of 2022. This Court vide order dated 26.07.2022 was pleased to quash the order dated 02.05.2022 passed by the Opposite Party No.4 with a direction to take a fresh decision on the representation of the petitioner.

8. On 29.06.2022, Opposite Party No.3 has once again issued a letter to the recommending authorities for recommendation of the names of the eligible officers with five years of CCR from 2015-2015 to 2019-2020 for consideration for promotion to ORS (Group-B) Cadre for the recruitment year 2021. Pursuant to such letter, the Opposite Party No.5 vide letter dated 27.07.2022 has recommended the names of the petitioner for promotion to the post of ORS (Group-B) Cadre for the recruitment year 2021, this time also the CCRs of the year 2015-2016 to 2019-2020 where under consideration and out of total five years, the petitioner had four "Outstanding" CCR and one year i.e. 2015-2016 he had "Very Good" CCR. The circumstances under which, the petitioner was given remark of "Very Good" has been narrated hereinabove. Further, it has been stated in the writ application that

since the petitioner was denied the promotion for the year 2020, he was also apprehending similar fate this time around because of "Very Good" CCR for one year.

9. It has also been stated in the writ application that the representation of the petitioner was rejected by the Opposite Party No.4 vide order dated 14.09.2022 by misinterpreting the judgment of the Hon'ble Supreme Court. Therefore, such rejection of the representation by the Opposite Party No.4 is illegal, arbitrary and discriminatory.

10. Per contra, a joint counter affidavit has been filed on behalf of the Opposite Party Nos.1 and 4. In the said counter affidavit, it has been stated that as per the provisions contained in Book Circular No.46 dated 05.02.1982, a representation against adverse remark of appointing authority will be made before the next higher authority and in the case of the petitioner, the representation is not against adverse remark but for up-gradation in his CCR for the year 2015-2016 from "Very Good" to "Outstanding". Since there is no such provision, in the aforesaid Book Circular No.46 for up-gradation of non-adverse CCRs, the Opposite Party No.4 had no scope to accept the prayer of the petitioner.

11. In the counter affidavit, it has also been stated that pursuant to order passed by this Court in W.P.(C) No.15758 of 2022 vide order dated 26.07.2022, the Opposite Party No.4 issued notice to the petitioner. When the petitioner appeared before the Opposite Party No.4, he was asked to produce relevant provision to substantiate his claim. The Opposite Party No.4 is the competent authority for up-gradation of the CCR, which are not adverse in nature even beyond the provision of Book Circular No.46. On thorough perusal of the documents submitted by the petitioner, the Opposite Party No.4 narrated that the petitioner has failed to submit proper document to justify his claim. Further, justification has been given by the Opposite Party No.4 by stating that the Opposite Party No.4 being the next higher authority of Collector, Rayagada, the appointing authority of the petitioner, is empowered only to consider adverse remark, if any, written in the CCR of the petitioner and that grading of **"Very Good"** given by the Collector, Rayagada-Opposite Party No.5 as the final Accepting Authority **cannot be termed as "adverse".** Further such circular only provides for expunction of adverse remark. It has also been stated in the counter affidavit that the G.A. Department letter dated 18.07.2013 is not applicable to the case of the petitioner as the petitioner comes under the Category of "Group-C" employee.

12. A rejoinder affidavit has also been filed to the counter affidavit of Opposite Party Nos.1 and 4. In the said rejoinder affidavit, it has been stated that the averments in Paragraph-3 to 15 of the writ petition has not been specifically controverted by such Opposite Parties. On the contrary, the affidavit has been filed by reiterating the grounds stated in the rejection order dated 14.09.2022.

13. In the rejoinder affidavit filed by the petitioner, the petitioner has stated that nowhere in the counter affidavit the Opposite Parties have disputed the fact that the remark "Very Good" in CCR in the year 2015-2016 was ever communicated to the petitioner and any opportunity was provided to the petitioner to make a representation against such remarks. Moreover, it has also been stated that the remark made in the CCR for the year 2015-2016, has serious consequences as the petitioner was denied promotion only on that ground. Therefore, referring to various judgments of the Hon'ble Supreme Court, the petitioner has laid emphasis on the ground that the remark of "Very good" in the CCR for the year 2015-2016 being an adverse remark, the same should have been communicated to the petitioner by providing an opportunity to the petitioner to make a representation to the authority against such adverse remark. Referring to the judgments of the Hon'ble Supreme Court, it has been stated that since such a procedure has not been followed in the case of the petitioner, the conduct of the Opposite Party No.4 in rejecting the representation of the petitioner is illegal, arbitrary and discriminatory and as such, unsustainable in law.

14. Furthermore, referring to the G.A. Department memorandum dated 05.02.1982 under Annexure-13, which is also otherwise known as Book Circular No.46 and specifically referring to Clause-(xiii), it has been stated that while maintaining CCR, the counter signing authority should clearly indicate their assessment where they agree with the remark and reasons be given by the officer where they feel that R.Os. remark should be toned down and a clear indication to that effect should be given. In contrast, the provision contained in G.A. Department memorandum dated 18.07.2013 in respect of the Group-A and Group-B Officers has also been referred to. Such memorandum dated 18.07.2013 provides a guidelines for recording and maintenance of PARs by giving chance to the officers to make representation for up-gradation of their benchmarks i.e. in Clause-3(iii) and (iv). Thus, laying emphasis on the aforesaid two memorandums of the G.A. Department, one in "Group-C" and another for "Group-A and B" officers, it has been stated "Group-C" employees like the petitioners have been discriminated against and that the memorandum of the G.A. Department dated 05.02.1982 under Annexure-13 is not consistent with the law laid down by the Hon'ble Supreme Court in the case of ***Dev Dutt vrs. Union of India and others*** and many other judgments.

**W.P.(C) No.12123 of 2022**

***Rupak Kumar Das vrs. State of Odisha and others***

15. By filing the above noted writ application, the petitioner has sought for quashing of office order dated 06.04.2022 under Annexure-11 and further for issuance of writ of mandamus directing the Opposite Parties particularly, Opposite Party No.2 to grant an opportunity to the petitioner to represent against entry of "Very Good" for the year 2016-2017 in terms of the Book Circular of G.A. Deptt.

dated 15.02.1982 read with principle of law laid down by the Hon'ble Supreme Court of India in the case of ***Dev Dutt vrs. Union of India and others*** as well as judgment rendered by this Court in W.P.(C) No.5260 of 2009 disposed of 17.03.2020 : reported in ***2020 (I) OLR 771*** and further a direction to the Opposite Parties be also given to hold DPC/Review DPC and to consider the case of the petitioner for promotion to the post of ORS (Group-B) Cadre and accordingly, give promotion to the petitioner with effect from the date his juniors have been given promotion vide notification dated 29.12.2021.

**W.P.(C) No.12124 of 2022**

***Himanshu Sekhar Panda vrs. State of Odisha and others***

16. This writ application has been filed by the petitioner with an identical prayer as has been made in the W.P.(C) No.12123 of 2022 for the sake of brevity the same has not been repeated here.

**W.P.(C) No.12125 of 2022**

***Prasanna Kumar Das vrs. State of Odisha and others***

17. The above noted writ application has also been filed with an identical prayer as has been made in W.P.(C) No.12123 of 2022 and W.P.(C) No.12124 of 2022. Therefore, for the sake of brevity, the prayer has not been repeated here.

Since the factual background involved in the above noted three writ applications are identical, the facts of the case W.P.(C) No.12123 of 2022, the same is being treated as the lead case in the batch of writ applications. Accordingly, the facts stated in W.P.(C) No.12123 of 2023 is being discussed / analyzed herein below:-

On perusal of the writ application bearing W.P.(C) No.12123 of 2022, it appears that initially the petitioner was appointed as Junior Clerk in the office of the Sub-collector, Balasore vide order dated 24.02.2009 and accordingly, the petitioner joined in service, the petitioner was promoted to the post of Senior Clerk. Till date, the petitioner is continuing as Senor Revenue Assistant.

While the petitioner was continuing as Senor Revenue Assistant, the Board of Revenue Odisha, Cuttack issued notification/guideline dated 18.11.2020 to all Revenue Divisions to recommend a large number of Revenue Ministerial staff for consideration of their cases for promotion to Odisha Revenue Service (ORS)(Group-B) cadre for the recruitment year 2020. Pursuant to the said notification application format along with copy of the notification were provided to all eligible staff to enable them to apply so that their cases can be considered for promotion to the post of "ORS Group-B". Notification dated 18.11.2020 also lays down the eligibility criteria for promotion to the post of "ORS Group-B".

Since the petitioner was fulfilling all the criteria, the Collector-cum-D.M., Balasore vide letter dated 05.12.2020 recommended the name of the petitioner for consideration of promotion to the next higher grade i.e. "ORS Group-B" cadre. However, Odisha Public Service Commission vide letter dated 22.12.2021 gave its concurrence to the proposal of the selection committee for promotion of 154 officers to "ORS Group-B" cadre for the recruitment year 2020 ignoring the case of the petitioner.

On the basis of the recommendation of the selection committee and the concurrence given by the Odisha Public Service Commission, the Opposite parties vide Notification dated 29.12.2021 promoted 154 officers which includes the name of some officers, who are junior to the petitioner. Although the petitioner fulfills all the eligibility criteria as envisaged in the rules and as laid down in the notification dated 18.11.2020, the name of the petitioner did not find place in the final notification dated 29.1.2021 under Annexure-6. Although the case of the petitioner was recommended to the DPC by the departmental authorities as the petitioner was found eligible along with eligible candidates, however, the petitioner has come to learn that in the CCR of the petitioner, the Collector, Balasore has given a remark "Very Good" for the year 2016-2017, therefore, the case of the petitioner has not been considered and he has not been given promotion to "ORS Group-B" cadre. Immediately thereafter, the petitioner sought for information under the RTI Act pertaining to entries in the CCR for the year 2013-2014, 2014-2015, 2015-2016, 2016-2017, 2017-2018, 2018-2019 and 2019-2020 from the office of the Collector-cum-D.M. Balasore. The public information officer in the office of the Collector-cum-D.M. Balasore vide his letter dated 01.01.2022 supplied copy of the CCRs for the aforesaid periods to the petitioner.

On a close scrutiny of the information obtain under the RTI Act, which has been filed as Annexure-7 to the writ application, the petitioner was extremely shocked to know that for the year 2016-2017 he has been awarded a remark and accordingly an entry has been made in the CCR of the petitioner as "Very Good". So far the CCR of other years are concerned, the petitioner has been given as "Outstanding". It has also been stated in the writ application that although in respect of the year 2016-2017, Sub-collector, Balasore, had awarded "Outstanding" remark in the CCR, however, the Collector, Balasore on review has modified the same and a "Very Good" remark has been entered in the service book. Further it has been emphatically pleaded that the above noted entry of "Very Good" for the year 2016-2017, in the CCR of the petitioner, has neither been communicated nor the petitioner was afforded an opportunity to represent against such remark at any point of time. Further it has been pleaded that although the petitioner in the meantime has made a representation to the RDC, Central Division, Odisha, Cuttack against the entry in CCR in respect of the year 2016-2017 by the Collector, Balasore with a specific prayer to grant him opportunity to make a representation against such adverse entry in terms of G.A. Department circular as well as the judgment of the Honourable

Supreme Court and to re-consider the case of the petitioner for promotion to the post of "ORS Group-B" by convening a review DPC, as of now, no action whatsoever has been taken on the representation of the petitioner dated 10.01.2022 under Annexure-8 to the writ application.

Challenging the aforesaid inaction of the authorities to consider the representation dated 10.01.2022 under Annexure-8 submitted by the petitioner, the petitioner had earlier approached this Court by filing W.P.(C) No.3909 of 2022, this Court after hearing learned counsel for the petitioner disposed of the above noted writ application with a direction to the Opposite Parties to consider the representation of the petitioner under Annexure-9 taking into consideration Annexures-7 and 8 and to pass a reasoned and speaking order within a period of three months.

After disposal of the above noted writ application, the petitioner approached the RDC with a certified copy of the order dated 08.02.2022, however, the RDC Central Division, Cuttack vide order dated 06.04.2022 rejected the representation of the petitioner on the ground that the judgment rendered by the Hon'ble Supreme Court in Civil Appeal No.7631 of 2002 with a specific direction, which is applicable to a particular group of employees and as such, the same cannot be made applicable to the facts of the petitioner's case. Further, the Opposite Party No.3 in the rejection order has observed that the Book Circular No.46 issued by the G.A. Department vide memo dated 05.02.1982 only deals with the adverse remarks of the CCR and there is no provision of communicating remarks other than the adverse remark and that the remarks "Very Good" does not come under the category of adverse remark. Accordingly, the Opposite Party No.3 has justified the action in non-communication of the remark in respect of the year 2016-2017 entered in the service book of the petitioner. Finally, the Opposite Party No.3 has also observed that the communication of the remarks in CCR of the employees concerned are done in a routine manner, the same will have serious repercussions on the honest assessment of an officer under his control and the discipline in administration will be disturbed. Accordingly, vide order dated 06.04.2022, the Opposite Party No.3 has rejected the representation of the petitioner which has been annexed to the writ application as Annexure-11.

18. Heard learned counsels appearing for the petitioners in different writ petitions as well as leaned Additional Government Advocate for the State-Opposite Parties. Perused the pleadings of the parties as well as materials placed before this Court in course of hearing of writ petitions.

19. After a careful analysis of the factual background involved in all the writ petitions and upon a careful consideration of the contentions raised by learned counsels appearing for the parties in all the above noted writ applications, this Court is of the considered view that this Court is basically required to adjudicate two

important questions of law, those are involved in the above noted batch of writ applications;

> I. Whether the remark of "Very Good" in the CCR of the petitioner is to be treated as an adverse remark in the facts and circumstances of the petitioner's case?
>
> II. Whether the remark in the CCR of the petitioner of "Very Good" for the relevant year which was used against the petitioner for not considering his case for promotion to ORS (Group-B) Cadre was required to be communicated to the petitioner by providing an opportunity to the petitioner to make a representation against such remark?
>
> III. To what relief, the petitioners are entitled to in the facts and circumstances of the present case?

20. Before answering the questions formulated by this Court for adjudication of the present batch of writ applications, this Court is required to analyze the provisions of law applicable to the facts and circumstances of the respective petitioner's case. Since the issues and the facts involved in the above noted batch of writ applications are similar, therefore, in such common background facts, this Court would proceed to examine the position of law. In the lead matter i.e. W.P.(C) No.25821 of 2022, learned counsel for the petitioner has referred to the guidelines for recording and maintenance of PARs of Group-A and Group-B officers of the State Government as introduced by the G.A. Department, Government of Odisha on 18.07.2013 under Annexure-14. He has also referred to the guidelines with regard to confidential character rolls and non-gazetted employees of the Government. Such procedure provides for the recording and maintenance of CCR and communication of adverse remark and opportunity to make a representation and for disposal of such representations, which was issued vide Memo No.741-PRO-11/81-(SE) by the G.A. Department, Government of Odisha on 5th of February, 1982 indisputably, both the guidelines have been issued in the shape of executive instructions.

21. Let us first examine the guidelines of the year 1982 issued vide Memo dated 5th of February, 1982 under Annexure-13. Clause-(xiii) of the aforesaid guideline provides that the countersigning authority should clearly indicate in their assessment whether they are agreeing with the remarks and rating given by the R.O. If they feel that the R.O's remark should be modified or toned down, a clear indication to that effect should be given. These instructions would apply to the accepting authorities also. If the R.O. and C.O. have given conflicting assessment, the accepting authority has to indicate clearly with whom he agrees.

Whereas Clause (xiv) of the guidelines provides that C.Rs on receipt, will be scrutinized in the office of the appointing authority and all adverse remarks will be communicated to the employees by the officers entrusted with maintenance of C.Rs. The purpose of the communication is to ensure that the employee rectifies his defects at the earliest. Hence, the utmost priority should be given to communication of adverse remark. All such communications should normally be issued before 31st of December immediately following the report period.

Whereas Clause (xv) provides that the employees are expected to profit by the communication of the adverse remarks and should not regard that as matters of argument. Hence, representations against adverse remarks should not ordinarily be entertained. But in cases whether the impugned remark, obviously, is the result of a mistake on the part of the assessing authority, the representation may be entertained and considered. Representations should be factual and courteously worded and should not be argumentative.

Similarly, Clause (xvi) provides that the representations will be generally disposed of by the appointing authority, it means, the same will be disposed of by the next higher authority. In such cases, representations should be forwarded to the authorities as indicated in the said clause.

Moreover, Clause (xviii) provides that if on examination of the representation, it is found that the remark should be expunged, modified toned down, necessary corrections to that effect will be made in CR under proper attestation. If it is found that the representation has no merit, it should be rejected. The decision in either case will be intimated to the representationist.

Finally, it has also been provided in the above noted guidelines that all representations must be filed within a period of six months from the date of receipt of communication. In exceptional case, however, where the reasons for delay are explained to his satisfaction, the competent authority may extent this period, which in no case should exceed one year. Representations should ordinarily be disposed of within three months from the date of receipt.

22. In view of the aforesaid provisions in the guidelines of the G.A. Department vide Memo dated 05.02.1982, it is crystal clear that the said guidelines provides a window to the petitioner to make a representation, if the remarks made in the CCR of the petitioner are adverse in nature. Further the same also provides for a complete Code with regard to manner in which the representation made by any employee against any adverse remark is to be dealt with by the authorities.

23. The next guidelines vide letter dated 18.07.2013 of the G.A. Department for recording and maintenance of PARs is meant for Group-A and Group-B Officers of the State Government. The guidelines vide letter dated 18.07.2013 under Annexure-14 reference to memo of the G.A. Department dated 26.04.2006, which has been issued by the Government of Odisha through G.A. Department for recording and maintenance of PARs of Group-A and Group-B Officers of the Government. In the very beginning of the letter dated 18.07.2013, it has been provided by referring to Para-12 (ii) on memo dated 26.04.2006 that "all adverse remarks contained in earmarked box in part-III, IV & V of the PAR should be communicated directly to the officers concerned by the GA(SE) Department within two months of the receipt of the complete PAR". Similarly, Para-15(v) also provides that the representation against the adverse remarks should be normally disposed of within six months from

the receipt of such representation taking into consideration facts stated in the PAR, representation and substantiation report, if any. Furthermore, the order passed on the representation shall be informed suitably to the officer concerned. Further, letter under Annexure-14 has also referred to a judgment of the Central Administrative Tribunal, Hyderabad Bench dated 04.12.2008 in O.A. No.665 of 2006 in the case of ***Tejdeep Kumar Menon vrs. UOI and others***. In para-3 of the aforesaid letter, a clear procedure has been laid down with regard to up-gradation/down gradation of PARs after expunction of adverse remarks. In Clause 3(i) it has also been specifically provided that an adverse entry should be communicated to the Officer concerned along with overall grading. Further Clause-3(iv) provides that where the authority has upgraded/downgraded the overall grading without giving sufficient reasons, the Government shall treat such an exercise as non-est/invalid.

24. Keeping in view the above stated principles laid down under Annexures-13 and 14 by the G.A. Department, Government of Odisha, this Court at this stage would proceed to analyze the law laid down by the Hon'ble Supreme Court of India on the issue involved in the present batch of writ applications. In the case of ***U.P. Jal Nigam and others vrs. Prabhat Chandra Jain and others :*** reported ***1996 SCC (L&S) 519***. The issue that fell for determination by the Hon'ble Supreme Court is as to when entry in the CCR could be construed as an adverse remark. In the said reported case, the ***Nigam*** has rules whereunder an adverse entry is required to be communicated to the employees concerned but not downgrading for an entry. While answering the issue, the Hon'ble Supreme Court while coming to a conclusion that it may be emphasized that even a positive confidential entry in a given case can perilously be adverse and to say that an adverse entry in CCR should always be qualitatively damaging may not be true. For better understanding of the findings of the Hon'ble Supreme Court in the aforesaid reported judgment, this Court would like to extract para-3 of the said judgment:-

xx xx xx xx

> "3. We need to explain these observations of the High Court. The Nigam has rules, whereunder an adverse entry is required to be communicated to the employees concerned, but not downgrading of an entry. It has been urged on behalf of the Nigam that when the nature of the entry does not reflect any adverseness that it is not required to be communicated. As we view it extreme illustration given by the High Court may reflect an adverse element compulsorily communicable, but if the graded entry is of going to step down, like falling from 'very good' to 'good' that may not ordinarily be an adverse entry since both are a positive grading. All that is required by the authority recording confidentials in the situation is to record reasons for such downgrading on the personal file of the officer concerned, and inform him of the change in the form of an advice. If the variation warranted be not permissible, then the very purpose of writing annual confidential reports would be frustrated. Having achieved an optimum level the employee on his part and may slacken in his work, relaxing secure by his one-time achievement. This Court be an undesirable situation. All the same the sting of adverseness must, in all events, not be reflected in such variations, otherwise they shall be communicated as such. It may be emphasized that even a positive confidential entry in a given case can perilously be adverse and to say that an adverse entry

> should always be qualitatively damaging may not be true. In the instant case we have seen the service record of the first respondent. No reason for the change is mentioned. The downgrading is reflected by comparison. This cannot sustain. Having explained in this manner the case of the first respondent and the system that should prevail in the Jal Nigam, we do not find any difficulty in accepting the ultimate result arrived at by the High Court."
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> xx xx xx xx

25. The next judgment of the Hon'ble Supreme court which is relevant for the purpose of the present case, is in the matter of ***Dev Dutt vrs. Union of India and others*** : reported in AIR 2008 S.C. 2513. After a threadbare analysis of the facts involved in the said case, Hon'ble Supreme Court was of the view that the fairness and transparency in public administration requires that all entries whether poor, fair, adverse, good or very good in the Annual Confidential Report of a public servant, whether the civil, judicial, police or any other State service must be communicated to him within a reasonable period so that he can make a representation for its upgradation. However, only exception to the aforesaid principle laid down by the Hon'ble Supreme Court is the military service. Here at this juncture, this court would like to extract paragraph-10 of the aforesaid judgment:-

> xx xx xx xx
>
> "10. In the present case the bench-mark (i.e. essential requirement) laid down by the authorities for promotion to the post of Superintendent Engineer was that the candidate should have 'very good' entry for the last five years. Thus in this situation the 'good' entry in fact is an adverse entry because it eliminates the candidates from being considered for promotion. Thus, nomenclature is not relevant, it is the effect which the entry is having which determines whether it is an adverse entry or not. It is thus the rigorous of the entry which is important, not the phraseology. The grant of a 'good' entry is of no satisfaction to the incumbent if it in fact makes him ineligible for promotion or has an adverse effect on his chances."
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> xx xx xx xx

The observation of the Hon'ble Supreme Court in Paragraph-10 in the case of ***Dev Dutt*** (supra) is relevant for the purpose of the present case and to answer the first issue as to whether the remark of "Very Good" in the CCR of the petitioner is adverse remark in the facts and circumstances of the present case. In Paragraph-10 of the above noted judgment, the Hon'ble Supreme Court has very categorically come to a conclusion that the nomenclature of the remark is not relevant, rather it is the effect which the entry is having that will determine whether it is an adverse entry or not. Therefore, the remark that was given in the petitioner's CCR (Very Good) is to be construed as an adverse remark in the facts and circumstances of the present case inasmuch as the DPC by relying upon such remark came to a conclusion that the petitioner is not eligible for promotion or such remark has an adverse effect on the chances of promotion of the petitioner. Therefore, the remarks in the CCR are very substantive and it depends on the facts and circumstances of each case. In the present batch of cases, the remark / entries made in the CCR which is admittedly used against the petitioner to make the petitioner ineligible for promotion, therefore,

such remark, in the facts and circumstances of the petitioner's case are no doubt adverse remarks.

26. In the above referred ***Dev Dutt*** case (supra), the issue was raised on behalf of the respondent by submitting before the Hon'ble Supreme Court that under office memorandum issued by the Ministry of Personnel/Public Grievance and Pension dated 10/11.09.1987, only adverse entry is to be communicated to the concerned employee. In paragraph-12 of the judgment it was held by the Hon'ble Supreme Court that no rule or Government instruction can violate Article 14 or any other provisions of the Constitution, as the Constitution is highest law of the land. Moreover, it was also observed that the aforesaid office memorandum, if it is interpreted mean that only adverse entries are to be communicated to the concerned employee and not other entries, would in our opinion become arbitrary and hence illegal being violative of Article 14. The Hon'ble Supreme court went on to further observe that on similar rules/Government orders/Office Memorandum in respect of services under the State, whether the civil, judicial, police or other services (except the military)will hence also be illegal and are, therefore, liable to be ignored.

27. In the concluding paragraph of the case in ***Dev Dutt*** (supra), the Hon'ble Supreme Court directed that "good: entry be communicated to the appellant within a period of two months from the date of receipt of the copy of that judgment. On being communicated, the appellant may make the representation, if he so chooses against the said entry within two months thereafter and the said representation will be decided within two months thereafter. If his entry is upgraded the appellant shall be considered for promotion retrospectively by the DPC within three months thereafter and if the appellant succeeds, he should be given higher pension with arrears of pay with interest @ 8% per annum till the date of payment.

28. The next judgment, this Court would like to refer to which has been decided by the Hon'ble Supreme Court in the case of ***Abhijit Ghosh Dastidar vrs. Union of India and others*** : reported in ***Civil AppealNo.6227 of 2008 (Arising out of S.L.P.(C) No.26556 of 2004)*** in paragraph-4 of the said judgment, the Hon'ble Supreme Court had observed as follows:-

xx xx xx xx

"4. It is not in dispute that the CAT, Patna Bench passed an order recommending the authority not to rely on the order of caution dated 22.09.1997 and the order of adverse remarks dated 09.06.1998. In view of the said order, one obstacle relating to his promotion goes. Coming to the second aspect, that though the benchmark "very good" is required for being considered for promotion admittedly the entry of "good" was not communicated to the appellant. The entry of 'good' should have been communicated to him as he was having "very good" in the previous year. In those circumstances, in our opinion, non-communication of entries in the ACR of a public servant whether he is in civil, judicial, police or any other service (other than the armed forces), it has civil consequences because it may affect his chances for promotion or get other benefits. Hence, such non-communication would be arbitrary and as such violative of Article 14 of the Constitution. The same view has been

reiterated in the above referred decision relied on by the appellant. Therefore, the entries "good" if at all granted to the appellant, the same should not have been taken into consideration for being considered for promotion to the higher grade. The respondent has no case that the appellant had ever been informed of the nature of the grading given to him."

xx xx xx xx

29. In the case of ***Sukhdev Singh vrs. Union of India and others*** in Civil Appeal No.5892 of 2006 decided on 23rd of April, 2013, a Three Judge Bench of the Hon'ble Supreme Court was required to consider the inconsistency in two judgments of the Hon'ble Supreme Court i.e. ***U.P. Jal Nigam and others vrs. Prabhat Chandra Jain and others*** and ***Union of India and another vrs. Major Bahadur Singh***. While answering the reference, a Three Judge Bench has taken note of the judgment in ***Dev Dutt*** case (supra) and in ***Abhijit Ghosh Dastidar*** case (supra) while answering the reference in Paragraphs-8 and 9. Finally, affirmed the view in the case of ***Dev Dutt*** (supra). Paragrahs-8 and 9 of the said judgment is quoted herein below:-

xx xx xx xx

"8. In our opinion, the view taken in Dev. Dut that every entry in ACR of a public servant must be communicated to him/her within a reasonable period is legally sound and helps in achieving threefold objectives. First, the communication of every entry in ACR to a public servant helps him/her to work harder and achieve more that help him in improving his work and give better results. Second and equally important, on being made aware of the entry in the ACR, the public servant may feel dissatisfied with the same. Communication of the entry enables him/her to make representation for upgradation of the remarks entered in the ACR. Third, communication of every entry in the ACR brings transparency in recording the remarks relating to a public servant and the system becomes more conforming to the principles of natural justice. We, accordingly, hold that every entry in ACR poor, fair, average, good or very good must be communicated to him/her within a reasonable period.

9. The decisions of this Court in Satya Narain Shukla vs. Union of India and others and K.M. Mishra vs. Central Bank of India and others and the other decisions of this Court taking a contrary view are declared to be not laying down a good law."

xx xx xx xx

30. While answering the issue involved in the present writ application, this Court would also like to refer to recent judgment of the Hon'ble Supreme Court in the case of ***Union of India and others vrs. G.R. Meghwal*** in ***Civil Appeal No.2021 of 2022*** decided on 23rd of September, 2022. In view of ***G.R. Meghwal*** case (supra) the Reviewing Officer rated the respondent as "good" in the ACR of 2007-2008 instead of "very good" as was given in ACR in previous two years. Against such remark of "good", the petitioner submitted a representation, which was rejected by the authority. Thereafter, a DPC meeting was held to consider grant of NFU in SAG. The respondent was found not eligible by the DPC on the ground that for the year 2007- 2008 his ACR was "good". Challenging such decision of the DPC, the respondent approached the Central Administrative Tribunal. The Tribunal came to a conclusion that the remark entry for the year 2007-2008 was clearly adverse and

same warranted communication to the officer concerned within the time limit and accordingly, the Tribunal set aside the rejection of the representation and directed to review the case of the respondent ignoring below benchmark "good" for the year 2007-2008.

31. Being aggrieved by the decision of the Central Administrative Tribunal, the Union of India preferred a writ before the Rajasthan High Court by filing a writ application. The High Court of Rajasthan dismissed the writ application filed by the Union of India and others. As against such dismissal order, the Union of India approached the Hon'ble Supreme Court. While deciding the case, the Hon'ble Supreme Court has referred to the judgment of the Hon'ble Supreme Court in the case of ***Dev Dutt*** (supra) ***(2008) 8 SCC 725***, ***Abhijit Ghosh Dastidar*** (supra) ***(2009) 16 SCC 146*** and in the case of ***Sukhdev Singh*** (supra) ***(2013) 9 SCC 573***. After analyzing the factual background of the case, a detailed analysis of the legal position, the Hon'ble Supreme Court in Paragraph-10 of the judgment concluded as follows:-

xx xx xx xx

> "10. Therefore, in view of the above and in the facts and circumstances of the case and considering the fact that though the respondent was graded as "Very Good" in the ACRs for the year 2005-2006 and 2006-2007 and was graded only "Good" in the ACR for the year 2007-2008 by the very same reporting and reviewing officer, despite the fact that specifically the respondent was given the opportunity against the ACR for the year 2007-2008. However, no valid reasons are given for rejecting the representation, we are of the opinion that in view of the aforesaid facts and circumstances, the learned Tribunal and the High Court have not committed any error in directing the Department to call for a review meeting of the Screening Committee to re-assess the suitability of the respondent for the purpose of grant of SAG and while doing so to exclude the ACR for the year 2007-2008. Therefore, in the facts and circumstances of the case, no interference of this Court is called for.
>
> In view of the above and for the reasons stated above, present appeal fails and the same deserves to be dismissed and is accordingly dismissed."

32. Keeping in view of the aforesaid analysis of the legal position as well as factual background of the present case, this Court endeavoured to answer the questions formulated in para-19 of this judgment. So far present writ applications are concerned, it is the admitted position of the Opposite Parties that since remark given in the CCR of the petitioner is "Very Good", the same is not to be treated as an adverse remark, therefore, there was admittedly no necessity to communicate the same to the petitioner.

33. In contrast, on examination of the impugned order, it appears that the case of the petitioner has not been considered for promotion to ORS Group-B Cadre and the same has been rejected by the authorities vide order under Annexure-11.

34. Furthermore, perusal of the impugned order dated 14.09.2022 under Annexure-11 reveals that the RDC (SD), Berhampur has rejected the representation of the petitioner with the observation that the petitioner has failed to produce any

court order/Government order to substantiate his claim regarding up-gradation of the remarks in his CCR recorded by accepting authority from "Very Good" to "Outstanding" and that as the process of recording of CCR of Non-Gazetted employees of Government of Odisha is governed by guidelines enunciated in Book Circular No.46, no power having been conferred on the authority in the said circular for up-gradation of remarks in his CCR from "Very Good" to "Outstanding", as such, the relief sought for by the petitioner cannot be granted at this level and accordingly, the representation was disposed of.

35. On a careful analysis of such observation made by the RDC(S.D.), Berhampur, it appears that the petitioner was not given promotion to ORS Group-B Cadre and his representation was rejected by the Opposite Parties on the ground that the CCR of the petitioner in the year 2015-2016 contains a remark "Very Good". Hence, the authorities, after considering such CCR of the petitioner, did not consider his case for promotion. Therefore, such remark has been used to the disadvantage of the petitioner and accordingly, the petitioners are seriously prejudiced. At this juncture, by applying the ratio laid down by the Hon'ble Supreme Court in ***Dev Dutt*** case (supra) as well as in ***Abhijit Ghosh Dastidar*** case (supra) to the effect that such entries should have been communicated to the employee concerned. Further in para-4 of the judgment in ***Abhijit Ghosh Dastidar*** case (supra), the Hon'ble Supreme Court has categorically held that where for promotion the benchmark of "Very Good" is required and admittedly, the entry of "Good" was not communicated to the Government employee, therefore, the entry "Good" should have been communicated to the concerned Government employee as he was having "Very Good" for the previous years. Further, it was held that non-communication of the entry "Good" to the public servant has civil consequence because such entry in CCR has affect chances for promotion and to get other service and financial benefits. Hence, the said non-communication would be arbitrary and as such violative of Article 14 of the Constitution of India. In such view of the matter this Court has no hesitation to hold that the entry in CCR of the petitioner in respect of the year 2015-2016 as "Very Good" is adverse entry as the same has created obstacle in considering the case of the petitioner for promotion to the post of ORS Group-B. Accordingly, the 1st question is answered.

36. So far the 2nd question formulated by this Court in para-19 of this judgment is concerned, i.e. whether the remark "Very Good" in CCR of the petitioner for the relevant year was required to be communicated to the petitioner by providing the petitioner an opportunity to make a representation against such remark. Since this Court has categorically held that the remark "Very Good", in the case of the petitioner to be an adverse remark, so far the petitioner is concerned. Therefore, by applying the law laid down by the Hon'ble Supreme Court in the above referred judgments, this Court is of the considered view that the Opposite Parties should have communicated such remarks in the CCR for the year 2015-2016 to the petitioner and

an opportunity should have been provided to the petitioner to make a representation against such remark. Therefore, the question no.2 is answered in the affirmative.

37. The next question that falls for consideration by this Court is as to whether petitioner is entitled to any relief in the facts and circumstances of the present case? In view of the analysis of law made hereinabove and further keeping in view the answer to question nos.1 and 2, this Court has no hesitation to hold that the impugned order dated 14.09.222 under Annxure-11 is unsustainable in law and accordingly, the same is required to be quashed and hereby quashed. The Opposite Parties are directed to convene a review DPC meeting to re-assess the suitability of the petitioner for promotion to the post of ORS Group-B Cadre and while doing so, the adverse entry in the CCR of the petitioner in respect of the year 2015-2016 be excluded. In the event the petitioner is found otherwise suitable by taking into consideration equal number of immediate preceding years CCR of the petitioner, he shall be given promotion to the post of ORS Group-B Cadre with effect from the date his batch-mates were given promotion to ORS Group-B Cadre. It is needless to direct here that all service and financial benefits be extended in favour of the petitioner by taking into consideration the date of promotion of the petitioner to ORS Group-B Cadre from date on which the batch-mates of the petitioners were promoted. The Opposite Parties are directed to complete the aforesaid exercise within a period of two months from the date of production of certified copy of the judgment.

38. Accordingly, the writ petition stands allowed. However, there shall be no order as to cost.

**W.P.(C) No.12123 of 2022**

39. In view of the aforesaid analysis of law and categorical finding given by this Court, the present writ petition stands allowed. Accordingly, the order dated 06.04.2022 under Annexure-11 is hereby quashed. Further, it is directed that the Opposite Parties shall convene a review DPC immediately and the case of the petitioner for promotion to the post of ORS Group-B Cadre be considered by such review DPC in the light of the direction given in W.P.(C) No.25821 of 2022 decided on 31.03.2023 within a period of two months from the date of communication of this judgment.

**W.P.(C) No.12124 of 2022**

40. In view of the aforesaid analysis of law and categorical finding given by this Court, the present writ petition stands allowed. Accordingly, the order dated 06.04.2022 under Annexure-11 is hereby quashed. Further, it is directed that the Opposite Parties shall convene a review DPC immediately and the case of the petitioner for promotion to the post of ORS Group-B Cadre be considered by such review DPC in the light of the direction given in W.P.(C) No.25821 of 2022 decided

on 31.03.2023 within a period of two months from the date of communication of this judgment.

**W.P.(C) No.12125 of 2022**

41. In view of the aforesaid analysis of law as well as fact and further keeping in view the answer to the questions formulated in paragraph-19 of this judgment, the present writ application stands allowed, the impugned order dated 31.03.2022 under Annexure-11 is hereby quashed. Further, it is directed that the Opposite Parties shall convene a review DPC and proceed in the manner, as has been directed in W.P.(C) No.25821 of 2022 decided on 31.03.2023 within a period of two months from the date of communication of this judgment.

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## 2023 (I) ILR - CUT-1158

**V. NARASINGH, J.**

W.P.(C) NO. 10683 OF 2016

**STATE OF ODISHA** ..... Petitioner

-V-

**THE ASST.PROVIDENT FUND COMMISSIONER & ANR.** .....Opp.Parties

**EMPLOYEES' PROVIDENT FUNDS AND MISCELLANEOUS PROVISIONS ACT, 1952 R/W EMPLOYEES' PROVIDENT FUNDS SCHEME, 1952 – Whether, the NMR employees of the Gopalpur Port Project after availing the Voluntary Separation Scheme (VSS) and collecting full and final settlement of all the dues can raise a further claim under EPF & MP Act ? – Held, yes – The VSS notification does not disclose that, opting for the said scheme would automatically disentitle the workman from claiming his legitimate right – Law is well settled that any notification/circular cannot override the statute and such restriction ex facie are nullity in the eye of law.** (Paras 30 - 31)

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

1. 2016 ILR Cut-767 : Ram Chandra Omkarlal vrs. Asst. Provident Fund Commissioner.
2. (2008) 5 SCC 756 : Himachal Pradesh State Forest Corporation vrs. RPF Commissioner.
3. (2015) 3 SCC 695 : Jt. Collector Ranga Reddy District & Anr. vrs. D. Narsing Rao & Ors.
4. AIR 2001 SC 850 : S.K. Nasirudin Beedi Merchant Ltd. vrs. Central Provident Fund Commissioner & Anr.
5. (2019) 7 SCC 440 : Director, Steel Authority of India Limited vrs. Ispat Khadan Janta Mazdoor Union.
6. AIR 1955 SC 425 : Sangram Singh vrs. Election Tribunal Kotah & Anr.

For Petitioner : Mr. S.N. Pattnaik, A.G.A
Mr. Prasanjit Mohapatra, A.S.C.

For Opp.Parties : Mr. S.S. Mohanty (O.P.1)
Mr. S.Sahoo (Caveator)

JUDGMENT Date of Hearing : 17.03.2022 : Date of Judgment : 24.03.2023

***V. NARASINGH, J.***

**1.** The Executive Engineer (Civil), Gopalpur Port Trust, Ganjam has preferred this petition invoking writ jurisdiction assailing the assessment order dated 17.11.2014 passed by the Assessing Officer & Asst. P.F. Commissioner SRO, Berhampur, Odisha in 7-A Case No.47 of 2014 under Section 7-A of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as "the Act, 1952") directing for payment of a sum of Rs.1,55,77,612.00 at Annexure-6 as well as the appellate order dated 01.04.2016 passed by the Presiding Officer, EPFAT in ATA No.172 (10) of 2015 at Annexure-11 confirming such assessment.

**2.** It is apt to state here that it is the third journey of the State/its functionaries to this Court inasmuch as assailing the notice issued by the authorities under the Act, 1952, the Petitioner had filed WP(C) No.20682 of 2012, which was disposed of by order dated 12.3.2014 directing them to participate in the proceeding.

**3.** The impugned order of assessment at Annexure-6 was earlier challenged by the State by filing WP(C) No.910 of 2015.

**4.** And, by order dated 29.01.2015, this Court disposed of the said writ petition with a direction to appear before the statutory appellate authority in terms of Section 7(1) of the Act, 1952.

**5.** By the impugned order at Annexure-11, the appellate authority dismissed the appeal. Hence, this writ petition.

**6.** Brief undisputed facts germane for just adjudication of the lis bereft of unnecessary detail is stated hereunder.

Gopalpur Port Civil Division and Gopalpur Port Mechanical Division under Gopalpur Port Project started functioning at Arjipalli in the District of Ganjam under Commerce and Transport Department, Government of Orissa (now Odisha) for construction of Gopalpur Port Project in the year 1980. On 10.02.1982 as required by the Enforcement Officer in terms of Act, 1952, the Executive Engineer, Gopalpur Port Project, filled up the Investigation Proforma detailing therein various information required to be furnished to the EPF Authority by which there was an admission that the said Project started functioning since February, 1980.

**7.** On 04.05.1982, the Regional Provident Fund Commissioner, Odisha, Headquarters, Bhubaneswar, vide communication dated 04.05.1982, addressed to the

Executive Engineer, Gopalpur Port Project Division, for coverage of the said Establishment w.e.f. 31.10.1980 and Clause No.23 of the said communication reflects that the Petitioner Establishment was allotted with EPF Code i.e. OR/1945. In the said communication dated 04.05.1982, the Petitioner Establishment was intimated as to compliance of various provisions of the Act, 1952 including deposit of contributions in terms of the said Act so also the Employees Provident Fund Scheme, 1952 (Scheme 1952).

**8.** It was also indicated in the said communication as to what would be the consequences in case of non-compliance of the said provisions under the Act, 1952 as well as Scheme, 1952.

**9.** On 23.07.1982, the Regional Provident Commissioner, Odisha wrote to the Executive Engineer, Gopalpur Port Project reiterating that the said Establishment has been covered under the Act, 1952 and the Schemes, 1952 framed thereunder w.e.f. 31.10.1980 and he has to report compliance under the said Act w.e.f. 01.11.1980 onwards.

**10.** The Gopalpur Port Civil Division and Gopalpur Port Mechanical Division were two public works divisions functioning at Arzipalli in the district of Ganjam under Commerce and Transport (Commerce) Department for construction of Gopalpur Port Project. After restructure of Inland Water Transport Sector, both the Public Works Divisions in Commerce and Transport (Commerce) Department were merged together and designated as Ports and Inland Water Transport, South Division, Berhampur w.e.f. 1.4.2007.

**11.** The Work Charged as well as NMR Workers working in Gopalpur Port Project raised an industrial dispute for regularization of their services and the said industrial dispute was referred for adjudication to the Industrial Tribunal, Bhubaneswar which was registered as ID Case No. 38 of 1996.

**12.** An Award was passed by the Industrial Tribunal, Bhubaneswar directing the Management to regularize the services of the said NMR Workers. The Management challenged the said Award in OJC No. 675 of 2000 before this Court. This Court confirmed such award passed in I.D. Case No.38 of 1996 and dismissed the Writ Petition.

**13.** The Management preferred Special Leave Petition against the said Award as well as Judgment passed by this Court in OJC No.675 of 2000 before the Apex Court. As the said Port Project was not commercially viable, a decision was taken to close Gopalpur Port and privatize the same in the year 2003. On 30.01.2003 during pendency of the Special Leave Petition before the Apex Court, the Management vide Notification No.865 dated 30.01.2003, at Annnexure-1, floated the Voluntary Separation Scheme (in short, "VS Scheme) for disengagement of NMR Workers from service from Gopalpur Port Project. Apprehending that the Management may

not follow the pre-conditions prescribed under the Industrial Disputes Act, 1947 for retrenchment of workmen, if any Workman fails to opt for VS Scheme, Opp. Party No.2 Union preferred W.P.(C) No 1516 of 2003 challenging the said VS Scheme and this Court, as an Interim measure, stayed the operation of the said VS Scheme.

**14.** The said W.P.(C) No.1516 of 2003 was disposed of on 21.01.2004 with an observation that in the event the Management intends to terminate the service/retrench any NMR Employee, who does not exercise his option for voluntary retirement under the said Scheme, such retrenchment shall be made only after following the due process of law and in accordance with the provisions of the Industrial Disputes Act, 1947. Pursuant to the said order of this Court, vide Notification dated 01.07.2004, the said VS Scheme was re-implemented on 01.07.2004. Accordingly, out of 221 NMR Workmen, 219 Workmen opted for VSS and they were paid Rs.5,000/- for each completed year of service subject to ceiling of Rs.1,00,000/- as financial benefit, in terms of Clause-4 of the said VS Scheme Notification dated 30.01.2003. The remaining 2 NMRs, pursuant to clarification received from the Labour Commissioner, Odisha, Bhubaneswar, vide his letter dtd. 08.09.2004 were paid retrenchment compensation in terms of the provisions enshrined under the Industrial Disputes Act, 1947.

**15.** While the matter stood thus, the Special Leave Petition preferred by the Management was dismissed. Because of inaction of the Authority relating to coverage under the Act, 1952, a Pleaders Notice was given by the Opposite Party No.2-Union on 09.11.2010. The Regional Provident Fund Commissioner-I, Odisha, EPFO, Bhubaneswar, on 29.06.2011 wrote to the Secretary to Government, Government of Odisha, Commerce and Transport (Commerce) Department regarding extension of EPF benefits to the Ex-NMR Employees of Gopalpur Port Project clarifying therein that all the Ports have been brought under the purview of Section 1(3) (b) of the Act, 1952 w.e.f. 23.11.1981 under the scheduled head "Establishments engaged in stevedoring, loading and unloading of ships". Basing on the Pleader's Notice dated 09.11.2010, at Annexure-4, the Assistant Provident Fund Commissioner, SRO, Berhampur (Opp.Party No. 1) on 09.08.2011 at Annexure-5 gave a notice to the Petitioner Management regarding extension of EPF benefits to Ex-NMRs Employees and vide the said notice, it was directed to appear before him on 29.08.2011 and produce the relevant records such as Attendance Register, Payment Register/Bills/Paid Voucher, Cash Book, General Ledger, Trading/Profit And Loss Account/Income And Expenditure Account and Audited Balance Sheet/Trial Balance, Income Tax Assessment and Sale Tax Assessment, list of Ex-NMR Employees with date of joining and month wise wages/salary statements and any other document necessary for ascertaining attendance and payments made to the said Employees. The Petitioner Management, vide its letter dated 22.11.2011 and the Director, Ports and I.W.T, Odisha, Bhubaneswar to take a decision on extension of EPF benefits to Ex-NMRs of Gopalpur Port Project for compliance of the Notice of Asst. Provident Fund Commissioner, Berhampur, in time.

**16.** Challenging the said Notice dated 09.08.2011, at Annexure-5, the Petitioner Management preferred W.P.(C) No.20862 of 2012. During pendency of the said Writ Application, on 30.03.2013 the Joint Secretary to Government, Government of Odisha, Commerce and Transport (Commerce) Department, wrote to the Central Provident Fund Commissioner, EPFO, New Delhi for exemption of Ex-NMRs of Gopalpur Port Project from the purview of the Act, 1952.

**17.** This Court dismissed the said Writ Application on 12.03.2014.

**18.** Pursuant to the said Notice as at Annexure-5, 7-A proceeding was initiated by the Opp. Party No.1, which was registered as 7-A Case No. 47 of 2014. On 17.11.2014, Opposite Party No.1 after giving due opportunity to the Petitioner Management represented by a Lawyer, in view of non-production of documents by the Petitioner Management and taking note of the documents filed by the Opposite Party No.2 Union on 22.08.2014 so also information/report of the ESI Inspector, passed the impugned order at Annexure-6 directing payment of Rs.1,55,77,612/- towards contribution (both Employer's as well as Employees') for the period from April, 1986 to September, 2004 keeping in view the Petitioner Management's stand that all the workmen were disengaged w.e.f. 30.09.2004 and they have received their retrenchment compensation/V.S.S. benefits from erstwhile Gopalpur Project in full and final settlement of all their claims.

**19.** Challenging the said Order of Assessment dated 17.11.2014 at Annexure-6, the Petitioner-Management preferred W.P.(C) No.910 of 2015 before this Court instead of filing statutory Appeal before the PF Appellate Tribunal U/s.7-I of the Act, 1952. The said Writ Application was disposed of on 29.01.2015 giving liberty to the Petitioner Management to prefer an Appeal U/s.7-I of the Act, 1952 with further observation that the Appellate Authority shall condone the delay and hear the Appeal on its own merit.

**20.** Pursuant to the same, the Petitioner Management preferred an Appeal U/s. 7-I of the Act, before the EPFA Tribunal, New Delhi and the same was registered as Appeal No.172 (10) of 2015**.** The EPF Appellate Tribunal by order dated 01.04.2016, at Annexure-11, confirmed the 7-A order under the Act, 1952 and in passing such order in exercise of its appellate jurisdiction the original official records pertaining to the present Petitioner/Appellant Establishment, so also Form No.5-A duly filled and signed by the present Petitioner Establishment and given to the EPF Department on 10.02.1982 were noted. It was further observed by the Appellate Tribunal that the Appellant Establishment was brought under the provisions of the Act, 1952 w.e.f. 31.10.1980 vide letter dated 23.07.1982. The appellate authority noted that Establishment-Petitioner never challenged the said order dated 23.07.1982 though the same is appealable U/s. 7-I of the Act, 1952 and as such the same attained finality.

**21.** Before the appellate Tribunal, three grounds were specifically agitated. The same are culled out hereunder;

> "(I) Whether the NMR employees of the Gopalpur Port Project after availing the Voluntary Separation Scheme (VSS) and collecting full and final settlement of all the dues can raise a further claim under the EPF & MP Act ?
>
> (II) Whether such claim can be raised from the Government after 7 years of receiving the full and final settlement ?
>
> (III) Whether the Assistant Provident Fund Commissioner was correct in raising demand from the appellant without first determining whether the appellant establishment was liable for such statutory contributions ?" (Para 20 of the Writ Petition)

**22.** It is the assertion of the Petitioner that the statutory Tribunal abdicated its responsibility in not answering the points raised, inter alia, as to whether the employees, who have already retired after receipt of full and final settlement amount under VS Scheme, can further raise a claim under the Act, 1952; Whether the same is permissible after 7 years of receipt of their entitlement under VSS and Whether the Petitioner establishment is liable to pay such contribution.

**23.** It is apt to note here that the Tribunal confined itself to Ground Nos.II and III with regard to coverage of establishment under the Act 1952, so also its liability to pay the statutory contribution under the Act, 1952.

**24.** Opposite Party No.1-Assistant Provident Commissioner filed a counter affidavit supporting the order passed by the Tribunal, inter alia, asserting that there being no irregularity or illegality, either procedural or in the assessment of materials on record by the Tribunal, there is no scope for this Court to interfere with the same.

**25.** Opposite Party No.2- Union filed the counter seeking dismissal of the writ petition.

**26.** Relying on such counter affidavit Opposite Party No.1 submitted that the Tribunal in exercise of its statutory function on due consideration of materials on record arrived at the cogent findings. As such there is no room for this Court to interfere with such order in exercise of its power under Article 226/227 of the Constitution of India. In this context he relied on the judgment of this Court in the case of **Ram Chandra Omkarlal vrs. Assistant Provident Fund Commissioner** reported in **2016 ILR Cuttack 767**.

**27.** The Petitioner filed rejoinders to the counter filed by the Employees Union-Opposite Party No.2 as well as counter filed on behalf of the Provident Fund Commissioner-Opposite Party No.1.

**28.** As regards Ground No.I it is apt to state here that this court independently examined the contention of the State Petitioner as agitated in Ground No.I. For convenience of ready reference, at the cost of repetition, the said ground is extract hereunder.

> "(I) Whether the NMR employees of the Gopalpur Port Project after availing the Voluntary Separation Scheme (VSS) and collecting full and final settlement of all the dues can raise a further claim under the EPF & MP Act ?"

**29.** It is pertinent to mention here that the said ground was raised for the 1st time before the Tribunal. Nevertheless this Court thought it prudent to examine the same.

**30.** The VSS Notification dated 30.01.2003 annexed to the writ petition as Annexure-1 does not disclose that, opting for the said scheme would automatically disentitle the Workman from claiming his legitimate right. Further, as rightly pointed out, 7-A proceeding was initiated by the authority in terms of the special statute that is Act, 1952 not by the employees concerned or their union. In fact at the instance of the Opposite Party No.2 Union on getting a legal notice at Annexure-4 of the writ petition dated 9.11.2010 the pending issue as to non-deposit of EPF contribution relating to 221 NMRs was revived by the competent authority and in the absence of any provision under the Act, 1952 or the Scheme, 1952 restricting the authority to revive the pending proceeding or issues pertaining to coverage of an establishment and non-payment of contributions, both on account of the shares of the employer as well as the employees, the provident fund authority was justified in reviving the said pending issue and pass the impugned order dated 17.11.2014 at Annexure 6.

**31.** Law is well settled that any notification/circular or for that matter settlement as in the case at hand cannot override the statute and such restrictions ex facie are a nullity in the eye of law. Hence non consideration of such issue raised for the 1st time as noted by the Tribunal relating to availing of VSS scheme and the rights as guaranteed under the special statute can not in any way have any impact on the merits of the matter. Hence for the non consideration of the said ground by the Tribunal the writ petition cannot be dismissed as prayed for by the learned counsel for the State.

**32.** The Provisions enshrined under the EPF and MP Act, 1952 so also the EPF Scheme, 1952, which are relevant for just adjudication of the present lis, are detailed below for ready reference.

> "**Section-1(2)(b) of the EPF and MP Act, 1952** prescribes that the said Act is applicable to any other establishment **employing twenty or more** persons or class of such establishments which the Central Government may, by the Notification in the Official Gazette, specify in this behalf.
>
> **Section-2 (f)** of the EPF and MP Act, 1952 defines "**employee**" means any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of [an establishment], and who gets his wages directly or indirectly from the employer, [and includes any person –
>
> (i) employed by or through a contractor in or in connection with the work of the establishment;

**Section 2(ff)** of the EPF and MP Act, 1952 defines "**exempted employee**" means an employee to whom a Scheme [or the Insurance Scheme, as the case may be] would, but for the exemption granted under Section 17, have applied.

**Section - 2(fff)** of the EPF and MP Act, 1952 defines "exempted establishment" means an establishment in respect of which an exemption has been granted under section 17 from the operation of all or any of the provisions of any Scheme or the Insurance Scheme, as the case may be, whether such exemption has been granted to the establishment as such or to any person or class of person employed therein.

**Section-17** of the EPF and MP Act, 1952 empowers the appropriate Government to exempt an establishment, whether prospectively or retrospectively, from the operation of all or any of the provisions of any Scheme-

(a) any establishment to which the said Act applies if, in the opinion of the appropriate Government, the rules of its Provident Fund with respect to the rates of contribution are not less favorable than those specified in Section 6 and the employees are also in employment of other Provident Fund benefits which on the whole are not less favorable to the employees than the benefits provided under the said Act or any Scheme in relation to the employees in any other establishment of a similar character.

**Para-26(1)(a) of the Employees' Provident Funds Scheme, 1952** prescribes that every employee employed in or in connection with the work of a factory or other establishment to which the said Scheme applies, other than an excluded employee, shall be entitled and required to become a member of the Fund on the day the said paragraph came into force in such factory or any other establishment.

**Para-27-AA** deals with exemption of an employee and terms and condition of such exemption of an employee.

**Para-30(1)** of the Employees Provident Funds Scheme, 1952 prescribes that the employer shall, in the first instance, pay both the contribution payable by himself (in the Scheme referred to as the employer's contribution) and also, on behalf of the member employed by him directly or by or through a contractor, the contribution payable by such member (in the Scheme referred to as the member's contribution).

**Para-30(3)** of the Employees' Provident Funds Scheme, 1952 mandates that it shall be the responsibility of the principal employer to pay both the contribution payable by himself in respect of the employees directly employed by him and also in respect of the employees employed by or through a contractor and also administrative charges.

**Para-31** of the Employees' Provident Funds Scheme, 1952 prescribes that notwithstanding any contract to the contrary the employer shall not be entitled to deduct the employer's contribution from the wages of a member or otherwise to recover it from him.

**Para-32(1)** of the Employees Provident Funds Scheme, 1952 mandates that the amount of a member's contribution paid by the employer or a contractor shall, notwithstanding the provisions in the said Scheme or any law for the time being in force or any contract to the contrary, be recoverable by means of deduction from the wages of the member and not otherwise.

**The first Proviso** to **Para-32(1)** provides that no such deduction may be made from any wages **other than that which is paid in respect of the period or part of the period in respect of which the contribution is payable**.

**The third Proviso to Para-32 (1)** permits the employer to deduct from the subsequent wages of an employee where no such deduction has been made on account of accidental mistake or a clerical error, with the consent in writing of the ESI Inspector.

**Para-36 (1)** of the EPF Scheme, 1952 mandates that every employer shall send to the Commissioner, within fifteen days of the commencement of the said Scheme, a consolidated return in such form as the Commissioner may specify, of the employees required or entitled to become members of the Fund showing the basic wages, retaining allowance (if any) and dearness allowance including the cash value of any food concession paid to each of such employees. Provided that if there is no employee who is required or entitled to be a member of the Fund, the employer shall send a "Nil" return.

**Para-37** of the EPF Scheme, 1952 prescribes that on receipt of the information referred to in paragraphs 33, 34 and 36, the Commissioner shall promptly allot an Account Number to each employee qualifying to become a member and shall communicate the Account Number to the member through the employer.

**Para-38 (1)** of the EPF Scheme, 1952 prescribes as to mode of payment of contributions other than an excluded employee."

**33.** To fortify their stance of limitation, as agitated in Ground No.II "Whether such claim can be raised from the Government after 7 years of receiving the full and final settlement?" learned counsel for the Petitioner-State relied on the judgment of the apex court in the case of **Himachal Pradesh State Forest Corporation vrs. RPF Commissioner** reported in **(2008) 5 SCC 756** at paras 4 and 5 quoted hereunder:

"4. Mr M.N. Rao, the learned Senior Counsel for the appellant has at the outset very fairly pointed out that as of today and in the light of the fact that the Corporation itself had voluntarily submitted that it was covered by the provisions of the Act the question of a dispute with regard to the liability of the Corporation was now largely academic, but has pleaded that as the employees in question were seasonal employees and the matter pertained to a long-gone period i.e. 1982-1988, the record pertaining to the employees was not available either with the Corporation or with the contractors and that in many a case those who stood to benefit were not even traceable, it would be appropriate that the impugned orders be quashed as they would not serve any useful purpose. It has also been pleaded that although there was no limit prescribed under the Act within which proceedings under Section 7-A could be initiated, but under the broad principle that a reasonable period ought to be read into the statute, the present delay of 16 years from 1982 could not be justified. The learned counsel for the respondents has, however, argued that the Tribunal and the High Court had granted a limited relief to the employees inasmuch that the examination of the claim was to be limited only to those employees who could be identified and that as the authorities below had exercised their authority with respect to a beneficent legislation for the weaker sections, it would be inappropriate to interfere with the impugned orders.

5. We have heard the learned counsel for the parties and gone through the record. We do appreciate that the inaction on the part of the Commissioner to initiate proceedings within a reasonable time, has to be deplored. However, as the Corporation has itself submitted that it was covered under the Act and in view of the limited relief granted by the authorities below and by the High Court, we are disinclined to interfere with the matter at this stage. We accordingly dismiss the appeals but reiterate the recommendation that the amounts due from the Corporation will be determined only with respect to those employees who are identifiable and whose entitlement can be proved on the evidence and that in the event the record is not available with the Corporation (at this belated stage), it would not be obliged to explain its loss, or that any adverse inference be drawn on this score. With this very small modification, we dismiss the appeals."

**33-A.** And in the case of **Joint Collector Ranga Reddy District and another vrs. D. Narsing Rao and others,** reported in **(2015) 3 SCC 695.** The Apex Court at paras-25 and 31 held as follows :

> "25. The legal position is fairly well settled by a long line of decisions of this Court which have laid down that even when there is no period of limitation prescribed for the exercise of any power, revisional or otherwise, such power must be exercised within a reasonable period. This is so even in cases where allegations of fraud have necessitated the exercise of any corrective power. We may briefly refer to some of the decisions only to bring home the point that the absence of a stipulated period of limitation makes little or no difference insofar as the exercise of the power is concerned which ought to be permissible only when the power is invoked within a reasonable period.
>
> xxx xxx xxx
>
> 31. To sum up, delayed exercise of revisional jurisdiction is frowned upon because if actions or transactions were to remain forever open to challenge, it will mean avoidable and endless uncertainty in human affairs, which is not the policy of law. Because, even when there is no period of limitation prescribed for exercise of such powers, the intervening delay, may have led to creation of third-party rights, that cannot be trampled by a belated exercise of a discretionary power especially when no cogent explanation for the delay is in sight. Rule of law it is said must run closely with the rule of life. Even in cases where the orders sought to be revised are fraudulent, the exercise of power must be within a reasonable period of the discovery of fraud. Simply describing an act or transaction to be fraudulent will not extend the time for its correction to infinity; for otherwise the exercise of revisional power would itself be tantamount to a fraud upon the statute that vests such power in an authority."

**34.** On a bare perusal of both the judgments it can be seen that they are not applicable to the facts of the present case. In the case of **Himachal Pradesh State Forest Corporation** (supra), the apex Court while deploring the inaction on the part of the Commissioner to initiate a proceeding under Section 7-A of the Act, 1952 did not approve the submission that limitation can be read into a beneficial legislation meant for the weaker section when the lawmakers consciously chose not to do so.

**35.** Similarly in the case of **D. Narsing Rao** (supra) exercise of suo motu power by way of revision was being considered by the apex Court.

**36.** Hence, there is no merit in the contention that the claim cannot be raised after a lapse of 7 years as alleged. Even otherwise, this Court having already held that full and final settlement cannot have any bearing on dues which are statutorily payable by the employer, the Ground No.II, as framed, is outcome of non application of mind regarding statutory liability enjoined upon an employer by the Act, 1952.

**37.** On perusal of materials on record, it is abundantly clear that Petitioner Management's Establishment was not an Exempted Establishment duly notified by the Appropriate Government as required U/s. 17 (1) of the Act, 1952. And, the concerned 221 workmen were "Employee" as defined U/s. 2 (f) and not "Exempted Employee" as defined U/s. 2 (ff) of the Act, 1952, in view of clear and unambiguous provisions enshrined under the Act, 1952 so also Scheme, 1952. As such, the statutory

authority did not commit any mistake in raising the demand in exercise of the statutory functions. Hence, the Ground No.III as framed is misconceived.

**38.** Once the Establishment of the Petitioner Management was brought under the coverage of the Act, 1952 as per the communication made to it vide letter dated 04.05.1982 as well as 23.07.1982, it was obligatory on the part of the Petitioner Management to deduct the employees share from the salary of the concerned 221 NMR Workers and deposit the said amount with Employer's share so also Administrative Charges with the PF Authority.

**39.** At this juncture, it is not open to challenge the action of the PF Authority for initiation of Section-7-A proceeding in terms of Act, 1952 on the plea that the concerned workers never demanded to bring them under the coverage of the Act, 1952 so also on the ground of non deduction of employee's share from the respective salaries of the said concerned 221 NMR Workers for the relevant period i.e. since April, 1986 to September, 2004, i.e. the date till which, all the concerned workmen continued under the Pay Roll of the Petitioner Management and were finally paid the VSS benefits as well as Retrenchment Compensation as and when applicable.

**40.** Hence, the Assistant Provident Fund Commissioner was justified to pass the impugned order dated 17.11.2014 U/s. 7-A of Act, 1952, after giving sufficient opportunity to the Petitioner Management to have its say so also produce the relevant records and particulars pertaining to all the concerned 221 NMR Workers and that too based on the minimum wages notified by the State Government as the Petitioner Management failed to provide the wages particulars of the concerned 221 NMR Workers for the relevant period despite repeated and sufficient opportunity given to it in the 7-A proceeding. And, in view of clear and unambiguous provision under Section-7Q of the Act, 1952, the statutory authority imposed interest @ 12% so also penal damages U/s. 14-B of the Act, 1952.

**41.** The Petitioner Management also submitted that since it never deducted the employees' contributions from the wages of the concerned 221 NMR Workers, the order passed in 7-A proceeding by the Authority under the Act, 1952 so also the confirming order passed by the Appellate Authority imposing such financial liability on the Petitioner Management is neither legal nor justified.

**42.** It is pertinent to mention here that the Apex Court in the case of **S.K. Nasirudin Beedi Merchant Ltd. vrs. Central Provident Fund Commissioner and another** reported in **AIR 2001 SC 850** held thus:

> "….The applicability of the Act to any class of employees is not determined or decided by any proceeding under Section 7-A of the Act but under the provisions of the Act itself. When the Act became applicable to the employees in question, the liability arises. What is done under Section 7-A of the Act is only determination or quantification of the same. Therefore, the contention put forth on behalf of the appellant that their liability was attracted only from the date of determination of the matter under Section 7-A of the Act does not stand to reason."

**43.** Contour for exercise of judicial review in interfering with an order of statutory authority is well defined. It would be apposite to refer to a few of the authoritative pronouncement of the Apex Court in this context.

**43-A.** In **Director, Steel Authority of India Limited vrs. Ispat Khadan Janta Mazdoor Union**, reported in **(2019) 7 SCC 440**, the apex Court held thus:

> "….in absence of the finding of fact recorded being perverse or being of no evidence and even if there are two views which could possibly be arrived at, the view expressed by the Tribunal ordinarily was not open to be interfered with by the High Court under its limited scope of judicial review under Articles 226/227 of the Constitution of India and this exposition has been settled by this Court in its various judicial precedents."

**43-B.** In **Sangram Singh vrs. Election Tribunal Kotah and another**, reported in **AIR 1955 SC 425**, the apex Court held thus:

> "….The High Courts do not, and should not, act as Courts of appeal under Art. 226. Their powers are purely discretionary and though no limits can be placed upon that discretion it must be exercised along recognized lines and not arbitrarily; and one of the limitations imposed by the Courts on themselves is that they will not exercise jurisdiction in this class of case unless substantial injustice has ensued, or is likely to ensue…."

**44.** The order of this Court in the case of **Ram Chandra Omkarlal** (supra) is also to the same effect reiterating that this Court under Article 226 of the Constitution of India cannot assume the power of second appeal in order to disturb the fact finding by re-appreciating the materials on record.

**45.** On a conspectus of materials on record and on close evaluation of the orders of the Assessing Authority and Appellate Authority at Annexure-6 & 11 respectively, on the touchstone of the boundaries prescribing the exercise of jurisdiction in considering the orders passed by the statutory authorities, as noted above, this Court does not find any error of appreciation of fact and/or law so as to warrant interference under Articles 226 and 227 of the Constitution of India.

**46.** By way of affidavit filed on 16.03.2023 it is brought to the notice of this Court that in terms of the order dated 07.07.2015 passed by the Employees Provident Fund Appellate Tribunal, New Delhi, vide Annexure-11, 50% of the assessed amount i.e. Rs.77,88,806/- is lying in deposit with the Tribunal. The balance as due and admissible in terms of the appellate order of the Tribunal at Annexure-11 be deposited with Opposite Party No.1 within a period of six months hence in accordance with the provisions of Act 1952 and Scheme framed thereunder.

**47.** The Writ Petition is dismissed. All interim orders stand vacated. No costs.

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**2023 (I) ILR - CUT-1170**

**BIRAJA PRASANNA SATAPATHY, J.**

W.P.C.(OA) NO. 3068 OF 2018

**BIBEKANANDA MOHANTY** ..... Petitioner

-V-

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

**WITH**

W.P.C.(OA) NO. 942 OF 2019
SUDHAKAR PRADHAN -V- STATE OF ODISHA & ORS.

**AND**

W.P.C.(OAC) NO. 1228 OF 2019
AMAR MOHAPATRA -V- STATE OF ODISHA & ORS.

**ODISHA CIVIL SERVICE (CLASSIFICATION, CONTROL AND APPEAL) RULE, 1962 – Rule 15 & 17 – Disciplinary proceeding was initiated against the petitioner – Charges were proved by enquiry officer relying upon 5 Nos. of documents which include the special audit report – Petitioners were never provided with the copy of the same, but allowed to inspect the documents prior to submission of the written statement of defence – Effect of – Held, offering of inspection of document is not sufficient and failure to supply document alongwith charge memo vitiate the entire proceeding.** (Paras 6.4 to 6.6)

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

1. (2011) 14 SCC 770 : State of Punjab Vs. Davinder Pal Singh Bhullar.
2. (2009) 2 SCC 570 : Roop Singh Negi Vs. Punjab National Bank.
3. (2010) 2 SCC 772 : State of Utter Pradesh Vs. Saroj Kumar Sinha.
4. AIR 1986 SC 2118 : Kashinath Dikshita Vs. Union of India & Ors.
5. AIR 1961 SC 1623 : State of Madhya Pradesh Vs. Chintaman Sadashiva Waishapayan.
6. 2014 (II) ILR-CUT-618 : G.S. Srivastab Vs. Union of India.
7. (1995) 1 SCC 332 : Transport Commissioner, Madras-5 Vs. A. Radha Krishna Moorthy.
8. (2006) 5 SCC 88 : M.V. Bijlani Vs. Union of India.
9. AIR 1957 SC 397 : Pannalal Binjraj & Anr. Vs. Union of India & Ors.

For Petitioner : M/s. Sidheswar Mallick

For Opp.Parties : Mr. A.P. Das, Addl. Standing Counsel

JUDGMENT Date of Hearing : 10.02.2023 : Date of Judgment : 02.03.2023

***B.P.SATAPATHY, J.***

Since the issue involved in the all the three (3) writ petitions is similar and the claim made by the Petitioners is also similar, all the three (3) writ petitions were heard analogously and disposed of vide the present common order.

All the three (3) writ petitions have been filed challenging the order of punishment passed by the Govt.-O.P. No. 1 vide its order dtd.03.11.2018.

**2.** The factual backdrop giving rise to filing of the writ petitions is that vide memorandum dtd.25.04.2016 a joint proceeding was initiated against the Petitioners purportedly under Rule 17 r.w. Rule 15 of the OCS (CCA) Rules, 1962 (in short "Rules"). The proceeding in question was initiated against 5 nos. of delinquent employees which includes the present three (3) Petitioners. The article of charges framed vide Annexure-I to the memorandum dtd.25.04.2016 is reproduced hereunder:-

> *"Lack of integrity, decorum of conduct, devotion of duty leading to violation of Rule-3 of Odisha Govt. Servant's Conduct Rules' 1959."*

**2.1.** Vide Annexure-II to the memorandum, the statement of imputations in support of article of charges against all the delinquent employees were framed and communicated. Similarly vide Annexure-III to the memorandum the memo of evidence basing on which the charges are to be proved were indicated. On receipt of the memorandum of charges all the Petitioners filed their respective written statement of defence. Thereafter, vide office order dtd.05.08.2016 Opp. Party No. 1 being the Disciplinary Authority appointed the Enquiry Officer and the Marshalling Officer to conduct the enquiry against all the 5 nos. of delinquent employees. In the said office order it was indicated that the proceeding dtd.25.04.2016 has been initiated under Rule 17 r.w. Rule 15 of the Rules.

**2.2.** The Petitioners on being noticed by the Enquiry Officer vide letter dtd.19.08.2016 duly participated in the enquiry which was conducted on 17.09.2016. The Enquiry Officer after conducting the enquiry when submitted the enquiry report on 02.05.2017, the Petitioners herein were issued with the 1st show-cause vide letter dtd.06.05.2017. Even though all the Petitioners submitted their respective show-causes to the finding of the Enquiry Officer, but the Disciplinary Authority without considering the replies so submitted by the Petitioners issued the 2nd show-cause vide letter dtd.07.09.2017 by proposing the punishments to be imposed against each of the 5 delinquent employees.

**2.3.** Even though the Petitioners submitted their respective replies against the second show-cause, but the Opp. Party No. 1 passed the impugned order of punishment on 03.11.2018 by imposing the following punishment against the present three (3) Petitioners:-

> *"A. Sri Amar Mahapatra, Ex-CSO-cum-DM, Khordha*
> *i. Two increments withheld with cumulative effect.*
> *ii. Recovery of Rs. 1,34,02,705/- in suitable instalments.*
>
> *B. Sri Sudhakar Pradhan, Ex-I/c CSO-cum-DM, Khordha*
> *i. One increment withheld with cumulative effect.*
> *ii. Recovery of Rs.32,29,344/- in suitable installments.*
>
> *C. Sri Bibekananda Mohanty, Ex-MI, Begunia*
> *i. One increment withheld with cumulative effect.*
> *ii. Recovery of Rs.32,29,344/- in suitable instalment."*

**2.4.** Being aggrieved by the order of punishment so passed on 03.11.2018 the present Petitioners have approached this Court in the present three (3) Writ Petitions. **3.** Mr. S. Mallick, learned counsel for the Petitioners initially raised a preliminary objection with regard to maintainability of the proceeding inter alia on the ground that since the proceeding in question was initiated under Rule 17 r.w. Rule 15 of the Rules, in absence of the order of the Governor no such proceeding could have been initiated against the Petitioners vide memorandum dtd.25.4.2016 under Annexure-4.

Rule 17 of the Rules prescribes that where two (2) or more Government servants are concerned in any case, Governor or any other authority competent to impose the penalty of dismissal from service on all such Government servants may make an order directing that disciplinary action against all of them may be taken in a common proceeding. Sub Rule 2 of Rule 17 provides that subject to provision of Sub-rule (4) of Rule 14 any such order shall specify-

> *"(i) the authority which may function as the disciplinary authority for the purpose of such common proceedings;*
> *(ii) the penalties specified in Rule 13 which such disciplinary authority shall be competent to impose; and*
> *(iii) whether the procedure prescribed in Rule 15 or Rule 16 may be followed in the proceedings."*

**3.1.** Learned counsel for the Petitioners contended that since the memorandum dt.25.04.2016 was issued by the Opp. Party No. 1 and it does not reflect that it has been initiated by order of the Governor, the initiation of the proceeding is not only bad in the eye of law but also consequential action taken thereof.

In support of his aforesaid submission, Mr. Mallick, learned counsel for the Petitioners relied on a decision of the Hon'ble Apex Court in the case of ***State of Punjab Vs. Davinder Pal Singh Bhullar (2011) 14 SCC 770***. Hon'ble Apex Court in Para 107 to 111 of the Judgment has held as under:-

> *"107. It is a settled legal proposition that if initial action is not in consonance with law, all subsequent and consequential proceedings would fall through for the reason that illegality strikes at the root of the order. In such a fact situation, the legal maxim sublato fundamento cadit opus meaning thereby that foundation being removed, structure/work falls, comes into play and applies on all scores in the present case.*
>
> *108. In Badrinath v. Govt. of TN 86 and State of Kerala v. Puthenkavu N.S.S. Karayogam this Court observed that once the basis of a proceeding is gone, all consequential acts, actions, orders would fall to the ground automatically and this principle is applicable to judicial, quasi-judicial and administrative proceedings equally.*
>
> *109. Similarly in Mangal Prasad Tamoli v. Narvadeshwar Mishra this Court held that if an order at the initial stage is bad in law, then all further proceedings, consequent thereto, will be non est and have to be necessarily set aside.*
>
> *110. In C. Albert Morris v. K. Chandrasekaran89 this Court held that a right in law exists only and only when it has a lawful origin. (See also Upen Chandra Gogoi v. State of Assam, Satchidananda Misra v. State of Orissa, SBI v. Rakesh Kumar Tewari and Ritesh Tewari v. State of U.P.)*

*111. Thus, in view of the above, we are of the considered opinion that the orders impugned being a nullity, cannot be sustained. As a consequence, subsequent proceedings/orders/FIR/investigation stand automatically vitiated and are liable to be declared non est."*

**3.2.** Bereft of the question of maintainability learned counsel for the Petitioners also contended that even though the very basis of initiation of the proceeding is the special audit report, but the auditor of the report was never examined as a witness to prove the report nor the special audit report was proved in course of the enquiry. It is also contended that the Enquiry Officer without examining any witnesses in support of the charges conducted the enquiry on a single date and submitted the report on 02.05.2017 vide Annexure-9. It is contended that in a Departmental Proceeding mere production of the document is not enough and contents of such documentary evidence has to be proved by examining the concerned witnesses. In the instant case neither the auditor of the special audit report was examined nor the audit report was proved though any independent witnesses.

**3.3.** It is also contended that the Enquiry Officer never examined any witnesses to prove the charges against the Petitioners nor the Petitioners were given an opportunity to examine their witnesses in support of their stand as taken in the written statement of defence as the enquiry was held and concluded on a single day. Not only that since the prosecution never examined any witnesses to prove the charges, the Petitioners were deprived from cross-examining the said witnesses. In support of his aforesaid submission, Mr. Mallick relied on a decision of the Hon'ble Apex Court in the case of ***Roop Singh Negi Vs. Punjab National Bank (2009) 2 SCC 570*** as well as in the case of ***State of Utter Pradesh Vs. Saroj Kumar Sinha (2010) 2 SCC 772***.

**3.4.** Hon'ble Apex Court in the case of ***Roop Singh Negi*** in Para 14, 15 and 23 and in the case of ***State of Uttar Pradesh*** in Para 26 to 28 has held as follows:-

*"14. Indisputably, a departmental proceeding is a quasi-judicial proceeding. The enquiry officer performs a quasi-judicial function. The charges levelled against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the investigating officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, inter alia, was placed by the enquiry officer on the FIR which could not have been treated as evidence.*

*15. We have noticed hereinbefore that the only basic evidence whereupon reliance has been placed by the enquiry officer was the purported confession made by the appellant before the police. According to the appellant, he was forced to sign on the said confession, as he was tortured in the police station. The appellant being an employee of the Bank, the said confession should have been proved. Some evidence should have been brought on record to show that he had indulged in stealing the bank draft book. Admittedly, there was no direct evidence. Even there was no indirect evidence. The tenor of the report demonstrates that the*

*enquiry officer had made up his mind to find him guilty as otherwise he would not have proceeded on the basis that the offence was committed in such a manner that no evidence was left.*

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*23. Furthermore, the order of the disciplinary authority as also the appellate authority are not supported by any reason. As the orders passed by e them have severe civil consequences, appropriate reasons should have been assigned. If the enquiry officer had relied upon the confession made by the appellant, there was no reason as to why the order of discharge passed by the criminal court on the basis of selfsame evidence should not have been taken into consideration. The materials brought on record pointing out the guilt are required to be proved. A decision must be arrived at on some evidence, which is legally admissible. The provisions of the Evidence Act may not be applicable in a departmental proceeding but the principles of natural justice are. As the report of the enquiry officer was based on merely ipse dixit as also surmises and conjectures, the same could not have been sustained. The inferences drawn by the enquiry officer apparently were not supported by any evidence. Suspicion, as is well known, however high may be, can under no circumstances be held to be a substitute for legal proof."*

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*"26. The first inquiry report is vitiated also on the ground that the inquiry officers failed to fix any date for the appearance of the respondent to answer the charges. Rule 7(x) clearly provides as under:*

*"7. (x) Where the charged government servant does not appear on the date fixed in the inquiry or at any stage of the proceeding in spite of the service of the notice on him or having knowledge of the date, the inquiry officer shall proceed with the inquiry ex parte. In such a case the inquiry officer shall record the statement of witnesses mentioned in the charge-sheet in absence of the charged government servant."*

*27. A bare perusal of the aforesaid sub-rule shows that when the respondent had failed to submit the explanation to the charge-sheet it was incumbent upon the inquiry officer to fix a date for his appearance in the inquiry. It is only in a case when the government servant despite notice of the date fixed failed to appear that the inquiry officer can proceed with the inquiry ex parte. Even in such circumstances it is incumbent on the inquiry officer to record the statement of witnesses mentioned in the charge-sheet. Since the government servant is absent, he would clearly lose the benefit of cross-examination of the witnesses. But nonetheless in order to establish the charges the Department is required to produce the necessary evidence before the inquiry officer. This is so as to avoid the charge that the inquiry officer has acted as a prosecutor as well as a judge.*

*28. An inquiry officer acting in a quasi-judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the department/disciplinary authority/Government. His function is to examine the evidence presented by the Department, even in the absence of the delinquent official to see as to whether the unrebutted evidence is sufficient to hold that the charges are proved. In the present case the aforesaid procedure has not been observed. Since no oral evidence has been examined the documents have not been proved, and could not have been taken into consideration to conclude that the charges have been proved against the respondents."*

**3.5.** It is also contended that even though while initiating the proceeding vide Memorandum dtd.25.04.2016, the charges were to be proved basing on 5 nos. of documents more fully described vide Annexure-III to the memorandum, but the Petitioners at no point of time were provided with those documents. It is contended

that it is the obligation of the Disciplinary Authority to supply the documents along with the charge memo basing on which the charges were framed. Failure of supply of documents along with the charge memo violates the principle of natural justice and the consequential order of punishment is not sustainable in the eye of law. In support of his aforesaid submission Mr. Mallick relied on the decision of the Hon'ble Apex Court in the case of ***Kashinath Dikshita Vs. Union of India & Ors. (AIR 1986 SC 2118).*** Hon'ble Apex Court in Para 2, 12 and 13 of the said Judgment has held as follows:-

> *"2. The scope of the inquiry whether the impugned order of dismissal dated June 11, 1969 is null and void is restricted to two facets. Whether the principles of Natural justice were violated by the Respondents by refusing to supply to the appellant (1) copies of the statements of the witnesses examined at the stage of preliminary Inquiry preceding the commencement of the inquiry and (2) copies of the documents said to have been relied upon by the disciplinary authority in order to establish the charges against the appellant who was holding the post of Superintendent of Police, Bijnor, Uttar Pradesh. Such is the position having regard to the fact that this Court per Bhagwati, J. (as he then was) and Kailasam J. as per order dated October 25, 1977 whilst granting special leave, has so restricted the scope of the appeal in the following terms: -*
>
> *"Special leave granted limited only to the question whether there was any violation of Article 311 of the Constitution in regard to the documents and the statement of witnesses referred to in the affidavit of the petitioner dated 12-2-1977."*
>
> *XXX XXX XXX*
>
> *12. The appellant relied on Tirlok Nath v. Union of India 1967 Serv LR 759 (SC) in support of the proposition that if a public servant facing an inquiry is not supplied copies of documents, it would amount to denial of reasonable opportunity. It has been held in this case:*
>
> *"Had he decided to do so, the documents would have been useful to the appellant for cross-examining the witnesses who deposed against him. Again had the copies of the documents been furnished to the appellant he might, after perusing them, well have exercised his right under the rule and asked for an oral inquiry to be held. Therefore, in our view the failure of the Inquiry Officer to furnish to the appellant with copies of the documents such as the FIR and statements recorded at Shidhipura house and during the investigation must be held to have caused prejudice to the appellant in making his defence at the inquiry."*
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> *Reliance has also been placed on State of Punjab v. Bhagat Ram (1975) 2 SCR 370: (AIR 1974 SC 2335) and State of Uttar Pradesh v. Mohd. Sharif (dead) through LRS. (1982) 2 Lab LJ 180: (AIR 1982 SC 937) in support of the proposition that copies of statements of witnesses must be supplied to the Government servant facing a departmental inquiry it has been emphatically stated in State of Punjab V. Bhagat Ram by this Court as under:-*
>
> *"The State contended that the respondent was not entitled to get copies of statements. The reasoning of the State was that the respondent was given an opportunity to cross-examine the witnesses and during the cross-examination the respondent would have the opportunity of confronting the witnesses with the statements. It is contended that the synopsis was adequate to acquaint the respondent with the gist of the evidence.*
>
> *The meaning of a reasonable opportunity of showing cause against the action proposed to be taken is that the Government servant is afforded a reasonable opportunity to defend himself against the charges on which inquiry is held. The Government servant should be given an*

*opportunity to deny his guilt and establish his innocence. He can do so when he is told what the charges against him are. He can do so by cross-examining the witnesses produced against him. The object of supplying statements is that the Government servant will be able to refer to the previous statements of the witnesses proposed to be examined against the Government servant. Unless the statements are given to the Government servant he will not be able to have an effective and useful cross-examination.*

*It is unjust and unfair to deny the Government servant copies of statements of witnesses examined during investigation and produced at the inquiry in support of the charges levelled against the Government servant. A synopsis does not satisfy the requirements of giving the Government servant a reasonable opportunity of showing cause against the action proposed to be taken."*

*13. In view of the pronouncements of this Court it is impossible to take any other view. As discussed earlier the facts and circumstances of this case also impel us to the conclusion that the appellant has been denied reasonable opportunity to defend himself. In the result, we are of the opinion that the impugned order of dismissal rendered by the disciplinary authority is violative of Article 311(2) of the Constitution of India inasmuch as the appellant has been denied reasonable opportunity of defending himself and is on that account null and vold. We accordingly allow the appeal. The judgment of the High court is set aside. The impugned order of dismissal dated 10-11-1967 passed against the appellant is quashed and set aside We further declare that the impugned order of dismissal is a nullity and non-existent in the eye of law and the appellant must be treated as having continued in service till the date of his superannuation on January 31, 1983. Taking into account the facts and circumstances of this case and the time which has elapsed we are of the opinion that the State Government should not be permitted to hold a fresh inquiry against the appellant on the charges in question. We therefore direct the State Government not to do so.*

**3.6.** It is also contended that though the Petitioners were given an opportunity to verify the documents which form the basis of the charges, but in view of the decision of the Hon'ble Apex Court in the case of ***State of Madhya Pradesh Vs. Chintaman Sadashiva Waishapayan (AIR 1961 SC 1623)***, offering of inspection of a document is not sufficient and failure to supply the documents along with charge memo vitiates the entire proceeding. Hon'ble Apex Court in Para 2 and 11 of the said Judgment has held as follows:-

*"2. Broadly stated the respondent challenged the validity of the impugned order on three grounds. He urged that the said order was Invalid as it was passed on the basis of an enquiry made by the police officers of the Hyderabad State who were not subordinate to the Inspector General of Police, Madhya Pradesh; according to him it was essential that an enquiry should have been held against him under the Police Act and Regulations of Madhya Pradesh after the show-cause notice was served on him; and since no such enquiry was held the whole proceedings are void and the impugned order is ultra vires. He also urged that the said order was not in accordance with Regulation No. 273 of Police Regulations of Madhya Pradesh, and the contravention of the said Regulation made the order invalid. Lastly it was argued that the enquiry held by the Hyderabad authorities was contrary to all principles of natural justice, and at the said enquiry the respondent had not been given a reasonable opportunity to meet the charges framed against him.*

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*11. Mr Khaskalam has strenuously contended before us that in not supplying the copies of the documents asked for by the respondent the enquiry officer was merely exercising his*

*discretion, and as such it was not open to the High Court to consider the propriety or the validity of his decision. In support of this argument he has referred us to the decision of the Patna High Court in Dr Tribhuwan Nath v. State of Bihar, In that case the public officer wanted to have a copy of the report made by the anti-corruption department as a result of a confidential enquiry made by it against the said officer; and the enquiry officer had rejected his prayer. When it was urged before the High Court that the failure to supply the copy of the said report constituted a serious infirmity in the enquiry and amounted thereby to a denial of a reasonable opportunity to the public officer, the High Court repelled the argument, and held that the officer was not entitled to a copy of the report unless that report formed part of the evidence before the Enquiry Commissioner and was relied upon by him. "When, however, the report was not at all exhibited in the case, nor was it referred to, nor relied upon by the Commissioner", said the High Court, "there was no meaning in contesting it, and consequently absence of opportunity to meet its contents involved no violation of constitutional provisions". In our opinion, this decision cannot assist the appellant's case because, as we have already pointed out, the documents which the respondent I wanted in the present case were relevant and would have been of Invaluable assistance to him in making his defence and cross- examining the witnesses who gave evidence against him. It cannot be denied that when an order of dismissal passed against a public servant is challenged by him by a petition filed in the High Court under Article 226 it is for the High Court to consider whether the constitutional requirements of Article 311(2) have been satisfied or not. In such a case it would be idle to contend that the infirmities on which the public officer relies flow from the exercise of discretion vested in the enquiry officer. The enquiry officer may have acted bona fide but that does not mean that the discretionary orders passed by him are final and conclusive. Whenever it is urged before the High Court that as a result of such orders the public officer has been deprived of a reasonable opportunity it would be open to the High Court to examine the matter and decide whether the requirements of Article 311(2) have been satisfied or not. In such matters it is difficult and inexpedient to lay down any general rules; whether or not the officer in question has had a reasonable opportunity must always depend on the facts in each case. The only general statement that can be safely made in this connection is that the departmental enquiries should observe rules of natural justice, and that if they are fairly and properly conducted the decisions reached by the enquiry officers on the merits are open to be challenged on the ground that the procedure followed was not exactly in accordance with that which is observed in courts of law. As Venkatarama Aiyar, J. has observed in Union of India v. T.R. Varma "stating it broadly and without intending it to be exhaustive it may be observed that rules of natural justice require that a party should have the opportunity of adducing all relevant evidence on which he relies, that the evidence of the opponent should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party, and that no materials should be relied on against him without his being given an opportunity of explaining them". It is hardly necessary to emphasise that the right to cross-examine the witnesses who give evidence against him is a very valuable right, and if it appears that effective exercise of this right has been prevented by the enquiry officer by not giving to the officer relevant documents to which he is entitled, that inevitably would be that the enquiry had not been held in accordance with rules of natural justice. That is the view taken by the High Court, and in the present appeal which has been brought to this Court under Article 136 we see no justification for interfering with it. In this connection it would be relevant to refer to the decision of this Court in Khem Chand v. Union of Indias where this Court has emphasised the importance of giving an opportunity to the public officer defend himself by cross-examining the witnesses produced against him."*

**3.7.** It is also contended that even though the Enquiry Officer did not find any specific charges proved against the Petitioners, but the Opp. Party No. 1 while

issuing the 2nd show-cause though gave his reason for not concurring with the finding of the Enquiry Officer, but it is contended that since the very enquiry was conducted in a casual manner without examining any witnesses either from the prosecution or from the defence and that too conducting the enquiry on a single date vis-a-vis the nature of allegations made, the action of the Opp. Party No. 1 in issuing the 2nd show-cause and upholding the same while imposing the order of punishment is not sustainable in the eye of law. It is also contended that even though the allegation is with regard to illegal action of the concerned miller namely M/s. Kalinga Agriculture Private Limited, but the said miller was also not examined as a witness and the Petitioners accordingly were deprived to cross-examine him in order to prove their innocence. In support of the same Mr. Mallick relied on the decision of the Hon'ble Apex Court reported in the case of ***G.S. Srivastab Vs. Union of India (2014 (II) ILR-CUT-618).*** Hon'ble Apex Court in Para 10 & 11 of the Judgment held as follows:-

> *"10. This Court in Bhubaneswar Chhatria (supra) has also referring to Hardwari Lal (supra) set aside the punishment imposed on the delinquent holding that non- amination of complainant whose evidence could have revealed truth or otherwise of charges is also a material factor to be taken into consideration. Had Prabhat Kumar Barik been examined in the proceeding he could have said with regard to payment of so called illegal gratification of Rs. 30/- to the petitioner. Therefore, non-examination of material witness and non-affording of opportunity to the petitioner amounts to none compliance of principle of natural justice. Therefore, the proceeding is vitiated and in consequence thereof the major penalty of removal from service in Annexure-5 and confirmation thereof in appeal Annexure-7 as well as in Revision under Annexure-9 also cannot be sustained.*
>
> *11. In view of the aforesaid analysis being made and after going through the evidence on record, this Court is of the view that the finding of the Enquiring Officer is based on no evidence and as such there is non-compliance of principle of natural justice. Therefore, this Court sets aside the order of removal from service passed by the disciplinary authority, which has been confirmed by the appellate authority vide Annexure-7 and the Revisional Authority vide Annexure-9."*

**3.8.** Learned counsel for the petitioner contended that since the charges framed against the Petitioners are not specific with regard to any mis-appropriation and thereby causing loss to the Department the entire charge memo was liable to set aside in view of the decision of the Hon'ble Apex Court in the case of ***Transport Commissioner, Madras-5 Vs. A. Radha Krishna Moorthy (1995) 1 SCC 332***. It is also contended that since the charge memo does not specify any specific charges against the delinquent employees, the enquiry into the allegation in respect of which the delinquent has not been charged is not just and proper in view of the decision of the Hon'ble Apex Court in the case of ***M.V. Bijlani Vs. Union of India reported in (2006) 5 SCC 88***. Hon'ble Apex Court in Para 2, 9 and 10 of the Judgment in the case of ***Transport Commissioner*** and in Para 25 of the Judgment in the case of ***M.V. Bijlani*** has held as follows:-

*"2. This appeal is preferred against the judgment of the Tamil Nadu Administrative Tribunal allowing the original application filed by the respondent and quashing the memo of charges communicated to the respondent.*

*9. Insofar as the vagueness of the charges is concerned we find that it deserves acceptance. It is asserted by Shri Vaidyanathan, learned counsel for the respondent that except the memo of charges dated 4-6-1989, no other particulars of charges or supporting particulars were supplied. This assertion could not be denied by the learned counsel for the appellant. A reading of charges would show that they are not specific and clear. They do not point out clearly the precise charge against the respondent, which he was expected to meet. One can understand the charges being accompanied by a statement of particulars or other statement furnishing the particulars of the aforesaid charges but that was not done. The charges are general in nature to the effect that the respondent along with eight other officials indulged in misappropriation by falsification of accounts. What part did the respondent play, which account did he falsify or help falsify, which amount did he individually or together with other named persons misappropriate, are not particularized. The charge is a general one. It is significant to notice that respondent has been objecting to the charges on the ground of vagueness from the earliest stage and yet he was not furnished with the particulars. It is brought to our notice that respondent's name was not included in the schedule appended to GOMs 928 dated 25-4-1988 mentioning the names of officials responsible for falsification of accounts and misappropriation and that he is also not made an accused in the criminal proceedings initiated in that behalf.*

*10. We are, therefore, of the opinion that the judgment of the Tribunal is right insofar as it holds that the charges communicated to the respondent are vague. In the ordinary course we would have directed the disciplinary authority or the authority which framed the charges to particularize the charges and then to proceed with the enquiry but it appears that the respondent has hardly about seven or eight months to go for retirement Having regard to the facts and circumstances of the case, we are of the opinion that the matter should end here."*

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*"25. It is true that the jurisdiction of the court in judicial review is limited. Disciplinary proceedings, however, being quasi-criminal in nature, there should be some evidence to prove the charge. Although the charges in a departmental proceeding are not required to be proved like a criminal trial i.e. beyond all reasonable doubt, we cannot lose sight of the fact that the enquiry officer performs a quasi-judicial function, who upon analyzing the documents must arrive at a conclusion that there had been a preponderance of probability to prove the charges on the basis of materials on record. While doing so, he cannot take into consideration any irrelevant fact. He cannot refuse to consider the relevant facts. He cannot shift the burden of proof. He cannot reject the relevant testimony of the witnesses only on the basis of surmises and conjectures. He cannot enquire into the allegations with which the delinquent officer had not been charged with."*

**3.9.** Making all such submissions learned counsel for the Petitioners contended that in view of such material irregularity with regard to initiation as well as conduct of the proceeding vis-à-vis the decision cited supra, the impugned order of punishment passed on 03.11.2018 is not sustainable in the eye of law and liable for interference by this Court.

**4.** Mr. A.P. Das, learned Addl. Standing Counsel appearing for the Opp. Party No. 1 on the other hand made his submissions basing on the stand taken in the counter affidavit. It is contended that since the proceeding was initiated under Rule

17 r.w. Rule 15 of the Rules the proceeding was initiated after due approval of the Hon'ble Minister, Department of Food Supplies and Consumer Welfare. Hence there is no irregularity with regard to initiation of the proceeding. It is also contended that since after initiation of the proceeding the Petitioner duly participated in the same, the grounds taken by the Petitioners that the proceeding is not maintainable in absence of the order of the Governor cannot be raised at this point of time. It is contended that once the Petitioners usurp to the jurisdiction of the Disciplinary Authority, the plea with regard to initiation of the proceeding cannot be taken after disposal of the same in view of the decision of the Hon'ble Apex Court reported in the case of ***Pannalal Binjraj & Anr. Vs. Union of India & Ors. (AIR 1957 SC 397)*** as well as the decision in the case of ***P.D. Dinakaran (1) Vs. Judges Inquiry Committee & Ors.*** Hon'ble Apex Court in the case of ***Pannalal Binjraj*** in Para 42 and in the case of ***P.D. Dinakaran*** in Para 77 to 79 has held as follows:-

> *"**42.** There is moreover another feature which is common to both these groups and it is that none of the petitioners raised any objection to their cases being transferred in the manner stated above and in fact submitted to the jurisdiction of the Income Tax Officers to whom their cases had been transferred. It was only after our decision in Bidi Supply Co. v. Union of India [(1956) SCR 267] , was pronounced on March 20, 1956, that these petitioners woke up and asserted their alleged rights, the Amritsar group on April 20, 1956, and the Raichur group on November 5, 1956. If they acquiesced in the jurisdiction of the Income Tax Officers to whom their cases were transferred, they were certainly not entitled to invoke the jurisdiction of this Court under Article 32. It is well settled that such conduct of the petitioners would disentitle them to any relief at the hands of this Court (Vide Halsbury's Laws of England, Vol. II, 3rd Edn., p. 140, para 265; Rex v. Tabrum, Ex parte Dash [(1907) 97 LT 551]; O.A.O.K. Lakshmanan Chettiar v. Commissioner, Corporation of Madras and Chief Judge, Court of Small Causes, Madras [(1927) ILR 50 Mad 130] ).*
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> *XXX XXX XXX*
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> ***77.** It is not the pleaded case of the petitioner that he had no knowledge about the seminar organised by the Bar Association of India on 28-11-2009 which was attended by eminent advocates including two former Attorneys General and in which Respondent 3 made a speech opposing his elevation to this Court and also drafted a resolution for the said purpose. The proceedings of the seminar received wide publicity in the print and electronic media. Therefore, it can be said that much before the constitution of the Committee, the petitioner had become aware of the fact that Respondent 3, who, as per the petitioner's own version, had appreciated his work on the Bench and had sent a congratulatory message when his name was cleared by the collegium for elevation to this Court, had participated in the seminar and made a speech opposing his elevation and also drafted resolution for the said purpose. The Chairman had appointed Respondent 3 as a member of the Committee keeping in view his long experience as an eminent advocate and expertise in the field of constitutional law. The constitution of the Committee was notified in the Official Gazette dated 15-1-2010 and was widely publicised by almost all the newspapers. Therefore, it can reasonably be presumed that the petitioner had become aware about the constitution of the Committee, which included Respondent 3, in the month of January 2010.*
>
> ***78.** In his representation dated 12-5-2010, the petitioner claimed that he came to know about the constitution and composition of the Committee through the print and electronic media. Thus, at least on 12-5-2010 he was very much aware that Respondent 3 had been appointed*

*as a member of the Committee. Notwithstanding this, he did not raise any objection apparently because after meeting Respondent 3 on 6-12-2009 at the latter's residence, the petitioner felt satisfied that the said respondent had nothing against him. Therefore, the belated plea taken by the petitioner that by virtue of his active participation in the meeting held by the Bar Association of India, Respondent 3 will be deemed to be biased against him does not merit acceptance.*

***79.*** *It is also significant to note that Respondent 3 had nothing personal against the petitioner. He had taken part in the seminar as Vice-President of the Association. The concern shown by senior members of the Bar including Respondent 3 in the matter of elevation of the petitioner, who is alleged to have misused his position as a Judge and as Chief Justice of the High Court for material gains was not actuated by ulterior motive. They genuinely felt that the allegations made against the petitioner need investigation. After the seminar, Respondent 3 is not shown to have done anything which may give the slightest impression to any person of reasonable prudence that he was ill-disposed against the petitioner. Rather, as per the petitioner's own statement, he had met Respondent 3 at the latter's residence on 6-12-2009 and was convinced that the latter had nothing against him. This being the position, it is not possible to entertain the petitioner's plea that constitution of the Committee should be declared a nullity on the ground that Respondent 3 is biased against him and the order dated 24-4-2011 be quashed."*

**4.1.** Mr. A.P. Das, learned ASC further contended that while issuing the memorandum of charges the Petitioners were allowed to peruse the relevant records in the office of CSO -Cum- District Magistrate, Khordha-Opp. Party No. 4 and on perusal of the same the Petitioners submitted their respective written statement of defence. The Petitioners never asked for any documents at any point of time. Therefore, the plea taken by the Petitioners that they were prejudiced on the ground of non-supply of the document along with the charge memo cannot be raised after participating in the proceeding and after disposal of the same.

**4.2.** It is also contended that in course of enquiry none of the Petitioners requested for examination of the any witnesses and accordingly the Enquiry Officer duly conducted the enquiry and submitted the report on 02.05.2017 by holding the Petitioners guilty of the charges. After receipt of the enquiry report, the Opp. Party No. 1 in terms of the provision contained under the Rules, issued the 1st show-cause as well as the 2nd show-cause and thereby giving opportunity of hearing to the Petitioners. It is also contended that while issuing the 2nd show-cause on 07.09.2017 Opp. Party No. 1 gave detailed reasons vide Annexure-A on the point of imposition of the proposed penalties. Therefore, the stand taken by the Petitioners that the Opp. Party No. 1 issued the 2nd show-cause without assigning any reason is not sustainable.

**4.3.** Since all the delinquent officers during their respective tenure are responsible and accountable for the loss in question, the proceeding was initiated under Rule 17 and the order of punishment was passed by following the procedures contained under the Rules. Accordingly, it is contended that the impugned order has been rightly passed as against the Petitioners which requires no interference.

**5.** I have heard Mr. Sidheswar Mallick, learned counsel for the Petitioners, Mr. A.P. Das, learned Addl. Standing Counsel appearing for the State-Opp. Party. On the consent of both the Parties the matters were finally heard at the stage of admission and disposed of vide the present common order.

**6.** Having heard learned counsel appearing for the Parties and after going through the materials available on record, since learned counsel for the Petitioners raised a preliminary issue with regard to maintainability of the proceeding in absence of the order by the Hon'ble Governor, the same issue is required to be dealt with by this Court as a preliminary issue.

**6.1.** With regard to the stand taken by the Petitioners regarding maintainability of the proceeding on the ground that the same was not initiated by taking appropriate order from the Governor, it is the view of this Court that since the Petitioners after receipt of the charges duly participated in the proceeding and usurp to the jurisdiction of the Opp. Party No. 1, the Petitioners after closure of the proceeding are not permitted to raise such a stand in view of the decision of the Hon'ble Apex Court as cited supra in the case of ***Pannalal Binjraj & Anr. Vs. Union of India & Ors. (AIR 1957 SC 397)*** as well as the decision in the case of ***P.D. Dinakaran (1) Vs. Judges Inquiry Committee & Ors.*** The Petitioners are not permitted to take such a stand after due participation in the proceeding and the issue is decided against the Petitioners.

**6.2.** It is found that the proceeding dtd.25.04.2016 was initiated against the Petitioner with the charges mentioned vide Annexure-I and the statement of imputation vide Annexure-II and the memo of evidence vide Annexure-III. Though the prosecution as revealed from Annexure-III, is required to prove the charges relying on 5 nos. of documents which includes the special audit report, but the Petitioners were never provided with the copy of the same, nor the said audit report was proved by the Enquiry Officer in course of enquiry by giving opportunity of hearing to the Petitioners to disprove the same.

**6.3.** It is also found that the Enquiry Officer taking into account the serious nature of charges and the amount of loss involved, never examined any witnesses to prove the charges against the Petitioners and the enquiry was conducted on a single day. Not only that the prosecution in support of the charges though relied on 5 nos. of documents which includes the special audit report, but the Petitioners were never provided with the same nor the same was proved by the Enquiry Officer by examining the Auditor or any competent witness.

**6.4.** It is also found that even though the Petitioners were allowed to inspect the documents prior to submission of the written statement of defence, but in view of the decision of the Hon'ble Apex Court in the case of ***State of Madhya Pradesh*** as cited supra, offering of inspection of documents is not sufficient and failure to supply

documents along with charge memo vitiates the entire proceeding. It is also found from the record that though the charges relate to the irregularities committed by the miller namely M/s. Kalinga Agriculture Pvt. Ltd., but the said miller was not examined as a witness by the Enquiry Officer nor the Petitioners were allowed to cross-examine him. Therefore, as per the view of this Court, the privileged rights of the Petitioners to prove their innocence by cross-examining the miller was curtailed.

**6.5.** It is also found that in the memorandum of charges no specific charge was framed against the Petitioners with regard to the loss caused by them and all the 5 nos. of delinquent employees were charged with a single charge i.e. lack of integrity, decorum of conduct, devotion of duty leading to violation of Rule-3 of Odisha Government Servant's Conduct Rules, 1959. Since no specific charge was framed against each of the delinquent employees, the enquiry officer should have dealt with it by giving opportunity of hearing to the Petitioners.

**6.6.** Therefore, taking into account the pleadings available, submissions made and the decisions as cited (supra), it is the view of this Court that the enquiry in the present case was conducted in a casual manner and the Enquiry Officer never proved any documents in support of the charges with due examination of witnesses. Therefore, the order of punishment so imposed basing on such enquiry report is not sustainable in the eye of law. Accordingly, this Court is inclined to quash the order of punishment dt.03.11.2018 so passed against the Petitioners. However, while quashing the same, this Court remits the matter back to the Opp. Party No. 1 to conduct the proceeding afresh from the stage of initiation of the proceeding vide memorandum dtd.23.04.2016.

**6.7.** It is directed that Petitioners shall be allowed to take copies of the documents basing on which the charges have been framed and the Petitioners will be permitted to file their respective written statement of defence afresh. The Opp. Party No. 1 after receipt of the written statement of defence shall appoint a fresh Enquiry Officer and conclude the proceedings by following the provision contained under OCS (CCA) Rules, 1962. Since the proceeding is of the year 2016, Opp. Party No. 1 is directed to conclude the same by the end of this year, if there is no other legal impediment.

**7.** All the writ petitions are disposed of accordingly with the aforesaid observation and direction. However, there shall be no order as to cost.

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**2023 (I) ILR - CUT-1184**

**BIRAJA PRASANNA SATAPATHY, J.**

MSA NO. 4 OF 2022

**BENUDHAR PAIKARAY & ANR.** .....Appellants

-V-

**SRI NILAKANTHESWAR MAHADEV BIJE SUNAKHALA & ORS.** ..... Respondents

**ORISSA HINDU RELIGIOUS ENDOWMENT ACT, 1951 – Section 44(ii) – Locus standi – Present appellants were not party to the original proceeding – They were only impleaded as respondents at a belated stage after rejection of their application for intervention on two occasion – Whether, the appellant has any locus standi to challenge the order of learned Deputy Commissioner in absence of any material placed by them ? – Held, No – The court is not inclined to interfere with the impugned judgment and dismiss the appeal.**

For Appellants : M/s. S.C. Choudhury

For Respondents : M/s. Ashok Ku. Mohapatra (Resp.Nos.2 & 3), Mr. S.S. Mohapatra (Resp.Nos.4 & 5), Mr. Ambika Prasada Rath & Mr. A.K. Nath (Resp. No.1)

JUDGMENT Date of Hearing : 08.02.2023 : Date of Judgment : 10.03.2023

***B.P.SATAPATHY, J.***

This appeal under Sub-section(ii) of Section 44 of the Orissa Hindu Religious Endowment Act, 1951 (In short, "The Act") has been filed challenging the judgment dated 19.05.2022 passed by the Deputy Commissioner of Endowments, Odisha, Bhubaneswar in First Appeal No.20 of 2010.

**2.** The appellants are the Respondent Nos.8 & 9 before the learned First Appellate Court and challenge the judgment passed by the learned Deputy Commissioner in First Appeal No.20 of 2010 on various grounds.

**3.** It is contended by the learned counsel appearing for the appellants that the Respondent Nos.1,2 & 3 initially moved an application under Section 41 of the Act before the Assistant Commissioner of Endowment, Bhubaneswar in O.A. No.13 of 2004 inter alia with the following prayer.

> *"Let the appeal be admitted, records from the Court below be called for Respondent be noticed and after hearing the parties the impugned judgment dated 19.05.2022 by the learned Deputy Commissioner of Endowments, Odisha, Bhubaneswar in F.A. No.20/2010 be set aside and the judgment dated 19.5.2022 passed by the learned Asst. Commissioner of Endowments, Bhubaneswar in O.A. NO.13 of 2004 be confirmed.*

**3.1.** Learned Assistant Commissioner after due consideration of the materials placed before him dismissed the O.A vide his judgment dated 28.09.2010. The relevant portion of the order so passed by the Assistant Commissioner is reproduced hereunder.

> *"The case be and the same is dismissed on contest against ops but in the circumstances without any cost. The case institution of Sri Nilakantheswar Deb and Sri Bahuti Thakurani both bije At/Po-Sunakhala, P.S-Banapur, Dist-Khurda is a public temple within the meaning of O.H.R.E. Act without any hereditary trustee and the case schedule properties were public religious endowments & the petitioner as well as Op. No.1 & 2 has no hereditary right over the properties of the deity.*

**3.2.** It is contended that challenging the judgment dated 28.09.2010 so passed in O.A. No.13 of 2004, the Respondents No.1, 2 & 3 herein moved the Deputy Commissioner of Endowment in F.A No.20 of 2010. The learned Deputy Commissioner on the face of the order passed by the learned Assistant Commissioner and in absence of any fresh materials, while setting aside the order passed by the learned Assistant Commissioner allowed the appeal with the following order.

> *"In the result, the appeal is partly allowed on ex parte against the respondent No.1 to 7 and contest against respondent No.8,9 & 10. The case institution is hereby declared as temple, and the properties are all religious endowments. The appellant No.3 along with respondent No.1 & 2 are declared as hereditary trustee of the case institution. Accordingly, the appeal is disposed of with the above findings."*

**4.** Mr. S.C. Choudhury, learned counsel appearing for the appellants contended that the present appellants though were not party to the original proceeding before the learned Assistant Commissioner in O.A. No.13 of 2004, but during pendency of the matter before the learned Deputy Commissioner, their application for intervention was allowed and they participated in the proceeding. Since the learned Deputy Commissioner in absence of any fresh material set aside the order passed by the learned Asst. Commissioner by allowing the prayer of the Respondent Nos.1,2 & 3/Petitioners in O.A. No.13 of 2004, the appellants are before this Court in the present appeal challenging the judgment of the learned Deputy Commissioner of Endowment so passed on 19.05.2022.

**4.1.** Learned Counsel for the appellants contended that the lower appellate Court arrived at a wrong conclusion that the Respondent Nos.1,2 & 3 herein and his family members are the hereditary trustee of the deity in question. It is also contended that the learned First Appellate Court also did not take into consideration, the fact that the Hindu public were not represented properly and the paper publication made under order/Rule 8 of the C.P.C is a defective one. Learned First Appellate Court also did not take into consideration the stand of the present appellants regarding constitution of non-hereditary trustee Board by the Commissioner of Endowment vide his order dated 21.7.2012 by appointing the present appellants as the non-hereditary trust members and the fresh order passed by the self-same Commissioner of Endowment vide order dated 17.3.2022.

**4.2.** It is contended that since the Respondent Nos.1,2 & 3 are not the hereditary trustee of the deity in question, non-hereditary trust Board was constituted by the Commissioner of Endowments vide order dated 21.07.2012 and during pendency of the appeal, an interim Trust Board was also constituted vide order dated 17.3.2022 pending constitution of a non-hereditary Trust Board as provided under Section 27 of the Act. But the learned First Appellate Court never take into consideration the said aspect while deciding the appeal in favour of respondent Nos.1,2 & 3.

**4.3.** It is also contended that the Hindu Public who were arrayed as Opp. Parties before the learned Assistant Commissioner never took part in the proceeding and they were set ex parte. However, when the Respondent Nos.1,2 & 3 failed to get an order in their favour before the learned Assistant Commissioner in the proceeding in O.A. No.13 of 2004, they challenged the same before the learned Deputy Commissioner in First Appeal No.20 of 2010. Learned First Appellate Court without having any cogent reason and without proper appreciation of the stand taken by the present appellants reverse the judgment of the learned Assistant Commissioner by allowing the appeal. Accordingly, it is contended that the judgment of the learned First Appellate Court is not sustainable in the eye of law and liable to be interfered with by this Court.

**5.** Mr. Ashok Kumar Mohapatra, learned counsel appearing for the Respondents Nos.2 & 3 on the other hand while supporting the judgment passed by the learned First Appellate Court contended that even though in support of their claim, the Respondent Nos.1,2 & 3 filed various documents showing their status as the hereditary trustee of the deity in question and exhibited various documents vide Exts.1 to 13, but in absence of any contrary evidence, when the learned Assistant Commissioner dismissed the matter vide his judgment dated 28.09.2010, Respondents No.1,2 & 3 moved the learned Deputy Commissioner in FA No.20 of 2010.

**5.1.** Learned Deputy Commissioner after due perusal of the materials available on record and the documents produced by the Respondent Nos.1 ,2 & 3 vide Ext. 1 to Ext.13 and other materials available on record was pleased to reverse the judgment passed by the learned Assistant Commissioner while allowing the prayer vide its judgment dated 19.5.2022. Accordingly, it is contended that learned Deputy Commissioner has rightly allowed the claim vide the impugned judgment dated 19.5.2022 and it needs no interference by this Court while exercising the power of second appellate Court.

**6.** Learned Counsel appearing for the Respondent Nos.4 & 5 as well as Respondent Nos.7 to 12 also did not dispute the judgment passed by the learned Deputy Commissioner of Endowment and instead, supported the stand taken by the Respondent Nos.1,2 & 3.

**7.** However, Mr. A.K. Nath, learned counsel appearing for the Commissioner of Endowments contended that the dispute arose when some part of the landed property of the deity was acquired by the National Highway Authority for the purpose of expansion of N.H.-5. It is contended that the entire award amount of Rs.67,791/- so received from the NH authority has been kept in a fixed deposit in Indian Overseas Bank, Nandapur (Banapur) branch vide receipt No.96/DR-H-0642106 dated 03.01.2004 for a period of 10 years and the said fixed deposit is lying in the name of the Inspector of Endowments, who is continuing as an interim trustee.

**8.** I have heard Mr. S.C. Choudhury, learned counsel appearing for the appellants, Mr. Ashok Kumar Mohapatra, learned counsel appearing for the Respondent Nos. 2 & 3, Mr. S.S. Mohapatra, learned counsel appearing for the Respondent Nos.4 & 5 and Mr. Ambika Prasad Rath, learned Counsel appearing for Respondent Nos.7 & 12 along with Mr. A.K. Nath, learned counsel appearing for the Commissioner of Endowment- Respondent No.1. On the consent of the learned counsel for the parties, the matter was heard at the stage of admission and disposed of by the present order.

**9.** Having heard learned counsel for the Parties and after going through the materials available on record, it is found that even though in support of their claim, Respondent Nos.1,2 & 3 moved the application under Section 41 of the Act before the learned Assistant Commissioner in O.A. No.13 of 2004, but the learned Assistant Commissioner without proper appreciation of the claim, so raised by the present Respondent Nos.1,2 & 3 and without proper appreciation of the documents exhibited by the Respondent Nos.1,2 & 3 vide Ext. 1 to 13, dismissed the claim vide his judgment dated 28.09.2010. Respondent Nos.1,2 & 3 being aggrieved by the said judgment when approached the learned Deputy Commissioner in F.A. No.20 of 2010, learned Deputy Commissioner after going through the materials available on record and the documents exhibited by the Respondent Nos.1,2 & 3 vide Ext. 1 to 13 as well as the evidence so laid allowed the claim vide its judgment dated 19.05.2022. The view expressed by the learned 1st Appellate Court in Paragraph 44 to 49 of the impugned judgment is reproduced hereunder:-

> *"**44.** The learned counsel for the contesting respondents heavily relied on the evidence of the I.E (C.W-1). ON perusal of evidence of C.W-1, he has stated in para-5 of his cross-examination that none of the villagers have stated before him during inquiry that the villagers are managing the case institution. It is admitted by him in Para-7 of his evidence that the family members of the Petitoner-3 are managing the seba puja and niti kanti of the case deities properly.*
>
> ***45.** The order dated 24.01.1975 in Misc. Case No.235/73 of the Court of Munsif, Khurda shows that the N.H.T Board which was formed by the order of the Asst. Commissioner of Endowments, Bhubaneswar vide order dated 11.12.1964 in O.A. No.89/64 was not taken effect due to non-fulfilment of the conditions for deposit of security money of Rs.200/- or property security worth of Rs.500/-. When the condition of the order has not been fulfilled, then it can safely hold that the order has not taken into effect. It is seen in Para-8 of the said order that the so-called managing trustee Surendranath Routray had initiated the*

*Commissioner of Endowments, Odisha, Bhubaneswar vide his letter dated 04.12.1972 stating that he has not taken charge of the properties of the deity from the hereditary trustee Ananta Rana. The order was made for three years from 11.12.1964 to 31.11.1967. When the period of trust board was for three years from 11.12.1964 to 31.11.1967 and the so-called trustee intimated the Commissioner of Endowments, Odisha, Bhubaneswar in the above letter regarding non taking of charge from the hereditary trustee-Ananta Rana, then it can conclusively hold that the trust board formed by the said order was not implemented. When the trust board was not functional, then question of interruption with regard to hereditary trusteeship of the petitioner's family cannot be questioned. So, the submission of the learned counsel for the contesting respondents takes rear seat.*

***46.*** *From the definition of hereditary trustee enshrined under section 3 (iv) of the OHRE Act, 1951, it is well discernible that the claimant has to prove hereditary trusteeship by three modes. The documentary evidence to prove the hereditary trustee as per the definition keeps more weight-age than oral evidence. Therefore, this Court considers all the documentary evidence filed by the petitioner-3 minutely. Thirteen documents have been filed which are considered below.*

***47.*** *Ext.1,2,3,4,5 & 6 are the RORs of different settlements which stand recorded int he name of Nilakantheswar Dev, Bije-Sunakhala. Ananta Rana, S/O-Bhikari Rana has been noted as marfatdar of the properties under Ext-1 & 2. Bula Rana, S/O- Pankaj Rana, Pabana Rana, Katu Rana, S/O-Ananta Rana have been described as marfatdar of the properties under Ext-3 & 4. Bula Rana, S/O-Pankaj Rana, Pabana Rana, Kalu Rana, S/O-Ananta Rana have been described as marfatdar of the properties. All are described as marfatdar in the remarks column of the respective RORs.*

***48.*** *on bare reading of Ext-1 to 6, it is crystal clear that the ancestors of the petitioner-3 and OP No.1 & 2 have been possessing the properties of the deity from generation to generation.*

***49.*** *Next, this Court takes Ext-7,7/1,7/2,7/3 and 7/4. On perusal of all the five documents, it is seen that all the documents have been issued from the office of the Commissioner of Endowments, Odisha, Bhubaneswar and I.E Puri to Ananta Rana and Pankaj Rana for the payment of contribution on behalf of the deity Nilakantheswar Dev, Sunakhala. The date of issuance of all the documents are 23.09.1952, 30.09.1958, 12.02,1980, 21.01,1982 and 12.02.1980 respectively.*

*On analysis of Ext-8,8/1,8/2,8/3 and 8/4, it is ascertained that contributions of the property of the case deity have been received by the Inspector of Endowments from Ananta Rana & Bula Rana on the dates as mentioned thereon."*

**9.1.** This Court after going through the judgment so passed by the learned Deputy Commissioner finds no illegality or irregularity in the said judgment. It is also the view of this Court that the present appellants being not party to the original proceeding and were only impleaded as Respondents at a belated stage, after rejection of their application for intervention on two occasions, are not supposed to challenge the judgment so passed by the learned Deputy Commissioner in absence of any materials placed by them or by the Respondent Nos.8 & 9/Opp. Party Nos.6 & 7 before the Assistant Commissioner, who have entered appearance after due publication of the notice under Order 1 Rule 8 C.P.C. Accordingly, this Court is not inclined to interfere with the impugned judgment and dismiss the appeal. However, taking into account the affidavit filed by the Inspector of Endowment, Khurda, In-charge, Banapur and Nayagarh, it is observed that the amount so received by way of

compensation from the NH authority which has been kept in a fixed deposit in the name of the Inspector of Endowment shall continue to remain in his name and the Respondents No.1,2 & 3 will not be permitted to use the same save and except for the benefit of the deity and with prior permission of the Inspector of Endowment.

The appeal is accordingly dismissed with the aforesaid observation.

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## 2023 (I) ILR - CUT-1189

**SANJAY KUMAR MISHRA, J.**

W.P.(C) NO. 15407 OF 2017

**KANHU CHARAN PRADHAN & ORS.** .....Petitioners

-V-

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

**ABSORPTION – Rampur Grama Panchayat merged with Notified Area Council, Redhakhol with effect from 01.03.1999 – The petitioners were all staff of the erstwhile G.P – Petitioners claim to absorb them in the NAC, Redhakhol – Held, this court directs opposite parties, more particularly opposite party No. 1, to take necessary steps immediately and accord necessary approval at the earliest preferably with a period of four weeks.**

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

1. O.J.C. No. 6928 of 2000 (decided on 20.09.2007) : Santosh Chandra Pattnaik & Ors. Vs. State of Orissa & Ors.
2. O.J.C. No. 4845 of 1999 (decided on 18.05. 2010) : Surendra Kumar Srichandan & Ors. Vs. State of Orissa & Ors.

For Petitioners : Ms. S.Mohapatra

For Opp.Parties : Mr. G.N.Rout, A.S.C (O.P.Nos. 1 to 3)
Mr. S.K.Purohit (O.P.No. 4)

JUDGMENT Date of Judgment : 29.03.2023

***SANJAY KUMAR MISHRA, J.***

***1.*** The Petitioners, four in numbers, have filed this Writ Petition with a prayer to direct the State-Opposite Party No.1 to absorb them in the regular posts of the Notified Area Council, Redhakhol, shortly, hereinafter 'NAC, Redhakhol' with effect from 01.03.1999 i.e. the date of merger of the erstwhile Rampur Grama Panchayat in the NAC, Redhakhol.

***2.*** The factual matrix of the case in nutshell is that, the Petitioners were all Staff of the erstwhile Rampur Grama Panchayat under the NAC, Redhakhol. The

Governor of Odisha, in exercise of power conferred by Clause (2) of Article 243Q of the Constitution of India, read with Sub-Section (2) of Section-4 of the Orissa Municipal Act, 1950 (Orissa Act 23 of 1950), specified the transitional area consisting of the villages in the district of Sambalpur mentioned in the schedule of the notification of Government of Orissa in the Housing and Urban Development Department dated 26th February, 1999. Accordingly, in terms of clause (a) of Sub-Section (1) of Section 4 of the Orissa Municipal Act, 1950 (Orissa Act 23 of 1950), the State Government constituted the NAC, Redhakhol for the said transitional area in the district of Sambalpur with effect from 1st March, 1999. Accordingly, Rampur Grama Panchayat was brought over to the NAC, Redhakhol in terms of the said notification dated 26th February, 1999.

***3.*** After merger of Rampur Grama Panchayat, the services of the Petitioners were taken over by the NAC, Redhakhol. On 7th October, 1999, the Executive Officer, NAC, Redhakhol requested the District Magistrate, Sambalpur to move the Government to create different posts under the NAC, Redhakhol to run the day to day function of the NAC, clarifying therein that the said posts including the transferred old Grama Panchayat staff, so also staff newly required for the NAC and it is self sufficient to meet the salary of the said staff. On the other hand, the Government directed the Executive Officer, NAC, Redhakhol not to engage any DLR employees and to manage the work of the NAC with the help of the Grama Panchayat Secretary and staff of Redhakhol. Pursuant to the request of the Executive Officer, NAC, Redhakhol, the Government asked for a detailed report for creation of posts for absorption of the Ex-staff of the Rampur Grama Panchayat on 08.11.1999. The District Magistrate-cum-Collector, Sambalpur, basing upon the Government query, asked the NAC, Redhakhol to furnish the full report for justification in creation of new posts including Ex-Grama Panchayat staff on 21.09.2000. The Executive Officer, NAC, Redhakhol submitted full report to the Officer-in-Charge, General & Misc. Collectorate, Sambalpur with copy to the Government, inter alia, justifying the creation of the sanctioned posts with effect from 01.03.1999 to absorb the Ex-Grama Panchayat staff vide letter dated 9th October, 2000. In the meantime, Government asked the NAC, Redhakhol to satisfy all the queries like financial status of the NAC etc.

***4.*** Despite submitting the representation before the Government to declare them as regular staff of the NAC, Redhakhol, after merger of EX-Grama Panchayat with NAC, Redhakhol, no action was taken by the Government. However, on 07.11.2006, once again the Government asked the source of income of the NAC, Redhakhol. The Executive Officer, NAC, Redhakhol, vide letter dated 16.11.2006, complied the said query for further action at the end of the Government. Pursuant to the same, vide letter dated 06.12.2006, again the Government asked to furnish the detail statement of income and expenditure of last three years i.e. 2003-2004, 2004-2005 and 2005-2006, for consideration of the proposal for creation of different posts

in NAC, Redhakhol. On 21.12.2006, the Executive Officer, NAC, Redhakhol submitted the detailed report of income and expenditure of the NAC, Redhakhol for creation of posts, as had been asked for. The Opposite Party No.1, without taking any step for creation of the post to absorb the Ex-Grama Panchayat staff like the Petitioners, again sent queries to the then Executive Officer, NAC on 18.01.2007 for justification in creation of posts in the NAC, Redhakhol and the same queries were also satisfied by the Executive Officer, NAC by making a communication to the said effect on 09.02.2007. The contents of the said communication are extracted below:

*"To*

*The Under Secretary to Govt.,*
*Housing and Urban Development Department*
*Orissa, Bhubaneswar.*

*Sub: Creation of posts in favour of Redhakhol NAC.*

*Ref:- H & U.D Deptt letter No.MIS.64/06*
*1257/HUD dtd 18.1.07*

*Sir,*

*With reference to the letter on the subject cited above, I am to say that the Redhakhol NAC is newly constituted w.e.f. 1.3.99 as per Govt. in H & U D Deptt Notification No.7010/HUD dtd 26.2.99. Before constitution of Redhakhol NAC it was under Rampur Gram Panchayat and at that time the following G.P. staff were working in the said G.P. After conversion of said G.P. as Redhakhol NAC the same staff are working now under this NAC.*

| *Sl. No.* | *Name of the Ex-GP Employees* | *Post holding in G.P.* | *Post holding in NAC At present* |
|---|---|---|---|
| | *Now working as NAC Redhakhol* | | |
| *1.* | *Sri Birendra Kumar Purohit* | *Secretary* | *Sr. Assistant* |
| *2.* | *Sri Nilambara Pradhan* | *Librarian* | *Jr. Assistant* |
| *3.* | *Sri Damodara Naik* | *Asst. Secretary* | *Lineman* |
| *4.* | *Sri Kanhu Charan Pradhan* | *Dafadar* | *Jamadar* |
| *5.* | *Sri Rushinath Bagarti* | *Peon* | *Peon* |
| *6.* | *Sri Nityananda Mohakud* | *Watchman* | *Peon* |
| *7.* | *Bisakha Bewa* | *Sweepress* | *Sweepress* |
| *8.* | *Upasi Mukhi* | *-do-* | *-do-* |
| *9.* | *Ami Mukhi* | *Sweeper* | *Sweeper* |
| *10.* | *Dhulia Behera* | *Sweeper* | *Watchman* |

*1. Creation and continuance of the above staff and justification for creation of posts have been recommended by the District Magistrate and Collector, Sambalpur to the Director Municipal Administration, Ex-Officio, Addl. Secretary to Govt., Housing and Urban Development Department, Orissa, Bhubaneswar in his letter No.1098 dtd 13.11.2000 (Copy enclosed) along with preposition statement in prescribed form No.1. As per the recommendation of the District Magistrate & Collector, Sambalpur in the above cited letter it is fully justified for creation of above new posts to adjust the G.P. staff of Redhakhol NAC.*

*2.* ***The income and expenditure of Redhakhol NAC during the last 3 years i.e. 2003-04-, 2004-05 and 2005-06 is enclosed in a separate sheet****.*

*3.* ***For creation of the above mentioned post the following financial implication will be made out of the own fund of this NAC.***

| *Sl. No.* | *Name of the Employees* | *Designation of the post in the NAC at present* | *Initial pay* | *Total financial involvement per Annum* |
|---|---|---|---|---|
| *1.* | *Sri Birendra Kumar Purohit* | *Sr. Assistant* | *4000/-* | *48,000/-* |
| *2.* | *Sri Nilambara Pradhan* | *Jr. Assistant* | *3050/-* | *36,600/-* |
| *3.* | *Sri Damodara Naik* | *Lineman* | *2650/-* | *31,800/-* |
| *4.* | *Sri Kanhu Charan Pradhan* | *Jamadar* | *2610/-* | *31,320/-* |
| *5.* | *Sri Rushinath Bagarti* | *Peon* | *2550/-* | *30,600/-* |
| *6.* | *Sri Nityananda Mohakud* | *Peon* | *2550/-* | *30,600/-* |
| *7.* | *Bisakha Bewa* | *Sweepress* | *2550/-* | *30,600/-* |
| *8.* | *Upasi Mukhi* | *-do-* | *2550/-* | *30,600/-* |
| *9.* | *Ami Mukhi* | *Sweeper* | *2550/-* | *30,600/-* |
| *10.* | *Dhulia Behera* | *Watchman* | *2550/-* | *30,600/-* |
| | | *Total* | *27610/-* | *3,31,320/-* |

*4.* ***The above additional expenditure will be met out of own source of this NAC from collection of parking fees, Holding tax, tax on carts & carriages, Licence fees u/s 290, rent of shopping complex, House rent, Auction sale of Bandha Katta, weekly market and Daily market etc.***

*I would therefore request you to kindly place the matter before Govt. for creation of the posts and continuance of the above existing G.P. staff now working in Redhakhol NAC and communicate Govt. orders at at early date.*

*Yours faithfully,*
*Sd/-*
*Executive Officer,*
*NAC, Redhakhol*

*Memo No. 187 Date. 9/2/07*

*Copy submitted to the District Magistrate & Collector, Sambalpur for information and necessary action.*

*Sd/-*
*Executive Officer,*
*NAC, Redhakhol"*
(Emphasis supplied)

***5.*** Despite such communication, the Government repeatedly asked the NAC, Redhakhol to justify the creation of posts in almost every year. On grievance petition submitted before the Hon'ble Chief Minister, once again the same queries were made by the Government on 17th February, 2009 and 25th February, 2009. Pursuant to the said queries, a communication was made by the Executive Officer, NAC, Redhakhol on 16.02.2009 giving a detailed report along with financial implications for absorption of the present Petitioners and similarly placed others. Contents of the said communication are extracted below:

*"To,*
*The Under Secretary to Govt.,*
*Housing and Urban Development Department*
*Orissa, Bhubaneswar.*

*Sub: Creation of posts in Redhakhol NAC.*

*Ref:- This office letter No.1201 dtd. 1.12.08, 186 dt 9.2.07 and letter No.1098 dt. 13.11.2000 by D.M. & Collector, Sambalpur*

*Sir,*

*With reference to the letter on the subject cited above, that the Redhakhol NAC is constituted w.e.f. 1.3.1999 as per Govt in H & U D Deptt notification No.7610/HUD dt 26.2.1999. The Director of Municipal Administration-cum-Ex-Officio Addl. Secretary to Govt. vide letter No.39437/HUD dt 25.10.1999 was pleased to order to manage the newly created NAC by the existing Ex-G.P. staffs of Rampur G.P. Redhakhol on its merger with the newly created ULB of Redhakhol NAC.*

***That this Council has also resolved with council resolution dtd 21.6.1999 vide proposal No.7 for creation of new posts immediately for smooth functioning of the Redhakhol NAC and also several reminder have sent to Govt for kind perusal and immediate steps for the above purpose**. The D.M. & Collector, Sambalpur vide above reference has also placed suggestion before Govt. for according approval for creation of new post to adjust the Ex-Rampur G.P. staff of Redhakhol NAC.*

*That this NAC covers about 37.5 sq Km having a population of 13723 as per 2001 census with the present existing staff. **Moreover Govt. has been pleased to release a large amount of grants under different scheme like BRGF, SJSRY, NSDP, RMG, R.D, TFC and other development programme etc where the present staffs are discharging their duty very effectively**.*

***In view of the above it is essential for creation of new posts to adjust the Ex-G.P staff of Redhakhol NAC at an early date**. The xerox copy of letter of D.M. & Collector, Sambalpur is enclosed herewith for kind perusal and necessary action.*

*Encl:- **A statement of income and expenditure of Redhakhol NAC during last 3 years***

*Yours faithfully,*
*Sd/-*
*Executive Officer,*
*NAC, Redhakhol*

*Memo No.119 Date. 16/2/09*

*Copy submitted to the District Magistrate & Collector, Sambalpur for information and necessary action.*

*Sd/-*
*Executive Officer,*
*NAC, Redhakhol"*

(Emphasis supplied)

***6.*** It is also the case of the Petitioners, in identical case pertaining to some of the similarly placed employees under Cuttack Municipal Corporation, this Court directed the State-Opposite Parties to take steps to absorb the erstwhile Grama Panchayat staff within four months. Knowing so, the Petitioners gave a representation on 7th February, 2009 along with the copy of the Judgment passed in OJC No.6928 of 2000 to the District Magistrate and Collector, Sambalpur for extension of the same and similar benefits to them. On 09.07.2009, the Collector, Sambalpur wrote to the Director of Municipal Administration and Ex-Officio Additional Secretary to Government, H & U.D, Department, Odisha, Bhubaneswar

requesting therein for consideration by the Government for creation of posts for absorption of all the erstwhile Rampur Grama Panchayat staff in NAC, Redhakhol. Contents of the said letter dated 9th July, 2009 are extracted herewith.

> *"To*
>
> *The Director of Municipal Administration and Ex-Officio Addl. Secretary to Govt., H & U.D. Deptt, Orissa, Bhubaneswar.*
>
> *Sub:Adjustment of Ex-Rampur G.P. Staff in Redhakhol N.A.C.Creation of new posts-petition dt. 7.2.09 of Birendra Ku. Purohit and others, ex-employees of Ram G.P.*
>
> *Ref : This Office L.No.1098 dt. 13.11.2000, 474 dt. 23.04.08 and 148 dt. 16.02.09*
>
> *Sir,*
>
> *With reference to the letters on the subject cited above, I am to say that, Birendra Ku. Purohit and others, Ex-employees of Rampur Gram Panchayat presenting working in Redhakhol N.A.C. (created on 01.03.99) have submitted a petition dt. 7.2.09 (copy enclosed) for regularization of their service. They have submitted a photo copy of* ***orders of the Hon'ble High Court in O.J.C. No.6928/2000 Santosh Ch. Pattanaik Vs. State of Orissa, wherein the Honourable Court has allowed the absorption of Subhadrapur and Kacharamal G.P. staff in Cuttack Municipal Corporation as the G.Ps have been merged with the C.M.C****.*
>
> *In this context, a report was called for from the Executive Officer Redhakhol N.A.C. who submitted a report vide his L.No.243 dt. 22.4.09 (copy enclosed) which speaks clearly about the claim of the petitioners.*
>
> *In this context, this officer L.No.1098/Gen dt. 13.11.2000 and 148 dt. 16.2.09 may be referred to.*
>
> *In view of the above, I would request that the matter may kindly be considered by Govt. for creation of posts for absorption of all the erstwhile Rampur G.P Staff in Redhakhol N.A.C.*
>
> *Yours faithfully,*
> *Sd/-*
> *District Magistrate and*
> *Collector, Sambalpur"*
> (Emphasis supplied)

***7.*** Despite such request as the Government slept over the matter, for inaction on the part of the State-Opposite Party, the Petitioners were constrained to approach this Court in W.P.(C) No.22057 of 2011. This Court disposed of the said Writ Petition at the stage of admission, inter alia, directing the State-Opposite Parties to take a decision on the recommendation made by the District Magistrate and Collector, Sambalpur, specifically with reference to the Judgment of this Court passed in O.J.C. No.6928 of 2000 within a period of three months from the date of communication of the said Order. Relevant portions of the said order dated 29.8.2011 are reproduced below:

> *"Heard learned counsel for the petitioners and learned counsel for the State.*
>
> *The petitioners in this Writ Petition have prayed for a direction to opposite party No.1 to absorb them in the regular posts under N.A.C. Redhakhol with effect from 1.3.1999 i.e. the date of merger of the erstwhile Rampur Grama Panchayat in the N.A.C. Redhakhol.*

> ***It appears from Annexure-16 that the District Magistrate and Collector, Sambalpur has issued a letter to the Director, Municipal Administration for adjustment of Ex-Rampur G.P. Staff in Redhakhol N.A.C. by creating new posts and it is stated at the Bar that the matter is now pending before the Director, Municipal Administration since July, 2009 and no decision has been taken***.
>
> *This being the grievance of the petitioners,* ***we dispose of the writ petition directing the opposite party No.1 to take a decision on the recommendation made by the District Magistrate and Collector, Sambalpur in Annexure-16 specially with reference to a Judgment of this Court in O.J.C. No.6928 of 2000 within a period of three months from the date of communication of this Order****."*
>
> (Emphasis supplied)

***8.*** Though copy of the said order was communicated to the State-Opposite Parties by the Petitioners, but the State/Opposite Parties time and again made the same query with the Executive Officer, NAC, Redhakhol for compliance of the Order passed by this Court. Ultimately, the Deputy Secretary to Government, Housing and Urban Development Department, vide letter dated 21.08.2012, wrote to the Executive Officer, NAC, Redhakhol to furnish copy of the Writ Petition with all its annexures forthwith for taking a decision as per order of this Court on the plea that the same has not been received by the Department. Being so asked for, the Executive Officer, NAC, Redhakhol, vide letter dated 15th September, 2012, furnished a copy of the Writ Petition for information and necessary action. However, because of further inaction, the Petitioners were again constrained to approach this Court in W.P.(C) No.13167 of 2015, which was disposed of at the stage of admission on 22.07.2015 with the following observations.

> *"Considering the submission of the learned counsel for the parties, it* ***appears that for the self same relief, the Petitioners had earlier approached this Hon'ble Court and if the said order has not been complied with, the petitioners should have filed appropriate application*** *instead of invoking jurisdiction of this Hon'ble Court under Articles 226 and 227 of the Constitution of India. Accordingly, the same is disposed of* ***granting liberty to the petitioners to pursue their remedy in accordance with law****."* (Emphasis supplied)

***9.*** Accordingly, the Petitioners preferred CONTC No.1459 of 2015. However, the same being beyond the period of limitation, was dismissed, inter alia, directing the Petitioners to approach the authority for redressal of their grievances. Hence, in terms of the observation made by this Court in the said contempt proceeding, the Petitioners submitted a detailed representation before the authority concerned on 4th November, 2016. Till date no action has been taken by the Opposite Party No.1 on the said representation of the Petitioners for regularization of their services in NAC, Redhakhol. Hence, this Writ Petition.

***10.*** The N.A.C., Redhakhol (Opposite Party No.4), being noticed, has filed Counter Affidavit admitting and reiterating the facts pleaded in the Writ Petition. That apart, it has been stated that when the Opposite Party No.1 asked for the copy of W.P.(C) No.22057 of 2011, the Opposite Party No.4 vide letter dated 15.09.2012, has submitted the same. Thereafter no response has been received from Opposite

Party No.1. It has further been stated that all steps have been taken by the NAC, Redhakhol by requesting the Opposite Party No.1 to create the posts on merger of Rampur Grama Panchayat with NAC, Redhakhol. The details of the present status of the Petitioners are indicated in the Counter Affidavit in a tabular form and it has been stated that the said employees have performed their duties satisfactorily from the inception of the NAC, Redhakhol till date and though Government has recently posted two numbers of employees in the NAC, Redhakhol, but the workload of NAC is increasing day by day and various schemes are being implemented every year and it will be practicable on the part of the NAC to implement all the schemes smoothly by regularization of the Petitioners and the financial implication can be meted out from Council's own fund. The relevant portions from paragraph-3 of the Counter Affidavit filed by the Opposite Party No.4 are extracted below:

> *"**This deponent has taken all the steps by requesting the O.P.1 several times to create the post on merger of the G.P. with N.A.C. The undersigned has sent all the documents asked for by the O.P.1 in due time. When the O.P.1 asked for the copy of writ petition, this deponent sent the same vide letter dt.15.09.2012** but there has not been any response so far from the O.P.1. All the proposal for creation and unless for the same, this deponent is helpless.*
>
> *The details of the present status of the petitioners are given below:-*

| *Sl. No.* | *Name of the Employee* | *Post Hold in NAC* | *Salary at present* | *Status* |
|---|---|---|---|---|
| *1.* | *Sri Kanhu Charan Pradhan* | *Jamadar* | *Retired* | *On dt.31.05.2021* |
| *2.* | *Sri Nilambara Pradhan* | *Jr. Asst.* | *16016 (Consolidated)* | *Continuing* |
| *3.* | *Sri Birendra Kumar Purohit* | *I/c Head Asst.* | *16262 (Consolidated)* | *Continuing* |
| *4.* | *Sri Nityananda Mohakud* | *Peon* | *11704 (Consolidated)* | *Continuing* |

> ***The above employees have performed their duties satisfactorily from inception of the NAC till date. Though Govt. has recently posted two nos employees in this NAC but the workload of this NAC is increasing day by day and various schemes are being implemented every year. All the schemes will be implemented smoothly by regularization of the above employees will be met out of councils own fund**."* (Emphasis supplied)

***11.*** The State-Opposite Party No.1 has filed Counter Affidavit reiterating the facts as detailed in the Writ Petition. However, it has been stated in para-7 of the Counter Affidavit that though Opposite Party No.4, Executive Officer, NAC Redhakhol submitted a report, yet the said report with regard to income and expenditure of the years 2003 to 2006 was not in conformity with the requirement for sanction and creation of posts for absorption of the former employees of Rampur Grama Panchayat, who were allowed to continue in NAC, Redhakhol. Further, it has been contended in the Counter Affidavit, the Petitioners were continuing at Rampur Grama Panchayat without being regularized and had not raised the issue of regularization during their tenure in Rampur Grama Panchayat. The said Grama Panchayat merged with NAC, Redhakhol with adjustment of the Petitioners with

their previous status, as they had in Rampur Grama Panchayat. In the meantime, the Petitioner No.1 has retired from service on attaining the age of superannuation on 31st May, 2021. It has further been averred that the action of Opposite Party No.1 asking the Opposite Party No.4 to justify the creation of posts for absorption of the erstwhile employees of Rampur Grama Panchayat cannot be said to be deliberate inaction in taking a decision and there is no lapses or laches on the part of the State-Opposite Party No.1, as alleged by the Petitioners.

***12.*** This Court, after hearing the parties, vide Order dated 28th February, 2023, directed the learned Counsel for the State to take necessary instruction and file Additional Affidavit with regard to what action has been taken by the Opposite Party No.1 pursuant to Order dated 29th August, 2011 passed by this Court in W.P.(C) No.22057 of 2011, as the Counter Affidavit filed by the State-Opposite Party No.1 is silent with regard to the allegations made by the Petitioners regarding inaction of the State-Opposite Party No.1 to act in terms of the earlier direction given by this Court. Being so directed, an Additional Affidavit dated 21.03.2023 has been filed reiterating the averments made in the Counter Affidavit. However, the said Affidavit is silent in terms of the direction given by the Order dated 28th February, 2023. Relevant paragraphs of the said Order are extracted below:

> "***3. Though a Counter Affidavit has been filed by the State-Opposite Party No.1 on 19th September, 2022, but the same is silent as to what action has been taken by the State pursuant to Order dated 29.08.2011, passed in W.P.(C) No.22057 of 2011, vide which direction was given to the Opposite Party No.1 to take decision on the recommendation made by the District Magistrate and Collector, Sambalpur in Annexure-16, specifically with reference to the Judgment of this Court passed in O.J.C. No.6928 of 2000, within a period of three months from the date of communication of the said Order, so also on the representation of the Petitioners dated 04.11.2016 pursuant to Order passed in CONTC No.1459 of 2015***.
>
> ***4.*** *On being asked, Mr. Rout, learned Additional Standing Counsel prays for ten days time to take necessary instruction in this regard and file an Additional Affidavit to the said effect. Time granted is peremptory.*
>
> ***5.*** *Additional Affidavit in terms of the instruction received be filed by 13th March, 2023, after serving copy of the same on the learned Counsel for the Petitioners."* (Emphasis supplied)

However, on being asked, Mr. Rout, learned Additional Standing Counsel fairly concedes that the said representation of the Petitioners is still pending at the end of Opposite Party No.1 and State Government is yet to act in terms of direction given by the coordinate Bench in W.P.(C) No.22057 of 2011.

***13.*** Learned Counsel for the Petitioner further submits, it is a glaring example on the part of the State-Opposite Party No.1 as to its inaction and step motherly attitude to deal with the case of the present Petitioners for regularization of their services though similarly placed others have already been regularized in the meantime, being directed by this Court, pertaining to Cuttack Municipal Corporation, so also Bhubaneswar Municipal Corporation. He relies on the Judgments of this Court

in **Santosh Chandra Pattnaik & others Vs. State of Orissa and others**, (O.J.C. No.6928 of 2000) decided on 20.09.2007 and in **Surendra Kumar Srichandan and others Vs. State of Orissa and others**, (O.J.C. No.4845 of 1999) decided on 18th May, 2010 to substantiate the claim of the Petitioners.

***14.*** Mr. Purohit, learned counsel for the Opposite Party No.4 submits that the documents appended to the Writ Petition, so also the Counter Affidavit filed by the NAC well demonstrate that the NAC has already complied with the information and documents sought for by the Opposite Party No.1 and the averments made in Para-7 of the Counter Affidavit filed by Opposite Party No.1 that the report with income and expenditure of the years 2003 to 2006, submitted by the NAC, is not in conformity with the requirement for sanction and creation of posts for absorption of the Petitioners is incorrect and misleading. To substantiate the said submissions, he draws attention of the Court towards the letter dated 21.12.2006, written by the Executive Officer, NAC, Redhakhol, addressed to the Under Secretary to Govt., Housing and Urban Development Department, Orissa, the contents of which are extracted below:

"*OFFICE OF THE NOTIFIED AREA COUNCIL, REDHAKHOL*

*No.1622/NAC* *Date: 21.12.2006*

*To*
*The Under Secretary to Govt.,*
*Housing and Urban Development Department,*
*Orissa, Bhubaneswar*

*Sub:Creation of different posts and continuation of existing Gram Panchayat staff in their present posts of Redhakhol NAC.*

*Ref:- H & U.D Deptt. Letter No.LFS(S)37/2005 28595/HUD dtd. 6.12.2006.*

*Sir,*

*With reference to the letter on the subject cited above, I* ***am to furnish herewith a detail income and expenditure statement of Redhakhol NAC for last 3 years i.e. 2003-04-, 2004-05 & 2005-06 to consider creation of different post & continuance of existing of G.P. Staff*** *in their present post as desired.*

*Encl: 3 statement of Income and Expenditure*

*Yours faithfully,*
*Sd/-*
*Executive Officer,*
*NAC, Redhakhol"*
(Emphasis supplied)

Mr. Purohit further submits that after the said communication was made to Opposite Party No.1, no further communication has been made by the State to Opposite Party No.4 for further compliance, as has been alleged in the Counter Affidavit.

***15.*** Admittedly, pursuant to direction given by this Court on 29th August, 2011 in W.P.(C) No.22057 of 2011, the last communication made by the State-Opposite Party No.1 to NAC, Redhakhol is dated 21st August, 2012, vide which a copy of the Writ Petition with all annexures was asked for. Pursuant to the said communication, Opposite Party No.4 promptly complied the requirement vide communication dated 15th September, 2012. Thereafter no further communication has been made to NAC, Redhakhol by the State-Opposite Party No.1.

***16.*** Though a specific stand has been taken in the Counter Affidavit filed by the Opposite Party No.4-N.A.C that thereafter no further communication has been made till date seeking any further clarification or information from the Opposite Party No.4, the Counter Affidavit filed by the State-Opposite Party No.1 is silent as to any further communication made by the State-Opposite Party No.1 to the NAC, Redhakhol, though a baseless allegation has been made in para-7 of the Counter Affidavit that the Report furnished by NAC, Redhakhol with regard to income and expenditure of the years 2003 to 2006 was not in conformity with the requirement for sanction and creation of posts for absorption of the Petitioners.

***17.*** After taking note of the averments made in the Writ Petition and Counters of the Opposite Parties as well as submissions of the learned Counsel for the parties, this Court is of the view that there is a gross delay and laches on the part of the State-Opposite Party No.1 to deal with the recommendations made by the Opposite Party Nos.3 & 4 for creation and sanction of the posts of existing staff of erstwhile Rampur Grama Panchayat with effect from 1st March, 1999 i.e. the date of constitution of NAC, Redhakhol.

***18.*** This Court is of further view that because of such delay and laches on the part of the State-Opposite Party No.1, the Petitioners have suffered a lot and one of them has already been superannuated in the meantime with effect from 31.05.2021, causing immense financial loss to him.

***19.*** In view of the pleadings and documents on record, so also submissions made by the learned Counsel for the parties as detailed above and Judgments of this Court in **Santosh Chandra Pattnaik** (Supra) and **Surendra Kumar Srichandan** (Supra), so also direction given in W.P.(C) No.22057 of 2011, this Court directs Opposites Parties, more particularly Opposite Party No.1, to take necessary steps immediately and accord necessary approval at the earliest, preferably within a period of four weeks from the date of communication of the certified copy of this Judgment for creation and sanction of posts enabling the Opposite Party No.4 to permanently absorb the Petitioners in the posts which they are holding, as prayed in the Writ Petition.

On such absorption of the Petitioners, the Opposite Party No.4 shall workout the arrear salary and other dues of the Petitioners from the date of their absorption till date and pay the same to the Petitioners within three months from the date of

according sanction by the State Government. The entire exercise shall be completed within four months from the date of communication of the certified copy of this Judgment.

Since the Petitioner No.1, Kanhu Charan Pradhan has already been superannuated with effect from 31.05.2021, as has been stated in the Counter Affidavit filed by the Opposite Party No.4, the differential financial benefits shall be extended to him in accordance with law from the date of permanent absorption of his counterparts till the date of his superannuation, including other arrear after retiral benefits, if any, within a period of four months from date of communication of the certified copy of this Judgment.

***20.*** Accordingly, the Writ Petition stands disposed of. No order as to cost.

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## 2023 (I) ILR - CUT-1200

**SANJAY KUMAR MISHRA, J.**

W.P.(C) NO. 3446 OF 2019

**BISHNU CHARAN BISWAL** .....Petitioner

-V-

**SECY, MANAGEMENT COMMITTEE, PARADEEP PORT TRUST, JAGATSINGHPUR & ANR.** .....Opp.Parties

**PENSION – Delay in payment of pension and gratuity – Effect of – Held, Pension and gratuity are valuable right and property of an employee and the same shall be paid by the Govt. to its employees on their retirement – If there is a delay in payment of retiral dues and gratuity, the same will carry interest at the current market rate till actual payment.** (Paras 24 & 26)

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

1. AIR 1985 SC 356 : State of Kerala & Ors. v. Padmanavan Nair

For Petitioners : Mr. A.Tripathy

For Opp.Parties : Mr. A. Das (O.P.1)
Mr.P.S.Acharya (O.P.2)

JUDGMENT Date of Hearing & Judgment : 04.04.2023

***SANJAY KUMAR MISHRA, J.***

**1.** This is the 3rd round legal battle at the instance of the Petitioner before this Court to get his after retiral benefits. The Petitioner, who was working as Mazdoor under the Opposite Party No. 1 and availed early retirement under the Voluntary

Retirement Scheme (VRS) introduced by the Opposite Party-Management in the year 2012, is yet to receive his Retirement Benefit Fund (RBF) as well as other dues, as has been detailed in the Writ Petition.

**2.** The background facts which led to filing of this Writ Petition is that the Petitioner had earlier approached this Court in W.P.(C) No.6176 of 2016 challenging the notice dated 15.01.2016 issued by the Opposite Party No.1 to the Petitioner to evict him from Plot No. GJC-9 alleging therein that he is in unauthorized possession of the said plot and as not releasing his after retiral benefits on the said plea.

**3.** This Court disposed of the Writ Petition at the stage of admission on 11th October, 2017. The said order is reproduced below.

> "Heard learned counsel for the parties.
>
> This writ petition has been filed assailing the order under Annexure-6 issued by the Management Committee directing the petitioner to vacate/clear the plot no.GJC-9 under his occupation within fifteen days from the date of issue of such notice.
>
> Considering the submission of learned counsel for the petitioner and on perusal of the averments made in paragraph-7 of this petition, **this Court finds, the petitioner has a clear statement that he has already vacated the quarter by handing over possession of the same to the Paradeep Port Trust on compliance of the direction contained in Annexure-1.**
>
> Under the circumstance and for the petitioners claim that he has already vacated the quarter, nothing survives to be decided in the matter but considering the further submission of the learned counsel for the petitioner that the petitioner has not been paid with the dues he is entitled, in the event the petitioner has vacated the quarters and there is no other impediment, the Management Committee may take decision with regard to release of the dues of the petitioner within a time frame.
>
> The Civil Misc. Petition stands disposed of with the above direction." (Emphasis supplied)

**4.** Against the said order passed by the coordinate Bench, the Opposite Party Management filed RVWPET No.249 of 2017 for review of the said order passed in W.P.(C) No.6176 of 2016, so also CONTC No.1744 of 2017 and both the said applications filed by the Opposite Party were dismissed.

**5.** The Petitioner filed CONTC No.564 of 2018 against the Opposite Party for non compliance of Order dated 11th October, 2017 passed in W.P.(C) No.6176 of 2016, which was disposed of on 9th May, 2018 with a direction to the Opposite Party that in the event, the representation at the instance of the Petitioner is still pending, the same shall be disposed of in accordance with law.

**6.** After disposal of the said contempt petition, the Petitioner again filed representation on 22nd May, 2018 before the Opposite Party for release of his legitimate dues.

**7.** Despite such direction given by this Court, as the Opposite Party kept the said representation of the Petitioner pending for indefinite period, he being an old

and retired person and badly in need of money for his medical treatment, approached this Court again in W.P.(C) No.10791 of 2018 for inaction on the part of the Opposite Party to release his after retirement benefits. The said Writ Petition was also disposed on 6th July, 2018 with a direction to the Opposite Party to dispose of the representation of the Petitioner dated 22nd May, 2018 in accordance with law.

**8.** Pursuant to the said direction of this Court, the representation of the Petitioner was disposed of vide communication dated 25th September, 2018 admitting therein that the Petitioner is entitled to Rs.9,85,764/- towards the VRS benefit, gratuity and W.R.C arrear and the said amount can be released immediately on receipt of requisites papers and No Objection Certificate (NOC) is not required. However, only the Retirement Benefit Fund (RBF) dues can be released after submission of No Objection Certificate issued by the Estate Wing, PPT. The relevant portion of the communication, which is impugned in the Writ Petition, are extracted below:

> "It is a fact that after your retirement on VRS, you have handed over the Qrs.no.C&F-67 to Management Committee which is not disputed. But on the contrary, you are still enjoying to stay over the allotted plot no.GJC-9 and the said fact has been concealed before the Hon'ble High Court. But, you are repeatedly denying/misleading the Opp. Party as well as the Hon'ble High Court that you have never occupied the plot no.GJC-9 and handed over the same to Sri R.I. of Estate Wing, PPT since long which is false and misconceived. In spite of several notices, without vacating the plot, you are continuously misrepresenting facts, which ultimately violates the Allotment Rules of Estate Wing, PPT for which you have not been issued with "**No Objection"** certificate by the Estate Wing, PPT.
>
> As per the prevalent rule, until and unless the Plot no.GJC-9 under your possession unauthorisedly is vacated and handed over to the Estate Wing, responsibility/liability ultimately lies with the Opp. Party. Since you have not vacated and handed over the immovable structure over the Public Premises which ultimately violate the Paradip Port Trust Immovable Properties (Land and House) Leasing and Licensing Regulations, 1975, the Estate Wing is unable to issue "No Objection Certificate". Therefore, the Opp. Party is not able to release the Retirement Benefits Fund (RBF) in your favour as per the Rule in vogue.
>
> Further, you are very much aware that consequent upon your retirement, the following dues were immediately ready to be released in your favour by Management Committee after receipt of necessary application with bank clearance. But, instead of doing so, you had taken the shelter of court of law with false pleas and misrepresentation of facts to get all the benefits illegally.
>
> | | | | |
> |---|---|---|---|
> | 1. | VRS Benefit | - | Rs.4,67,130.00 |
> | 2. | Gratuity | - | Rs.3,31,119.00 |
> | 3. | W.R.C. arrear | - | Rs.1,86,569.00 |
> | (01.01.2007 to 31.03.2012) | | - | 946.00 |
> | | Total : | | Rs.9,85,764.00 |
>
> (Rupees nine lakhs eighty five thousand seven hundred sixy four) only,
>
> **The above amount of Rs.9,85,764.00 can be released immediately on receipt of requisite papers and "No Objection Certificate" (NOC) is not required from Estate Wing, PPT.**

> However, only the R.B.F. dues as per your entitlement is withheld and the same can be released after submission of the "**No Objection Certificate**" issued by Estate Wing, PPT which is already mentioned in VRS order (copy enclosed at Annexure-5). But on the contrary without vacating the Govt. plot, you are continuously misrepresenting facts to the Opp. Party as well as the Hon'ble High Court to get the benefits illegally.
>
> Therefore, your representation is devoid of merit and request to release your financial benefits consequent upon your retirement under VRS without vacating plot no.GJC-9 cannot be agreed to.
>
> Hence, your representation dated 22.05.2018 pursuant to the orders of the Hon'ble High Court is disposed of."

**9.** Being aggrieved by the said communication dated 25th September, 2018, the Petitioner has preferred the Writ Petition with a prayer to quash the said communication and direct the Opposite Parties to release all the admitted dues, including R.B.F. dues, of the Petitioner along with interest on the said admitted dues calculated from the date of his retirement till the payment is made.

**10.** On being noticed, the Opposite Party Nos.1 & 2 have filed separate Counter Affidavits taking almost the same stand alleging therein that since the Petitioner is occupying the Plot No.GJC-9 forcibly and unauthorizedly and he has not handed over the vacant possession of Plot No. GJC-9 to the Opposite Party No.2, who is to issue NOC in favour of the Petitioner to be produced before the Opposite Party No.1, admitted dues of the Petitioner cannot be released in his favour.

**11.** Since there is a controversy between the parties as to alleged illegal and unauthorized retention of Plot No.GJC-9 by the Petitioner, in order to resolve the said issue, the Petitioner being a poor retired Mazdoor and this being the 3rd round litigation at the instance of the Petitioner to get his after retiral dues, including unpaid gratuity, so also benefits flowing out of Voluntary Retirement Scheme, Mr.U.C.Mohanty, learned Advocate, after taking his consent, was appointed as Court's Commissioner to inspect the plot to ascertain the status of Plot No.GJC-9. As per the Order of this Court dated 14.03.2023, Mr.U.C.Mohanty inspected the plot and today, being present in Court, submits the Report in a sealed cover. On opening the said cover, it is ascertained that the inspection report dated 26th March, 2023 is accompanied with photographs of the construction made over the said plot, so also other documents collected from the present occupant of the said plot. On being directed, the copies of the said inspection report are also supplied to the learned Counsel for the parties. Relevant portion of the said Report is extracted below:-

> "Inspection/Site Visit has been undertaken on 26.03.2023 (Sunday) at about 12:00 P.M pertaining to Plot No. GJC- 9 of Gopaljew Colony., Paradeep Port Trust Area in presence of the Parties viz.
>
> 1. Bishnu Charan Biswal (Writ Petitioner),
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> 2. Sriman Narayan Mishra representing as the Secretary, Management Committee, Paradeep Port Trust (Opp. PartyNo. 1),
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> 3. Biswajit Mishra, Estate Officer Paradeep Port Trust (Opp.Party No. 2)

4. Sri Amitav Tripathy, Learned Advocate, Orissa High Court,Cuttack representing the Petitioner

5. Sri Partha Sarathi Acharya, Learned Advocate, Orissa HighCourt, Cuttack representing Paradeep Port Trust,

6. Mamata Parida, aged about 40 years, W/o- Kishore Parida (who is in physical possession of the Plot No. (GJC-9).

The aforesaid persons who were present in the site signed the attendance sheet dated 26.03.2023, copy of which is enclosed herewith **Annexure-I.**

The Petitioner along with his advocate Sri Amitav Tripathy and the authorized person, Photo/Videographer and other staffs of Paradeep Port Trust Managing Committee accompanied the inspection. **The Inspection was conducted in presence of all the aforesaid persons named above. In course of inspection it is found that one Mamata Parida, aged about 40 years, W/o- Kishore Parida physically possessing the Plot No. GJC-9**. It is stated by her that her husband is running a bettleshop in that locality. The area of the Plot has been measured and it is found that the House (Hutment) with (length) 36' 10" Inches x 18' 8" (width). The colored Photograph of the said Hutment House has been obtained. The copy of the photographs of the house (hutment) standing over the Plot No. GJC-9 are enclosed herewith as **Annexure-II.**

- **On my request, said Mamata Parida stated that her family is in physical possession over the said Plot No. GJC-9 about 10 to 15 years. Again she stated that they are possessing the said house since 2008-2009.** She further stated that her family is a permanent resident of Vill- Garoi, P. S- Naugaon, Dist- Jagatsinghpur. **She also stated that when Bishnu Charan Biswal, (the original alottee) shifted to the residential Quarter allotted by the Paradeep Port Trust, she made some construction and possessing the aforesaid plot and residing thereon- She again stated that Shri Bishnu Charan Biswal left the plot and shifted to the Paradeep Port Quarter during 2009-2010. The house (hutment) constructed over Plot No. GJC-9 having facilities of water and electricity connection thereto. She further stated that they are paying some tax to the Paradeep Municipality and shown the receipt granted by Paradcep Municipality, Paradeep vide SL No. 29807 dated 12.12.2022 for Rs. 250/-**. The copy of such receipt is enclosed herewith as **Annexure-III**. She also shown the card having Ward No. 8 & House No. 364 granted by Paradeep Municipality. The copy of such Card is enclosed herewith as **Annexure-IV.**

- She also stated that she knew the Petitioner Bishnu Charan Biswal since 2008-2009. **She further stated that though she is in physical possession of the Plot No. GJC-9 and house thereon she has not taken any permission from the Competent Authority of the Paradeep Port Trust.**

- Similarly, the Petitioner Sri Bishnu Charan Biswal also stated that he is retired from service on attaining the age of superannuation in the year 2012. Prior to his retirement he was residing at Quarter No. 67 (C&F), Bhimabhoi Colony, Paradeep Port Trust. When he resided at the aforesaid Quarter No. 67, he left the Plot No. GJC-9 at Gopaljew Colony. On specific query as to whether he has physically surrendered the plot to the Management Committee, Paradeep Port Trust, he replied that he has not surrendered the vacant possession to the authorities of the Paradeep Port Trust. HeI further stated that when he left the Plot No. GJC-9, the electricity & water connection were disconnected. He also stated that he knew Mamata Parida, W/o- Kishore Parida, since Mamata Parida was residing in that locality on rent but he knew them. He specifically stated that he has not given the physical possession to Mamata Parida and her family nor physically surrendered the aforesaid plot to the Paradeep Port Trust Authorities.

> ➢ Inasmuch as the Opp. Party No. 1 represented by Sriman Narayan Mishra who stated before me that the Estate Officer, Paradeep Port Trust is looking after the affairs & management of the Plots of Bhimabhoi Nagar i.e. the plotted house (hutment) including the Plot No. GJC-9. The Petitioner Shri Bishnu Charan Biswal has neither surrendered the vacant possession of the Plot No. GJC-9 till date." (Emphasis Supplied)

**12.** Mr.Tripathy, learned Counsel for the Petitioner, relying on the said report submitted by the Court's Commissioner, submits that it can be well ascertained from the said report that his client is no more in possession of the said Plot No.GJC-9 since long.

**13**. Relying on the said report, Mr.Das, learned Counsel for the Opposite Party No.1 submits, the Petitioner has admitted before the Court's Commissioner that he never physically surrendered the said plot to the Management Committee, Paradeep Port Trust Authority, though he is not staying over the said plot.

**14**. Mr. Das, further submits that the Petitioner ought to have demolished the construction over Plot No.GJC-9 before shifting to Qrs.No. C & F/67 allotted in his favour. On being asked, he draws attention of this Court towards the averments made in para-9 of the Counter Affidavit to the said effect. However, he fails to demonstrate from the documents appended to the Counter Affidavit or any communication made to the Petitioner to the said effect indicating therein that the Petitioner was supposed to demolish the temporary construction over the said plot i.e. Plot No.GJC-9, before shifting to Qrs. No. C & F/67.

**15**. Mr. Das further submits, recently vide notice dated 16th September, 2022 it was circulated by the Management Committee to all the retired workers to handover plots/quarters by 31st October, 2022, failing which their RBF dues will be forfeited and that apart, necessary legal action will be initiated against those retired workers to evict them from the said plots. Since the Petitioner has not physically handed over the vacant possession of the said plot, he is not entitled for the dues as detailed in the impugned Order.

**16.** Mr.Acharya, learned Counsel for the Opposite Party No.2 reiterates the submissions made by Mr.Das, learned Counsel for the Opposite Party No.1 and submits, since the Petitioner has not physically handed over the vacant possession of the said plot and even though one Mamata Parida is forcefully occupying the said plot having electricity connection and water supply to the said plot, the Paradeep Port Trust Authority was justified in not issuing NOC in favour of the Petitioner enabling him to get his after retiral dues from the Management Committee.

**17.** In response to the said arguments advanced by the learned Counsel for the Opposite Parties, Mr.Tripathy draws attention of this Court towards Clause- 3 & 4 of the Office Order dated 26th August, 2010 (Annexure-2), vide which Quarter No. C & F/67 was allotted in favour of his client. The said clauses are extracted below :-

> "3. That within 7 days of allotment of M.C. Quarters, the allottee should ensure to hand over the vacant possession of Plot/Quarters of Paradip Port Trust, if any, to the Estate Wing, PPT and submit a "No Demand Certificate", **failing which, the allotment order shall stand cancelled.**
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> 4. **In the event the allottee fails to hand over the physical possession of Plot/Quarters to Paradip Port Trust within the specified period, the booking shall be stopped forthwith."**
> (Emphasis Supplied)

**18.** He further draws attention of this Court towards the terms and conditions No.6 & 7 of allotment of Management Committee Quarters, which is appended to Counter Affidavit of the Opposite Party No.2 as part of Annexure-F, at running page-81, which are extracted below.

> "6. That the allotment is governed by M.C. (Immovable Property) Rules, 2009.
>
> 7. **That the allottee shall be given physical possession of quarters only after handing over of quarters/plot, if any, under his/her possession, to the Port Estate Wing."**
> (Emphasis Supplied)

**19.** He further submits, the terms and conditions for allotment of quarter in favour of the Petitioner were very clear. As the Petitioner vacated the Plot No.GJC-9, he was allowed to take possession of the Quarter No. C & F/67 in terms of the Quarters Allotment Order dated 26th August, 2010 and he continued in said quarter till his retirement in the year 2012.

**20.** After hearing learned Counsel for the parties, so also on perusal of the inspection report dated 26th March, 2023 submitted by the Court's Commissioner and its enclosures, this Court is of the view that the Petitioner is no more occupying the said Plot No.GJC-9 since long, even though the vacant possession of the said plot was allegedly not handed over to the Paradeep Port Trust Authority by demolishing the temporary structure laying over the said plot.

**21.** From the terms of quarter allotment order dated 26th August, 2010, so also other terms and conditions for allotment of quarters appended to the said order, which have been extracted above, it is implied that the Petitioner left the said Plot No.GJC-9 and that being well within the knowledge of authority concerned, he was allowed to shift to Quarter No. C&F/67 allotted to him vide Office Order dated 26th August, 2010. Hence, this Court is of the view that, the Opposite party No.2 is not justified to deny as to issuance of NOC in favour of the Petitioner enabling the Opposite Party No.1 to release the after retiral dues, including RBF dues of the Petitioner, as was communicated to him vide letter dated 25th September, 2018.

**22.** So far as the stand of the Opposite Party No.1 as to forfeiture of all the dues of the Petitioner, including the RBF, in view of the notice dated 16th September, 2022 annexed to the Counter Affidavit for the first time, that being a general notice of the Managing Committee meant for all the unauthorized occupants and contrary to the communication made to the Petitioner vide impugned order dated 25th September, 2018, is unsustainable.

**23.** Admittedly, the property i.e. Plot No.GJC-9, belongs to Paradeep Port Trust and the Managing Committee, which has been formed pursuant to direction of the apex Court, as has been pointed out by Mr. Das, has no authority to forfeit the after retiral dues, including the gratuity, so also VRS amount of the Petitioner on the ground of alleged illegal retention of Plot No.GJC-9.

**24**. Law is well settled that Pension and Gratuity are valuable right and property of an employee and the same shall be paid by the Government to its employees on their retirement. If there is a delay in payment of after retiral dues and Gratuity, the same will carry interest at the current market rate till actual payment. In ***State of Kerala & Ors. v. Padmanavan Nair,*** reported in AIR 1985 SC 356, the apex Court has observed as follows:-

> "Pension and gratuity are no longer any bounty to be distributed by the Government to its employees on their retirement but have become, under the decisions of this Court, valuable rights and property in their hands and **any culpable delay in settlement and disbursement thereof must be visited with the penalty of payment of interest at the current market rate till actual payment."** (Emphasis Supplied)

**25.** Mr.Tripathy, learned Counsel for the Petitioner files letter dated 03.03.2016 of the Secretary, Managing Committee addressed to the Petitioner supplying information under the Right to Information Act, 2005, which well demonstrates that the Petitioner is entitled to Rs.13,83,264/- towards VRS benefits, Gratuity, RVF amount, WRC amount from 01.01.2007 to 31.05.2012. He further submits, the said documents were part and parcel of earlier writ petition preferred by the Petitioner, having annexed to the said writ petition as Annexure-8. The said submission made by Mr.Tripathy is not disputed by the learned Counsel for the Opposite Parties.

**26.** Accordingly, this Court directs the Opposite Party No.2 to issue NOC in favour of the Petitioner within a week from the date of production of certified copy of this judgment with copy to Opposite Party No.1. On getting the NOC from the Opposite Party No.2, Opposite Party No.1 is directed to release all the admitted dues in favour of the Petitioner in terms of the information supplied to the Petitioner under the Right to Information Act, 2005 within four weeks thereafter. That apart, since payment of gratuity is governed under the Payment of Gratuity Act, 1972, in terms of provisions enshrined under Sub-Section (3-A) of Section-7 of the Payment of Gratuity Act, 1972, read with notification dated 01.10.1987 of the Central Government, the Opposite Party No.1 is directed to pay 10% interest on the unpaid gratuity from the date the Petitioner was separated in terms of VRS till the date of actual payment. So far as other admitted dues of the Petitioner, the same will carry interest @ 6% from the date the same became due till the date of actual payment.

**27.** At this stage, Mr.Acharya, learned Counsel for the Opposite Party No.2 prays to grant liberty to the Paradeep Port Trust to take necessary steps against Mamata Parida, wife of Kishore Parida, who is at present illegally residing in Plot No. GJC-9 as has been reflected in the inspection report dated 26th March, 2023 to

evict her from the said plot. Since the said issue is not the subject matter of the Writ Petition and it is the prerogative of the Paradeep Port Trust Authority to proceed against the said illegal occupant of Plot No.GJC-9, there is no need to grant any liberty in favour of the Opposite Party No.2 to take necessary action against the said encroacher to evict her from Plot No.GJC-9, as has been prayed for. Needless to mention here that it is open for the Paradeep Port Trust to initiate appropriate legal action against the said illegal encroacher, if so advised.

**28.** This Court appreciates the efforts put in by the Court's Commissioner Mr.U.C.Mohanty, learned Counsel and his dedication in preparing the report. His commitment to ensure that justice is served has not gone unnoticed, and the thoroughness with which he has approached his task is truly commendable. The report submitted by the Court's Commissioner be kept on record.

**29.** The Writ Petition stands disposed of. No order as to cost.

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## 2023 (I) ILR - CUT-1208

### G. SATAPATHY, J.

BLAPL NOS. 9319, 9835 & 9836 OF 2022

**CHHATAR SINGH @ NIKU SINGH** .....Petitioner

-V-

**STATE OF ODISHA** .....Opp.Party

**WITH**

BLAPL NO. 9835 OF 2022
DHANMAN SHAW -V- STATE OF ODISHA
AND
BLAPL NO. 9836 OF 2022
RAM BHAROSE SHAW -V- STATE OF ODISHA

**CODE OF CRIMINAL PROCEDURE, 1973 – Section 439 – Offence U/ss. 132(1)(b)(c) and (l) of the OGST Act – A huge amount of financial fraud being levelled against the petitioners for the alleged manner and method of commission of involving such huge amount of tax evasion by way of issuing fake invoices and availing input tax credit without physical purchase and supply of goods in the guise of business of non-existing entities with existing and non-existing companies and thereby, resulting in defraud of State Exchequer – Whether, the petitioners should be enlarged on bail ? – Held, No – Involvement of petitioners in commission of offence to the tune of ₹ 316 crores and some odd, this Court does not consider it proper to extend the benefit of bail to the petitioners.** (Para 9)

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

1. (2022) 86 OCR 624 : Ajaj Ahamad Vrs. State of Odisha (CGST).
2. BLAPL No. 8831 of 2021 (disposed of on 11.01.2022) : Rohit Berlia Vrs. Intelligence Officer, Director General of Goods & Service Tax Intelligence, Bhubaneswar.
3. BLAPL No. 4125 of 2020 (disposed of on 23.12.2020) : Pramod Kumar Sahoo Vrs. State of Odisha.
4. 2022 SCC OnLine Ori 743 : Smruti Ranjan Mohanty Vrs. State of Odisha.
5. AIR 1987 SC 1321 : State of Gujarat Vrs. Mohanlal Jitamalji Porwal.
6. (2013) 7 SCC 450 : Y.S.Jagamohan Reddy Vrs. Central Bureau of Investigation.
7. (2013) 7 SCC 466 : Nimmagada Prasad Vrs. Central Bureau of Investigation.

For Petitioner(s) : Mr. B.Nayak
Mr. B.Mansinga

For Opp.Party : Mr. S.Mishra (for CT-GST)

JUDGMENT Date of Judgment : 05.04.2023

***G. SATAPATHY, J.***

**1.** Since all these three bail applications arise out of one and same case in 2(c) CC Case No. 27 of 2022, for convenience, the same are heard together and disposed of by this common order with consent of the learned counsel for the respective parties.

**2.** These are the bail applications U/S. 439 of Cr.P.C. by the Petitioners for grant of bail in connection with CT & GST Enforcement Unit, Rourkela Case No. 3/2022-23 corresponding to 2(c) CC Case No. 27 of 2022 of the Court of learned S.D.J.M., Panposh at Rourkela for commission of offence U/Ss. 132(1)(b)(c) & (l) of the OGST Act.

**3.** The allegations as set out in the prosecution report which eventually led to institution of complaint by the Additional Commissioner of CT & GST, Rourkela, are that on the basis of confidential information of involvement of Directors as well as Ex-Directors of three companies namely, M/S. Sairam Ingot Private Limited, M/S. Swastik Ingot Private Limited and M/S. Sunayana Metal Industries Limited and others for wrongfully claiming, utilizing and passing bogus input tax credit on the strength of forged documents purportedly issued in the name of non-existent and ghost business entities created and operated by them, without physical receipt and supply of goods, the local Authorities under GST Act started investigation, in the course of which, the petitioners Dhanman Shaw, Ram Bharose Shaw, Niku Singh and others were found to have committed the offences U/Ss. 132(1)(b)(c)(f) & (l) of the OGST Act for individually as well as jointly and severally in collusion with each other by issuing invoices or bills without physical supply of goods or services leading to wrongful availment or utilization of input tax credit by using such invoices or bills or fraudulently availing input tax credit without any invoices or bills and falsification of financial records including books of account and thereby, the petitioners and others have wrongfully gained huge financial benefits. It is claimed

in the investigation that M/S. Sairam Ingot Private Limited is a physically non-existent company having no business activities in operation at its registered place of location, but the petitioner Dhanman Shaw and his family members continued to control its activities and utilized the said company for passing of bogus input tax credit to two others existing companies under the seal and signature of Directors, and the petitioner Dhanman Shaw was alleged to have operated the activities of said non-existent company and caused evasion of GST running to crores of Rupees. It is also alleged that the remaining two existing companies M/S. Swastik Ingot Private Limited and M/S. Sunayana Metal Industries Limited are primarily being manufacturing units for producing iron and steel goods and petitioner Ram Bharose Shaw and his brother petitioner-Dhanwan Shaw, although stated to be resigned as Directors with effect from 01.06.2019, but it is claimed that documentary evidence reveals that petitioner Dhanwan Shaw and his family members continue to act as de-facto Directors/operators of the companies and the three petitioners along with others have used false tax invoices issued in the name of non-existent and ghost business entities for wrongfully passing of bogus input tax credit and for that purpose, the petitioners have collected identity documents such as Pan, Aadhar and Passport from different innocent persons and obtained registration under GST Act fraudulently by misusing the said documents and wrongfully obtained financial benefits accrued out of trading with the help of such fake invoices by using these documents. It is also alleged that the petitioners and others have operated as many as 25 numbers of non-existent and fictitious business entities in the name of men of no means by misusing their personal identity documents without their knowledge and consent. The petitioners were alleged to have issued forged tax invoices in the name of these fictitious business entities disclosing fake supply of iron and steel goods which have been mostly used by the existing companies M/S. Swastik Ingot Private Limited and M/S. Sunayana Metal Industries Limited. It is also alleged that petitioner Dhanman Shaw was the creator and operator of 19 numbers of non-existent ghost business entities and have effected purchase of goods from different registered and un-registered tax payers without obtaining purchase invoices from them and without payment of tax and he by arranging forged invoices from non-existing and dummy firms availed bogus input tax credit worth Rs.96.26 crores on the strength of fake invoices and defrauded the State Exchequer and similarly, petitioner-Ram Bharose Shaw by allegedly creating and operating 17 numbers of non-existent and ghost business entities has secured bogus input tax credit worth Rs.78.87 crores on the strength of fake invoices and thereby, defrauded the State Exchequer and petitioner-Niku Singh allegedly by creating and operating 10 numbers of non-existent and ghost business entities could manage to avail bogus input tax credit worth Rs.49.09 crores and defrauded the State Exchequer. It is also alleged in the prosecution report that petitioner Dhanwan Shaw, Ram Bharose Shaw and along with others have managed to secure bogus input tax credit of Rs.212.88 crores, whereas petitioner Niku Singh in collusion with others could manage to get

bogus input tax credit of Rs.105.77 crores and all the three petitioners and another were accordingly arrested on 06.07.2022 and produced before the learned S.D.J.M., Panposh on the same day and in the meantime, prosecution report was submitted before the Court.

**4.** In the course of hearing of bail application, Mr.Biswajit Nayak, learned counsel for the petitioner-Niku Singh in BLAPL No. 9319 of 2022 by taking this Court through the allegations against the petitioner has submitted that the petitioner is no way connected in this case and all the allegations are directed against the Directors of three companies, but the allegation against the petitioner for collecting personal identity documents of 10 numbers of person and creating ghost firms in the name of said persons by misusing the documents appears to be incorrect. It is further submitted that the offence alleged against the petitioner are triable by Magistrate First Class and the punishment prescribed therein may extend to five years and with fine, but the petitioner having detained in custody more than seven months and in the meantime final P.R. having already been submitted resulting in taking cognizance of offences, no fruitful purpose would be served for detaining the petitioner in custody any further. It is also submitted that when fictitious transactions, which means no transaction has taken place as alleged by the Department, where is the question of availing input tax credit/evasion of tax by the petitioner. In relying upon the decisions in (i) ***Ajaj Ahamad Vrs. State of Odisha (CGST); (2022) 86 OCR 624, (ii) Rohit Berlia Vrs. Intelligence Officer, Director General of Goods & Service Tax Intelligence, Bhubaneswar*** in ***BLAPL No. 8831 of 2021*** disposed of on 11.01.2022 and (iii) ***Pramod Kumar Sahoo Vrs. State of Odisha in BLAPL No. 4125 of 2020*** disposed of on 23.12.2020, learned counsel for the petitioner-Niku Singh prays for grant of bail to the petitioner.

**4.1** Mr.B.Mansinga, learned counsel for the petitioners Dhanman Shaw in BLAPL No. 9835 of 2022 and Ram Bharose Shaw in BLAPL No. 9836 of 2022 has submitted that the petitioners were neither Directors of M/S. Swastik Ingot Private Limited nor M/S. Sunayana Metal Industries Limited and admittedly, they having resigned as Directors of said two companies with effect from 31.03.2018, they cannot be saddled with any liability for fraud or for offences committed by the said companies after their resignation, but the prosecution being overzealous has registered this case against the petitioners. It is further submitted that the offence alleged against the petitioners are triable by Magistrate First Class and prescribes punishment up to five years, but the petitioners having detained in custody for more than seven months, no further detention would be useful in view of the fact that the prosecution has already submitted PR basing upon which, cognizance has been taken and there is hardly any chance of tampering of prosecution evidence by the petitioners. It is further submitted that the petitioners have cooperated the Authorities in the course of investigation and thereby, all the three petitioners are entitled to bail on that score. Mr.B.Mansinga by relying upon the decision in ***Smruti Ranjan Mohanty Vrs. State of Odisha; 2022 SCC OnLine Ori 743*** prays to grant bail to the petitioners on any stringent conditions.

**5.** Mr.Sunil Mishra, learned counsel for the CT & GST has submitted that the petitioners are not merely fraudsters, but are accused of committing economic offence upon the State by defrauding approximately an amount of Rs.316.33 crores, out of which the ill-gotten share of petitioner-Niku Singh is Rs.105 crores and the rest amount is the ill-gotten share of Dhanman Shaw and Ram Bharose Shaw. Mr.Mishra has further submitted that the petitioner-Niku Singh by creating and operating ten numbers of ghost business entities has availed more than Rs.100 crores input tax credit and thereby defrauded the State to the tune of such amount and the manner of commission of the offences is by claiming, utilizing and passing bogus input tax credit through fake transaction of non-existent and fictitious business entities. It is also submitted that the petitioners are influential persons and have the capacity to influence the witnesses in case they are being released on bail and they also pose flight risks. It is further submitted that the petitioners were operating through one fictitious company M/S. Sairam Ingot Private Limited and two other existing companies with 25 numbers of ghost business entities and the petitioners thereby in collusion with other were alleged to have availed input tax credit to the tune of Rs.316 crores and some odd amount on the strength of fake invoices purportedly issued in the name of ghost entities without physical receipt and supply of goods during the period of July, 2017 to November, 2019 and the modus of operation of all the petitioners are same. It is also submitted that although the petitioners Ram Bharose Shaw and Dhanman Shaw had claimed to have tendered resignation as Directors of company with effect from 31.03.2018, but they were operating these companies surreptitiously in the name of other directors. It is also submitted that since witnesses are yet to be examined in this case, it would not be proper to grant bail to the petitioners as the petitioners can influence the witnesses in the course of trial. Mr.Mishra by relying upon certain decisions has prayed to reject the bail application of the petitioners.

**6.** After having heard the rival submissions for the parties, this Court clarifies that for the limited purpose of considering the bail application of a person accused of an offence, neither it is desirable nor is it necessary to weigh the evidence meticulously, rather it is to be considered whether there exists any prima facie materials or accusations against the accused person and the accused has otherwise made out a case for grant of bail in his favour. The broad principles governing grant or refusal of bail has been laid down by the Apex Court in a plethora of decisions and the same has to be considered in the facts and circumstance of each case. While considering bail application, amongst other factors, the severity and magnitude of allegation has to be taken into consideration. On coming back to the materials placed on record, it appears that the authority under GST after making a detailed investigation has submitted prosecution report against the petitioners for commission of offences U/Ss. 132(1)(b)(c)(f) & (l) of the OGST Act which are punishable U/S. 132(1)(a to l)(i) of OGST Act, 2017 in this case.

**7.** In the course of hearing of bail applications, learned counsel for CT & GST, Orissa has produced the prosecution report in which the manner and circumstance of evasion of tax in the form of bogus input tax credit amounting to little more than Rs.316 crores has been alleged against the petitioners and the manner of commission of such tax evasion has been minutely described. In such prosecution report it is alleged against the petitioner Niku Singh that he being one of the associate of petitioner Dhanman Shaw was involved in creation and operation of ten numbers of fictitious and non-existent business entities and has issued fake invoices in the name of such non-existence business entities and consequently, such business entities had availed bogus input tax credit on the strength of fake invoices without physical receipt & supply of goods and he, thereby, was alleged for defrauding the State Exchequer for an amount of Rs.105.77 crores. In the course of hearing of bail application, although learned counsel for the petitioner Niku Singh has tried to impress upon the Court that the petitioner is no way involved in this case, but the prosecution report so produced on behalf of the CT & GST discloses some prima facie materials against the petitioner Niku Singh for creating and operating ten numbers of non-existent business entities for issuing fake invoices of these business entities to company M/S. Swastik Ingot Private Limited and M/S. Sunayuana Metal Industries Limited and one non-existent company M/S. Sairam Ingot Private Limited and in the process, these companies have claimed and utilized bogus input tax credit and allegedly availed bogus input tax credit amounting Rs.105.77 corres on the strength of fake invoices without physical receipt and supply of goods. Similarly, there is allegation against the petitioner Dhanman Shaw for operating companies in the name of M/S. Swastik Ingot Private Limited and M/S. Sunayana Metal Industries Limited as well as in the name of one non-existent company M/S. Sairam Ingot Private Limited for fictitious business activity with 19 numbers of ghost and non-existent business entities allegedly created by him in collusion with other accused persons for availing and passing bogus input tax credit amounting to Rs.212.88 crores on the strength of fake invoices purportedly issued in the name of these ghost business entities without physical receipt and supply of goods. It is also alleged against the petitioner Ram Bharose Shaw that he being the brother of petitioner Dhanman Shaw was also operating the business activity of the companies such as, M/S. Swastik Ingot Private Limited and M/S. Sunayana Metal Industries Limited with 17 numbers of ghost and non-existent business entities and in order to avail bogus input tax credit, he had arranged fake purchase invoices for non-existing and dummy firms for an amount of Rs.78.78 crores and for passing bogus input tax credit worth Rs.99.19 crores to the recipient inside and outside the State of Orissa without physical dispatch of goods in the name of fictitious firms created and operated by him. It, therefore, appears that there is prima facie allegations against these three petitioners and other for operating numbers of fictitious and ghost business entities for fake transaction with existing companies as well as non-existing company and by means of fake invoices, allegedly availed crores

of input tax credit without physical purchase and supply of goods, which according to the GST Department has resulted fraud upon the State Exchequer to the tune of Rs.316 crores and some odd which is a serious allegation against these petitioners for commission of economic offences.

**8.** Albeit, the petitioners have relied upon the decisions of this Court in ***Ajaj Ahamad, Rohit Berlia, Pramod Kumar Sahoo and Smruti Ranjan Mohanty (supra),*** but the magnitude of allegation of tax evasion in each case therein appears to be small as compared to the amount alleged in the present case to the tune of little more than Rs.316 crores and therefore, in the peculiar facts and circumstance together with the manner of alleged commission of economic offence involving huge amount of tax evasion leveled against the petitioners makes the present case quite distinguishable from the facts of the cases relied on by the petitioners. While considering the bail application of a person accused of economic offences of huge magnitude on prima facie accusations, no liberal approach should be adopted, especially when the extent of economic offence runs to more than hundreds of crores and the law on this point has been more or less explained by the Apex Court in following decisions in ***State of Gujarat Vrs. Mohanlal Jitamalji Porwal; AIR 1987 SC 1321, Y.S.Jagamohan Reddy Vrs. Central Bureau of Investigation; (2013) 7 SCC 450 and Nimmagada Prasad Vrs. Central Bureau of Investigation; (2013) 7 SCC 466***.

**8.1.** In ***Mohanlal Jitamalji(supra),*** the Apex Court in Paragraph-5 has held as follows:-

> *"The entire Community is aggrieved if the economic offenders who ruin the economy of the State are not brought to books. A murder may be committed in the heat of moment upon passions being aroused. An economic offence is committed with cool calculation and deliberate design with an eye on personal profit regardless of the consequence to the Community. 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."*

**8.2** In ***Y.S.Jagan Mohan Reddy (supra),*** the Apex Court at Paragraphs- 34 and 45 has held as under:-

> *"34.Economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The economic offence having deep rooted conspiracies and involving huge loss of public funds needs to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country.*
>
> *35. While granting bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public/State and other similar considerations."*

**8.3** In ***Nimmagadda Prasad (supra),*** the Apex court at Paragraph-24 has held as under:-

> *"24. While granting bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public/State and other similar considerations. It has also to be kept in mind that for the purpose of granting bail, the Legislature has used the words "reasonable grounds for believing" instead of "the evidence" which means the Court dealing with the grant of bail can only satisfy it as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt."*

**9.** It is true that the petitioners are in custody for little more than seven months and charge sheet has already been filed in the meantime, but considering the allegation of huge amount of financial fraud being leveled against the petitioners by itself in the facts and circumstance of the case not entitle them for grant bail at this stage. Besides, the alleged manner and method of commission of offence involving such huge amount of tax evasion by way of issuing fake invoices and availing input tax credit without physical purchase and supply of goods in the guise of business of non-existing entities with existing and non-existing companies and thereby, resulting in defraud of State Exchequer for such a huge amount, would by itself constitute prima facie materials against the petitioners for not considering their bail applications positively. In such circumstance and taking into consideration the availability of prima facie allegations against the petitioners for their involvement in commission of economic offences to the tune of Rs.316 crores and some odd and keeping in mind the fact that some of the co-accused are still at large avoiding their apprehension, this Court does not consider it proper to extend the benefit of bail to the petitioners.

Hence, the bail applications of the petitioners stand rejected. Since cognizance has already been taken as stated at the Bar, trial be expedited, if there is no other legal impediment.

Accordingly all the three BLAPLs stand disposed of.

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**2023 (I) ILR - CUT-1216**

**CHITTARANJAN DASH, J.**

CRLREV NO. 1511 OF 2008

**MAGUNI CHARAN JENA** .....Petitioner

-V-

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

**NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138 – The cheques given by the petitioner were dishonoured on the ground of insufficient of funds – The learned trial court upon adjudication of the matter having assessed the evidence led before it, held the petitioner guilty for the offence U/s. 138 of the Act – The petitioner challenged the judgment on the sole ground that there was no debt or liability against the petitioner to be discharged in favour of respondent No 2, those cheques were issued against the purchase of shop owned by respondent No. 2 and as such the petitioner is not liable for the offence under section 138 of the NI Act – Whether, such plea is admissible ? – Held, No – The plea propounded by petitioner is not admissible at this stage.** (Para 11)

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

1. (2013) 1 CJD (SC) 120 : Vijay v. Laxman and another.

For Petitioner(s) : Mr. B.K.Mohanty
For Opp.Party : Mr. M.K.Mohanty, ASC.

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 29th November, 2008 passed by the learned Second Additional Sessions Judge; Cuttack in Criminal Appeal No.66 of 2008 arising out of I.C.C. Case No.62 of 2005 passed by the learned S.D.J.M., Cuttack has been under challenge in this revision. The Petitioner having found guilty in the offence under section 138 of the Negotiable Instruments Act (hereinafter called the N.I. Act) sentenced to pay compensation of Rs.3,46,000/- i.e. double the cheque amount to be paid to the complainant and to undergo S.I. for two years.

3. The background facts of the case are that the Respondent No.2, namely, Kailash Chandra Sahu, a businessman by profession having a DTP Center at Pramila Mandap Market Complex, Madhupatna, Cuttack was in search of a piece of land at Madhupatna area. He requested his friend, namely, one Lingaraj

Dash who was serving at District Audit Office, Cuttack. The said Lingaraj Dash introduced the Petitioner who was working as a sub-staff in the Union Bank of India, Madhupatna Branch, Cuttack. In course of discussion between the Petitioner and Respondent No.2, the Petitioner revealed that he has a land behind Pramila Mandap, Market Complex which he wanted to sell. To build up the confidence in the Respondent No.2, the Petitioner showed the documents such as Record of Right (ROR) of the land in question. The Petitioner also got introduced to the Branch Manager, Union Bank of India, Madhupatna Branch where the Petitioner was serving as a sub-staff. After introduction, the Petitioner also helped the Respondent No.2 in arranging a home loan following which Respondent No.2 opened a pass book in the said branch of the Union Bank of India. In lieu of the purchase of the piece of land as proposed by the Petitioner to be sold out to the Respondent No.2, the Respondent No.2 paid a sum of Rs.1,73,000/- to the Petitioner as part consideration in presence of his friend Lingaraj Dash. Subsequently, the Petitioner did not comply the assurance given by him to the Respondent No.2 by selling out the land. He also played hide and seek with Respondent No.2. However, as there was no chance of the land being conveyed in favour of Respondent No.2 by the Petitioner he wanted the money given to the Petitioner to be refunded. Having agreed to refund the money, the Petitioner issued four cheques i.e. cheque No.033504, dated 23.08.2004 for Rs.50,000/-, No.033502, dated 10.09.2004 for Rs.6,500/- , No.33511 dated 02.10.2004 for Rs. 90,000/- and No.33503, dated 29.10.2004 for Rs.26,500/- drawn on Union Bank of India, Madhupatna Branch towards refund of the part consideration taken by the Petitioner. Respondent No.2 presented the Cheques bearing No.033354 and 033502 with his banker. His banker, the said Union Bank intimated that the cheques got dishonoured vide memo dated 17th November, 2004 and 24th November, 2004 on the ground of "insufficient of funds" in the account of the Petitioner. After receipt of the intimation from the Bank, Respondent No.2 issued notice to the Petitioner through registered post dated 13th December, 2004 demanding the dishonoured cheque amount within the statutory period but the notice returned with endorsement "refused". The Petitioner having found committed the offence under Section 138 of the N.I. Act, Respondent No.2 moved a complaint before the learned S.D.J.M., Cuttack. The said complaint was registered vide I.C.C. Case No.62 of 2005 (TAN No.1061 of 2005). The Petitioner having appeared before the court faced the trial and took the plea that the cheques issued to the complainant was against purchase of the shop from the complainant and the complainant deceived him by presenting cheque and denied the plea advanced by the complainant as regards the issuance of cheque by him as against sale of the land in favour of Respondent No.2.

4. In course of evidence before the trial court while Respondent No.2 examined himself as the only witness (PW 1), the Petitioner examined two witnesses (DWs 1 and 2). While Respondent No.2 as complainant proved the documents vide Exts.1 to 13 whereas the Petitioner as accused proved no document in support of his plea.

5. Learned trial court upon adjudication of the matter having assessed the evidence led before it, found the Petitioner to have committed the offence under Section 138 of the N.I. Act, held him guilty there under and sentenced as mentioned above.

6. Being aggrieved by the impugned judgment and order, the Petitioner preferred Appeal before the learned Sessions Judge, Cuttack registered vide Criminal Appeal No. 66 of 2008 which having transferred to the court of learned Second Additional Sessions Judge, Cuttack was heard and disposed of vide the impugned judgment. The learned Additional Sessions Judge having reassessed the evidence found the order of the learned S.D.J.M. to be in consonance with the law and evidence. The learned Appellate Court having concurred with the findings dismissed the Appeal against the Petitioner.

7. Being aggrieved with the judgment passed by the learned Addl. Sessions Judge, the Petitioner moved in the present, *inter alia,* challenging the judgment on the sole ground that there was no debt or liability against the Petitioner to be discharged in favour of Respondent No.2 by issuance of cheque and that those cheques were issued against the purchase of shop owned by Respondent No.2 at Dolamundai and as such the Petitioner is not liable in the offence under Section 138 of the N.I. Act and the impugned judgment being not in conformity with law are liable to be set aside.

8. In course of the hearing in the revision, the learned counsel for the Petitioner reiterated his plea and cited the decision in support of his contention. Learned counsel on behalf of Respondent No.2, on the contrary, submitted that the impugned judgment and order being in consonance with the law and evidence is legal and justified and requires no interference and prayed for dismissal of the revision.

9. On a meticulous analysis of the evidence it emerges that Respondent No.2 as complainant before the trial court has vividly narrated the fact constituting the complaint, the statutory compliance required to bring the complaint such as the manner in which the transaction took place, the amount and cheque, the cheque number, its value, the presentation of the cheque before his banker, the intimation received from his banker regarding dishonour of

cheque, the statutory notice addressed to the Petitioner accused and its service. From the evidence it is crystal clear and has also not been disputed by the Petitioner that the statutory obligation required under Section 138 of the N.I. Act by the complainant has been complied and as such found proved.

10. Coming to the point of dispute as raised by the Petitioner to the effect that the cheques were not issued against a legally enforceable debt, this Court assessed the evidence laid by the Petitioner before the court in trial. No formidable evidence is found to have brought by the Petitioner during trial before the court to substantiate the plea propounded by him as regards the purpose for which the cheque was issued in favour of the complainant. On the contrary the presumption goes in favour of Respondent No.2/complainant under Section 139 of the N.I. Act that the cheques were issued only against a legally enforceable debt. The Apex Court in the matter of ***Vijay v. Laxman and another*** reported in (2013) 1 CJD (SC) 120 held as under:

> "9. Having heard the learned counsels for the contesting parties in the light of the evidence led by them, we find substance in the plea urged on behalf of the complainant-appellant to the extent that in spite of the admitted signature of the respondent-accused on the cheque, it was not available to the respondent-accused to deny the fact that he had not issued the cheque in favour of the complainant for once the signature on the cheque is admitted and the same had been returned on account of insufficient funds, the offence under Section 138 of the Act will clearly be held to have been made out and it was not open for the respondent- accused to urge that although the cheque had been dishonoured, no offence under the Act is made out. Reliance placed by learned counsel for the complainant-appellant on the authority of this Court in the matter of K.N. Beena vs. Muniyappan and Anr. [1] adds sufficient weight to the plea of the complainant-appellant that the burden of proving the consideration for dishonour of the cheque is not on the complainant-appellant, but the burden of proving that a cheque had not been issued for discharge of a lawful debt or a liability is on the accused and if he fails to discharge such burden, he is liable to be convicted for the offence under the Act. Thus, the contention of the counsel for the appellant that it is the respondent-accused (since acquitted) who should have discharged the burden that the cheque was given merely by way of security, lay upon the Respondent/ accused to establish that the cheque was not meant to be encashed by the complainant since respondent had already supplied the milk towards the amount. But then the question remains whether the High Court was justified in holding that the respondent had succeeded in proving his case that the cheque was merely by way of security deposit which should not have been encashed in the facts and circumstances of the case since inaction to do so was bound to result into conviction and sentence of the Respondent/Accused.

11. In the instant case the initial burden having been discharged by the Respondent No.2/ complainant as regards the issuance of cheque was against discharge of legally enforceable debt, the presumption under Section 139 of the

N.I. Act can very well be read in favour of Respondent No.2. Conversely, the same being not rebutted in any manner by the Petitioner, even an inference cannot be drawn that the transaction was towards the purchase of shop, thereby, goes completely in favour of Respondent No.2. In essence, it is apt to say that the plea taken by the Petitioner is otherwise for the purpose of the case only inasmuch as even after filing of the complaint by the Respondent No.2 no such attempt has been made by the Petitioner resorting to the forum available under law insisting for specific performance of contract or for refund and damage against the payment made to the complainant on his failure to comply the promise, if at all. Consequently, the plea propounded by the Petitioner subsequent to the filing of the complaint is apparently to stall the proceeding initiated against him and as such cannot be said to be sufficient to dislodge the claim of the Respondent as required under the law. The decision cited by the learned counsel being factually distinguishable to the present case cannot be read in favour of the Petitioner so as to give him an advantage. Hence, ordered.

12. The impugned judgment being in conformity with the evidence and law requires no interference. In the result, the Revision being devoid of merit is dismissed but in the circumstance without any cost.

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